CONSERVATIVE AND REFORM HALAKHAH AS DEFINED THROUGH RESPONSA: DIFFERENT PATHS TO SIMILAR CONCLUSIONS

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Introduction

Shortly after Rabbi Walter Jacob began his tenure as Chairman of the Responsa Committee ("RC") of the Central Conference of American Rabbis ("CCAR"), he had proposed to the then chair of the Committee on Jewish Law and Standards ("CJLS") of the Rabbinical Assembly ("RA") that the RC and CJLS consider writing joint responsa, or *t'shuvot*, on questions of mutual concern. However, Rabbi Jacob reported to his committee that, at that time, the RA was "unwilling to move in this direction."[1] That was but one of several unsuccessful attempts he had made in this regard.[2]

Rather then giving up, the following year Rabbi Jacob wrote to Rabbi Seymour Cohen, then the President of the RA, and made one more attempt to forge some sort of cooperative effort. Rabbi Cohen responded that he would proceed further on Rabbi Jacob's proposal. Meanwhile, Rabbi Jacob, who lived in Pittsburgh, began an informal contact through another Pittsburgh rabbi, Rabbi Philip Sigal, whom he described as representing "the most liberal element" of the CJLS.

By invitation, Rabbi Sigal attended a meeting of the RC and provided that committee with background material on the "trends within the [CJLS] during the last three decades." Rabbi Sigal also believed that possibilities existed for writing joint responsa, or "at least influencing each other's responsa even if they were prepared separately."[3] There was a discussion of the working policies of the two committees and Rabbi Sigal agreed to contact Rabbi Ben Zion

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[1] Jacob, Walter, *Report of the Committee on Responsa*, CCAR Yearbook, Vol. LXXXIX, CCAR, New York, 1980, 108 ("*1979 Report*").

[2] Jacob, Walter, *Report of the Committee on Responsa*, CCAR Yearbook, Vol. XC, CCAR, New York, 1981, 82 ("*1980 Report*").

[3] *Ibid.*

Bokser, then the chairman of the CJLS, to work towards a common meeting of the two committees, or, at least of representatives from both of them. He also thought it would be useful if both committees would "circulate lists of subjects under consideration so that one or two areas of common concern could be chosen for a joint effort."[4] Although such an effort might have generated a consistent contemporary *halakhah* in many areas, it did not come into being.

A quick survey of recent responsa in the area of bioethics issued by the RC, and *t'shuvot* in that same area issued by the CJLS, reflects that, acting independently, these two bodies have reached similar conclusions, albeit with some differences. This suggests that in some areas of modern Jewish life, there may exist a species of so-called "liberal *halakhah*"[5] which spans denominational boundaries.

Is there a "liberal *halakhah*"? And if there is, what is it? Does it differ from what the Orthodox call *halakhah*? And if it does differ, do the differences stem from the methods employed, or from the way in which those methods are employed? Or do those differences stem from the identify and affiliation of the *halakhic* decisor? And if there exists a "liberal *halakhah*", can it encompass more than one stream of Judaism, or is it limited to the movement which promulgates it?

I pose these questions because surveys, such as the 2006 Annual Survey of American Jewish Opinion, by the American Jewish Committee,[6] indicate that American Jews are

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[4] *Ibid.*

[5] In the Reform literature, the terms "liberal *halakhah*", "progressive *halakhah*", and "Reform *halakhah*" are used interchangeably. The Conservative movement speaks only of *halakhah*. In this paper, unless the context otherwise is clear from the subject matter, or in quotations, I shall use the term "liberal *halakhah*" to refer generally to the *halakhah* or *halakhic* decisions of the Reform and Conservative responsa writing committees.

[6] http://www.ajc.org/atf/cf/%7B42D75369-D582-4380-8395-D25925B85EAF%7D/2006_FINAL_QUESTIONNAIRE_SURVEY_FULL.PDF

predominately socially and politically liberal. Given that almost two-thirds of the survey respondents considered themselves either Conservative or Reform, suggests that most members of those movements, likewise, hold similar liberal views. And it would appear from a review of recent decisions by the RC and by the CJLS, that those committees are reaching what they believe are *halakhic* conclusions consistent with the liberal views of the majority of their movements' members.

Historically, there is one example of "joint" responsa. During World War II, a responsa committee was established by Division of Religious Activities of the National Jewish Welfare Board to provide *halakhah l'ma'aseh* — practical Jewish law — solutions to questions directed to them by the government, rabbis, soldiers and sailors and civilians, dealing with issues stemming from the war.[7] This committee consisted of Rabbis Leo Jung, Milton Steinberg and Solomon B. Freehof, representing the Orthodox, Conservative and Reform rabbinate.[8] By limiting the subject matter and the decisions to the period of the emergency only ("*hora'at sha'ah* — guidance for the hour"), the committee generally was able to come to a decision satisfactory to all three.[9]

Yet, Rabbi Mark Washofsky, the current chair of the RC, notes that

> "[l]egal reasoning is rather embedded *within* the practices and the culture of specific legal communities . . . [and l]ike law in general, *halakhah* is a species of practice, an endeavor that is always *situated* within a particular community of

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[7] Freehof, Solomon B., Chair, *Introduction to* Responsa in War Time, Division of Religious Activities, National Jewish Welfare Board. New York 1947, *i.*

[8] Freehof, *Introduction to* Responsa in War Time, *Op cit. i, iii.*

[9] Freehof, *Introduction to* Responsa in War Time, *Op cit. iii, iv.* When necessary, the exceptional point of view necessary to conform to Reform practice was specifically provided for. Freehof, *Introduction to* Responsa in War Time, *Op cit. iii.* And occasionally, the Orthodox member would record his disagreement. Freehof, *Introduction to* Responsa in War Time, *Op cit. iii-iv.* Moreover,

legal interpretation."[10]

Therefore, "[i]f halakhic practice always takes place within a *particular* community of interpretation, we should not be surprised that very different sorts of interpretation and consensus will emerge from different halakhic communities."[11]

In this paper I shall briefly examine the history of Responsa Literature, the system of *she'elot u't'shuvot* — questions and answers — which has been the principal method for reaching *halakhic* decisions over the past several centuries. I shall look at the development of the Conservative and Reform committees[12] which write the responsa for their respective movements, to determine whether the methods used by each such committee are consistent with those of the past. Finally, I shall examine in detail, specific responsa in the areas of bioethics and human relations — areas in which marked differences in liturgy and observance are not likely to intrude — to analyze how each movement approaches the questions presented and to determine whether similar conclusions demonstrate similar *halakhic* approaches, whether those conclusions are reached through different pathways reflecting the philosophical underpinnings of each movement, or whether they are due to wholly unrelated factors, such as the identification of the core issue, or the phrasing of the question presented, by the decisor.

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[10] Washofsky, Mark, *Against Method: Liberal Halakhah Between Theory and Practice*, in Jacob, Walter, ed., Beyond the Letter of the Law, Rodef Shalom Press, Pittsburgh, 2004, 50, 51. This article is also available online at *http://huc.edu/faculty/faculty/washofsky/againstmethod.pdf.*

[11] Washofsky, Mark, *Against Method, Op cit.* 52-53.

[12] This paper will be limited to the work of the Responsa Committee of the CCAR and the Committee on Jewish Law and Standards of the RA. I recognize that these movements also have *halakhic* decisonmaking in Israel — the *Va'ad Halakhah* of the Masorti movement, headed by Rabbi David Golinkin and Reform *halakhah* from Rabbi Moshe Zemer — each doing superb work regarding issues specific to *Ha'aretz*, but those responsa are beyond the scope of this inquiry.

Chapter 1
The Responsa Literature — A Brief History

Following the redaction of the Palestinian and Babylonian Talmuds, rabbinic literature developed along three different pathways. The first branch was the talmudic commentaries — *Rashi* and *Tosafot* and the *hiddushim* ("new notes"). The second branch were the codes — the *Mishneh Torah*, the *Tur* and the *Shulhan Arukh*. And the third, the largest group of rabbinic writings, are the responsa.[1] Responsa constitute a special class of rabbinical literature. "Nowhere else in the history of Law is there so large and widely-ranging a literature, developed from actual cases and discussed by correspondence."[2]

Responsa, also known as *she'elot u't'shuvot* — questions and answers, are written decisions and rulings in response to written questions addressed to rabbis, teachers, or heads of academies.[3] In form, responsa historically were "an exchange of letters in which one party consult[ed] another on an halachic matter."[4] Throughout history, many questions were theoretical in character, "contain[ing] rulings on the philosophy of religion, astronomy, mathematics, chronology, and geography, as well as interpretations of difficult passages in the Bible, the Mishnah, and the Talmud."[5] Yet, they addressed issues with practical applications,

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1 Freehof, Solomon B., The Responsa Literature, Jewish Publication Society, Philadelphia 1955, 14-16.

2 Freehof, The Responsa Literature, *Op cit.* 18. Unfortunately, many responsa have been lost over time. However, *Otzar HaPoskim* (The Institute for Responsa Literature) had published in Israel, a CD-ROM containing over 1 million responsa. Isaacs, Ronald H., Every Person's Guide to Jewish Law, Jason Aronson Inc., Northvale, NJ 2000, 142.

3 According to Lewittes, Moses' words in charging the newly appointed judges in Deut. 1:17: "And any matter that is difficult for you, bring to me and I will hear it.", is the Torah's precedent for responsa. Lewittes, Mendell, Principles and Development of Jewish Law, Bloch Publishing Company, Inc., New York, 1987, 111.

4 Isaacs, *Op cit.*, 129.

5 Batcher, Wilhelm & Jacob Zallel Lauterbach, *She'elot U-Teshubot*, in Jewish Enclyclopedia, Vol. XI, Funk & Wagnals, New York, 1905, xxx. Also available online at [http://www.jewishencyclopedia.com/view.jsp?artid=576&letter=S].

because they concerned specific new contingencies for which no provision had been made in the codes.[6] Those responsa also contained historical material which illustrated and explained the conditions of the times.[7]

The body of responsa literature spans a period of approximately 1,700 years.[8] There are no known responsa prior to the redaction of the *Mishnah*, most likely in accord with the custom that *halakhah* should not be reduced to writing.[9] The Babylonian Talmud refers to an early recorded reference to responsa in the Jewish *halakhic* literature.[10] By the *geonic* period,[11] the Talmud generally was recognized as authoritative. And it was in the middle of the *geonic* period that responsa "as a literary and historical phenomenon" really began.[12]

There were three basic categories of *geonic* responsa: "very short responsa, sometimes consisting only of one or two words";[13] "responsa containing the exposition of an entire book,

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6 *Ibid.* The codes referred to are the *Mishneh Torah*, the *Tur* and the *Shulhan Arukh*. Feldman, David M., Birth Control in Jewish Law, Jason Aronson Inc., Northvale, NJ 1998, 18.

7 Batcher & Lautervach, *Op.cit.* 240.

8 *Ibid.*

9 Batcher & Lauterbach Op. cit. xxx. B.T. *Gittin* 60b: "Oral laws you are not permitted to relate in writing. . . . The Holy One Blessed be He made a covenant with Israel only because of oral laws . . . ."

10 B.T. *Hullin* 95b. The *sugya* mentions that *Shmuel* "wrote and sent to [*R. Yohanan*] thirteen camels of doubtful *tereifot*". However, the *Tosafot* (s.v. *treisar gamlei* — "twelve camels") noted that *R.' Hananel* had a parchment which said "twelve parchments with written questions." — twelve letters containing *she'elot*. To the same effect is B.T. *Bava Batra* 139a. "*Avuha bar G'niva* sent [a letter] to *Rava* [with a question]" and B.T. *Sanhedrin* 29a, where Mar Ukva was told by a disappointed litigant that "we will bring a letter from the west [*Eretz Yisrael*] that the *halakhah* does not follow R. Yehudah". These "letters" exchanging *halakhic* opinion were not necessary in the format of inquiry and response, as were later responsa, but nevertheless "may be considered the inception of theresponsa literature. Ta-Shma, Israel Moses, "The Geonic Period" in "Responsa", Encyclopedia Judaica 2d ed., Vol. 17, Keter Publishing House, Ltd., Jerusalem 2007, 229.

11 The period of the *Geonim* spanned approximately the seventh through the eleventh centuries. Goldwurm, Hersh, The Rishonim, Mesorah Publications Ltd., Brooklyn , NY 1982, 17.

12 Ta-Shma, *Op.cit.* 229.

13 *Ibid.* These included the earliest surviving responsa, written by *Yehudai Gaon. Ibid.*

chapter, or topic";[14] and the most common, "responsa of average scope."[15] In the shorter responsa, it generally was sufficient to cite a Talmudic passage in support, or as proof, of the decision, or to controvert any possible opposition from another Talmudic passage. If the questioner was uneducated in Talmud, the respondent was required to explain the Talmudic passage in question and its application to the specific case. The respondent often proved the validity of his decision by comparing it with another passage, and by demonstrating that no other interpretation was possible. In addition, the respondent often was required to consider consequences which might result from his decision, or to explain points which had not been asked.[16]

The longest *Geonic* responsa often were scholarly treatises, although this is not a universal characteristic. In the days of the earliest *geonim*, the majority of the questions originated from Babylonia and the neighboring lands. The written questions were confined to one or more specific cases. The responsum briefly stated the requested ruling and a concise reason for it, together with a citation of an analogous Talmudic case, and a refutation of any potential objection.[17] The responsa of the later *geonim*[18] replied to questions originating in more distant regions,[19] where the inhabitants were less familiar with the Talmud. Those responsa not only referred to the appropriate Talmudic passage, but also included the entire context for clarity.

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[14] *Ibid.* This category principally appeared in the latter portion of the period, from and after *Saadia Gaon. Ibid.*

[15] *Ibid.*

[16] Batcher & Lauterbach, *Op cit.* 242.

[17] *Ibid.*

[18] Beginning in the latter half of the 9th century. Batcher & Lauterbach, *Op cit.* 242-43. Most of the known *geonic* responsa come from this period. The leading authors were *Sherira Gaon* and his son, *Hai Gaon.* Ta-Shma, *Op. cit.* 229.

[19] Such as Spain, countries in North Africa, countries around Israel and as far south as Yemen. Ta-Shma, *Op. cit.* 229.

There was an extensive and detailed discussion of the subject, even when that had not been requested. These later *geonim* did not restrict their analyses to the *Mishnah* and Talmud, but utilized decisions and responsa of their predecessors.[20]

There was an established format to the *geonic* responsa. Questions were assembled by representatives of the *yeshivot* from around the Jewish world and were sent to Babylonia along with a financial contribution.[21] Many hundreds of questions would be read and discussed before all the sages and their pupils during the *kallah* ("gathering") month.[22] When the discussions had concluded, the *Gaon*[23] would instruct his scribe to write up the decision. The decisions, which were signed by all the senior members of the Academy,[24] began with the statement that the questions had been correctly received, read, and considered, and that the corresponding answers had been given in the presence of the *Gaon* and with his approval. The answer to each question then followed.[25] These responsa were formatted to "give them the character of impersonal finality, representative of the yeshivah as a whole."[26] Because *geonic* responsa were "considered a binding legal decision [and] not merely a legal opinion that could be obtained from more than one authority", submission of a question to more than one responder gave rise to strong

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20 Batcher & Lauterbach, *Op cit.* 243; Freehof, The Responsa Literature, *Op cit.* 30.

21 Ta-Shma, *Op. cit.* 229. A modern analogue would be the unsigned *per curiam* judicial opinion.

22 The month of *Adar*. Lewittes, *Op cit.* 115; Passamanek, Stephen M., *Introduction to* Bazak, Jacob, ed. & Stephen M. Passamanek, tr., Jewish Law and Jewish Life (Books 2, 3, 4), Union of American Hebrew Congregations, New York 1978, xxi.

23 The *Gaon*, which means "pride", was the head of an academy, or *yeshiva*. In Babylonia, the principal academies were at Sura and Pumbedita. Ben-Sasson, H.H., ed., A History of the Jewish People, Harvard University Press, Cambridge, MA 1969, 377, 423

24 Ta-Shma, *Op. cit.* 229. An urgent question was decided by the *Gaon*, himself, as soon as he had received it. *Ibid.*

25 Batcher & Lauterbach, *Op cit.* 243.

26 Ta-Shma, *Op. cit.* 229.

objections and rebukes.[27]

Geonic responsa were written in three languages — Hebrew, Aramaic, and Arabic. In the earliest period, Aramaic, the language of the *Gemara*, prevailed exclusively, but in the middle of the ninth century, Hebrew began to appear in the responsa. When Arabic became the prevailing language of many Jews, questions were frequently addressed to the *Geonim* in Arabic, and that language also was employed in reply.[28] The responsa of the *Geonim* dealt with all avenues of human life and knowledge,[29] treating liturgical, theological, philosophical, exegetic, lexicographical, archeological, historical, and other questions.

Moreover, by this time, the number of individuals learned in Talmud had multiplied into the thousands. As a result, respondents no longer were corresponding with the their scholarly inferiors, but with their peers. The questions and answers were now between "approximate equals" and substantial justifications for the answer were now required, because the inquirer would be able to evaluate the response.[30] At this juncture, responsa became a branch of the rabbinic literature. The three factors that made this possible were the educational level of the inquirers and the shift to Hebrew as a language, which then resulted in the compilation of collections of responsa..[31]

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[27] Libson, Gideon, *Halakhah and Law in the Period of the Geonim*, in Hecht, N.S., *et al.*, eds., An Introduction to the History and Sources of Jewish Law, Oxford University Press, New York, 1996, 209, 210. This is the principal reason that there are few mentions of earlier *Geonim* in the *geonic* responsa. Ta-Shma, *Op. cit.* 229.

[28] Batcher & Lauterbach, *Op. cit.* 243; Libson, *Op cit.* 209; Passamanek, *Op cit.* xxii.

[29] Isaacs, *Op cit.* 130.

[30] Freehof, The Responsa Literature, *Op cit.* 32.

[31] Freehof, The Responsa Literature, *Op cit.* 31-32; Isaacs, *Op cit.* 131. Because several questions were bundled together for transmission to the Academies in Babylonia, the responsa included answers to all those questions in the reply. But when responsa began to be collected — into *kovatzim* (collections), or *kunteresim* (booklets) — these responsa were separated by subject matter, names of respondents (which were carelessly transcribed), or tractates, and thus the integrity of the original responsa was not maintained and makes it difficult to establish the identity of individual authors. Ta-Shma, *Op. cit.* 229-30.

By the end of the *geonic* period, people gradually began to submit their inquiries to the teachers and heads of the schools of their own countries, and soon, responsa of eminent rabbis of other lands appeared side by side with *geonic* rulings.[32] These responsa of non-*geonic* authorities formed a bridge to the period of the *Rishonim*.[33] Although they resembled the rulings of the *Geonim* both in their form and in their use of introductory phrases, they were not constrained by the *geonic* official style and tone. The decisions were written in Hebrew, and contained theoretical interpretations of Talmudic passages, in addition to rulings governing practical cases.[34]

The responsa from the period of the *Rishonim* began with responsa from France and Spain. Jews in many countries had lost their central spiritual authorities and, when their local authorities were incapable of providing solutions, they were forced to submit religious and legal questions to the great *halakhic* authorities of the time.[35] These responsa came from various countries and from different viewpoints.[36] The questions were not restricted to practical problems, as the interpretation of a *halakhic* or *aggadic* passage in the Talmud often was a subject of inquiry, and were of a theoretical nature.[37] It is in this period that we begin to see an exchange of responsa between rabbis in different countries. The intention in such exchanges often was to clarify and reinforce one's own rulings and to limit his responsibility for errors. In

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32 Batcher & Lauterbach, *Op cit.* 244.

33 The period of the *Rishonim* spanned the eleventh to the fifteenth centuries. Goldwurm, *Op cit.* 11.

34 Batcher & Lauterbach, *Op cit.* 245.

35 Shochetman, Eliav, *Jewish Law in Spain and the Halakhic Activity of its Scholars before 1300*, in Hecht, N.S., *et al.*, *Op cit.* 281.

36 *Ibid.* In fact, unlike *geonic* responsa, it is in this period of the *Rishonim* that we see differences of opinion on a question and this suggests that the authority of the rabbis was diminishing. Ta-Shma, *Op. cit.* 230.

37 Shochetman. *Op. cit.* 281.

addition, such exchanges had the desirable effect of strengthening connections between communities.[38]

The majority of the rulings from this period either were based on, or confirmed by, a Talmudic passage, and here, there is a clear difference between the French and the Spanish Talmud respondents. The Spanish were the more logical and strove for brevity and lucidity in their rulings, while the French were more dialectic and they frequently engaged in interpretive reasoning at the expense of clarity.[39]

R. Solomon ben Isaac ("*Rashi*")[40] was the leading French representative in this period and many of his responsa have been preserved. His decisions were written in Hebrew, without formulas. The concurrent leader in Spain was R. Isaac Alfasi (the "*Rif*") and many of his responsa likewise have been preserved. His decisions were written in Arabic, but were translated into Hebrew at an early date. Alfasi employed the same introductory formulas as the *Geonim*. Many of Alfasi's responsa are devoted to the interpretation of *aggadic* passages of the Talmud, and exhibited the spirit of his Spanish contemporaries.[41]

During the latter portion of the period of the *Rishonim*, the differences between the Spanish and the Franco-German respondents vanished. On the one hand, the scientific spirit of

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38 Ta-Shma, *Op. cit.* 230.

39 Shochetman, *Op. cit.* 281.

40 *Ibid.* In addition to Rashi, the leading representatives of the French school were R. Yaakov ben Meir ("Jacob Tam" or "*Rabbeinu Tam*"), Rashi's grandson, whose students compiled his responsa in *Sefer HaYashar*. Isaacs, *Op cit.* 132; Freehof, The Responsa Literature, *Op cit.* 35, Goldwurm, *Op cit.* 126, 129, R. Abraham ben David of Posquières (the "*Ravad*"), Goldwurm, *Op cit.* 168, and R. Eliezer ben Nathan of Mayence (the "*Ravan*"), Goldwurm, *Op cit.* 131. Batcher & Lauterbach, *Op cit.* 246.

41 Batcher & Lauterbach, *Op cit.* 245-46. In addition to the Rif, the Spanish / North African school was principally represented by R. Joseph ibn Migash ("*Ri Migash*"), Goldwurm, *Op cit.* 70, and R. Moses ben Maimon ("*Maimonides*" or "*Rambam*"). Goldwurm, *Op cit.* 79. *Rambam's* responsa were largely written in Arabic and contained brief decisions of problems of a ritual or legal content, as well as elucidations of astronomical and chronological questions. Batcher & Lauterbach, *Op cit.* 246.

the Spanish partially entered the academies of southern France, and, on the other hand, the dialecticism of the French rabbis steadily increased in influence in Spain.[42] The principal Spanish respondents were R. Moshe ben Nahman ("*Nahmanides*" or "*Ramban*"),[43] R. Solomon ibn Aderet (the "*Rashba*"),[44] and R. Nissim b. Reuben (the "*Ran*").[45] The responsa of the *Rashba* number in excess of three thousand and mark a high point in the development of responsa literature. His responsa remain authoritative to this day.[46]

A German center of responsa literature appeared during the thirteenth century, initially represented by R. Meïr ben Barukh of Rothenburg (the "*MaHaRaM*").[47] R. Meïr's responsa, found in numerous collections, paint a picture of the distressed condition of the German Jews of his time, and of their sufferings from the caprice of princes and from heavy taxation.[48] One of his successors, approaching the period of the *Aharonim*, was R. Jacob Moellin (the "*Maharil*"), perhaps the leading *Ashkenzic halakhic* authority of his generation.[49] Moellin "once wrote to a correspondent

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42 Batcher & Lauterbach, *Op cit.* 246-47.

43 Goldwurm, *Op cit.* 90.

44 Goldwurm, *Op cit.* 96.

45 Goldwurm, *Op cit. 106.*

46 Batcher & Lauterbach, *Op cit.* 247; Freehof, The Responsa Literature, *Op cit.* 36; Shochetman, *Op cit.* 283. Rashba's responsa "were incorporated in the *Tur,* and the *Shulhan Arukh,* and throughout the literature of the *poskim* and responsa in later generations. Shochetman, *Op cit.* 292. Other respondents from this school were R. Asher ben Yehiel (the "*Rosh*"), Goldwurm, *Op cit.* 144, and R. Isaac ben Sheshet (the "*Rivash*"), who led the move from Spain back to North Africa. Freehof, The Responsa Literature, *Op cit.* 37; Goldwurm, *Op cit.* 108. Many curious customs of the Spanish communities may be found in the responsa of the Rosh, who, after all, was an Ashkenazic rabbi, who found much to disagree with Sefardic practice. The *Rivash* published over 500 responsa, which also contain interesting discussions illustrative of the conditions of the times, such as his rulings on marriage and marital relations in the case of Jews who had been forcibly baptized. Batcher & Lauterbach, *Op cit.* 247.

47 Goldwurm, *Op cit.* 15.

48 *Ibid.* 151; Batcher & Lauterbach, *Op cit.* 247; Isaacs, *Op cit.* 132

49 Goldwurm, *Op cit.* 152-53; Freehof, The Responsa Literature, *Op cit.* 35.

> 'As for your statement that one should not rely upon responsa; I say, they are practical law and we should learn from them more than from the codifiers, who after all, were not present at the time when the decision was made.'"[50]

Moellin therefore believed that responsa were the principal decisional authorities, paralleling Anglo-Saxon (and American) case law.[51]

The period of the *Aharonim* extends from end of the fifteenth to the eighteenth centuries, and includes responsa of Italian, Turkish, German, and Polish rabbis. The responsa of this period captured the persecutions and the difficult political status which imposed much misery upon the Jewish people.[52] These responsa also differed significantly from their predecessors in the nature of the problems presented, their method of treatment, and in the arrangement of subject matter. While earlier responsa were concerned both with *halakhic* and exegetic themes and with ethical and philosophical problems, by this time, most of the responsa were directed to legal issues.[53]

As a result of the expulsion from Spain (and elsewhere), the exiles founded new communities; disputes arose about different customs, as well as the powers of the new communities, as it related to suffrage and apportionment of taxes between the older inhabitants and the new arrivals. In addition, there were disputes in commercial matters where the customs and conditions in the new locale differed from those of the former places of residence. And there were issues of *issur v'heter* — forbidden and permitted actions, or ritual law — and marriage and divorce. Thus, practical solutions had to be devised in accordance with the principles of

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50 Freehof, The Responsa Literature, *Op cit.* 35, quoting from *Medieval Jewish Chronicles* I, 128.

51 Freehof, The Responsa Lietrature, *Op cit.* 35-36.

52 Isaacs, *Op cit.* 133; Batcher & Lauterbach, *Op cit.* 249.

53 Batcher & Lauterbach, *Op cit.* 249. In most countries, Jews were unwilling to submit to a non-Jewish court and the rendering of judgment was regarded by Jews as a religious duty. *Ibid.*

halakhah and responsa were the perfect medium for the task.[54]

While decisions from earlier periods had been so simple, clear and lucid that the reader, if at all acquainted with the subject, could easily follow them, these responsa were marked by hair-splitting dialectics. In part, this was caused by the need to examine prior decisions, as respondents began to base their rulings and decisions on those of prior authorities, and in part, it was caused by the need to search for answers to questions not addressed by those prior generations. They carefully searched for the question, or an analogous one and if one was found, they then searched the entire Talmudic and rabbinical literature to determine whether their decision would be consistent with those of prior generations.[55] Thus, their responsa became lengthy with the addition of "novellae and complicated argumentation".[56]

While there was no systematic sequencing of earlier responsa, by this time, the responsa had available as models the *Arba'ah Turim* of R. Jacob ben Asher (the "*Ba'al HaTurim*")[57] and, two centuries later, the *Shulḥan Arukh* of R. Joseph Caro (the "*Meḥaber*").[58] Thus, responsa of this period began to be arranged according to these two works.[59] Moreover, as the *Shulḥan Arukh*, with the glosses of R. Moshe Isserlies (the "*Rema*"), began to be accepted as

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54 Tal, Shlomo, "From the Beginning of the 16th Century", in "Responsa", Encyclopedia Judaica 2d ed., Vol. 17, Keter Publishing House, Ltd., Jerusalem 2007, 231. Other *halakhaic* methods included bans, judicial rulings and *takkanot*. *Ibid.*

55 Batcher & Lauterbach, *Op. cit.* 249. Thus, precedent now became an important factor in responsa. The *Aḥaronim* generally would accept the prior conclusions of the *Rishonim* as binding. However, if the factual data of the prior decision did not correspond to that of the latter case, the *Aḥaronim* were not bound to follow the prior decision. Tal, *Op. cit.* 232.

56 *Ibid.*

57 Goldwurm, *Op cit.* 147.

58 Caro's *Bet Yosef*, his commentary on the *Tur*, "is a veritable treasure house of responsa of all the past ages, Spanish and German. . . . [and] made the responsa a permanent and determining factor in the codes of Jewish Law." Freehof, The Responsa Literature, *Op cit.* 39.

59 Batcher & Lauterbach, *Op cit.* 249.

authoritative in matters of *halakhah*, from that point on, it was no longer possible for responsa to be creative, except on matters not treated in that code.[60]

The period of the *Aharonim* is the most prolific in responsa literature[61]. The most important respondents of the fifteenth century were R. Israel Isserlein and R. Israel Bruna from Germany and R. Joseph Colon[62] and R. Judah Minz in Italy. Especially important in the responsa literature of this period were the Turkish rabbis, principally R. Jacob Berab, R. Levi ibn Habib, R. Elijah Mizrahi, and R. Moses Alashkar.[63]

In the sixteenth century, the responsa literature is represented almost exclusively by the Polish and the Turkish rabbis. The most notable Polish respondents of this century were the *Rema*, R. Solomon Luria (the "*Maharshal*"), and R. Meïr Lublin (the "*Maharam*").[64] The most noteable Turkish respondents were the *Mehaber*, R. Joseph ibn Leb, R. Samuel of Modena, and David abi Zimra.[65]

In the seventeenth and eighteenth centuries, most of the respondents were Polish rabbis, although there were rabbis from other countries writing responsa,[66] such as the noted German respondent R. Jacob Emden. Among the principal Polish rabbis were R. Joel Sirkes (the "*Bah*)

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60 Tal, Shlomo, "The 17th Century", in "Responsa", Encyclopedia Judaica 2d ed., Vol. 17, Keter Publishing House, Ltd., Jerusalem 2007, 232.

61 Accounting for the apparent inconsistency between the limitations on creativity and the prolific numbers of responsa in this period is due to the fact that larger numbers of responsa from this period have survived.

62 Colon (the "*Marharik*") was largely influenced by the Germans and became the leading Italian author of responsa. Goldwurm, *Op cit.* 195; Freehof, The Responsa Literature, *Op cit.* 35.

63 Batcher & Lauterbach, *Op cit.* 248. Among the responsa of Mizrahi are those which defined the attitude of the Rabbinic Jews toward the Karaites. *Ibid.*

64 Batcher & Lauterbach, *Op cit.*249; Freehof, The Responsa Literature, *Op cit.* 40.

65 Batcher & Lauterbach, *Op cit* 249. Of the responsa written by abi Zimra, there is an especially interesting one discussing the issue of whether a Jew is permitted to abjure his religion and accept Islam when threatened with death and sets out the cases in which he may save his life and those in which he must choose death. *Ibid.*

66 See, for example, the list in Tal, *Op. cit.* 233.

R. Meir Eisenstadt and R. Ezekiel Landau. The responsa by Landau, known as *Noda b'Yehudah*, were highly praised and distinguished for its independence regarding rulings of later authorities, while at the same time, strictly adhering to the decisions of earlier scholars.[67]

The modern period comprises the responsa written in various countries from the beginning of the nineteenth century. This was the age of emancipation and with it came changes in every sphere of life in Western Europe. The abolition of Jewish judicial autonomy, depriving the rabbinical courts of the authority they had possessed, had the effect of reducing the number responsa on monetary issues. These were replaced by responsa dealing with matters arising from new technology.[68]

As regards the *t'shuvot*, or responsa proper, this period is identical with the preceding one, both in external form and in the method of discussion. What differentiated this period from those preceding it were the questions. In earlier times, those questions, seeking practical answers, were taken from real life. The responsa of the nineteenth century, however, and especially those from its latter half, predominately responded to hypothetical problems. Perhaps fueled by a desire for notoriety, the inquirer raised a problem which seldom, or never, could occur in real life, and for which, there could be found no solution in the earlier responsa or codes.[69]

Yet, some responsa did deal with problems taken from real-life experience. This was especially true of issues raised by the inventions which brought sweeping changes to modern life.

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67 Batcher & Lauterback, *Op. cit.* 249.

68 Tal, "The 19th Century", in "Responsa", Encyclopedia Judaica 2d ed., Vol. 17, Keter Publishing House, Ltd., Jerusalem 2007, 233-34.

69 Batcher & Lauterbach, *Op. cit.* 249.

Respondents now had to determine whether any of the earlier laws had relevance to the issues raised by the new inventions, and how could such laws be "distilled into a usable principle applicable to the new conditions."[70] Notable examples include whether electric lights, rather than candles, might be used for *Shabbat*,[71] or for *Hanukkah*, and whether the telephone or the phonograph may be used on *Shabbat*.[72] Other issues were caused by changes in the conditions of Jews in different countries, or by the emerging movements within Judaism itself.[73] Examples include those by R. Moses Sofer (the "*Hatam Sofer*")[74] who discussed the problem whether the *bimah*[75] might be removed from the center and placed near the Ark, as is now the case in many synagogues, but which was then suspiciously viewed as a prohibited innovation.[76]

The movements seeking the reform of Judaism evoked many responsa in reply to questions concerning the location of the *bimah*, organ accompaniments, covering the head in the synagogue, the seating of men and women together, and prayers in the vernacular. Major

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70 Freehof, The Responsa Literature, *Op cit.* 229.

71 Respondents have disagreed on some of these questions, or even among basic questions. For example, is the glowing filament of an incandescent light bulb a flame, which would prohibit its being turned on and off on *Shabbat*, or is it a "glowing bit of metal" which the Talmud [B.T. *Shabbat* 42a] permits to be extinguished on *Shabbat*. Freehof, The Responsa Literature, *Op cit.* 237. But that Talmud passage restricts such extinguishment to metal that is "*birshut ha'rabim* — in the public domain" and "*bishvil shelo yizuku bah rabim* — in order that the public is not damaged by it", neither of which relate to an electric light in the home or synagogue.

72 Batcher & Lauterbach, *Op cit.* 250. See Freehof, The Responsa Literature, *Op cit.* 235-42 for a discussion of electricity and *Shabbat*.

73 *E.g.,* Reform, Conservative and national Judaism and Zionism, all of which arose during the nineteenth century. Batcher & Lauterbach, *Op cit.* 249. Among the issues raised by the emerging movements were the permissibility of an organ in the synagogue and prayer in the vernacular. Tal, "The 19th Century", *Op. cit.* 234.

74 Lewittes, *Op cit.* 185.

75 A raised platform from where religious services are conducted and the Torah is read in a synagogue. The Hatam Sofer, perhaps, is best known for his pronouncement: "*Hadash assur min ha'Torah* — anything new is forbidden by the Torah", "referring to Lev. 23:14 prohibiting the consumption of new (*hadash*) grain before bringing the *omer* offering". Lewittes, *Op cit.* 185. Such a statement obviously negates all human progress, including progress in the *halakhah* through responsa.

76 Batcher & Lauterbach, *Op cit.* 250.

responsa were written seeking to justify these practices.[77] On the other hand, several collections of responsa were written in opposition to Reform by the *Hatam Sofer*, Akiba Eger, and others, protesting against prayers in the vernacular and against the use of the organ on *Shabbat*, etc.[78]

Other responsa of this period included issues such as whether a Protestant church might be changed into a synagogue. The Jewish colonization of Palestine occasioned many responsa on questions connected with agriculture and horticulture in the Holy Land, including the problems of the cessation of all labor in the fields during the Sabbatical year.[79]

In the first half of the twentieth century, many responsa dealt with issues of war and the *Shoah*.[80] But in the latter part of that century, issues specific to Israel, such as the Law of Return and immigration of intermarrieds,[81] as well as the effect of new technology both there[82] and in America[83] raised new and difficult questions, some of which will be examined in this paper.

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77 Novack, David, *Modern Responsa: 1800 to the Present*, in Hecht, N.S., *et al.*, *Op cit.* 381-82.

78 Novack, David, *Modern Responsa: 1800 to the Present*, in Hecht, N.S., *et al.*, *Op cit.* 382-83.

79 Batcher & Lauterbach, *Op cit.* 250; .

80 Indeed, there is a specific collection of responsa which was created from Kovno Ghetto during the *Shoah*: "*Mi-Ma'amakim* — From the Depths". Lewittes, *Op cit.* 221; see also Freehof, Responsa in War Time, *Op cit.*

81 Isaacs, *Op cit.* 139.

82 *Ibid.* Other issues included listening to a woman's voice on the radio, departing by airplane on *Shabbat*, use of a microphone in the synagogue, use of hearing aids for the deaf, a refrigerator, or the telephone on *Shabbat*, transplantation of a womb and the hybridization of fruit. Isaacs, *Op cit.* 141.

83 Isaacs, *Op cit.* 139. Issues in the United States included the use of automobiles and electricity on *Shabbat* and the role of women in the synagogue. Isaacs, *Op cit.* 142.

Chapter 2
American Reform Judaism, its *Halakhah* and Responsa — History and Background

The Reform Movement "began as a movement to reform halachah and not the religion of Judaism as is often suggested."[1] Thus, the movement "has always concerned itself with matters of *halakhah*, and the language of *halakhah* has always served as it means of religious expression."[2] At it origins, both in Europe and America, its leaders "sought to explain and justify in halakhic terms the innovations they introduced into Jewish religious observance."[3] Believing that they were simply continuing "the rabbinic religion that was the common heritage of all Jews . . . they wrote responsa which attempted to demonstrate that their innovations in Jewish ritual . . . were entirely consistent with Jewish law."[4] However, many responsa written early in the history of the movement, were written as answers to Reform's Orthodox critics.[5]

After several decades, however, Reform *halakhic* literature all but ceased. Particularly in the United States, the radical reformers severed their connection with the rabbinic - *halakhic* past. The Pittsburgh Platform leaned in the direction of rejecting aspects of "rabbinical laws"[6]

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1 Meyer, Michael A. & W. Gunther Plaut, eds., The Reform Judaism Reader, UAHC Press, New York, 2001, 117.

2 Washofsky, Mark, Jewish Living — A Guide to Contemporary Reform Practice, UAHC Press, New York 2001, at xix.

3 Washofsky, Jewish Living, *Op cit.* xix.

4 *Ibid.*

5 Jacob, Walter, ed., Contemporary American Reform Responsa, CCAR Press, New York 1987, xv. In fact, discussions surrounding the formation of the Committee suggested that its purpose would be to help students graduating from HUC defend their positions through traditional texts. Jacob, Walter, *Pesikah and American Reform Responsa*, in Jacob, & Zemer, Dynamic Jewish Law, *Op cit.* 89.

6 Jacob, Contemporary American Reform Responsa, *Op cit.* xvii. The Pittsburgh Platform of 1885 states in part:

> "3 . . . [T]oday we accept as binding only its moral laws, and maintain only such ceremonies as elevate and sanctify our lives, but reject all such as are not adapted to the views and habits of modern civilization.
> "4. We hold that all such Mosaic and rabbinical laws as regulate diet, priestly

Nevertheless, the early Reformers did not view the Platform's language as the death knell of Reform *halakhic* inquiry. "As early as 1905, Rabbi Max Heller express his feeling that the Pittsburgh Platform represented 'in more than one way an obsolete standpoint.'"[7] Thus, Reform *halakhic* discourse never disappeared in its entirety, and the CCAR Yearbooks, whose publication commenced in the late 19th century, contain many documents referring to *halakhic* literature.[8]

The CCAR formed its Responsa Committee in 1906,[9] but no responsa were reported until 1911.[10] On occasion, full responsa, written in English,[11] were published in the CCAR Yearbooks, which also reported on other questions addressed by the Committee privately, or in a short report.[12] Its initial chairman was the son-in-law and follower of the radical reformer David Einhorn, Rabbi Kaufmann Kohler,[13] who served in that position from 1908 until 1922. Kohler was a professor at HUC, as were all of his successors until Rabbi Solomon B. Freehof,[14] and he

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purity, and dress originated in ages and under the influence of ideas entirely foreign to our present mental and spiritual state. . . ."

Meyer, Michael A., Response to Modernity — A History of the Reform Movement in Judaism, Oxford University Press, New York, 1988, at 387-88. By the time of the Columbus Platform, in 1937, the language was softened to omit only "laws [which] have lost their binding force with the passing of the conditions that called them forth." Meyer, Response to Modernity, *Op. cit.* 389.

7 Meyer, Response to Modernity, *Op. cit.* 295, quoting from [note 120].

8 Washofsky, Jewish Living, *Op.cit.* xix.

9 There is some confusion as to the date of formation of the Committee. Washofsky, Plaut & Washofsky, *supra*, note 7, xiv, and Jacob, Contemporary American Reform Responsa, hold to 1906. Meyer, Response to Modernity, *Op. cit.* 295, believes the date to be 1907, as do Jacob's later writings. Jacob, Walter, ed., Questions and Reform Jewish Answers — New American Reform Responsa, CCAR, New York, 1992, xix; Jacob, *Peskikah and American Reform Responsa, Op cit.* 89.

10 Jacob, Walter, ed., American Reform Responsa, CCAR Press, New York 1983, xvi. And that report was oral. A total of only 31 written responsa were produced during Kohler's tenure. Jacob, *Pesikah and American Reform Responsa, Op cit.* 92, 93.

11 *Ibid.*

12 Jacob, Walter, *Solomon B. Freehof and the Halakhah — An Appreciation*, in Freehof, Solomon B., Reform Responsa for Our Time, Hebrew Union College Press, New York 1977, xvi.

13 Jacob, Contemporary American Reform Responsa, *Op cit.* xvii.

14 Jacob, *Pesikah and American Reform Responsa, Op cit.* 90.

permitted other members of the Committee, all professors at HUC, to write responsa.[15]

Rabbi Kohler stated that "the intent of the committee was 'to bring about some order within the Reform Jewish practices and to provide ready access for those who sought answers in rabbinic matters.'"[16] The fact that Rabbi Kohler (and his successors over the next 50 years) were members of the HUC faculty provided a link between the seminary and its graduates in the pulpits. It also "could and eventually did serve as a brake on extremism . . . as a way of helping to bring uniformity to ritual practice.[17] Rabbi Kohler "was interested primarily in the theological overtones of the questions. . . . Bible and Talmud were cited [in his responsa], but [he] rarely [cited] any later authorities."[18]

Rabbi Jacob Z. Lauterbach served as chairman from 1923 until 1933.[19] Rabbi Lauterbach, unlike Rabbi Kohler, "used the responsa for thorough studies of the entire rabbinic past. His responsa presented normative material as well as other avenues. [This] historical approach emphasized the underlying principle which could be discovered in the developing tradition."[20] Rabbi Lauterbach's responsa were "thoroughly argued and full of citations".[21] That was not the case with his successor, Rabbi Jacob Mann, who served as chairman from 1934 to 1939. He "answered briefly with a handful of citations . . . but did not develop any lengthy

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15 Jacob, *Pesikah and American Reform Responsa, Op cit.* 92.

16 Jacob, Contemporary American Reform Responsa, *Op cit.* xvii.

17 Jacob, *Pesikah and American Reform Responsa, Op cit.* 90. Kohler became Honoray Chairman, but took no further part in the Committee's work. *Ibid.* 98.

18 Jacob, American Reform Responsa, *Op cit.* xvi-xvii.

19 Jacob, American Reform Responsa, *Op cit.* xvii.

20 Jacob, American Reform Responsa, *Op cit.* xvii.

21 Jacob, *Solomon B. Freehof and the Halakhah, Op.cit.* xvii. Lauterbach, who served on the Committee under Kohler, once complained that the chairman "did not cite tradition sufficiently." Jacob, *Pesikah and American Reform Responsa, Op cit.* 97.

discussion of either principles or historical background."[22] Like his predecessor, the next chairman, Rabbi Israel Bettan, who held that position from 1940 to 1954, Rabbi Mann "sought to address himself only to the question at hand and supplied virtually no references."[23] Rabbi Mann's "interest lay elsewhere and so [t]he committee hardly functioned during these years when major changes in the Reform Movement were taking place."[24]

Thus, for a period of two decades, from the early 1930s to the early 1950s, little was accomplished in the progression of Reform *halakhah* through its responsa. Up until this point, the Committee functioned primarily as a resource for Reform decisions. Because it seemed that few rabbis were in need of such answers, the number of questions remained small as did the Committee's size.[25]

Two coalescing factors brought a renewed interest in *halakhah* to Reform Jewish life — a striving for renewed certainties in a chaotic world" after the Second World War [26]and the appointment of Rabbi Solomon Freehof, who was a student of Lauterbach,[27] as the next Committee chairman. Rabbi Freehof joined the Committee in 1947 and became its chairman in 1955. His interest in responsa began with a lecture given at a CCAR Conference, entitled "A Code of Ceremonial and Ritual Practice", in which he argued that a demand for such a code was premature. During the Second World War, he chaired a Responsa Committee, made up of

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22 Jacob, American Reform Responsa, *Op cit.* xvii.

23 *Ibid.*

24 Jacob, *Pesikah and American Reform Responsa, Op cit.* 103.

25 *Ibid.* It has been suggested that there "may have been an intent to use the Committee as a way of strengthening the influence of [HUC]". At the outset, the Committee numbered eight. From 1909-12, the were only two. And from 1913 onward, from four to nine. Jacob, *Pesikah and American Reform Responsa, Op cit.* 104.

26 Meyer & Plaut, The Reform Jewish Reader, *Op cit.* 117.

27 Jacob, Walter, *Introduction* to Freehof, Solomon B., Today's Reform Responsa, *Op cit.* np. Jacob notes in this *Introduction* that Freehof was Lauterbach's favorite student.

Reform, Conservative and Orthodox rabbis, for the Commission on Chaplaincy of the National Jewish Welfare Board. While he served as chairman, that committee published two booklets of responsa, both in English.[28] As a result of his practical experience with this committee, Rabbi Freehof began independently to study responsa from a specifically Reform point of view.[29]

Rabbi Freehof also published two books on Reform Jewish Practice before becoming Committee chairman. Each volume was entitled "Reform Jewish Practice and its Rabbinic Background". According to Rabbi Walter Jacob, who would be Rabbi Freehof's successor as Committee chairman,[30] these books clearly indicated Rabbi Freehof's intention to bind Reform Judaism to the tradition. He considered his books a summary, rather than a guide for the future.[31] These and other publications, such as his analysis of "Jacob Z. Lauterbach and the Halakhah", published in 1952, demonstrated, according to Jacob, that Rabbi Freehof would follow Rabbi Lauterbach's "pattern of sifting the entire tradition to find a modern, liberal approach to a problem."[32] Thus, by the time he began to lead the Committee, he was primed and ready for the task.

During his first year as chairman, Rabbi Freehof reported to the CCAR that he "was surprised to discover that as many as thirty questions came to him during the year."[33] However, only two "were those which demanded not only research, but a Reform decision . . . ."[34] And he

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28 Jacob, *Solomon B. Freehof and the Halakhah, Op cit.* xvi.

29 Jacob, *Introduction* to Freehof, Solomon B., Today's Reform Responsa, *Op cit.* np.

30 Jacob, *Introduction* to Freehof, Solomon B., Today's Reform Responsa, *Op cit.* np.

31 Jacob, *Solomon B. Freehof and the Halakhah, Op.cit.* xvii.

32 Jacob, *Solomon B. Freehof and the Halakhah, Op.cit.* xviii.

33 Freehof, Solomon B., *Report of the Committee on Responsa*, CCAR Yearbook Vol. LXVI, CCAR, New York, 1957, 104 ("*1956 Report*").

34 *Ibid.*

determined that it was only that type of question, "which are interesting in themselves and require a liberal decision [that] should be reported to the Conference."[35]

At the prior Conference, a committee had been appointed to report on the purpose, scope and role of the Committee. Rabbi Freehof explained his views on the subject. On the Committee's role, he stated:

> "'Its first purpose is to inform members, generally younger members, inquiring what the law is in certain cases. Many of these inquiries can be answered by reference to the Code. . . ."[36]
>
> "'The second function of the Committee is to give a responsum on more complicated matters that are not readily found in the Code, but involve the gathering of materials . . . . Again, this sort of responsum is really a request for information to which the members are entitled to get asn answer from the Committee . . . ."[37]
>
> "The third type of inquiry is which most directly is the function of the Committee.. The member wants to know what should be the *Reform* attitude on certain legal questions."[38]

This third type is the type that Rabbi Freehof stated should be reported annually to the Conference.

On the issue of authority, Rabbi Freehof, noting that all codes were produced by individuals, stated that "*Never* did we have any official body make an official code."[39] He suggested that individuals who wished to could try their hand at a code, but noted that the "less

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35 *Ibid.* A survey of the CCAR Yearbooks during Freehof's tenure as chairman indicated that between one and three responsa were reported annually to the Conference.

36 Weinstein,, Jacob J., *Report of the Commttee on the Purpose, Scope and Role of the Responsa Committee*, CCAR Yearbook, Vol. LXVI, *Op cit.* 111. By the "Code", it is assumed Freehof meant the *Shulhan Arukh*, as that is the term he employed in describing the same function in his report. Freehof, *1956 Report, Op cit.* 104.

37 Weinstein, *Report, Op cit.* 111.

38 *Ibid.* Emphasis in original.

39 Weinstein, *Report, Op cit.* 111-112.

the Conference has codal power, the more we are in harmony with Jewish tradition."[40]

Rabbi Freehof served as chairman for over twenty years, until 1976. As chairman, he wrote and published responsa for the CCAR with "only a minimum of involvement by the rest of the committee."[41] Yet, in all, he wrote "seven volumes of responsa [over] a period of twenty years, representing 421 responsa and inquiries."[42] In each of those volumes, he organized the responsa according to the framework of the *Shulḥan Arukh*. Rabbi Freehof viewed *halakhah* as advisory; he treated the law as human.[43] In the introduction to his first responsa volume, "Reform Responsa", he stated that he considered Reform responsa to be "guidance not governance".[44]

As he authored more and more volumes of his responsa, Rabbi Freehof "reviewed some tendencies which have brought the Reform movement closer to tradition."[45] He "analyzed the mood of Reform Judaism and attempted to find his own way back to *Halachah*."[46] Responsa was a repository of wisdom — both human and divine — collected through the generations.

As noted above, many inquiries were sent to him, not as chairman of the Committee, but

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40 *Ibid.* Other members agreed with Freehof, but Rabbi Doppelt, who was working on his Guide, suggested that the Committee's findings be presented as resolutions to be voted on by the Conference, when a new approach or observance is carved out. Dr. Eugene Borowitz, seeking to bridge the gap between license and authority, offered a compromise — make the Committee's decisions an official position of the Conference, BUT expand the membership to insure representation from all factions AND permit any minority report to be written and published as an official report of the Conference as well. A decision was made to continue the study. Weinstein, *Report, Op cit.* 113-115.

41 Jacob, *Solomon B. Freehof and the Halakhah, Op.cit.* xix.

42 Jacob, American Reform Responsa, *Op cit.* xvii.

43 Jacob, *Solomon B. Freehof and the Halakhah, Op.cit.* xx.

44 Freehof, Solomon B., Reform Responsa, 1960, at 22. Gunther Plaut, in a 1973 article in the CCAR Year Book, wrote of a "Reform guidance system", adopting the language of the "astronautical age". Plaut, W. Gunther, *Chug on Halachah*, CCAR Yearbook, Vol. LXXXIII, CCAR, New York, 1974, 145.

45 Jacob, *Solomon B. Freehof and the Halakhah, Op.cit.* xxi.

46 *Ibid.*

in his individual capacity.[47] Rabbi Freehof often used the questions addressed to him as an educational device. Through his citations, he opened the pages of tradition as well as the responsa literature to many colleagues.[48] But he opened those pages to a wider audience as well. Rabbi Freehof wrote two books, "The Responsa Literature" and A Treasury of Responsa", which offered in non-technical language an introduction to this rabbinic literature which previously had not been widely available in English.[49]

Although he was opposed to a "Code" of Reform Jewish practice, it was during his tenure as chairman of the Committee that others, having failed to persuade the CCAR to publish such a work, did so on their own. Thus, a "Guide for Reform Jews" was published in 1957 by Rabbis Frederic Doppelt and David Polish.[50] This book employed the language of *mitzvot*, which they "understood as a re-enactment of "'spiritual moments in Jewish history when the Jewish people came upon God.'"[51] The book also defined *halakhot* as "the accepted ways to perform mitzvot in concrete life situations", and *minhagim* as "those folk customs that were subsidiary to mitzvot and did not possess equivalent authority."[52]

Near the end of Rabbi Freehof's tenure, in 1972, the CCAR finally published its own

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47 Jacob, *Solomon B. Freehof and the Halakhah, Op.cit.* xix.

48 Jacob, American Reform Responsa, *Op cit.* xvii.

49 Jacob, *Solomon B. Freehof and the Halakhah, Op.cit.* xviii.

50 Jacob, *Solomon B. Freehof and the Halakhah, Op.cit.* xxiv. Meyer and Plaut, *supra*, note that one year earlier, Rabbi Abraham J. Feldman published a guide, which he averred was "'not a code'". There long existed a fear in Reform circles that any such a code would create a new *Shulhan Arukh*. Meyer & Plaut, *Op cit.* 125-26. Doppelt and Polish wrote: "Reform can tolerate no authoritarian thought-control in the form of a superimposed Code of beliefs and practices. No official body could possibly impose such a code." Doppelt & Polish, eds., A Guide for Reform Jews, New York, 1957, at 9.

51 Meyer, *Op cit.* 376.

52 *Ibid.*

Guide, "*Tadrikh Le-Shabbat* — A Shabbat Manual"[53], edited by W. Gunther Plaut, who would later become Committee chairman. This volume occupied a CCAR committee for seven years and required compromises which were necessary to secure its acceptance by the CCAR membership. Thus, "[e]schewing belief in God as the One who commands and the notion of mitzvot as mere folkways, [it] spoke of a God who 'offers an opportunity to introduce an "ought"into our existence' . . . ."[54] However, this book did employ the language of *mitzvot* and even included prohibitions and positive commandments for the observance of *Shabbat*.[55]

Rabbi Freehof retired from service on and to the Committee during the 1976-77 fiscal year and became its Honorary Chairman. During that year, Rabbi Walter Jacob, the Committee's vice chairman, wrote the first drafts of the Committee's responsa.[56] During a Committee meeting held in January of that year, it was agreed that the Committee's task "was the writing of responsa utilizing the traditional literature and providing modern Reform answers from it. The answers should fit our mood, as well as the needs of our rabbis and congregants."[57]

Rabbi Jacob, who also had succeeded Rabbi Freehof as the Rabbi of Rodef Shalom in

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53 Washofsky, Jewish Living, *Op cit.* xx. Further guides followed: "Gates of Mitzvah" (1979); "Gates of the Seasons" (1983); and "Gates of Shabbat" (1991). Each of these describe "the central elements of {Reform] Jewish observance . . . and all of them draw deeply upon the literature of Talmud and *halakhah*." *Ibid.* As with "A Shabbat Guide", *Gates of Mitzvah* and *Gates of the Seasons* "are tentative with their wording, 'it is a *mitzvah*,' and skirt the issue of absolute obligation, but even in that form they reflect the stance of *halakhah* and commandments which would not have been acceptable to many Reform Jews a few generations earlier." Jacob, Contemporary American Reform Responsa, *Op.cit.* xx.

54 Meyer, *Op cit.* 377.

55 *Ibid.*

56 Jacob, Walter, *Report of the Committee on Responsa*, CCAR Yearbook, Vol. LXXXVII, CCAR, New York, 1978, 96 ("*1977 Report*").

57 Jacob, *1977 Report, Op cit.* 103.

Pittsburgh,[58] became the new chairman following the 1977 Conference.[59] Even after his retirement from official service, Rabbi Freehof remained active. He published two of his books on responsa in retirement. More importantly, Rabbis continued to address questions to him and during some years, both he and Rabbi Jacob were writing responsa for the Reform movement.[60]

By the time Rabbi Jacob became chairman, the number of inquiries to the Committee had markedly increased. In 1978-79, approximately fifty questions had been answered. In addition, the Committee began work on a book in which all the responsa issued by the CCAR would be included.[61] The following year, twenty-six responsa "had been circulated to the committee . . . two or three times."[62] Due to the workload, the Committee agreed on new procedures. The Committee would direct its efforts to circulate responsa only to those "which involves some major matter of principle or many members of the Conference."[63]

In addition, the Committee would only address specific questions and would not entertain "broad-ranging questions akin to some [posed] by the Committee on Family Life."[64] The responsa written by the chairman and not published by the CCAR were permitted to be published by the chairman in any form he desired. And, perhaps significantly, there was agreement that the responsa would be for the CCAR, or the Committee, and not for Reform Judaism at large, as the World Union of Progressive Judaism had constituted an international committee on Reform

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58 It is no understatement to say that this congregation was the locus of Reform *halakhah* virtually for the entire latter half of the 20th century. Jacob, *Introduction* to Freehof, Solomon B., Today's Reform Responsa, *Op cit.* np.

59 Jacob, *1977 Report, Op cit.* 105.

60 Jacob, *Introduction* to Freehof, Solomon B., Today's Reform Responsa, *Op cit.* np.

61 Jacob, *1979 Report, Op cit.* 108.

62 Jacob, *1980 Report, Op cit.* 80. An equal number had been responded to privately by the chairman. *Ibid.*

63 *Ibid.*

64 *Ibid.*

halakhah.[65]

Rabbi Jacob served as Committee chairman for eleven years[66] — until 1987 — and has retained an active interest and role in *halakhah* in the two decades since as the President of the Solomon B. Freehof Institute for Progressive Halakhah and co-editor of its publications. The Committee, under Rabbi Jacob's direction, was revamped as a working committee, as "part of an attempt to involve a broader group in this important area, and, thereby, to reflect a wider spectrum of opinions." Although the responsa were still written by the chairman, those of wider import were circulated to the entire Committee for comment.[67] During his tenure as chairman, Jacob wrote three hundred responsa and an equal number of inquiries which have required no formal statements.[68] But Rabbi Jacob reflected a significant change in Reform Jewish outlook, one that to this day is not universally recognized by its adherents and makes many Reform Jews most uncomfortable.[69]

> "Modern *halakhah* and responsa must provide a practical expression for our daily Jewish existence. We are no longer satisfied with guidance but seek governance. It is the duty of liberal Jews to perform *mitzvot* on a regular basis as part of their life."[70]

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65 *Ibid.*

66 Jacob, Contemporary American Reform Responsa, *Op cit.* xvii-xviii.

67 Jacob, American Reform Responsa, *Op cit.* xviii. Yet, in his initial report to the Conference, Jacob stated that the Committee agreed that "[a]ll the members of the committee should be involved in the writing of responsa and should be asked to do so." Jacob, *1977 Report, Op cit.* 96. The Committee also agreed to the potential for a dissenting minority opinion with the listing of the names of all members subscribing to any opinion or dissent. *Ibid.* The Rabbis who served on the Committee during Jacob's tenure as chairman were: Rabbis Robert Kirschner, Julius Kravetz, Leonard S. Kravitz, Yehiel Lander, Eugene Lipman, Eugene Mihaly, Isaac Neuman, Stephen M. Passamanek, W. Gunther Plaut, Richard Rosental, Henry A. Roth, Herman Schaalman, Rav A. Soloff, Mark Washofsky, Sheldon Zimmerman and Bernard Zlotowitz. Jacob, Contemporary American Reform Responsa, *Op cit.* xiii. Rabbis Plaut and Washofsky would follow Jacob as chairman. Plaut & Washofsky, *Op cit.* ix, xi.

68 Jacob, Contemporary American Reform Responsa, *Op cit.* xvii-xviii.

69 Plaut & Washofsky, *Op cit.* xv.

70 Jacob, Contemporary American Reform Responsa, *Op cit.* xxi.

Rabbi Jacob was succeeded as chairman by Rabbi Gunther Plaut, the third consecutive congregational rabbi to hold that post.[71] Rabbi Plaut decided to make all members of the Committee equally responsible for its responsa and some of them actively participated in the writing process. The Committee distributed drafts, discussed them and voted upon them. Those who submitted inquiries were told whether the decision was unanimous. On those occasions where there was a written dissent, the dissenting opinion was distributed along with the majority.[72]

Rabbi Plaut, in observing the methodology of his predecessors, noted that Rabbi Freehof, in his responsa "detailed with great scholarship how traditional decisors approached the question under consideration and on occasion he speculated how they might treat it today."[73] When he believed that their conclusion was correct he adopted their conclusion, "because he saw no particular reason not to . . . but when he did depart from it he rarely gave reasons that were grounded in any Progressive thought system."[74] But Rabbi Freehof gave Reform *minhag* pragmatic preference, even though the "overwhelming weight" of his conclusions were solidly based on tradition.[75] And Rabbi Plaut also noted that like his predecessor, Rabbi Jacob's responsa did not seek "to give his conclusions a comprehensive historical or theological basis."[76]

Rabbi Plaut thus noted that the Committee found itself in a dilemma — on the one hand Reform responsa are like authentic responsa literature, but on the other hand, they are different,

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71 At that same time, Rabbi Mark Washofsky was appointed as vice-chairman.

72 Plaut & Washofsky, *Op cit.* ix-x.

73 Plaut, W. Gunther, *Reform Responsa as Liberal Halakhah*, in Jacob & Zemer, Dynamic Jewish Law, *Op cit.* 113.

74 *Ibid.* Rabbi Freehof "would simply say, in effect, 'We do not do it that way.'" *Ibid.*

75 *Ibid.*

76 Plaut, *Reform Responsa as Liberal Halakhah*, *Op cit.* 114.

because they depart from tradition on occasion. Rabbi Plaut sought to resolve this dilemma as chairman of the Committee. He began with the realization there existed over a century and one-half of Reform thought, principles, and documents, such as Platforms and responsa literature. So he decided that the Committee was ready to state that, in the future, Reform responsa will be based upon "only two considerations: on Tradition as well as on the legal corpus of our Liberal movement."[77] How does this work in practice?

> "We begin with Tradition and ask: how does it treat this *sheela*? We then proceed to ask: What is there in our Liberal tradition that would have us disagree? Is there a previous ruling or other legal document that would have us decide otherwise? If not, Tradition stands; if there is, we must examine how our Liberal *halakhah*, as developed so far, can be applied in the case before us. . . . [I]t is imperative that we state and detail why we depart from Tradition, what principles and precedents guide us."[78]

Several years later, Rabbi Plaut refined his method as follows:

> "Our procedure was marked by two considerations. First, we asked: 'How might Tradition answer this question?' Then, after exploring this aspect, we asked: 'Are there reasons, why, as Reform Jews, we cannot agree. If so, can our disagreement be grounded in identifiable Reform policy?' In this way we placed Reform responsa in the continuum of halakhic literature."[79]

Rabbi Plaut concluded that the Committee is "in fact . . . creating a distinctly Liberal *halakhah* and we must have no hesitation to call it just that."[80] His hope was that the Committee would set "a pattern that will, in time, be seriously considered by those not of our movement."

When Rabbi Mark Washofsky became the most recent chairman in 1996, the chairmanship returned to the HUC faculty for the first time in forty years.[81] In an article written

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77 Plaut, *Reform Responsa as Liberal Halakhah*, *Op cit.* 115.

78 *Ibid.*

79 Plaut & Washofsky, *Op cit.* 10.

80 Plaut, *Reform Responsa as Liberal Halakhah*, *Op cit.* 115.

81 Plaut & Washofsky, *Op cit.* xi.

the early 1990s, Washofsky asked "whether the concept of a 'liberal *halakhah*' is anything more than a contradiction in terms."[82] Washofsky noted that there is a wide gap between liberal *halakhic* theory and practice.[83] Accordingly, he maintained that

> "[i]f they are to prove their case, *halakhic* liberals must respond directly to these theoretical objections. It is not enough for them to claim that *halakhah* can be flexible; they must show that it is flexible *enough* to support the items on their *halakhic* agenda. This requires a detailed and precise theory of *halakhah* which will demonstrate the criteria of *halakhic* legitimacy and demonstrate that the solutions advocated by today's liberals meet that criteria."[84]

In the early 1990s, according to Washofsky, there was one example of such a system — the *halakhah* of the Conservative movement.[85] He noted that all of the "recent innovations", such as the *kashrut* of wine and cheese, the counting of women in a *minyan*, conditional marriage, and even driving on *Shabbat*, meet the criteria as these positions "were justified through traditional methods of *halakhic* argumentation and issued by rabbis committed to the *halakhic* system and its basic norm."[86] Even so, he observed that the Conservative system does not fully account for the functioning of *halakhah* in the real world of rabbinic practice.[87]

Nevertheless, he concluded that it is possible to refute the consensus position of the *poskim* by testing it against the criterion of validity which all *halakhists* recognize. And if such

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82 Washofsky, Mark, *The Search for Liberal Halakhah: A Progress Report*, in Jacob, Walter & Moshe Zemert, eds., Dynamic Jewish Law — Progressive Halakhah: Essence and Application, Rodef Shalom Press, Pittsburgh, 1991, 25.

83 Washofsky, Mark, *The Search for Liberal Halakhah: A Progress Report*, *Op cit.* 26.

84 Washofsky, Mark, *The Search for Liberal Halakhah: A Progress Report*, *Op cit.* 27.

85 Washofsky, Mark, *The Search for Liberal Halakhah: A Progress Report*, *Op cit.* 37. Much of Washofsky's discussion on this point is based on Rabbi Joel Roth's argument in his book, The Halakhic Process: A Systemic Analysis, Jewish Theological Seminary Press, New York, 1986.

86 Washofsky, Mark, *The Search for Liberal Halakhah: A Progress Report*, *Op cit.* 38. This is so even though these positions are all contrary to the consensus positions of the *poskim*. *Ibid.*

87 Washofsky, Mark, *The Search for Liberal Halakhah: A Progress Report*, *Op cit.* 39. Washofsky particularly mentions the "dominant role played by the *gedolei hador* — the leading decisors of the age. *Ibid.*

occurs in a "significant number of cases", "there can be more than one 'correct' answer to a *halakhic* question."[88] By 1997, however, Washofsky recognized that "there is no 'tradition' of Jewish practice without halakhah".[89] And, he concluded, that "Reform responsa are emphatically halakhic documents; they speak the language of Jewish law and draw their source material from the texts of the Jewish legal tradition".[90]

He reached this conclusion despite his earlier argument that a wide gap existed between liberal *halakhic* theory and concrete *halakhic* practice. Concluding that the "'right' halakhic opinion is . . . the one which best expresses the underlying purposes and values of Jewish religious observance as we conceive them to be,"[91] rather than the "consensus opinion [of] today's Orthodox authorities",[92] Washofsky proclaimed that in determining the *halakhah*, Reform decisors

> "follow the lead of Maimonides and other great theorists of Jewish law who hold that the correct halakhic ruling is not determined by the weight of precedent, but by the scholar's honest and independent interpretation of the sources."[93]

Today, Reform Responsa, which are "arguments drawn from halakhic sources, interpreted through the eyes of Reform rabbis and directed toward a Reform Jewish readership",[94] is based on the following principles:

> "1. Our *teshuvot* are advisory opinions; they are intended to serve as arguments in favor of a particular approach to a particular issue of observance. Their 'authority,' whatever we mean by that word lies

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88 Washofsky, Mark, *The Search for Liberal Halakhah: A Progress Report, Op cit.* 45.

89 Washofsky, *Introduction*, Teshuvot for the Nineties, *Op cit.* xxv.

90 Washofsky, *Introduction*, Teshuvot for the Nineties, *Op cit.* xxvii.

91 Washofsky, *Introduction*, Teshuvot for the Nineties, *Op cit.* xxviii.

92 *Ibid.*

93 *Ibid.*

94 Washofsky, *Introduction*, in Plaut & Washofsky, Teshuvot for the Nineties, *Op cit.* xxix.

in their power to persuade.

"2. . . . . The 'right' halakhic opinion is rather the one which best expresses the underlying purposes and values of Jewish religious observance as we conceive them to be. Thus, a minority ruling, or an interpretation abandoned long ago by most rabbis, may offer a superior understanding of the tradition than the view adopted by the majority. . . . We, too, assert the right of independence in halakhic judgment, our right to adopt the minority position when that position appears to us to be the correct one.

"3. Our decisions are based upon the sources of Jewish tradition. For us, those sources include the tradition of Reform Jewish thought as expressed in our previous responsa, resolutions and publications of the Central Conference of American Rabbis . . . . This reflects our understanding of Reform as a continuation of Jewish tradition and not . . . a radical departure from it.

"4. As an expression of our identification with the Jewish heritage, we seek to uphold traditional halakhic approaches whenever fitting. But we reserve for ourselves the right to judge the degree of 'fit.' We will modify standards of halakhic observance to bring them into accord with the religious, moral, and cultural ideals to which we Reform Jews aspire and which, as we see it, characterize Jewish tradition at its best. And we will depart from the tradition altogether in those cases where even the most liberal interpretation of its sources yield conclusions which are unacceptable to us on religious or moral grounds."[95]

It is through these principles that I shall analyze the Reform responsa in the succeeding chapters.

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[95] Washofsky, *Introduction*, in Plaut & Washofsky, Teshuvot for the Nineties, *Op cit.* xxvii-xxix. Departing from set standards constitutes rabbinic legislation or *takkanot*, a classical rabbinic practice.

Chapter 3
American Conservative Judaism, its *Halakhah* and Responsa — History and Background

Although the CJLS of today is a committee within the RA, it did not begin life that way. The first arm of the Conservative Movement to deal with *halakhic* issues was the Alumni Association of the Jewish Theological Seminary of America ("JTS").[1] By 1911, the Association had formed a five person Standing Committee on Jewish Law for this purpose.[2] Three years later, it was reported that this committee consisted of five rabbis and was chaired by Rabbi Abraham Hershman.[3]

In June 1918, the Alumni Association held what would be its last meeting. Papers by Professor Louis Ginzberg and Samuel Cohen were presented on the topic of the "'role of women in the synagogue in the light of Jewish law and practice.'"[4] At that same meeting, the members voted to change the name of the association to the Rabbinical Assembly of the Jewish Theological Seminary.[5]

Several years earlier, there had come into existence the body that would become its synagogue organization, the United Synagogue of America ("USCJ").[6] There was controversy between those who viewed the establishment of this organization as *de facto* evidence of a third

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1 Fierstein, Robert A., "A Noble Beginning" in Fierstein, Robert A., ed., A Century of Commitment: One Hundred Years of the Rabbinical Assembly, The Rabbinical Assembly, New York, 2000, 15.

2 *Ibid.*

3 *Ibid.*

4 Fierstein, "A Noble Beginning", *Op cit.* 16 & n.79 (quoting from *The Jewish Exponent*, June 28, 1918).

5 Fierstein, "A Noble Beginning", *Op cit.* 16-17.

6 This organization was originally formed in 1914 as an outgrowth of the Alumni Association of the Jewish Theological Seminary of America and, in its formative years, was guided by Seminary Alumni. It would become a synagogue organization shortly after its formation. Fierstein, Robert A., "A Noble Beginning", *Op cit.* 14. Today, this organization is known as the United Synagogue of Conservative Judaism.

movement[7] and those who refused to acknowledge the same.[8] In 1917, the USCJ had established its own committee to deal with *halakhah*, the United Synagogue Committee on the Interpretation of Jewish Law, which was chaired by Professor Louis Ginzberg.[9] Ginzberg "made certain that only halakhically defensible decisions were rendered by his committee."[10] When he rendered his *halakhic* opinions on behalf of that committee, however, Ginzberg "would be careful to present his findings on major matters to the appropriate RA conferences as well."[11]

A few years later, a group of liberal congregational rabbis who were frustrated with the "Law Committee . . . seemingly hopelessly mired down in Traditionalist inertia" sought to establish a "Conference of Conservative Rabbis", but this effort disappeared after a few meetings.[12] Because the USCJ committee merely "restated existing Jewish legal precedents and resist[ed] breaking the type of new ground that the emerging congregations of the movement were anxious to see,"[13] by 1927, both JTS and the RA were agreeable to the latter's establishing

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[7] By 1904, the Reform — with Hebrew Union College, the Union of American Hebrew Congregations and the CCAR — and Orthodox — with the Rabbi Isaac Elchanan Yeshiva, the Union of Orthodox Jewish Congregation and the Union of Orthodox Rabbis — movements had firmly been established in America. Rosenblum, Herbert, "Emerging Self-Awareness" in Fierstein, ed., A Century of Commitment: One Hundred Years of the Rabbinical Assembly, *Op cit.* 23.

[8] Rosenblum, "Emerging Self-Awareness", *Op cit.* 23-24.

[9] Rosenblum, "Emerging Self-Awareness", *Op cit.* 34. Ginzberg had proposed the establishment of this committee, "'to advise congregations and associates of the United Synagogue in all matters pertaining to Jewish law and custom.'" Golinkin, David, "The Influence of Seminary Professors on Halakha in the Conservative Movement: 1902-1968", in Wertheimer, Jack, ed., Tradition Renewed – A History of the Jewish Theological Seminary of America, Vol. 2, Jewish Theological Seminary of America, New York, 1997, 464.

[10] Rosenblum, "Emerging Self-Awareness", *Op cit.* 31. In fact, Ginzberg "saw little point to developing a solution that would not be acceptable beyond the confines of the Rabbinical Assembly." Rosenblum, "Emerging Self-Awareness", *Op cit.* 34 (Quoting from Ginzberg, Eli, Keeper of the Law: Louis Ginzberg, Jewish Publication Society, Philadelphia 1967, 226).

[11] Rosenblum, "Emerging Self-Awareness", *Op cit.* 28.

[12] Rosenblum, "Emerging Self-Awareness", *Op cit.* 26-27. Members of this Committee included Rabbis Jacob Kohn, Max Kadushin, Max Arzt and Arthur Neulander. *Ibid.*

[13] Rosenblum, "Emerging Self-Awareness", *Op cit.* 42.

its own Committee on Jewish Law.[14] The resolution presented to the RA proposed that

> "a committee of ten be appointed representing the various tendencies in the Rabbinical Assembly to act in an advisory capacity to the members of the Assembly in matters of religious and legal procedure. This committee shall have the power to receive questions from the Rabbis, to discuss the same with them and with one another. Where a decision is unanimous it shall be issued as an authoritative opinion of the Rabbinical Assembly; otherwise the committee shall forward the majority as well as the dissenting opinions to the inquirer."[15]

The following year, that resolution was described as follows:

> "a committee on Jewish Law be selected to consist of four members representing the liberal tendency within the Rabbinical Assembly, and four members representing the more conservative tendency, and that these eight select two additional members. All questions pertaining to Jewish Law shall be addressed by members of the Assembly to this committee. . . ."[16]

Yet, though it replaced the USCJ committee chaired by Ginzberg, this committee was reluctant to depart from his guidelines.[17] And Ginzberg simply would not "support any initiatives that were not *ab initio* acceptable to the Orthodox".[18] So, feeling "uncomfortable with the clamor of the congregations and the rabbis," Ginzberg had stepped aside.[19] Rabbi Max Drob was the initial chairman of this new "Committee on Jewish Law" and, after five years, he was succeeded in 1932 by Rabbi Julius Greenstone, who served as chair until 1936.[20] This new

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14 *Ibid.*

15 Proceedings of the Rabbinical Assembly 1927, at 11, reprinted in, Golinkin, David, ed., *Proceedings of the* Committee on Jewish Law and Standards *of the Conservative Movement* 1927-1970 (hereinafter CJLS Proceedings"), The Rabbinical Assembly and the Institute of Applied Halakhah, Jerusalem 1997, Vol. 1, 4. *See also* Gillman, Neil, Conservative Judaism The New Century, Behrman House, West Orange, NJ, 1993, 94.

16 Proceedings of the Rabbinical Assembly 1928, at 21, in CJLS Proceedings, Vol. 1, 16. The language regarding unanimous and split decisions was substantially unchanged from the previous version. *Ibid.*

17 Rosenblum, "Emerging Self-Awareness", *Op cit.* 31.

18 Rosenblum, "Emerging Self-Awareness", *Op cit.* 34. This despite the fact that many Orthodox rabbis would not recognize the authority of the RA. *Ibid.*

19 Rosenblum, "Emerging Self-Awareness", *Op cit.* 42.

20 *Ibid.*

Committee on Jewish Law was no more effective than its predecessors.[21] As indicated in his 1933 Report,

> "The members of this Committee are not yet fully agreed as to whether this Committee should function merely as an interpretive body or whether it should also assume legislative prerogatives. In other words, we are not quite decided as to whether we have to wait until questions of law in a specific manner are presented to us and then to pass upon them in the light of Jewish tradition and of modern requirements, or whether we may initiate questions of larger import and pass judgment upon them."[22]

The effectiveness of this new committee was also hindered by organizational problems. In 1930, the committee was expanded by five members.[23] In 1931, a resolution was passed that "the committee be reorganized with a permanent chairman and holding regular meetings . . . ."[24] Two years earlier, however, the committee had reported that it had agreed upon procedural rules, which included meeting "four times a year, with one of the meetings to be held in connection with the Rabbinical Assembly Convention."[25] In 1932, it was reported that the committee had been reorganized in early February.[26] And in 1934, it was proposed to expand the Committee on

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[21] Rabbi Drob initially "saw in the new committee the potential for a renewed Sanhedrin and the writing of a new and glorious chapter in the history of the Jewish legal tradition. *Ibid.* Proceedings of the Rabbinical Assembly 1928, at 21, in CJLS Proceedings, Vol. 1, 16. However, like his predecessors, he, too, was "reluctant to breach the walls of existing halakhic precedents . . . ." Rosenblum, "Emerging Self-Awareness", *Op cit.* 42. In his 1929 Committee Report, Rabbi Drob stated that "As to the content of Judaism, there really is no difference between the Traditional Judaism as it was taught at the Seminary and Orthodox Judaism." Proceedings of the Rabbinical Assembly 1929, at 46, in CJLS Proceedings, Vol. 1, 53. Rabbi Greenstone likewise was unable to meet the demands of his colleagues. "It is not possible to meet the desires and expectations of all the various forms of thought prevalent among members of the Assembly . . . ." Rosenblum, "Emerging Self-Awareness", *Op cit.* 43; Proceedings of the Rabbinical Assembly 1934, at 103, in CJLS Proceedings, Vol. 1, 81.

[22] Rosenblum, "Emerging Self-Awareness", *Op cit.* 42; Proceedings of the Rabbinical Assembly 1933, at 31, in CJLS Proceedings, Vol. 1, 76.

[23] Proceedings of the Rabbinical Assembly 1930, in CJLS Proceedings, Vol. 1, 66.

[24] Proceedings of the Rabbinical Assembly 1931, in CJLS Proceedings, Vol. 1, 68.

[25] Proceedings of the Rabbinical Assembly 1929, at 57, in CJLS Proceedings, Vol. 1, 62. Other rules included all questions to be submitted in writing with full discussion of the law by the questioner, that each question should be submitted to two committee members for "special study" and that emergent questions be determined by committee members residing in New York and subsequently submitted to the entire committee. *Ibid.*

[26] Proceedings of the Rabbinical Assembly 1932, in CJLS Proceedings, Vol. 1, 74.

Jewish Law to 23 members.[27] The 1935 Report referred to "thirteen resident members and eight corresponding members",[28] indicating the proposal had been accepted.

Then, there was the "*agunah* problem" — an issue which would preoccupy this committee and its successors for decades.[29] Rabbi Louis Epstein, who in 1937 would succeed Rabbi Greenstone as chairman,[30] had proposed a solution to the problem of *agunot* at the 1930 convention. During the next five years, he circulated drafts "both inside and outside the RA". In 1935, his documented draft which had been submitted to the Committee on Jewish Law was approved both by that committee and by the RA as a whole.[31] But Rabbi Epstein's solution was not implemented, thereafter having been attacked, both from within and outside the RA.

The following year, the Committee on Jewish Law recommended that the RA postpone implementation "until such time as a fuller clarification . . . shall have resulted from the responsum of Professor Ginzberg and the correspondence with the rabbinical bodies of the various countries."[32] Although Rabbi Epstein had discussed his solution with authorities in the "Old World and Palestine" during his travels, he ultimately decided to permit his proposal to be withdrawn in 1939.[33]

Yet the debate continued, not only on the "*agunah* problem", but also on the issue of

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27 Proceedings of the Rabbinical Assembly 1934, at 100, in CJLS Proceedings, Vol. 1, 78.

28 Proceedings of the Rabbinical Assembly 1935, at 169, in CJLS Proceedings, Vol. 1, 84.

29 Rosenblum, "Emerging Self-Awareness", *Op cit.* 42.

30 Proceedings of the Rabbinical Assembly 1937, at 368, in CJLS Proceedings, Vol. 1, 88.

31 Rosenblum, "Emerging Self-Awareness", *Op cit.* 43; Proceedings of the Rabbinical Assembly 1936, at 331, in CJLS Proceedings, Vol. 1, 85.

32 Rosenblum, "Emerging Self-Awareness", *Op cit.* 43;. Professor Ginzberg never wrote that anticipated responsum. *Ibid.*

33 Rosenblum, "Emerging Self-Awareness", *Op cit.* 43-44.

control of the RA and its Committee on Jewish Law.[34] In 1938, the committee Report abstracted from Rabbi Boaz Cohen's Canons, "Principles of Interpretation upon which the Committee on Jewish Law is Guided . . . .

> "1. It recognizes the indisputable authority of the Talmud and the determinative character of the Codes.
>
> "2. It seeks to understand the general aim and spirit of the Law, by making a study of the history of the particular law that is under question.
>
> "3. It follows as a general rule the consensus of opinion of the codifiers.
>
> "4. It considers the advisability of adopting the minority view of the 'Poskim' in particular cases.
>
> "5. It gives thought not only to the legal aspect of the question, but also to the Jewish sentiment and to the consequences of its decisions.
>
> "6. It brings to bear with full force the machinery of interpretation to contrive means to alleviate those who are the victims of Jewish Law.
>
> "7. It recognizes that there are limits to genuine interpretation, and cannot attempt to remedy all evils.
>
> "8. It also takes note of the fact that certain laws are obsolete, yet it cannot declare them null and void.
>
> "9. It makes occasional departures from these principles in particular cases as it cannot dedicate itself to the implacable ideal of consistency. It strives to cope with the problems of Jewish Law in the spirit of Maimonides, Ibn Adret, R. Asher, R. Joseph Caro, and R. Isaac Elhanan."[35]

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[34] Rosenblum, "Emerging Self-Awareness", *Op cit.* 44. Two leading members of the Committee on Jewish Law, Rabbis Boaz Cohen and Louis Finkelstein, became strong advocates of a policy "not to legislate away any of the halakhic standards acceptable to the Orthodox [thus] strengthening the paralytic conditions that had engulfed the Law Committee." Rosenblum, "Emerging Self-Awareness", *Op cit.* 45. Rabbi Cohen's "'Canons of Interpretation of Jewish Law' . . . served, by default, as a framework for many of the processes of the Law Committee." *Ibid.*

[35] Proceedings of the Rabbinical Assembly 1938, in CJLS Proceedings, Vol. 1, 93. Yet, the push for change was still fermenting within the RA itself and a resolution was proposed and passed to rename the committee "The Committee on Expansion of Jewish Law". Proceedings of the Rabbinical Assembly 1938 at 409, in CJLS Proceedings, Vol. 1, 98.

In 1940, the Committee on Jewish Law was still looking to form a *bet din* composed of three halakhic experts to rule on Rabbi Epstein's resolution. But they could find no one to join Professor Ginzberg.[36] Rabbi David Aronson demanded that the Committee on Jewish Law circulate Rabbi Epstein's proposed solution. However, as it was still dominated by the Seminary, it refused. "The Committee on Jewish Law refused to call for a vote, asserting that the RA lacked the power to introduce any measure potentially affecting all Jewry."[37]

The advent of the Second World War saw the Committee on Jewish Law issuing a number of pragmatic interpretations of the *halakhah*, which did not fall within the authority and frame of exiting Jewish law. For example, soldiers were required to adhere to *kashrut* and *Shabbat* laws only as it was possible to do so. For one about to be sent overseas, it permitted rabbis to officiate at marriages on days that they were otherwise prohibited. And Professor Ginzberg drafted a document, akin to Rabbi Epstein's proposal for solving the "*agunah* problem", permitting "a husband to authorize, in advance, agents to write a get for his wife should he fail to return within two years of the end of the war."[38] Of course, those decisions were for the wartime emergency only and ceased to be effective after the war's end.[39]

If nothing else, these wartime provisions made clear that RA membership and the Committee on Jewish law were not in sync. In 1947, Rabbi Boaz Cohen, who became that

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[36] Nadell, Pamela S., "New and Expanding Horizons" in Fierstein, Robert A., ed., A Century of Commitment: One Hundred Years of the Rabbinical Assembly, The Rabbinical Assembly, New York, 2000, 84; Proceedings of the Rabbinical Assembly 1940, at 34, in CJLS Proceedings, Vol. 1, 128.

[37] Nadell, "New and Expanding Horizons", *Op cit.* 84; Proceedings of the Rabbinical Assembly 1941, at 33, in CJLS Proceedings, Vol. 1, 138.

[38] Nadell, "New and Expanding Horizons", *Op cit.* 85; Proceedings of the Rabbinical Assembly 1942, at 143-145, in CJLS Proceedings, Vol. 1, 151-153.

[39] Nadell, "New and Expanding Horizons", *Op cit.* 85.

committee's chairman in 1941,[40] had clearly stated its position:

> "We are not oblivious to the fact that a feeling exists among others that our Committee is inadequate to the task. This sentiment stems from a viewpoint toward Jewish Law not shared by the Committee, and originates in a difference in conception anent the manner in which the Committee should exercise its office."[41]

The upshot of this disagreement was the RA's decision to dissolve the Committee on Jewish Law and replace it with the CJLS.[42]

Rabbi Jacob Agus proposed the committee's reorganization.[43] Following a special conference on "The *Halachah* and the Challenges of Modern Life" the members agreed to set aside an entire day at the next convention for discussion of the "three basic attitudes toward Jewish law within the RA. At the end of these discussions, the rabbis would vote on the Law Committee's future."[44] At the symposium at its 1948 convention, "Towards a Philosophy of Conservative Judaism",[45] the "key question was whether or not the new Law Committee would be permitted to extend halakhah once the limits of limits of legitimate interpretation had been reached."[46]

The RA members voted on resolutions prepared by Rabbi Epstein.[47] His key language stated that:

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40 Proceedings of the Rabbinical Assembly 1941, at 38, in CJLS Proceedings, Vol. 1, 143.

41 Nadell, "New and Expanding Horizons", *Op cit.* 85; Proceedings of the Rabbinical Assembly 1947, at 54, in CJLS Proceedings, Vol. 1, 187.

42 Nadell, "New and Expanding Horizons", *Op cit.* 85.

43 Proceedings of the Rabbinical Assembly 1947, at 66, in CJLS Proceedings, Vol. 1, 199.

44 Nadell, "New and Expanding Horizons", *Op cit.* 86.

45 Nadell, "New and Expanding Horizons", *Op cit.* 86; Proceedings of the Rabbinical Assembly 1948, at 110-192, in CJLS Proceedings, Vol. 1, 215-297.

46 Nadell, "New and Expanding Horizons", *Op cit.* 86.

47 Nadell, "New and Expanding Horizons", *Op cit.* 86; Proceedings of the Rabbinical Assembly 1948, at 167-174, in CJLS Proceedings, Vol. 1, 272-279.

> "The Committee shall be instructed to hold itself bound by the authority of Jewish law and within the frame of Jewish law to labor toward progress and growth of the Law to the end of adjusting it to present day religious needs and orientation, whether it be on the side of severity or leniency."[48]

The membership defeated this resolution, which meant that the new CJLS "would go beyond halakhah."[49] As one historian noted: "Halakhic experts, isolated behind Seminary walls, could demand modern Jews to be bound by halakhah. But the rabbis out in the field knew better."[50] Rabbi Jacob Agus suggested that the committee's name be changed to the "Committee on Jewish Law and Standards". His suggestion was supported by Rabbi Mordecai Kaplan because

> "it implied that the task of the Committee would be not only to rule on questions of law, but also to deal with areas of Jewish practice [and] custom which for some members of the committee [do] not properly belong under the heading of Jewish law."[51]

This new committee's first chairman, Rabbi Morris Adler, who served from 1948-1951, stated that his committee would "not function as a body solely to provide responsa for particular questions. It will initiate studies and seek to render opinions in the various areas of Jewish law, which are of practical concern to us and our congregations."[52] And he also stated that the RA

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48 Nadell, "New and Expanding Horizons", *Op cit.* 86; Proceedings of the Rabbinical Assembly 1948, at 171-172, in CJLS Proceedings, Vol. 1, 276-277.

49 Nadell, "New and Expanding Horizons", *Op cit.* 87; Proceedings of the Rabbinical Assembly 1948, at 192, in CJLS Proceedings, Vol. 1, 297. Of the eleven paragraphs in Rabbi Epstein's proposed resolutions, only the first four were approved; the rest were defeated. *Ibid.* The four approved paragraphs related to the diversity of views among the committee membership; attendance and assignment requirements for membership, the appointment of a permanent secretary to the committee and his duties, and the provision for dissemination of the committee's deliberations and decisions. Proceedings of the Rabbinical Assembly 1948, at 171, in CJLS Proceedings, Vol. 1, 276.

50 Nadell, "New and Expanding Horizons", *Op cit.* 87.

51 Golinkin, David, The Influence of Seminary Professors on Halakha, *Op cit.* 456.

52 Proceedings of the Rabbinical Assembly 1949, at 48, in CJLS Proceedings, Vol. 1, 302. Rabbi Adler asserted that "Jewish law in the past has grown and expanded and that it has not lost its capacity to respond to changing circumstances. . . . The very designation Halacha, implies movement." Proceedings of the Rabbinical Assembly 1949, at 48-49, in CJLS Proceedings, Vol. 1, 302-03.

would not remain paralyzed by "fear of the Orthodox and danger to Reform."[53] The principles with which the members of the CJLS began their work were:

> "I. Change is a significant and characteristic property of Jewish law. . . .
>
> "II. [T]he changes we [will] propose grow out of our faith in the resources of vitality that reside in the Halacha, and out of need for Jewish law and observance . . . .
>
> "III. Such a conception of Halacha, when it is allowed to predominate, introduces possibilities of amendment beyond the strict and formal procedures traditionally followed in effecting change. . . .
>
> "IV. Because of our training in the Seminary we are all the more keenly aware of the need of relating the Halacha to the realities of life. . . .
>
> "V. The Halacha though shaped by the influences of life did develop consistency of character and a logic of development of its own. . . .
>
> "VI. The hope for a revitalized Jewish life cannot rest exclusively on changes in law. . . ."[54]

Thus, it was hoped that armed with the extra-halakhic powers, the CJLS "would succeed in the raising of the standards of piety, understanding, and participation in Jewish life' among Conservative Jewry."[55]

The CJLS membership was expanded to 23 members in an attempt to represent the diverse views within the Conservative rabbinate. Seminary faculty members and administration were excluded from membership, unless they also served as pulpit rabbis.[56] In addition, the CJLS determined to circulate its signed majority and minority opinions and rabbis were free to

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53 Nadell, "New and Expanding Horizons", *Op cit.* 87-88; Proceedings of the Rabbinical Assembly 1949, at 52, in CJLS Proceedings, Vol. 1, 306.

54 Proceedings of the Rabbinical Assembly 1949, at 53-56, in CJLS Proceedings, Vol. 1, 307-310.

55 Nadell, "New and Expanding Horizons", *Op cit.* 87.

56 *Ibid.*

follow either. And "under the historic concept of *mara d'atra*, [that] each rabbi stood as the halakhic expert for his community", no sanctions would be levied against any rabbi who refused to follow any decision of the CJLS, even one approved unanimously.[57]

Once the new CJLS began to function, it came face to face with the issue of *Shabbat* observance, or more accurately, the lack thereof. Exacerbating this concern was the suburban migration, with its necessary use of the automobile. Although the CJLS' predecessor 20 years earlier had refused to allow automobile travel on *Shabbat*, the new committee, "[d]etermined . . . to grapple with modernity," permitted automobile travel when necessary to attend *Shabbat* worship services.[58] As the CJLS viewed its decision, it had "conserved tradition — the prohibition on travel on the Sabbath was retained but for the exception of attending synagogue [and also] allowed for change, adjustments on the Sabbath laws designed to enhance observance."[59] Thus stated, it had employed *halakhah* "as a tool for enriching Jewish spiritual life."[60]

In 1951, Rabbi Adler was succeeded as committee chairman by Rabbi Theodore Friedman and it was under his watch that the committee turned its attention to the status of women, although it would be another two decades before there would be a persistent call for change in their status. At this time therefore, the attention of the CJLS was limited to the

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57 Nadell, "New and Expanding Horizons", *Op cit.* 88. The "Report of the Special Committee on the Scope of the Law Committee" is found in the *Bulletin of the Rabbinical Assembly of America*, at 10, in CJLS Proceedings, Vol. 1, 318.

58 Nadell, "New and Expanding Horizons", *Op cit.* 88. The initial Responsum on the Sabbath is found in the Proceedings of the Rabbinical Assembly 1950, 112 in CJLS Proceedings, Vol. 3, 1109-1134. A second responsum by Rabbis Gordis, Boxer and Neulander, which dealt with a modern approach to *halakhah*, travel and the use of electricity on *Shabbat*, followed by the discussion on the papers, follows in the Proceedings of the Rabbinical Assembly 1950, 138 ff, in CJLS Proceedings, Vol. 3, 1138-1185.

59 Nadell, "New and Expanding Horizons", *Op cit.* 89.

60 *Ibid.*

possibility of allowing women an *aliyah* and the persistent issue of *agunot*.[61] And it was with respect to the latter issue that it was clear that the Seminary's influence on the committee's agenda had not totally dissipated. Rabbi Louis Finkelstein, then Seminary Chancellor,

> "told the RA that the laws of marriage and divorce were far too important for the rabbis to decide for themselves. . . . [T]he Seminary proved willing to concede to the rabbis the power to determine what would go on in their congregations. But when it came to the critical issues of personal status with the potential to affect all Jews, not just Conservative Jews, the Seminary forbid its alumni to act alone."[62]

As a result a joint law conference was established in 1953 to address the issue. This conference established a national *bet din* and asserted its authority to legislate through the issuance of *takkanot*.[63] Although the CJLS, under its new chairman, Rabbi Arthur Neulander, now freed of its responsibilities for the *halakhic* status of women, had hoped to find "solutions to ongoing problems to enhance the observance of Conservative Jews", it found that much of its time was devoted to the usual inquiries regarding synagogue and other rituals, *kashrut*, intermarriage, circumcisions, conversions and funerals.[64]

Nevertheless, in 1955, it ultimately approved a responsum permitting women to accept an *aliyah*.[65] Although the committee maintained its opposition to granting synagogue membership

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61 *Ibid.*

62 *Ibid.*

63 Nadell, "New and Expanding Horizons", *Op cit.* 89-90. This decision to legislate led to a *takkanah* by Professor Saul Lieberman, who assumed the mantle of the Movement's leading expert on *halakhah* following the death of Louis Ginzberg, and, ultimately, to the creation of the "Lieberman Clause" which would be inserted in all Conservative *ketubot* (marriage contracts). This clause sought to make the *ketubah* a civilly binding contract, requiring the parties to follow the dictates of a *bet din*. Failing that, it was hoped that its decisions would be enforced in the civil courts. Nadell, "New and Expanding Horizons", *Op cit.* 90. The Report of the Joint Law Conference, the discussion and Professor Lieberman's *takkanah* are found in CJLS Proceedings, Vol. 2, 780-814, 820-822.

64 Nadell, "New and Expanding Horizons", *Op cit.* 90.

65 *Ibid.* The responsum is found the Proceedings of the Rabbinical Assembly 1955, 168 ff., in CJLS Proceedings, Vol. 3, 1086-1099.

to intermarried couples, as more children and grandchildren of Conservative Jews intermarried during the succeeding two decades, it ultimately was forced to relent.[66]

For the next 10 years under chairmen Rabbi Ben Zion Boxer, Rabbi Max Routtenberg and Rabbi Israel Silverman, the CJLS remained preoccupied with routine questions.[67] However, it did clarify the 1950 driving decision because many Conservative Jews had understood it as a blanket permission to drive on the Sabbath.[68] Yet, as before, the committee received criticism over its apparent inability to adapt the *halakhah* to contemporary life.[69] On the other hand, the decisions of the CJL and the CJLS during the 1950s and 1960s had helped forge a more unified national Conservative synagogue Movement.[70]

The CJLS finally entered an activist phase with the appointment of Rabbi Benjamin Kreitman as it chair in 1966. During his six years as chair, the CJLS issued several liberal rulings including what constituted an acceptable activity in a synagogue building, what foods Conservative Jews could eat in non-Kosher restaurants, whether certain foods were kosher, what was an acceptable *mikvah* (ritual bath), whom a *Kohen* could marry, and issues regarding festivals and other holidays.[71] Moreover, it finally put an end to the endless dickering about the

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66 Nadell, "New and Expanding Horizons", *Op cit.* 90.

67 Nadell, "New and Expanding Horizons", *Op cit.* 90-91. The CJLS was receiving more than 170 inquiries a year and with little funds for paid staff, it could not initiate the type of inquiries that led to the *Shabbat* responsa. Nadell, "New and Expanding Horizons", *Op cit.* 91.

68 Nadell, "New and Expanding Horizons", *Op cit.* 91. *See* CJLS Proceedings, Vol. 3, 1186-1190.

69 Among the hot issues were the failure of Conservative Jews to attend synagogue on *Yom Tov Sheini*, the *kashrut* of sturgeon, swordfish and gelatin, whether there should be observances of the *Shoah* and Israel's Independence Day and, of course, women's demand for *halakhic* equality. Nadell, "New and Expanding Horizons", *Op cit.* 91.

70 *Ibid.* Among those decisions were ones dealing with microphones, organs, mixed choirs, triennial Torah readings, abbreviated services and English prayers in the services. Because it was also the "Rabbi" for the constituent arms of the Movement, the CJLS gave its imprimatur to those practices that already existed in its congregations — such as mixed seating. Nadell, "New and Expanding Horizons", *Op cit* 91-92.

71 Nadell, "New and Expanding Horizons", *Op cit.* 92.

agunah issue, at least for Conservative Jews.[72]

On the other hand, the CJLS had little or no success in convincing the average Conservative Jew to live in accordance with the *halakhah*, even a *halakhah* based upon the committee's liberal decisions.[73] Moreover, tensions between the traditionalists and those advocating greater accommodation with the realities of modern American life boiled over once again. This time, however, the Seminary wasn't directly involved; rather, the dispute lay solely within the CJLS.

The majority of the CJLS were progressives and they were frustrated with requirement of unanimity on certain issues. Because they believed that the more traditional Seminary faculty had been employing their relationships with certain of the traditionalist CJLS members to exercise a veto on *halakhic* changes those faculty members thought to be too radical, sixteen members resigned from the CJLS at its meeting on December 2, 1970.[74]

Rabbi Benjamin Kreitman noted that resistance to change was psychological, rather than based on theology or *halakhic* philosophy. He said that "we have equated *chumrot* [stringency] with piety and steadfastness and *kulot* [leniency] with a weakening of our faith and our loyalty."[75] Rabbi Kreitman urges his colleagues to break through the psychological barriers, stating that if a "*kula* is for the purpose of making the law meaningful and viable, then it takes on the character

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[72] Nadell, "New and Expanding Horizons", *Op cit.* 92-93. It adopted a *t'nai b'kiddushin* — a conditional marriage agreement — which allowed for the annulment of a marriage if its conditions were not met. Nadell, "New and Expanding Horizons", *Op cit.* 93. The responsum on the *t'nai b'kiddushin* is found at CJLS Proceedings, Vol. 2, 914-926.

[73] Nadell, "New and Expanding Horizons", *Op cit.* 93.

[74] Panitz, Michael, "Completing a Century: The Rabbinical Assembly Since 1970", in Fierstein, Robert E., ed., A Century of Commitment – One Hundred Years of the Rabbinical Assembly, Rabbinical Assembly, 2000, 102.

[75] Report of the CJLS 1970, in CJLS Proceedings, Vol. 1, *Op cit.* 604.

of a divine imperative. And the *chumrah* opposing it becomes a sinful hindrance."[76]

An RA committee was appointed to examine the possibility of reorganizing the CJLS once again and a *kallah* to discuss this issue was held the following year.[77] As it turned out, the procedural issue which brought the matter to the boil was only a symptom of the underlying problem, which was "the parameters of change within the movement".[78] The committee eventually settled on a procedural change by which any position which received a minimum of six votes in the CJLS would become an official position of the movement.[79] When the CJLS, as reorganized, began renewed operation with Rabbi Seymour Siegel as the next chair, it was faced with the issue which would come to dominate the next decade and a half — "the role of women within the religious life of Conservative Judaism".[80]

The CJLS took up the issue of equalizing gender roles and in 1973, issued a *takkanah* allowing women to be counted in a *minyan* — the quorum of ten Jewish adults (formerly men) required for certain public prayers.[81] The debates surrounding this issue brought out the simmering tension between ethics and *halakhah*. Regarding the enactment of the *hafka'at kiddushin* (annulment), Rabbi Simon Greenberg[82] asserted that it "was not a triumph of extra-

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76 *Ibid.* Rabbi Kreitman urged that the Conservative Rabbinate not to "compound the sin of *bal tosif* by our *chumrah*-hangups." Report of the CJLS 1970, in CJLS Proceedings, Vol. 1, *Op cit.* 605. The sin of *Bal Tosif* is adding to a *mitzvah*. It is derived from Deut. 13:1: "*anokhi m'tzaveh etkhem oto tishm'ru la'asot lo toseif alav v'lo tigra mimenu*" — "Observe only the commanment[s] I have given to you; **do not add to it** and do not take away from it." See Rambam, The Commandments, Vol. 2, Negative Commandments, no. 313, C. Chavel, tr., Soncino Press, Ltd., Brooklyn, 1967; *Shulhan Arukh* O.H. 128:27.

77 *Ibid.*

78 *Ibid.*

79 *Ibid.* The effect of this change was that the CJLS could now move forward even in the absence of a consensus of opinion — even on divisive issues, such as those to be presented in the decades to come.

80 Panitz, "Completing a Century", *Op cit.* 103.

81 Panitz, "Completing a Century", *Op cit.* 105.

82 At the time, Rabbi Greenberg was a "senior statesman of the RA and the Vice Chancellor of the Seminary." *Ibid.*

halakhic ethics over the halakhah, but rather an instance of ethics being a part of the 'organically sound growth and development' of the halakhah".[83] However, Rabbi Siegel's statement that counting women in a *minyan* was not defensible solely on a traditional *halakhic* basis, but rather was an ethical imperative and, therefore, part of a "higher halakhah", fueled the tension.[84]

Nevertheless, several ritual changes affecting the status of women had already been made or suggested.[85] On the other hand, the main issue regarding the religious status of women — ordination — was *halakhicly* debated, not in the CJLS, but by the faculty in the Seminary.[86] The committee had enough with which to deal, however, because the next big push for religious equality would come from gay and lesbian Jews.

By the 1980s, the Conservative Movement, which sought to occupy the space between

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[83] Panitz, "Completing a Century", *Op cit.* 105, quoting from Greenberg, Simon, "And He Writes Her a Bill of Divorcement", 140, in CJLS Proceedings, Vol. 2, 994.

[84] Panitz, "Completing a Century", *Op cit.* 105. To those more liberal, the traditionalists were ignoring the ethical dimension of *halakhah*; while to those more aligned with tradition, the liberal members were seeking to improperly impose external ethical strictures on the *halakhah*. *Ibid.* Rabbi Joel Roth, who would become CJLS chair in the mid 1980s, put this disagreement into *halakhic* perspective:

> "Moral and ethical values and judgments that a decisor might wish to see incorporated into law may come from sources currently external to halakhah. But the responsible halakhist must comprehend that Torah creates values as much as it reflects them. The superimposition of values and judgments upon halakhah from outside of its corpus is responsible only if those values and judgments can *first* be cast in the language, idiom, and argumentational structure of halakhah. Only then can it lay claim to such a status. Otherwise, Torah becomes the reflection of values and judgments that have not been validated by Torah itself. And Torah must be the *source* of those values."

Roth, Joel, Halakhic Responsibility", Conservative Judaism, Vol. XLVII, Num. 3, 1975, 25. (Emphasis in original).

[85] These included equalization of *bar mitzvah* and *bat mitzvah* ceremonies, the inclusion of women in *hakafot* (Torah processions) and the use of one's mother's name in addition to his or her father's name in calling individuals for an *aliyah*. Panitz, "Completing a Century", *Op cit.* 106.

[86] The first debates took place in a special commission established "for the Study of the Ordination of Women as Rabbis". Because it was highly desirable that the first female member of the RA be ordained by the Seminary, the approval of the Seminary faculty was required and so, the debate shifted to that forum. *See generally*, Greenberg, Simon, ed., The Ordination of Women as Rabbis – Studies and Responsa, Jewish Theological Seminary of America, New York, 1988; Wenger, Beth S., "The Politics of Women's Ordination – Jewish Law, Institutional Power, and the Debate Over Women in the Rabbinate", in Wertheimer, Jack, ed., Tradition Renewed – A History of the Jewish Theological Seminary of America, Vol. II – Beyond the Academy, Jewish Theological Seminary of America, New York, 1997, 485 ff.

the Reform on the left and the Orthodox on the right, found that simply describing itself as centrist was insufficient. It was time for the Movement finally to set forth its philosophical underpinnings and, to that end, established a Commission on the Philosophy of Conservative Judaism, chaired by Rabbi Robert Gordis. Near the end of that decade, the Commission produced "*Emet V'Emunah* — A Statement of Principles of Conservative Judaism."[87]

That document defined *halakhah* as follows:

> "Halakhah consists of the norms taught by the Jewish tradition, how one is to live as a Jew. Most Jewish norms are embodied in the laws of the Bible and their rabbinic interpretation and expansion over the centuries, but some take the form of customs, and others are derived from the ethical ideals which inform the laws and customs and extend beyond them (*lifim m'shurat hadin*). Since each age required new interpretations and applications of the received norms, Halakhah is an ongoing process. It is thus both an ancient tradition, rooted in the experience and texts of our ancestors, and a contemporary way of life, giving value, shape, and direction to our lives."[88]

The document asserts that *halakhah*, though not comprising the entirety of the Jewish identity of the movement, "in its developing form is an indispensable element of traditional Judaism which is vital and modern."[89]

According to the document,

> "throughout Jewish history Halakhah has been subject to change. Reverence for tradition and concern for its continuity prevented rash revision of the law. But Jewish practice was modified from time to time. Most often, new interpretation or application of existing precedents produced the needed development; but sometimes new ordinances were necessary."[90]

Conservative Judaism thus is committed to preserving tradition, "making appropriate changes in

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87 *Emet V'Emunah* — A Statement of Principles of Conservative Judaism, The Jewish Theological Seminary of America, The Rabbinical Assembly and The United Synagogue of America, New York 1988.

88 *Emet V'Emunah, op cit.*21.

89 *Emet V'Emunah, op cit.*22.

90 *Ibid.*

[the Halakhah] through rabbinic decision."[91] Yet, it is "not committed to change for its own sake."[92]

In the 1990s, a structural change was made in the way the CJLS operated in order to take an activist role in the exploration of issues impacting Jewish life and the general cultural life of Jews. Rabbis Kassel Abelson and Elliot Dorff created several subcommittees focusing on biomedical issues, family life, *kashrut* and human sexuality.[93] In 1976, the CJLS had indicated that while there should not be separate synagogues for gays and lesbians, they should be integrated into synagogues life.[94] But more extensive attempts at integration did not fare well. In 1992, a proposed responsum by Rabbi Bradley Shavit Artson to permit Conservative rabbis to officiate at commitment ceremonies was rejected. The CJLS, however, did approve a paper by Rabbi Elliot Dorff to convene a commission to study human sexuality.[95] The commission's report noted that

> "'tension and conflict are inevitable when, on the one hand, we advocate civil rights and antidiscrimination legislation and, on the other hand, give credence to

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[91] *Emet V'Emunah, op cit.*23. The document notes that the "rapid technological and social change of our time, as well as new ethical insights and goals" are what require new interpretations and applications of *halakhah*. Moreover, it recognizes that "in some cases, modifications of the corpus of the Halakhah" may be required. *Ibid.*

[92] *Emet V'Emunah, op cit.*23.

[93] Meyers, Joel H., "Looking to the Future" in Fierstein, Robert E., ed., A Century of Commitment – One Hundred Years of the Rabbinical Assembly, Rabbinical Assembly, 2000, 255. Among the responsa to come out of these subcommittees were ones on "the *mitzvah* of organ donation and newly emerging issues of biomedical engineering", which are the subject of this paper. *Ibid.* Rabbi Abelson was CJLS chair and Rabbi Dorff was his co-chair. *Ibid.*

[94] Panitz, "Completing a Century", *Op cit.* 119. Despite this, several congregations dedicated to those groups were established by 1978. *Ibid.*

[95] Panitz, "Completing a Century", *Op cit.* 119-120. The work of the commission resulted, after at least eight drafts, in the issuance of a Rabbinic Letter, but the traditional stance was not overturned. Panitz, "Completing a Century", *Op cit.* 120-123. Hidden within this issue was possibility of a schism caused by the RA's passage of a resolution implementing the Dorff *t'shuvah*. The RA's Executive Vice President, Rabbi Joel Meyers, successfully avoided this potential explosion by assuring that the RA resolution was *not* an attempt to bypass the CJLS. Panitz, "Completing a Century", *Op cit.* 120.

biblical passages which clearly condemn homosexuality as . . . abomination.'"[96]

As *Emet V'Emunah* makes clear, it is not only the practical applications of the law that require change from time to time, but also moral principles. Immoral consequences and human suffering due to new conditions had to be addressed. The preferred route for Conservative Jews is through "existing halakhic norms." Where that is not possible,

> "some within the Conservative community are prepared to amend existing law by means of a formal procedure of legislation (*takkanah*). Some are willing to make a change only when they find it justified by sources in the halakhic literature."[97]

Finally, *Emet V'Emunah* notes that within the parameters set by the CJLS and the RA, there are variations of practice recognized as both legitimate, and in many cases, contributory to the richness of Jewish life."[98]

Today, the CJLS operates as a committee of the RA. The RA Constitution provides:

> "The Committee on Jewish Law and Standards is the authority on Jewish Law and Standards for the Conservative Movement. It shall consist of twenty-five duly appointed members of the Rabbinical Assembly, the terms of five to expire each year: fifteen to be appointed by the President of the Rabbinical Assembly, five by the Chancellor of the Jewish Theological Seminary of America, and five by the President of the United Synagogue of America. The chairman shall be appointed annually by the President of the Rabbinical Assembly. . . ."[99]

Those appointed to the CJLS represent a wide range of viewpoints. The Seminary and United Synagogue, in exchange for the right to appoint representatives to the CJLS, have agreed that it

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96 Panitz, "Completing a Century", *Op cit.* 122-123.

97 *Emet V'Emunah, op cit.*24.

98 *Emet V'Emunah, op cit.*25.

99 Abelson, Kassel, *Preface* to Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1986-1990, The Rabbinical Assembly, New York, 2001, ii, quoting from Rabbinical Assembly Constitution, Art. VII, Committees, Section 3. The United Synagogue of America is currently known as the United Synagogue of Conservative Judaism. In 1989, by agreement with the RA Executive Council, United Synagogue was allowed to appoint five lay, non-voting, members to the committee. CJLS Proceedings 1986-1990, *Op cit.* ii. In addition, one non-voting member of the Cantors' Assembly also sits on the CJLS. Kassel & David J. Fine, eds., Responsa 1991-2000, The Rabbinical Assembly, New York 2002, *Op cit* x.

will serve as the "Halakhic authority of the movement."

Decisions of the CJLS are presented in the form of traditional *t'shuvot* (responsa) and there may be several responsa representing conflicting viewpoints. An "official opinion of the Committee" requires the "endorsement of at least six members" of th CJLS.[100] Only those responsa which have become "Standards of Rabbinic Practice" may be enforced against a rabbi. Otherwise, the Rabbi may choose to disregard an "official position" without sanction.[101]

There are three such Standards:

> "1. No rabbi shall perform a marriage for a divorced man or woman unless such person has obtained a *get* or *hafkaat kiddushin*.[102]
>
> "2. A Member of the Rabbinical Assembly or of the Cantors' Assembly may not officiate at the marriage of a Jew to an unconverted non-Jew, not may he/she co-officiate at, or be present at a purely civil ceremony, nor may the Conservative synagogue be used for such a marriage.[103]
>
> "3. Ascription of Jewish lineage through a legal instrument or ceremonial act on the basis of anything other than matrilineal descent; or supervision of a conversion which omits *tevilah* in the case of females, or *tevilah* and *brit milah* in the case of males, shall continue to be regarded as violations of the halakhah of Conservative Judaism.

Among the various standards that have been suggested to guide the CJLS when faced with an *halahkic* dilemma is one which recognizes religious pluralism:

> "1. Seek out the precedent. Unless there is good reason to do otherwise, we are bound to the precedent.

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[100] That is 25% of the voting members. An "official opinion" is not viewed as a *da'at yahid* (individual opinion), even though it may have only one author. The only way to reject a prior opinion is by a new responsum agreed to by 80% of the members' vote. CJLS Proceedings 1986-1990, *Op cit.* iii.

[101] To become a Standard of Rabbinic Practice, two-thirds of the CJLS members present must agree that the subject is proper for a Standard and then it must be approves by four-fifths of the members and ratified by the RA convention. CJLS Proceedings 1986-1990, *Op cit.* iii.

[102] CJLS Proceedings 1986-1990, *Op cit.* iv, from Resolution, RA Convention, 1975.

[103] CJLS Proceedings 1986-1990, *Op cit.* iv, from Standard of Rabbinic Practice, Statement by Rabbi Aaron Blumenthal, February 24, 1972.

"2. In seeking out precedents, we do not necessarily limit ourselves, to any specific code.

"3. If the precedent is deficient in meeting the needs of the people, if it is clearly foreign to the group of law-observers in the community, if it is offensive to our ethical sensitivities, or if we do not share its basic scientific, economic, and social assumptions, then the law can be modified either by outright abrogation, or by ignoring it, or by modifying it."[104]

Another view is that

"1. Changes are not made for the sake of change; 2. Conservative rabbis prefer a lenient ruling to a strict one; 3. Conservative decisors utilize modern scientific and historical evidence; 4. The *Shulhan Arukh* is not the ultimate authority; 5. Conservative Jews are committed to *halakhic* pluralism; and 6. Conservative rabbis place great emphasis on the moral component of Judaism and *halakhah*."[105]

And it has been further suggested that the technique employed by the CJLS contain six elements:

"(a) [A] careful study of legal tradition with special concern for minority views, (b) a survey of present practices within the various sections of Catholic Israel, (c) an effort to establish optimum standards in terms of contemporary needs, (d) whenever possible, the delimitation of divergent patterns of observance varying from minimum to maximum, and corresponding to the phrases frequent in the traditional codes' 'be lenient' or 'be stringent'. . . . (e) [T]he reinterpretation of traditional Halachah to validate those new practices found acceptable for today, (f) the publication of Guides for American Jewry in various areas of Jewish observance, which would indicate the specific values inherent in each rite, as well as the method for observing it."[106]

These standards and techniques will be employed in analyzing the CJLS *t'shuvot* in this paper.

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[104] Siegel, Seymour, "The Meaning of Jewish Law in Conservative Judaism: An Overview and Summary, in Siegel, Seymour, ed., Conservative Judaism and Jewish Law, The Rabbinical Assembly, New York, 1977, xxiv-xxv.

[105] Golinkin, David, "The Whys and Hows of Conservative Halakhah", in Golikin, David, Responsa in a Moment, The Institute of applied Halakhah at the Schechter Institute of Jewish Studies, Jerusalem, 2000, 17-21.

[106] Gordis, Robert, "Authority in Jewish Law", in Siegel, Seymour, ed., Conservative Judaism and Jewish Law, The Rabbinical Assembly, New York, 1977, 74-75.

Chapter 4
Issues at the Beginning of Life

Infertility is not an unusual occurrence in the Hebrew Bible. Isaac's mother, Sarah, his wife, Rebecca, his son Jacob's wife, Rachel, and Hannah, the mother of Samuel, were each childless before God intervened.[1] Rebecca's pregnancy was not an easy one. The Torah ultimately tells us that Rebecca was carrying twins and that the fetuses "struggled in her womb."[2] And Rebecca asked: "If so, why did I [desire] this?"[3]

Commenting on Rebecca's question, *Rashi* wrote that Rebecca was in pain and wondered why she had wished and prayed to become pregnant after all.[4] *Ibn Ezra*, on the other hand, wrote that Rebecca had asked other women whether they had experienced such pain; and having received a negative answer, then asked why she was experiencing such an unusual pregnancy.[5] And *Ramban* interpreted Rebecca's question as: "If this is what is happening to me, why am I in the world?"[6] Yet, she, like her mother-in-law and daughter-in-law, was thrilled to have given birth.

Like our Biblical forebears, infertility is not uncommon in our modern world. Because children are seen as "one of God's chief blessings" and Jewish law (*halakhah*) views procreation as a commandment, many women (and some men) undergo various medical and surgical treatments in order to conceive and bear children. These treatments are not 100% effective and

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1 Gen. 18:11-12; 21:1-2; 25:21; 30:1-2, 22-23; I Sam. 1:2, 10-20.

2 Gen. 25:21-23.

3 Gen. 25:22.

4 *Rashi* to Gen. 25:22, s.v. *vatomer im kein*; s.v. *lama zeh anokhi.*

5 Abraham Ibn Ezra to Gen. 25:22, s.v. *vatomer im kein*

6 *Ramban* to Gen 25:22, s.v. *vatomer im kein lama zeh anokhi.*

there are significant medical, financial, legal, moral and psychological costs involved in utilizing them. Moreover, even when these treatments result in a pregnancy, one faces the risks of miscarriage, multiple births, and genetic abnormalities common to all pregnancies. Yet, because the pain of infertility is so great, couples will try again and again to conceive and carry to term. As one such person has written: "Is barrenness next to godlessness? If you who are fertile have received a sacred blessing, have we who are not received a divine curse?"[7]

Over fifty years ago, the RC addressed the issue of artificial insemination[8] when two prominent Reform Rabbis each wrote responsa on that subject.[9] The ultimate question posed in those papers was both simple and direct: "Is artificial insemination permitted by Jewish Law?"[10] Medicine has come a long way in those fifty plus years and today, there currently exist several medical techniques for assisting infertile couples to become parents.

Among these is the use of a surrogate, of which there are two types currently employed. One is an "Ovum Surrogate" where a fertile woman's egg is fertilized with the sperm of an infertile woman's husband and thereafter is implanted in the fertile woman's womb to be carried to term.[11] The second is the "Gestational Surrogate", commonly called a "tummy mummy", who carries the fertilized egg of the intended parents to term.[12]

The predominant present-day techniques involve the fertilization of eggs either with her

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7 Stockler, Julie, "The Longing for Children", *Moment*, 18:5 (October 1993), 94.

8 Freehof, Solomon B., "Artificial Insemination", in Jacob, Walter, ed., American Reform Responsa #157, CCAR Press, New York 1983, 501.

9 *Ibid.* Guttmann, Alexander, "Artificial Insemination", in Jacob, Walter, ed., American Reform Responsa #158, CCAR Press, New York 1983, 502.

10 *Ibid.*

11 Spitz, Elie Kaplan, "On the Use of Birth Surrogates", [EH 1:3.1997b], in Responsa 1991-2000, *Op cit.* 530.

12 Spitz, "On the Use of Birth Surrogates", *Op cit.* 531.

husband's sperm or that of a "sperm donor". Such fertilization may occur either by injecting the sperm directly into the woman's reproductive system (artificial insemination), or in a petri dish, followed by implantation of the fertilized ovum into the female's womb (in vitro fertilization). In order to maximize the chance for a successful pregnancy, present practice involves the fertilization of several eggs, not all of which are implanted in the woman's womb. This raises the derivative issue of what may, or may not, be done with those fertilized eggs. One possible solution has been to use those fertilized eggs for stem cell research.

In this chapter I shall use the way in which the RC and the CJLS have responded to the tragedy of infertility, in order to analyze whether any general principles about their respective approaches to *halakhah* may be drawn from this examination, whether the two bodies demonstrate similar or differing *halakhic* approaches, and whether any different conclusions reflect the philosophical underpinnings of the movements, or wholly unrelated factors.

Artificial Insemination & In Vitro Fertilization

Responsa Committee

In determining that he would answer the question: "Is artificial insemination permitted by Jewish Law?" in the affirmative, Rabbi Solomon B. Freehof first identified several problems of Jewish law which he believed were raised by such a procedure: First, if a child is born through such a procedure, but the donor has no other children, has he fulfilled the *mitzvah* of *p'ru*

urvu[13]? Second, does such person commit the sin of wasting seed — *zera levatala*[14]? Third, is the woman recipient forbidden thereafter to live with her husband (assuming he was not the donor)? Fourth, is the child a *mamzer*, born of a married woman — *eshet ish* — and a man not her husband? And, finally, is there a worry that the child born by means of such a procedure would violate the levirate laws?[15]

Not surprisingly, Rabbi Freehof began his analysis by looking for analogous situations in the traditional sources. He began with an interesting situation mentioned in the Babylonian Talmud — that of a woman said to have been impregnated through her bath water.[16] Based upon this *sugya*, Rabbi Joel Sirkes (the "*Bah*"), concluded that a child born as a result of a woman being impregnated in her bath water is not a *mamzer*, because there had been no forbidden intercourse.[17] Moreover, as there had been no forbidden intercourse, Rabbi Judah Rosanes

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[13] This is the first *mitzvah* – commandment – found in the Torah. "*va'y'varekh otam elohim vayomer lahem elohim p'ru urvu u'milu et ha'aretz*" – "And God blessed them, and God said to them, be fruitful, and multiply, and replenish the earth . . . ." Gen. 1:28.

[14] This sin has its origin in the Torah: "*vay'yeida onan ki lo lo yih'yeh ha'zara v'hayah im-ba el-eishet ahiv v'shiheit artzah l'vilti n'tan zera l'ahiv vay'yera b'einei adonai asher asah vay'yamet gam oto.*" — "And Onan knew that the seed should not be his; and it was, when he went in to his brother's wife, that he spilled it on the ground, lest that he should give seed to his brother. And the thing which he did was evil in the eyes of the Lord; and so He killed him also." Gen. 38:9-10. The Talmud, referring to these Torah verses (B.T. *Niddah* 13a), notes that "R. Johanan stated: Whoever emits semen in vain is liable for death. . . . ." *Rambam*, in his *Mishneh Torah*, states that for one who wastes semen, it is as though he had killed a human being. (*Hilkhot Issurei Bi'ah* 21:18). *See also Shulhan Arukh*, E.H. 23:1-2.

[15] Freehof, Solomon B., "Artificial Insemination", *Op cit.*, 501.

[16] *Ibid.* "*sha'alu et ben zoma b'tulah she'ibrah mahu l'koein gadol mi hay'shinan l'di'sh'muel damar sh'muel: yakhol ani liv'ol kamah b'i'lot b'lo dam o dilma di'sh'muel lo sh'viha amar l'hu 'di'sh'muel losh'viah v'hay'shinan shema b'ambati ibra.*" — "They inquired of Ben Zoma: 'If a virgin became pregnant, what [is her status] in regard to [marrying] a Kohen Gadol?' Might we suspect for Shmuel? For Shmuel said: 'I am capable of cohabiting many times without blood.' Or, perhaps, [what was described] by Shmuel is not common. [Ben Zoma] said to them: '[What was described] by Shmuel is not common, but we suspect that the virgin became pregnant in a bathtub.'" B.T. *Haggigah* 14b-15a.

[17] Freehof, Solomon B., "Artificial Insemination", *Op cit.*, 501; "*ein kan bi-at isur*", citing *Bah* to the *Tur*, Y.D. 195.

declared that the woman was not immoral and that she may thereafter live with her husband.[18]

Examining more recent sources, Rabbi Freehof noted that one *posek*, Rabbi Haim Fischel Epstein, would forbid the use of sperm from another man, but permit the use of sperm from the woman's husband, if that were the only way she could become pregnant.[19] Another decisor, Rabbi Ben Zion Uziel, the former chief Sephardic Rabbi of Palestine, had held that the child is not the child of the donor as to the issues of inheritance and *halitzah*,[20] but the mother is not immoral and the child is therefore *kasher*.[21] He concluded that the donor, however, has committed a sin by wasting seed. Nevertheless, he was reluctantly inclined to permit the procedure on the recommendation of the woman's physician.[22]

Looking at the same question, Rabbi Alexander Guttmann began by noting that

> "Talmudic and Rabbinic sources do not discuss, nor even mention, artificial insemination as understood (and practiced) in our day. Artificial insemination, with which we are concerned, is premeditated, planned. The physician performs it upon request by the parents, applying whether the husband's sperm or that of a stranger."[23]

In searching the sources that may have some bearing on the subject, Rabbi Guttman cogently

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[18] Freehof, Solomon B., "Artificial Insemination", *Op cit.*, 501; citing *Mishneh Lamelech* to *Rambam*, *Hilkhot Ishhut*, 14:4.

[19] Freehof, Solomon B., "Artificial Insemination", *Op cit.*, 501-02; citing *Teshuva Shelema* (E.H. #4). The child may unknowingly marry one of the forbidden degrees of relationship if another man's sperm was used to impregnate his mother.

[20] Freehof, Solomon B., "Artificial Insemination", *Op cit.*, 501-02, citing *Mishpitei Uziel*, Part II (E.H. Section 19). Here, Rabbi Uziel disagrees with Rabbi Samuel ben Uri Phoebus who, in his commentary, *Beit Sh'muel* to the *Shulhan Arukh*, E.H. 1, note 10, decided that the child would be the son of the donor; otherwise, there would be no concern over his marriage to his blood sister.

[21] Freehof, Solomon B., "Artificial Insemination", *Op cit.*, 501-02, citing *Mishpitei Uziel*, Part II (E.H. Section 19).

[22] *Ibid.*

[23] Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 501. In this statement, Rabbi Guttmann has recognized that each decisor must decide whether the facts in prior sources are sufficiently analogous to those forming the basis of the *she'elah* to be useful in reaching a conclusion.

noted that

> "Whereas many passages from the 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*[24]) real significance for the issue:"[25]

He finds four, three of which Rabbi Freehof referred to in his responsum.

The first is the *sugya* from the Talmud, about the woman who became pregnant in a bath.[26] But Rabbi Guttman noted that

> "this incident, considered by some rabbis as analogous to artificial insemination is, in fact an accident, a calamity; the pregnancy was undesired. It is not artificial in the sense in which this expression is being used today."[27]

In the second source, the only one not referred to by Rabbi Freehof, Rabbi Moses ben Isaac Yehudah Lima had asked whether the father fulfilled the *mitzvah* of *p'ru urvu*, when his wife became impregnated in the bath. By way of response to that question, he cited an example found in *Likutei Maharil*, where Ben Sira was described as having been conceived in a bath.[28]

In the third source, there was a discussion of a wife lying on a sheet on which sperm may have been deposited. The conclusion reached there was that a child conceived thereby is *kasher*, because there had been no forbidden intercourse, even if the sperm had been from a stranger.[29]

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[24] Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 502 (emphasis supplied). With this parenthetical, Rabbi Guttmann has identified the another crux of *halakhic* decisionmaking — that each decisor must choose which precedents he or she will use in constructing the *t'shuvah*.

[25] Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 502. This sentence foreshadows a comment in a subsequent RC Responsum on this subject regarding the difficulty of applying traditional logical *halakhic* methods to modern scientific discoveries.

[26] Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 502.

[27] *Ibid.*

[28] *Ibid.*, citing *Chelkat Mechokek*, E.H. 1, note 10.

[29] Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 502-503, citing *Beit Sh'muel* and *Bah* to the *Tur*, Y.D. 195. If the husband had been on the sheet, even were the women impregnated during her period, producing a *ben hanidah*, which is otherwise prohibited, the child is *kasher*, because there was no intercourse. The Ben Sira conception is cited as evidence. If a stranger had been on the sheets, because of the possibility of marrying

And in the fourth source, *Mishneh Lamelech*, there was the firm conclusion that "*Ein safek dela ne-esra leva-alah sishum 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."[30] So, while he agreed that accidental insemination cannot be considered adultery, Rabbi Guttman noted that "we are not trying to solve the problem of accidental insemination";[31] the question before him was premised on planned and intentional insemination.

Rabbi Guttman then noted that one of the questions that planned insemination raised was the prohibition of "*Hotsa-at zera levatala* (wasting of seed"). For a response, he looked to two *poskim*, Rabbis Ben Zion Uziel and Haim F. Epstein, whose papers Rabbi Freehof had also reviewed. The former was unable to find a way to permit artificial insemination, stating that it fell into the category of "*Halacha ve-ein morin kach*", or *halakhah* "which must not be transmitted into practice".[32] The latter, equating artificial insemination with insemination in the bath or on a sheet, conceded that with a husband's sperm, it is "*Efshar dedezeh mutar*" — "'It is possible that this is allowed', if the physician finds this is the only possible way for his begetting a child".[33]

Rabbi Guttmann recognized that each of the aforementioned incidents were describing

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his sister, *Beit Sh'muel* concluded that the child is from the "emitter of the seed". Guttman observes that "[t]his conclusion, needless to say, is irreconcilable with the fundamental rule of artificial insemination, requiring the child to belong to the mother's husband and not the donor of the seed." *Ibid.*

30 Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 503, citing *Mishneh Lamelech, Hilkhot Ishut*, 15.4 (among other sources).

31 Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 503.

32 *Ibid.*, citing *Mishpitei Uziel*, part II, E.H. 19. Rabbi Uziel equates artificial insemination with bath or sheet insemination. *Ibid.*

33 Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 503, citing *Teshuvah Shelema*, vol II, E.H. 4.

theoretical, rather than actual, events. Furthermore, he noted that the Rabbinic Sages never recommended bath insemination as a therapy, even if it were the only way of saving a marriage, which "ranks very high with the Rabbis".[34] Moreover, as Jewish tradition distinguishes between *ones* — accidental — and premeditated actions, he decided that those stories were not helpful to arriving at his decision.[35] He classified those incidents, including the one involving Ben Sira, as mere *aggadah*.[36] According to Rabbi Guttmann, the evidence pointed to a negative conclusion, "particularly if the seed of a stranger is to be used".[37] And while he recognized that there was not sufficient evidence to prohibit artificial insemination, nevertheless, he found that a hasty *heter* (permit) was without backing in Jewish traditions.[38]

In reaching his conclusions, Rabbi Guttman stated that he did not

> "claim that the last word has been said on artificial insemination and 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."[39]

Thus, forty-five years later, the RC again examined the issue of the permissibility of artificial techniques to assist with procreation.[40] In those intervening years much progress had been made

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34 Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 504, citing B.T. *Yevamot* 65b

35 *Ibid.* "I do not believe 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." *Ibid.*

36 Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 504. Rabbi Guttmann speculated that "[h]ad such an incident actually occurred, the Rabbis might have found a solution entirely different from the known theoretical considerations." *Ibid.*

37 Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 504.

38 *Ibid.*

39 *Ibid.*

40 In the interim, there was an interesting responsum on the permissibility of using mixed, or augmented, sperm in artificial insemination. Acknowledging that by then, "artificial insemination is firmly permitted if the seed comes from the husband", the RC concluded that insemination with mixed seed was prohibited, especially if the mixture came from what would be classified as an incestuous relationship. "Insemination with Mixed Seed " #46, in Freehof, Solomon B., ed., New Reform Responsa, HUC Press, New York, 1980, 202-204.

with techniques such as In Vitro Fertilization ("IVF"). A query was sent to the RC about this procedure. Specifically, the inquiring Rabbi wanted to know:

> "1. What is the status of the zygote with respect to "Humanhood?"
> "2. May those zygotes not chosen for implantation be used for medical research?"
> "3. May they be offered to another couple?"
> "4. And if they may, who are ultimately the parents of the child?"[41]

Unlike the prior two responsa, which focused on the means by which artificial insemination was accomplished to frame the discussion, in this new responsum, the RC focused on the purpose of the procedure. Thus, the RC looked at IVF to determine whether it might be viewed as a medical procedure, an issue that had not been raised in the two prior responsa.[42] The RC asked whether the medical benefits of the procedure would justify its risks.[43] The RC reiterated its belief that according to Jewish tradition, human bodies are gifts from God and human beings neither can place them in needless danger[44], nor subject them to unnecessary physical damage.[45] Accordingly, it also recognized that medicine constituted a *mitzvah* — *pikuah nefesh* — the saving of human life.[46]

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41 "In Vitro Fertilization and the Status of the Embryo", 5757.2, 1. There was an earlier responsum as well, "The Test Tube Baby", in Freehof, Solomon B., New Reform Responsa, No. 47, Hebrew Union College Press, New York 1980, 205 ff.

42 *Ibid.* & n.2.

43 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.*1.

44 *Ibid.* The responsum cited Deut. 4:15 — "*v'nishmartem m'od l'nafshoteikhem*"— "Be most careful for your life"; Lev. 18:5: "*u'shmartem et hukotai v'et mishpatai asher ya'aseh otam adam vahai bahem ani adonai*" — "You shall keep my laws and my statutes, by the pursuit of which, man shall live by them, I am the Lord"; B.T. *Yoma* 85b, *Shulhan Arukh,* Y.D. 116:5 (Isserles).

45 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1. The responsum cited M. *Bava Kama* 8:8; B.T. *Bava Kama* 91a-91b; *Shulhan Arukh*, H.M. 426:31. An example proffered of unnecessary physical damage was cosmetic surgery performed solely for cosmetic reasons, citing the RC responsum,"Cosmetic Surgery", 5752.7.

46 "In Vitro Fertilization and the Status of the Embryo", 5757.2, 1, citing the *Shulhan Arukh*, Y.D. 336.1 and *Ramban, Torat Ha'adam* 41-42. This RC responsum defined "medicine" as "the wide array of chemical surgical, and other procedures aimed at the correction or control of disease" and "disease" as "a condition in which some aspect of human biological or psychological systems does not function properly." "In Vitro Fertilization and

Based upon its definitions of "medicine" and "disease", the RC concluded that "infertility was a disease and procedures designed to correct it constituted medicine."[47] Having decided, without citation, that there were no unacceptable risks to mother or child, the responsum concluded that because the treatment qualifies as medicine, there was no reason to prohibit such procedures, though it urged couples to take into account the normal risks of surgical procedures, as well as the psychological stress of such treatments.[48]

Because an IVF procedure generally does not result in the implantation of all embryos produced, the RC reviewed the status of an embryo less than forty days old. The traditional sources viewed such an embryo as "*maya b'alma*" — mere water — and not a fetus — *ubar*.[49] According to the RC, because in Jewish law, a lesser standard was applied to the general prohibition of abortion when the fetus is *maya b'alma*, an embryo[50], which exists wholly outside the womb, would be entitled to even less protection in that law. Prior sources had concluded that although one may set aside *Shabbat* prohibitions in order to save a fetus[51], one may not set aside those prohibitions to save the life of an embryo in a petri dish.[52] As additional support, the RC

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the Status of the Embryo", 5757.2, *Op cit.* 1.

47 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1.

48 *Ibid.*

49 *Ibid.* The source of the view that a fetus of less than 40 days of gestation is *maya b'alma* is B.T. *Yevamot* 69b: "*amar rav hisda tovelet v'okhelet ad arbayim d'i lo mi'abra ha lo mi'abra v'i mi'abra ad arbayim maya b'alma hi*" — "Rav Hisda said: 'She immerses herself and may eat [*terumah*] until forty [days pass]. For if she has not become pregnant, she is not pregnant. And if she has become pregnant, until forty [days pass] it (the fetus) is mere water."

50 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1, citing *Resp. Chavat Ya'ir*, No. 31 (R. Ya'akov Emden); *Resp. Seridei Esh* 3:127 (p.341) (R. Yechiel Ya'akov Weinberg); and *Resp. Tzitz Eliezer* 7:48, Ch. 1 (pp. 190-191) (R. Eliezer Yehudah Waldenberg).

51 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1, citing *Halakhot Gedolot*, Laws of Yom Kippur, Warsaw ed., 31c ed. Hildesheimer, pp. 319-320.

52 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1, citing *Resp. Shevet Halevy* 5:47 (R. Shmuel Halevy Wasner).

noted that two Orthodox *poskim* had permitted the destruction of "excess" embryos created for IVF,[53] one of whom specifically held that the prohibition against abortion relates only to a fetus and not to an embryo outside the womb.[54]

Although finding itself in agreement with the aforementioned decisions, the RC was careful to state that the absence of a prohibition against destroying an embryo does not *ipso facto* act as justification for its destruction, any more than defining a fetus as "mere water" in and of itself justifies abortion.[55] While a zygote is not a legal person (*lav nefesh hu*)[56], according to the RC it is "a person 'in becoming'" and, therefore, at least some warrant would be needed in order to justify its destruction. That warrant was found in the RC's determination that IVF is a "form of *r'fuah*, of healing, a medical response to the disease of infertility."[57] Moreover, the RC noted that if unused IVF embryos can be destroyed, they could properly be utilized for experimentation "intended to increase our life-saving knowledge". In either event, the RC held that the embryo must be handled with reverence and respect as is due to a *nefesh* "in becoming."[58]

In seeking to decide the identity of the parents of a child conceived through IVF, the RC responsum referred to prior decisions of Orthodox *poskim* "and [its] difficulties with them."[59]

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53 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1, citing *Sefer Assia* 8 (1995), 3-4; *Techumin* 11 (1991), 272-273..

54 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1, citing *Sefer Assia, Op cit.*

55 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1-2.

56 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 2, citing *Rashi* to B.T. *Sanhedrin* 72b, s.v. *yatza rosho*: "*d'khol z'man shelo yatzah l'avir ha'olam lav nefesh hu*" — "for the entire time that it has not come out into the world it is not a person".

57 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 2. The RC responsum noted that because many embryos must be created for IVF to be efficient and successful and maintaining the unused embryos would place an undue burden on laboratories and hospitals, who might otherwise refuse to perform the procedure or make it that much more costly than it already is, the value of IVF as therapy justifies the destruction of unused embryos. *Ibid.*

58 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 2.

59 *Ibid.*

Waldenberg held that a child conceived outside the womb has no connection to the biological parents.[60] Other authorities have held that the mother is the one who delivers the child regardless of the one who conceives it[61], by analogy to one who converts to Judaism during her pregnancy.[62]

The RC responsum made two pertinent observations which offer insight into its approach and analysis. First, that Rabbinic scholars ought to acknowledge that *halakhic* reasoning by analogy is ill-equipped to deal with technological novelty and innovation.

> "[T]here may simply be no precedents or source materials in talmudic literature that offer plausible guidance to us in making decisions about these contemporary scientific and medical issues."[63]

Second,

> "given our positive attitude as liberal Jews towards modernity in general, it is surely appropriate to rely on the findings of modern science rather than upon tenuous analogies from traditional sources to render what we must consider to be

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[60] *Ibid.*, citing *Resp. Tzitz Eliezer* 15:45. The RC responsum criticizes this view on two points. First, Waldenberg relies on *Rambam*'s *Moreh Nevuchim* 1:72: "Again, it is impossible that any of the members of the human body should exist by themselves, not connected with the body . . . ." According to the RC, *Rambam*'s scientific judgment, though it may have been accurate as of the twelfth century, is certainly not so in the twentieth century, when this responsum was written. The RC believed that decisors must employ the "best science available, rather than enslave our scientific judgments to standards which science itself has long since abandoned." "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 2. Second, the RC responsum criticized Waldenberg's Talmudic source, B.T. *Kiddushin* 69a: "*kol valad bim'ei shifhah k'na'anit kevalad b'm'ei b'heimah damei*" — "every fetus in a Canaanite slavewoman's belly is like a fetus in the belly of a beast" as not supporting his thesis. The child of a non-Jewish female is not Jewish. *See also Rashi* to B.T. *Kiddushin* 69a, s.v. *kevalad b'm'ei b'heimah damei.*

[61] "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 2, citing *Techumim* 5 (1984), 248-267.

[62] "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 2, citing B.T. *Yevamot* 97b: "*gar sheyitgayeir k'katan shenolad damei*" — "a proselyte who converts is like a newborn child." The RC responsum rejects this analogy as "inapt" because it deals with religious, rather than biological identity. "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 2-3. Yet, "The Pregnant Proselyte" #25, in Freehof, Solomon, B., ed., Modern Reform Responsa, HUC Press, New York, 1971, 143-148, suggests that the fetus does not have a separate biological identity. Were it not deemed to be part of its mother (here, the woman in whose womb it resides), abortion would be murder, even were the mother's life danger. "The Pregnant Proslyte", *Op cit.* 145.

[63] "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 3, citing Elenson, David, "Artificial Fertilization (*Hafrayyah Melakhotit*) and Procreative Autonomy", in Jacob, Walter & M. Zemer, eds., The Fetus and Fertility in Jewish Law, Freehof Institute of Progressive Halakhah, Pittsburgh and Tel Aviv, 1995, 19-38.

scientific judgments."[64]

Therefore, the responsum concluded that based on modern science, the parents of the child are the sperm and egg donors. Furthermore, the responsum concluded that a child raised by one other than the donors of the genetic material, becomes the adopted child of such parents, and it is they who are the child's ultimate parents.[65]

In a second responsum, the RC looked at a related question, but one of major significance to infertile couples: Does the Jewish tradition require, or only urge, a couple to undertake the personal, physical and monetary burdens of IVF in order to fulfill the mitzvah of procreation?[66] The RC responsum commenced with this statement: "Our tradition indeed considers procreation to be a *mitzvah*, and Reform Judaism affirms this *mitzvah* as one of the highest values of Jewish life."[67] Once again, this responsum focused on the effect of the treatment, rather than the actual treatment itself.

What is the obligation encompassed by *p'ru urvu*?[68] According to the responsum, "[t]echnically, this obligation is fulfilled when one has produced a son and a daughter"[69] The responsum continued, quoting *Rambam*: "'a man who has already fulfilled this *mitzvah* is forbidden by way of rabbinic ordinance to desist from procreation so long as he has the power to

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64 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 3 (emphasis in original). To ask, "Who are the parents?" is to ask a scientific question. *Ibid.* In this responsum, the RC omitted any discussion of the potential *halakhic* concerns raised by a sperm donor other than the woman's husband.

65 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 3, citing "*Kaddish* for Adoptive and Biological Parents" (5753.12), in Plaut & Washofsky, Teshuvot for the Nineties *Op cit.*

66 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 1.

67 *Ibid.* The responsum noted that in Biblical literature, children are a sign of God's blessing and the lack of children is viewed as a tragedy. *Ibid.*

68 Gen 1:28. See note 13, *supra.*

69 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 1, citing M. *Yevamot* 6:6: "*u'veit hilleil omrim, zakhar u'n'keivah shene'emar: 'zakhar u'n'keivah b'ra'am*'" — "but the school of Hillel say a male and a female, as it is written: 'a man and a woman, He created them.'"

engage in it.'"[70] The *halakhah* eventually concluded that *p'ru urvu* is a requirement for the man, but not for the woman.[71]

The responsum also stated that Reform tradition is substantially similar to the traditional view, though given its commitment to gender equality, it would apply the same requirements to men and women alike.[72] And while concerned about world overpopulation, as well as the parental freedom to determine number of children they will have, given the decimation of Jewish population in the Holocaust, the RC concluded that "'couples are encouraged to consider the matter of family size carefully and with due regard to the problem of Jewish survival.'"[73]

The RC noted that Reform Jews place a high value on personal freedom, so procreation would not be an absolute requirement for everyone. Yet, like any other *mitzvah*, this one is required only of those "physically and emotionally capable of fulfilling it. Those who cannot are no less observant and no less Jewish."[74] Nevertheless, the responsum clearly stated that Reform Jewish tradition was not neutral on this issue. "Barring extenuating circumstances, it is the choice Jews ought to make . . . ."[75]

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[70] "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 1, quoting Mishneh Torah, *Hilkhot Ishut* 15:16, from a *baraita* of Rabbi Yehoshua, reported in B.T. *Yevamot* 62b: ". . . *hayu lo banim b'yalduto yih'yu lo banim b'ziknuto*" — "even if a man had children in his youth, he should have children in his old age."

[71] "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 1 & n.9, for analysis of how this came to be. The responsum then described the effects of this conclusion, that a *beit din* can compel a man to marry a fertile woman, or to divorce an infertile one, and whether a fertile woman may demand a divorce form an infertile man. "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 1 & nn.11-15.

[72] "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 1-2. *See also* Maslin, Simeon, J., ed., Gates of Mitzvah — A Guide to the Jewish Life Cycle, CCAR Press, New York, 1979, A-1, 11: "it is a *mitzvah* for a man and a woman, recognizing the sanctity of life and the sanctity of the marriage partnership, to bring children into the world."

[73] "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 2, quoting Gates of Mitzvah, *Op cit.* A-2, 11.

[74] *Ibid.*

[75] "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 2.

The RC turned next to the Reform Jewish view of artificial reproductive techniques. It noted that historically, the response to barrenness was prayer. Infertility historically had been viewed as divine punishment and one turned to God for supplication.[76] Jewish tradition for centuries has since adopted the practice of medicine as the proper response to illness. While stating that Jews should not abandon prayer, the RC asserted that prayer alone was no longer sufficient therapy for illness.[77] Having previously concluded that reproductive technologies are medicine,[78] the responsum then considered whether such medicine was obligatory, *i.e.* a religious duty, as was most medical treatment. Its premise was that where the treatment is a proven therapy (*refu'ah bedukah, or refu'ah vada'it*), one was obligated to accept the treatment and could be compelled to do so.

The RC thus evaluated IVF as a medical procedure to determine if it were a "tested remedy" and found that it was a "medically indicated" treatment for infertility resulting from a number of conditions.[79] The RC examined two possible ways of testing the medical effectiveness of this procedure. By counting the total number of babies born worldwide through the use of this procedure, the RC might have concluded that IVF was an effective procedure. However, by looking at the rate of success as of 1996, and which had not markedly improved during the previous five years, it ultimately concluded that IVF therapy "does not offer 'a

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[76] *Ibid.* The text notes the prayers of our patriarchs and Hannah. *See also* note 1, *supra.*

[77] *Ibid.*, citing B.T. *Bava Kamma* 46b: "*s'vara hu d'kha'iv lei k'eivah azil l'bei asyah*" — "One who is in pain should go to the doctor."

[78] "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 2, citing Freehof, Solomon B., "Artificial Insemination", *Op cit.*, Guttmann, Alexander, "Artificial Insemination", *Op cit.* and "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.*

[79] "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 3.

reasonably certain prospect of successful treatment.'"[80] As a result, while the RC recognized that IVF "offers much hope to those who seek children", it could not at that time be considered a "cure" for the disease of infertility.[81]

Finally, the RC turned to the heart of the *sh'eilah* — is IVF an obligation which an infertile couple must employ. Although the RC recognized that IVF is "one of the 'miracles' of modern medicine",[82] the success rate did not qualify it as a "tested and proven" treatment (*refu'ah bedukah*). Under such circumstances, it concluded that "if its therapeutic effect upon the disease is uncertain at best, then the patient is not required to accept it."[83] According to the RC, that was the situation in which IVF existed as of the date of the responsum.

The RC further defined the requirement for requiring medical treatment by stating that

> "[t]o say that a person is "required" or "obligated" to accept a particular medical treatment means, that as best medical opinion can determine, the therapeutic benefits of treatment significantly outweigh its potential risks and side-effects."[84]

While the RC found the benefits of IVF to be obvious — "'thousands of babies' it has brought into the world" — the risks were not as clear.[85] Although the surgical risks associated with IVF were roughly identical to those of normal pregnancies, as were the rates of observable birth defects, issues remained regarding the long-term effects of fertility drugs, increased frequency of

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80 *Ibid.*

81 *Ibid.*

82 *Ibid.*

83 *Ibid.* & n.39. The RC's conclusion on this point was based on its prior responsa dealing with medical treatment. The RC recognized that the IVF conception rate is roughly equivalent to that of natural conception; however, it believed that for the couple involved, "'success' means a successful conception leading to a live birth." "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 3, n.39. And until those rates "significantly" improve, the RC would not consider IVF to be "*refuah bedukah.*" *Ibid.*

84 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 3.

85 *Ibid.*

multiple births, or the risk of late-manifesting genetic defects in the children.[86] With the low success rate, plus these risks, the RC found it difficult to see how one could "require" a woman to undergo this treatment.[87]

Given the success rate, and the medical risks involved, the RC could not say that IVF justified its being an "obligation", irrespective of its cost, which is enormous. Thus, to require a couple to undergo the IVF procedure "especially when it does not offer them the prospect of probable success" would increase "to no good purpose" the anguish those of already suffering from the pain of infertility.[88] The RC decided to follow the wisdom of *raḥmanut* — compassion — "to listen to the voice of the sufferer, rather than require them to accede to ours".[89]

In concluding its responsum, the RC decided to explain how it could define procreation as a "a religious duty", but not require a couple to undergo IVF treatments.[90] Jewish law certainly "does not demand that a woman sacrifice her health for the sake of this *mitzvah*."[91] The RC also drew a distinction between *mitzvot* which are *ḥovah* — obligatory — and those which are not. In the former case, one is obligated to perform regardless of the cost or burden. In the latter, "'one who performs this act receives a heavenly reward for doing so, but one who does not

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86 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 3-4. The RC noted that the surgical risk and rate of birth defects are short-term, but the long term risks, as of the date of the responsum, had yet to be evaluated. *Ibid.*

87 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 4.

88 *Ibid.*

89 *Ibid.*

90 *Ibid.* As another example, the RC noted that Judaism does not compel individuals to marry, not does it any longer require childless couples to divorce. *Ibid.*

91 *Ibid.*, citing the *Ḥatam Sofer*: "'one is not required to lay waste to one's life in order to "settle the world."'" *Ibid.* & n.46, citing *Ḥatam Sofer*, EHE no. 20.

perform it is not punished thereby.'"[92] The RC suggested that IVF fell into the category of those *mitzvot* which were not *hovah*. Moreover, it concluded that "Reform Jewish teaching would endorse this distinction."[93]

Finally, the RC noted that infertile couples may create a family by way of adoption and that such parents' relationship with those children was "equivalent in every respect to that between parents and their biological children."[94] Such parents would be entitled to all the support that the Jewish community can give them.

Committee on Jewish Law and Standards

A few years earlier, the CJLS had taken up the issues of artificial insemination and egg donation.[95] The inquirer had asked: "Which if any of the new developments in reproductive technology does Jewish law *require* us to try? Which *may* we try? Which, if any, does Jewish law *forbid* us to try?"[96] In the responsum for the CJLS, Rabbi Elliot Dorff divided those questions between those affecting the infertile couple and those affecting the donors of sperm or eggs.

For the couple, the responsum asked:

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92 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 4 & n.47, citing *Mishneh Berurah* 260:1. The responsum notes that the *Darkhei Moshe* to the *Tur*, O.H. 260, was derived from the *Or Zaru'a Hilkhot Erev Shabbat*, par. 7. The original source in the Talmud is B.T. *Shabbat* 25b: "*amar rav nahman bar rava amar rav haldlikat neir b'shabbat hovah r'hitzat yadayim v'raglayim b'hamin arvit r'shut v'ani omeir mitzvah*" — "Rav Nahman bar Rava said in the name of Rav: 'The kindling of a light on *Shabbat* is an obligation, the washing of hands and feet in warm water on [*Shabbat*] evening is optional and I [Rava] say a *mitzvah*."

93 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 4.

94 *Ibid. See e.g.,* "*Kaddish* for Adoptive and Biological Parents", 5753.12, in Teshuvot for the Nineties, *Op cit.* 204.

95 Dorff, Elliott, "Artificial Insemination, Egg Donation and Adoption" [EH 1:3.1994], in Responsa 1991-2000, *Op cit.* 461 ff. The issues of IVF, GIFT, ZIFT and surrogate motherhood were treated in a separate responsum. Mackler, Aaron L., "In Vitro Fertilization" [EH 1:3.1995], in Responsa 1991-2000, *Op cit.* 510 ff.

96 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 462. There was an additional question about adoption, which is not treated by this paper. *Ibid.*

> "*May* an infertile couple use any or all of the following methods to procreate: (1) artificial insemination with the husband's sperm; (2) artificial insemination with a donor's sperm; or, (3) egg donation? *Must* they use one of these methods if they cannot procreate through their own sexual intercourse? . . . (4) Which of these methods for becoming parents, if any, fulfills the commandment to procreate?"[97]

For the donor, the reponsum asked: "May Jews donate their sperm or eggs so that other people who are infertile can have children? If so, are there any restrictions?"[98]

Rabbi Dorff began by noting, as did the most recent RC responsum, that Jewish sources treat children as of one of God's blessings and "propagation not only as a blessing, but a commandment."[99] He further noted that while children are a result of God's blessing[100], those who are unable to conceive feel quite differently.[101] Offering some hope to infertile couples, Rabbi Dorff noted that the Torah "is ambivalent about piety producing fertility and fertility being the mark of piety."[102] He also noted, as did the RC, that those couples who cannot have children are not obligated to follow the commandment to propagate, for one cannot command that which another has no ability to obey.[103]

Rabbi Dorff then looked to the traditional sources for guidance. He first described the Talmudic *sugya* in B.T. *Haggigah* surmising about the possibility of becoming pregnant in bath

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97 *Ibid.*

98 *Ibid.*

99 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 462. This paper cites, as did the ones from the RC, the Biblical stories of infertility, the Biblical source of the commandment and the conflicting sources which suggest that *p'ru urvu* applies only to the male partner and which set forth the requirement for its satisfaction. *Ibid.* nn.1-3.

100 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 463-464, citing one of the results of God's covenant with Israel: "'If you obey these rules and observe them faithfully, the Eternal, your God, will maintain for you the gracious covenant that God made on earth with your forbears. God will love you and bless you and multiply you . . . . There shall be no sterile male or female among you.'" [Deut. 7:12-14]. *Ibid.* & n.5.

101 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 464, quoting the Stocker excerpt from *Moment*. *See* n.7, *supra.*

102 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 464.

103 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 463.

water.[104] He then discussed the *midrash* about Ben Sira, as mentioned in *Likutei Maharil*, which claimed Ben Sira had been conceived without sexual intercourse.[105] He also referred to *Haggahot Semak*, which mentioned a woman being careful not to lie on the sheets on which another man has slept in order that she not become impregnated by a man who is not her husband.[106]

On the other side of the coin, Rabbi Dorff, referred to a source not mentioned in the RC responsa on this subject, *Ramban*'s commentary to Lev. 18:20: "*v'el eishet amit'kha lo titein sh'khavt'kha l'zera l'tam'a-va*", which he translated as: "Do not have intercourse with one's neighbor's wife for seed [or sperm]." He posited that *Ramban* suggested that the inclusion of the final two words of the verse was to prohibit adultery, because "society will not know from whom the child is descended."[107]

Rabbi Dorff summarized his excursion into the traditional sources as follows:

"[T]he first three sources are all rulings after the fact (*b'di'evad*) of insemination.

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[104] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 465 & n.9. Rabbi Dorff noted that while many medieval and modern rabbis read this passage metaphorically, it did stand for the possibility of conception without intercourse and that artificial insemination does not lead to adultery or incest. *Ibid.* & n.10. He also noted that Rabbi Moshe Feinstein used this *sugya* to permit donor insemination because "it specifically classifies the child as legitimate." Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 465 & n.11, citing *Iggrot Moshe*, 4 E.H. 1:10, 2:11, 3:11.

[105] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 465-466 & nn.13-13. Whether or not the *midrashic* story is real, Rabbi Dorff noted that it supports three things — conception without intercourse is possible, such conception does not support illegitimacy (*mamser*), the sperm donor is the legal, as well as the biological, father. *Ibid.*

[106] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 466 & n.14. This source has been quoted by Rabbi Joel Sirkes (the "*Bah*") in his *Bayit Hadash* to the *Tur*, Y.D. 195. Rabbi Dorff notes that this source again supports the possibility of conception without intercourse and that any child conceived thereby is legitimate. *Ibid.*

[107] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 466-467 & n.15, referring to Ramban on Lev. 18:20, s.v. *v'el eishet amit'kha lo titein sh'khavt'kha l'zera.* Rabbi Dorff further noted that Rabbi Yoel Titlebaum had relied on this comment to rule that artificial insemination is biblically prohibited [*Divrei Yoel*, 110, 140] and that Rabbi Eliezer Waldenberg had concluded that injecting a donor's sperm into a married woman is adultery, even in the absence of sexual contact [*Tzitz Eliezer* 51:4]. *Ibid.* n.15.

> Using them for rulings of artificial insemination, then, whether such rulings be stringent or lenient, will require us to ignore this disanalogy. . . . Moreover, the first three sources discussed in this section, the ones that explicitly contemplate the possibility of artificial insemination, are so unlike the contemporary conditions in which the question of the permissibility of artificial insemination arises that one wonders whether they can seriously serve as a legal resource for our questions.[108]

After spending a few pages discussing the range and costs of available infertility treatments, Rabbi Dorff turned to the subject of artificial insemination using the husband's sperm ("AIH"). At the outset he noted that the first successful artificial insemination in humans was documented either in 1790, or 1866, and as of the date of the responsum, it had been the most successful infertility treatment.[109] Rabbis have approved of AIH because "of Judaism's appreciation of medicine as an aid to God [even when] such means . . . are artificial."[110]

According to Rabbi Dorff, the sole issue was the method by which the sperm is obtained,[111] but he believed that any stringencies in the collection of sperm were not necessary, because "producing semen for the specific purpose of procreating cannot plausibly be called wasting it."[112] In a 1978 paper produced for (but apparently never approved by) the CJLS, which was written by Rabbi Morris Shapiro, entitled "Artificial Insemination in Jewish Law", he had

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108 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 467. Unlike the RC, Dorff questions, but does not outright reject, the traditional sources as inapposite, nor does he refer to the increase in scientific knowledge since the time those sources were composed. However, he had previously recognized this fact in his earlier responsum, "A Jewish Approach to End-Stage Medical Care", in CJLS Proceedings 1986-1990, *Op cit.* 67. *See also* Dorff, Elliot, N., Matters of Life and Death: A Jewish Approach to Modern Medical Ethics, Jewish Publication Society, 1998, Appendix — The Philosophical Foundations of My Approach to Biomedical Ethics, 412, reprinted in Dorff, Elliot N., ed., The Unfolding Tradition: Jewish Law after Sinai, Aviv Press, New York, 2005, 350: "Rabbinic sources, after all, did not contemplate the realities of modern medicine; nor, for that matter, did American legal sources as late as the 1940s."

109 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 470 & n.23.

110 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 472 & n.28.

111 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 472. To avoid wasting seed, some Rabbis have advocated collecting the sperm from the wife's vaginal cavity, which is medically unrealistic, or using a condom with a hole in it, so there is some chance of conception through intercourse. *Ibid.*

112 *Ibid.*

argued that both intercourse and AIH were merely "preparations" for conception and, therefore, the husband should be credited with fulfilling the *mitzvah*. His argument separated the command from the method. Rabbi Dorff found himself in agreement with this conclusion, because the child would be the husband's both legally and biologically, the husband was unable to fulfill the *mitzvah* any other way and because of the husband's trauma in having been unable to conceive through normal intercourse.[113]

Rabbi Dorff then transitioned to insemination with the sperm of a man other than the husband ("DI"). He began by stating unequivocally that as the husband was unable to produce sperm capable of impregnating his wife, upon receiving such a diagnosis from a physician, "the obligation to procreate ceases for the man, for one cannot be legally obligated to do that which is impossible for him to do."[114] Asserting that the source of ultimate, divine worth was not the ability to procreate, but having been created in God's image, Rabbi Dorff stated that there was no Jewish obligation to use any "artificial" means of conception.[115] Furthermore, he noted that "God in the Bible and in the Talmud and Midrash specifically does *not* engage in sexual union to create us or anything else, and so imitating God does not require procreation through sexual union."[116]

Nevertheless, a couple *may* choose to employ some of the medical procedures. After noting once again the necessity for counseling and thoughtful reflection by the couple, Rabbi Dorff turned next to those moral objections which have been raised to DI, some of which were

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113 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 472-473 & nn. 30-31.

114 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 473.

115 In reaching this conclusion, Rabbi Dorff did not employ the standard of a "tested and proven" treatment, as did the RC. *See* pp. 70-71, *supra.*

116 *Ibid.* Emphasis in original.

mentioned in the RC responsa. The first one he discussed is adultery and illegitimacy. Referring to the comment in *Tziztz Eliezer*,[117] Rabbi Dorff argued that it misstated our concern with adultery. He suggested that the Torah prohibits adultery with no specific explanation other than we should be holy and pure. The question, he wrote, "is whether artificial insemination violates our understanding of holiness and purity in a marital relationship."[118]

Rabbi Dorff posited that the answer to that question depended on whether DI would breach the trust between the husband and wife. In the case of DI, not only does the husband know of the insemination, he truly wants it, so that he and his wife can have children.[119] Moreover, as Rabbi Dorff noted, "the Talmud, Maimonides, Rabbi David Halevi (the "*Taz*"), and the majority of recent authorities have maintained that adultery takes place only when the penis of the man enters the vaginal cavity of the woman."[120] Thus, he concluded that DI did not constitute adultery and a child conceived and born as a result thereof would be legitimate.[121]

A second concern that he posited in connection with DI was the possibility of unintentional incest.[122] Where the donor is unknown to the recipient couple, there exists the potential that a child conceived through DI might marry his or her half-sister, or half-brother. Obviously, if the donor is known, this problem can be avoided. Rabbi Dorff noted that if the

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117 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 474 & n.34.

118 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 474 & n.35.

119 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 474. Rabbi Paul Plotkin had suggested that biblically, the prohibition was not based on breach of trust, but on the violation of a husband's *kinyan* — his acquisition of his wife. Rabbi Dorff retorted that with DI, the husband's agreement to the procedure meant that his possession rights were not being violated. Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 474 n.36.

120 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 475 & n.37..

121 *Ibid.* Rabbi Dorff further noted that because there is no intent to form an illicit relationship, the couple would be excused from the serious penalties of *kareit*, lashes, or death. And additionally, DI is just the opposite of a moral wrong, for it is the couple's deep love for one another that causes them to undergo DI. *Ibid.*

122 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 476.

donor is known not to be Jewish, there is no problem, because Jewish law "does not recognize family relationships through the father's line."[123] He also noted that Rabbi Moshe Feinstein, on this basis, had permitted DI if the donor was not Jewish, though he was later pressured to withdraw the responsum.[124]

Rabbi Dorff cited another reason, aside from the issue of unintentional incest, that a couple contemplating DI should press for disclosure of the donor's identity — the child's health, for which he stated that there was an independent commandment to preserve.[125] By knowing the identity of the donor, one would be able to prevent progeny with serious genetic defects, or illnesses. This is particularly important, he noted, where the donor is Jewish.[126] Without disclosure of the donor's identity, he believed that sperm banks must keep up-to-date detailed records available to the child as may be necessary.[127]

Rabbi Dorff next turned to the issue of how the identity of the Jewish donor affects the child. First is the issue, not mentioned in the RC responsa,[128] of the child's personal status — is the donor a *Kohein*, *Levi*, or *Yisrael*? According to Rabbi Dorff, the child adopts his biological

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123 *Ibid.* & n.39, citing B.T. *Yevamot* 98a; Mishneh Torah, *Issurei Bi'ah* 14:13; *Shulhan Arukh*, Y.D. 269:3.

124 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 476 & n.40, citing *inter alia*, *Iggrot Moshe*, E.H. vol. 1, nos 10, 71.

125 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 476.

126 *Ibid.* He further noted that even where the donor is not Jewish, given intermarriage and multiple sexual encounters outside of marriage by donors, the problem of unintended incest or health problems is very real. *Ibid.*

127 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 477.

128 The RC in a responsum: "A *Kohen* and *Torah* Honors", in Jacob, Walter, ed., New American Reform Responsa, No. 23, 1990, HUC Press, New York, 1992, 36, had held: "Among us as Reform Jews the *kohen* and the Levite possesses no special status and both the honors as well as the disabilities which remain among Orthodox Jews are disregarded by us. . . . All of the *kohanim* nowadays are, of course, of doubtful status as no strict genealogies have been maintained." When naming an adoptive child, the RC has held that the name to be provided would be *ben-* or *bat-*, and then the name of the adopting parents. "Adoption and Adopted Children", in American Reform Responsa, No. 63, 1978, *Op cit.* 206. Thus, this is not an issue of importance to Reform Jews, even though it has recognized that, ordinarily, the child follows the status of his father. "The Transplanted Ovum", *Op cit.* 217.

father's status.[129] A related question is which Hebrew name does the child take. Based upon a prior responsum by Rabbi Avram Reisner dealing with the naming of an adopted child,[130] Rabbi Dorff concluded that the child may take the Hebrew name of his adoptive father.[131] Then there is the question of inheritance; from which father does the child inherit? According to Rabbi Dorff, thirty-one states have some legislation dealing with this question, generally making the husband the responsible party.[132] In the United States and Canada, Jewish law follows the law of the State.[133]

But does DI fulfill for the infertile husband, the commandment of *p'ru ur'vu*? Rabbi Dorff stated that the "answer to that has generally been 'No.'"[134] He also noted that Rabbi Joseph Soloveitchik had held that raising adoptive children can fulfill the commandment and Rabbi Dorff saw no reason why that should not apply to DI.[135] Rabbi Dorff recognized that DI creates difficulties in determining this issue"no matter which way we rule", for there is a disconnect between the biological parent and the parent who will be raising him.[136]

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[129] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 478. But if the DI's identity is unknown, or he is not Jewish, the child is a *Yisrael.*

[130] Reisner, Avram Israel, "On the Adoption and Conversion of Patrilineal Children", in CJLS Proceedings 1986-1990, *Op cit.* 157 ff.

[131] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 483 n.59.

[132] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 478-479 & n.45. In many of these states the husband's written consent to the insemination is required and some states require that the procedure be performed by a licensed physician. *Ibid.* In the remaining states, where the procedure may be performed by one other than a physician, or where there is no written consent, the donor may have to remain anonymous in order to protect his property. *Ibid.*

[133] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 479. *See, e.g.*, B.T. *Gittin* 10b: "*dina d'malchuta dina*" — "the law of the land is the law".

[134] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 479 & n.46.

[135] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 479 & n.47. However, the Rav held only that one who adopts a child and raised him in a *yeshivah* atmosphere is considered as though he "partially" fulfilled the requirement of procreation.

[136] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 479.

He noted that in America, a man raising a child who is not his biological father is called a foster father, or a step-father, depending on the circumstances, and that status exists in rabbinic law as well.[137] Because Jewish law saw adoptive parents as an aid to the biological parents, one might think that only the donor could be the parent for the purposes of *p'ru urvu*. But Rabbi Dorff looked to other situations, such as levirate marriage, which would tilt the scale towards the infertile husband.

In a levirate marriage, the brother of a man who died without children is to have intercourse with the widow, so a child might be born having the parentage of his deceased brother. This would argue in favor of the infertile husband.[138] In addition, Rabbi Dorff referred to a *midrashic* source where the person raising a child is deemed to be the father.[139] Ultimately, unlike the RC, Rabbi Dorff held that it is the semen donor who is the father for the purposes of *p'ru urvu*. He based this conclusion, in part, on precedents previously cited, but more importantly, on the child's genetic heritage.[140] In reaching this decision, Rabbi Dorff reiterated that the infertile husband is exempt from *p'ru urvu*.[141]

Rabbi Dorff then noted certain moral concerns which have been raised in objection to

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137 Ibid. The term is "*apotropos*", a caretaker, or administrator. *See, e.g.,* B.T. *Gittin* 52a.

138 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 480, citing Deut. 25:5-10.

139 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 480 & n..49, quoting *Exodus Rabbah* 46:5: "*lama at shotaket amra lo mip'nei she'eini yoda'at li av ela otakh she hamgadel nik'ra av m'lo hamolid*" — "Why are you silent? She said to him: ' because I know no other father except you, for one who raises is called father, and not one who begets.'" *But see* B.T. *Sanhedrin* 19b: "*l'lamed'kha shekol hamgadel yatom b'tokh beito ma'aleh alav hakatuv k'ilu y'lado*" — "To teach you that all who raise an orphan in the midst of his home, is regarded in Scripture as if he had fathered him".

140 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 481. Dorff cites the prohibition against incest and genetic diseases as weighing heavily on this issue. *Ibid.*

141 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 482. Dorff cites B.T. *Nedarim* 27a: "*v'anus rahamana patreih*" — In cases of compulsion, the Merciful One exempts him"; B.T. *Bava Kamma* 28b: "*v'ones rahamana patreih*" — In cases of compulsion, the Merciful One exempts him"; B.T. *Avodah Zera* 54a: "*ones rahamana patreih*" — In cases of compulsion, the Merciful One exempts him".

these procedures. He began by stating his belief that

> "positive law and morality are one undifferentiated web, where one can and should influence the other. That is especially true in a religious legal system like the Jewish one, where a fundamental assumption is that the law must express the will of a moral — indeed, a benevolent — God. Thus the moral concerns that donor insemination raises are not for me, "merely" moral, but fully legal."[142]

After noting a couple of examples of those who argued that donor insemination would lead to widespread promiscuity,[143] Rabbi Dorff countered that those who wished to be licentious would do so without resorting to artificial insemination.[144]

More significant to him, though, was the effect on the marriage and on parent-child relationships. Rabbi Dorff looked at the effect that non-disclosure of the means of conception might have on the child's sense of trust.[145] He also looked at its effect on the husband and the sperm donor.[146] And he also looked at the effect of an asymmetrical relationship between the spouses, as well as between the child and his parents, when his father is not his genetic parent, while his mother is. He found those concerns not to be insurmountable and concluded that they did not provide a moral ground to prohibit the procedure.[147]

Rabbi Dorff then touched on two issues raised in the recent RC responsum — Jewish demographics and compassion. He noted that contemporary Jews generally did not favor large families as did their forbears, most likely because of the improvement in the rates of infant

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142 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 484 & n.61.

143 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 484-485 & nn.62-63.

144 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 485. In fact, he noted that it is such an onerous way of having illicit sex, "that it is downright implausible" that anyone would go to the trouble for that purpose. *Ibid.*

145 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 486.

146 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 486-490.

147 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 490-492.

mortality.[148] Added to assimilation, intermarriage and the loss of a substantial portion of world Jewry in the Holocaust, low birth rates have produced a major demographic problem. Factoring this moral issue with the dictates of the law, Rabbi Dorff, recognized that

> "Conservative Judaism, with its commitment to historical analysis, must surely not only recognize the influences of historical circumstances on the legal judgments of the past, but must also take the responsibility to meet the needs of Judaism and the Jewish community in its responsa of the present."[149]

Accordingly, he concluded that the CJLS must use any room the law might authorize in order to permit otherwise infertile Jews to bear children.[150]

He also noted that compassion runs two ways — for the infertile couples and for those couples who chose not to undergo the procedure. Whether it might be cost, or psychological concerns, he concluded that compassion requires that couples who make the difficult choice not to undergo the procedures should not be made to feel that "they have let down the Jewish people, their partner, or potential grandparents."[151]

Turning to the issue of egg donation, Rabbi Dorff immediately recognized that unlike sperm donation, with egg donation, there exists a medical risk to the donor.[152] Thus, he concluded that egg donation is permissible provided that the couple consider other options, including adoption.[153] When he looked at the moral and psychological factors, Rabbi Dorff

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148 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 492.

149 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 493. For a further Conservative view of the obligation to bear children, *see* Abelson, Kassel & Elliot Dorff, "Mitzvah Children", [E.H. 1:5.2007], CJLS, December 2007.

150 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 493.

151 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 494.

152 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 495, citing B.T. *Hullin* 10a, as well as B.T. *Berakhot* 32b; B.T *Shabbat* 32a; B.T. *Bava Kamma* 15b, 80a, 91b; Mishneh Torah, *Hilkhot Rotzei'ah* 11:4-5; and *Shulhan Arukh*, Y.D. 116:5 (Isserlies Gloss), O.H. 173:2.

153 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 495.

concluded that they could be resolved in the same manner as with sperm donation.[154]

A more troublesome issue was maternal identity, an issue not addressed by the RC in its IVF responsum, which looked solely at sperm donation.[155] Rabbi Dorff asserted that there was only one source "that even contemplates anything close to egg donation."[156] He questioned whether that *aggadah* was sufficient to support egg donation, noting that it was but one possible interpretation of the Biblical verse, but he found his support elsewhere. Recognizing that a child's religion is that of the woman who delivers him, and that for a first born, it is the one "who opens the womb", he concluded that the woman who bears the child is his or her mother.[157]

Another issue which arises in connection with egg donation, but not sperm donation, is selective abortion. Because of the low rate of success, it is often necessary to implant several eggs in order to increase the couple's chances for success. Because a woman cannot carry more than three healthy babies without risking her own health, physicians perform selective abortions to reduce that risk. According to Rabbi Dorff, one would not wish to sanction abortion in

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154 *Ibid.*

155 However, in "The Transplanted Ovum", *Op cit.* 218, by deciding that "since the wife carries the child and, therefore, according to the law her status impresses itself upon the child . . . the child here in question should be considered the offspring of the married couple", the RC reached a different conclusion than it would later reach in "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 3, where the committee held that the egg donor was the parent.

156 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 496. The Torah specifically refers to Dinah as the daughter of Leah. Gen. 30:21. A talmudic *midrash* seeks to explain why she was identified as Leah's daughter, and not the daughter of Jacob, as would be customary. B.T. *Berakhot* 60a. Combined with the *Targum Yonaton* on the Torah verse, it supports the explanation that answering a prayer, God transferred a male fetus from Leah to Rachel and a female fetus from Rachel to Leah. Rabbi Samuel Edels (the "*Maharsha*"), at B.T. *Niddah* 31a, agreed with the *Targum*'s version. Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 496 & n.87.

157 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 497 & nn. 88-89. Rabbi Dorff, in the original version of this responsum as approved by the CJLS, had held, in line with his conclusion that the sperm donor was the father, that the egg donor would be the mother. However, after the CJLS approved Rabbi Mackler's responsum on IVF, Mackler, "In Vitro Fertilization", *Op cit.* 510 ff., *see* p. 86 ff, *infra,* he changed his conclusion in the printed version. Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 497 & n.91.

advance by creating conditions where abortion is likely to occur. Therefore, he concluded that one should not transfer more than three embryos and, preferably, not more than two.[158]

Looking at the issue of *p'ru urvu* in connection with egg donation, Rabbi Dorff, agreed that it did not apply to women. However, if a woman chooses not to undergo the procedure, her husband will not be able to procreate with her. And while the *Mishnah* held that in such a case, after ten years, a man was required to divorce his wife and marry another,[159] the *Shulhan Arukh* has since held that "we do not force him to divorce her, although he has not fulfilled the commandment 'be fruitful and multiply.'"[160] Therefore, he stated that infertile couples who choose not to utilize egg donation "should not feel like they violated Jewish law and such couples *may* use egg donation as a means to have children, but they *are not required* to do so."[161]

Looking at these procedures from the standpoint of the Jewish egg or sperm donor, Rabbi Dorff began by reiterating that donor insemination constitutes procreation for the sperm donor and he pointed out the responsibilities and concerns that status entailed.[162] With respect to the egg donor, although her donation does not constitute procreation, all of the other responsibilities and concerns of a sperm donor were applicable to her as well. However, he noted that there is the additional concern over the medical risks entailed in harvesting the eggs. On balance, Rabbi Dorff concluded that:

"a Jewish woman *may* take on the risks of egg donation, but not repeatedly, and

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158 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 497-498.

159 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 498, citing M. *Yevamot* 6:6.

160 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 499, quoting *Shulhan Arukh*, E.H. 1:3 (Isserlies gloss).

161 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 499 (emphasis in original). Rabbi Dorff urged those couples to consider adoption. *Ibid.*

162 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 499-500.

only if she is assured by physicians after due examination that she personally can do so without much danger to her own life or health, for that clearly takes precedence in Jewish law to the good of enabling an infertile couple to have children, as great as that is."[163]

In his summary, Rabbi Dorff emphasized that his conclusions assume a married couple unable to have children through normal intercourse. Thus, he specifically declined to render an opinion about a single woman seeking to be inseminated, and, in some cases, the recipient of a donated ovum as well, or single men who artificially impregnate surrogate donors.[164] Although he did not carry out the necessary analyses of those situations, Rabbi David Golinkin for the *Va'ad Halakhah* of the Rabbinical Assembly of Israel[165] did examine one aspect of those situations.[166]

Twenty-one months after Rabbi Dorff's paper was approved by the CJLS, Rabbi Mackler's paper dealing with IVF was approved by that same committee. According to Rabbi Mackler, this technique raised the following important questions:

"1. May an infertile couple utilize IVF, using the husband's sperm and the wife's egg, to have a child? What is the status of the offspring?"

"2. Does *halakhah* provide any guidance regarding the transfer of embryos to the women's uterus for gestation?"

"3. May more embryos be created for IVF than are needed for immediate use? What may be done with the extra embryos, including those that are cryopreserved (frozen)?"

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163 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 500.

164 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 506. I intentionally omitted Rabbi Dorff's declination to opine about single men or women who wish to adopt, because this paper is not treating the issue of adoption.

165 The *Va'ad Halakhah* is the Israeli analogue of the CJLS for the *Masorti* Movement (the name of the Conservative Movement in Israel).

166 "Artificial Insemination for a Single Woman", in Responsa of the Va'ad Halakhah of the Rabbinical Assembly of Israel, The Rabbinical Assembly of Israel and the Masorti Movement, Jerusalem, 5748-5749, Vol. 3, 83-92. Rabbi Golinkin held that it was not permitted.

and

> "4. Is IVF using donated sperm and/or ova permitted? What is the status of the offspring?"[167]

After noting that children are a blessing and the commandment of *p'ru urvu*, he also noted the social benefits of IVF and related technologies. And because these technologies "can affect communal values and practices", communities employ a variety of responses. "In Judaism, the central means of responding to these concerns is through halakhah or Jewish law."[168]

After a history and description of the IVF process, Rabbi Mackler proceeded to the issue of IVF using the couple's own egg and sperm. He noted that most authorities viewed this procedure in the same way as artificial insemination and that the issues most commonly raised were those of wasting seed, assuring that the embryo(s) being transferred come from the couple's gametes, and whether the husband, by employing this procedure, fulfills the *mitzvah* of *p'ru urvu.*[169] Rabbi Mackler referred to Rabbi Ovadia Yosef as having held that IVF is permissible if it would be the only way for the couple to have children and that a child conceived thereby would be the parents' child in all respects.[170]

However, others have disagreed. He cited Rabbi Eliezer Waldenberg as having held that IVF resulted in "wasting seed"[171] And he noted that Rabbi J. David Bleich was concerned that it

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167 Mackler, "In Vitro Fertilization", *Op cit.* 510.

168 Mackler, "In Vitro Fertilization", *Op cit.* 510-511 & n.1.

169 Mackler, "In Vitro Fertilization", *Op cit.* 513.

170 Mackler, "In Vitro Fertilization", *Op cit.* 513 & n.9.

171 Mackler, "In Vitro Fertilization", *Op cit.* 513 & n.10. Because the embryo is outside the body, Waldenberg contended that it is unlike natural reproduction and "'upsets the order of things'". In addition, he asserted that it is more difficult to be certain that the transferred embryo is from the couple's gametes. *Ibid.,* citing *Tzitz Eliezer* vol. 15, *siman* 45.

"increases the likelihood of a seriously impaired child"[172] Additionally, Rabbi Bleich objected to the destruction of excess embryos that are created as part of the IVF procedure.[173] Rabbi David Feldman, on the other hand, while noting that IVF and other procedures "interfere with the natural process of reproduction", argued that given appropriate safeguards, it "can provide an appropriate way for humans to act with God in improving upon nature, and represented a positive response to the human desire for offspring."[174]

Rabbi Mackler agreed with Rabbi Feldman that technological innovations are not, in and of themselves, prohibited. He also believed that producing sperm for the purpose of reproduction did not violate any prohibition.[175] Responding to the other concern raised by Rabbi Bleich, Rabbi Mackler agreed that the issue of fetal impairment warrants caution, but he noted that the then current data had indicated no increase in such defects over those seen following normal conception. He further noted that there did not appear to be any excessive risks to the mother.[176]

Rabbi Mackler concluded from his review that "it is clear that couples are not required by Jewish law to utilize procedures such as IVF."[177] He reiterated Rabbi Dorff's statement that the source of ultimate, divine worth is not the ability to procreate, but being created in God's

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172 Mackler, "In Vitro Fertilization", *Op cit.* 513 & n.12. Rabbi Bleich held that IVF would require the birth and maturation of vast numbers of healthy and normal children before it could be viewed as "morally acceptable." *Ibid.*

173 *Ibid.* Rabbi Bleich has said that he hopes for the day when IVF can become a way of assisting childless couples. *Ibid.*

174 Mackler, "In Vitro Fertilization", *Op cit.* 514 & n.14.

175 Mackler, "In Vitro Fertilization", *Op cit.* 514 & n.16. He also cited the Dorff responsum, at p.472. *See also* p.76 and n.112, *supra.*

176 Mackler, "In Vitro Fertilization", *Op cit.* 514-515. Nevertheless, Rabbi Mackler urges caution and full disclosure of all risks, as well as the likelihood of a successful result. Mackler, "In Vitro Fertilization", *Op cit.* 515.

177 Mackler, "In Vitro Fertilization", *Op cit.* 515.

image,[178] and like Rabbi Dorff and others, including the RC, he suggested that couples strongly consider adoption. Nevertheless, he concluded that IVF is clearly "permissible for those who choose to utilize these procedures."[179] He stated unequivocally that a "child born as a result of IVF using a couple's sperm and egg would be the parents' child in all respects, and would cause the *mitzvah* of 'be fruitful and multiply' to be fulfilled."[180]

Rabbi Mackler then turned his attention to issues surrounding the implantation of the embryos, beginning with preimplantation genetic testing ("PIGT"). He noted that it is possible to remove one cell for such testing from the embryo once it consists of eight cells. He cited Rabbi Y. Zilberstein who wrote:

> "One cannot close the door in the face of despondent people who suffer mental anguish in fear of giving birth to sick children, pressure which can drive the mother mad. Therefore, in the case of a serious genetic disease that affects the couple, it is difficult to forbid the suggestion [for genetic testing through IVF]."[181]

Rabbi Mackler noted a relationship between allowing PIGT for a prenatal diagnosis and permitting the abortion of a fetus with a severe genetic disease.[182] While recognizing the practical problems of utilizing IVF for genetic testing, Rabbi Mackler nonetheless held that couples who chose to undergo IVF and use PIGT to avoid having a child with a severe genetic disease, may do so. In any event, he considered it preferable to undergoing IVF procedures and

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178 *Ibid.*, citing the Dorff responsum, at p. 473. See p.77, *supra.*

179 *Ibid.* Rabbi Mackler concluded that the technical and other concerns are outweighed "by the great good of a new human life, the addition to the harmony and joy of the family, and the contribution to the strengthening of the Jewish Community and humanity." *Ibid.*

180 Mackler, "In Vitro Fertilization", *Op cit.* 515.

181 Mackler, "In Vitro Fertilization", *Op cit.* 516 & n.25.

182 Mackler, "In Vitro Fertilization", *Op cit.* 516, citing Abelson. Kassel, "Prenatal Testing and Abortion", in CJLS Proceedings 1980-1985, *Op cit.* 3 ff.

then having to abort a fetus with a grave disease.[183]

Turning to the issue of gender selection, Rabbi Mackler agreed that it would be acceptable to utilize sex selection techniques in cases where a severe genetic disease would be sex-linked.[184] In other cases, however, he found it to be "more problematic". Not only would the risks and problem associated with IVF justify the desire for a child of a particular gender, but he stated that there exist more important concerns.[185] Among those was the sense that it "is offensive to consider one gender better than or preferable to the other".[186] Ultimately, relying on Orthodox *poskim*, he concluded that IVF should not be used for sex selection, other than in connection with the potential for sex-linked diseases.[187]

With respect to the number of embryos transferred, Rabbi Mackler noted that increasing the number transferred not only increased the chances of success, but also the risk of multifetal pregnancies, a particular concern when more than two or three are implanted. As a result, physicians normally perform selective abortions to reduce that risk. According to Rabbi Mackler, in order to reduce this serious risk to the mother and, he suggested, to the remaining fetuses as well, such a procedure would be *halakhicly* acceptable.[188] On the other hand, he noted that the procedure itself may entail medical risk to the mother and, possibly, the fetuses.

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183 Mackler, "In Vitro Fertilization", *Op cit.* 516. *See also* Popovsky, Mark, "Choosing our Children's Genes — The Use of Preimplantation Genetic Diagnosis" [E.H. 1:5], CJLS, May 28, 2008, 29-30, for a somewhat different *p'sak halakhah.*

184 *Ibid.*

185 Mackler, "In Vitro Fertilization", *Op cit.* 516-517.

186 Mackler, "In Vitro Fertilization", *Op cit.* 517. Rabbi Mackler noted the tendency of couples engaging in sex selection to choose boys and the imbalance which would occur if the practice became widespread. *Ibid.* He did not discuss the utility of such techniques for fulfilling the *mitzvah* of *p'ru urvu* (after several children of the same sex).

187 Mackler, "In Vitro Fertilization", *Op cit.* 517. Rabbi Mackler agreed with Rabbis Y.B. Shafran and Y. Zilberstein and, to a certain extent, with Rabbi Bleich. *Ibid.*

188 Mackler, "In Vitro Fertilization", *Op cit.* 517.

Therefore, he concluded that until all the risks are known to be acceptable, one may not transfer more than three embryos and, preferably, not more than two.[189]

With IVF, as not all eggs become fertilized, the usual practice is to attempt to fertilize eight to ten eggs, which raises the issue of what is to become of the ones not implanted. If they were frozen for later use by the couple, avoiding additional retrieval procedures, this would be an *halakhicly* acceptable procedure according to Rabbi Mackler.[190] Other options allowing the embryo to expire, to use it for scientific research, or to donate it to another couple.[191] There are some, such as Rabbi Hayyim David Halevi, who has held that:

> "'all ova that are fertilized in vitro do not have the legal status of an embryo; one does not violate the Sabbath on their behalf, and it is permissible to discard them if they are not chosen for transfer, since the law of abortion only applies to [an embryo] in the womb . . . . In vitro, there is no prohibition whatsoever.'"[192]

There are others who have disagreed, such as Rabbi Bleich, who held that: "'there are no obvious grounds for assuming that nascent human life may be destroyed simply because it is not sheltered in its natural habitat, i.e., its development takes place outside the mother's womb.'"[193] Thus, he would not permit the destruction of viable embryos.[194] Rabbi Mackler, as did the RC, did accord "a significant degree of respect and sanctity" to an early embryo as a "wondrous

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189 Mackler, "In Vitro Fertilization", *Op cit.* 517-518.

190 Mackler, "In Vitro Fertilization", *Op cit.* 518. The permission is based on his assumption that cryopreservation is safe. Mackler, "In Vitro Fertilization", *Op cit.* 518-519.

191 Mackler, "In Vitro Fertilization", *Op cit.* 519.

192 *Ibid.,* quoting from "Fetal Reduction", *Assia*, No.47-48, 1990, 15. Rabbi Mordechai Eliyahu agreed, in part, with that conclusion: "'Fertilized ova that have been designated for transfer to a woman's uterus should not be destroyed since a live fetus will develop from them, but fertilized ova that have not been designated for transfer may be destroyed.'" Mackler, "In Vitro Fertilization", *Op cit.* 519, quoting from "Destroying Fertilized Eggs and Fetal Reduction", *Techumin* 11, 1990-1991, 272-273. *See also* Feldman, David M., & Fred Rosner, eds., A Compendium on Medical Ethics, 6th Ed., Federation of Jewish Philanthropies of New York, New York, 1984, 51.

193 Mackler, "In Vitro Fertilization", *Op cit.* 519, quoting from Bleich, "*In vitro* Fertilization", *Tradition* 25, no. 4, 1991, 97.

194 *Ibid.*

divine creation" and a "potential human life". Ultimately, however, he concluded that while maintaining embryos is preferable and in accord with Jewish tradition, it is not *halakhicly* required.[195]

Finally, Rabbi Mackler addressed the use of donor eggs, sperm and embryos. With respect to the use of donor sperm, he was in agreement with the conclusions in Rabbi Dorff's paper on artificial insemination, which he would extend to donated eggs and embryos.[196] In evaluating the issues of parental identity, Rabbi Mackler once more is in agreement with Rabbi Dorff's position. With respect to egg donors, Rabbi Mackler looked to the analogy of a pregnant woman who underwent conversion.[197] Because the woman's status at birth determined the child's indentity (*i.e.* since she had converted before delivery, the child was Jewish)[198], Rabbi Mackler felt that the woman's status at birth determines the maternal identity as well.[199]

Thus, he concluded that the birth mother is the child's mother.[200] Once more extending a conclusion and its reasoning from Rabbi Dorff's paper, he concluded that "one should not marry (or engage in sexual relations with) children of one's genetic, gestational, or social parents."[201]

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195 Mackler, "In Vitro Fertilization", *Op cit.* 519-520. As to the issue of employing unused embryos for scientific research, while Rabbi Mackler suggested that it should be no more objectionable than destroying the embryo, he chose to leave that issue for another paper. Mackler, "In Vitro Fertilization", *Op cit.* 520.

196 Mackler, "In Vitro Fertilization", *Op cit.* 520. Rabbi Mackler would require the couple to give the matter careful consideration and would not permit the procedure unless both spouses were in agreement. Mackler, "In Vitro Fertilization", *Op cit.* 521.

197 Mackler, "In Vitro Fertilization", *Op cit.* 522.

198 Klein, Isaac, A Guide to Jewish Religious Practice, Jewish Theological Seminary of America, New York, 1979, 446; *Shulhan Arukh*, Y.D. 268:6.

199 Mackler, "In Vitro Fertilization", *Op cit.* 522 & n.53 (for the several arguments bolstering his conclusion).

200 Mackler, "In Vitro Fertilization", *Op cit.* 523.

201 *Ibid.* Rabbi Mackler noted that the prohibition would be *d'oraita* (Toratic) for the genetic father and birth mother and *sh'niyut* (secondary relations) for the children of other categories. Rabbi Mackler also discussed boundary issues which might arise, such as "Is my aunt my mother?" *Ibid.*

Nevertheless, he agreed that one might use donor eggs, or even donor sperm and eggs.[202]

With respect to donated embryos, Rabbi Mackler, again followed Rabbi Dorff's view with respect to donated sperm or eggs. He reiterated that donating embryos is not required, but may be done after careful consideration of all the implications and with "'due respect and, indeed, awe, for the whole procedure.'"[203] Rabbi Mackler reviewed other concerns, such as if a Jewish couple were to donate an embryo (or an egg) to a non-Jewish woman. That child, though biologically Jewish, would never be raised as such and, moreover, *halakhicly* the child would be non-Jewish, if the gestational mother was not Jewish at the time of delivery.[204]

Rabbi Mackler, having recognized this concern, nevertheless would permit embryo donation to both Jews and non-Jews because of the principles of *tikun ha'olam* (repairing the world) and *darkhei shalom* (the ways of peace).[205] He also noted that those who would restrict such embryos to a Jewish couple would be showing little concern "for the life and health of non-Jews [and] would represent a desecration of God's name."

Surrogacy

Twenty-five years ago, both the CJLS and the RC addressed issues regarding the use of a surrogate to provide a child for an infertile couple. A decade later, the CJLS readdressed some of those issues.

Responsa Committee

A New York rabbi had asked the RC to decide

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202 Mackler, "In Vitro Fertilization", *Op cit.* 526-524.

203 Mackler, "In Vitro Fertilization", *Op cit.* 524, quoting from Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 505.

204 Mackler, "In Vitro Fertilization", *Op cit.* 524.

205 *Ibid.*

> "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 [which child] will eventually be raised by the husband and his wife."[206]

Although not explicitly stated, one might reasonably have assumed that the sperm is from the husband of the infertile woman.

In answering the query about surrogates, the RC first noted that "the *Talmud* and later Rabbinic literature seem to have dealt with a subject akin to the use of a surrogate mother when those sources discussed pregnancies which were not caused by intercourse."[207] The Rabbis of the Talmud discussed if a woman might become pregnant from bathing in water into which semen had been discharged.[208] Rabbi Joel Sirkes (the "*Bah*") had referred to one opinion that a woman should not lie on a sheet on which a man had slept to avoid becoming impregnated by the sperm which he might have deposited thereon.[209]

Although there is a facial similarity between these sources and the question before the RC, the responsum notes a significant difference. In the cited sources, the child presumably was raised by the birth mother; whereas in the situation described in the question, the child was to be raised by the husband-donor and his wife. The RC then cited what it believed might have been a closer analogy — that of the biblical concubines *Hagar* and *Bilhah*.[210] *Sarai* gave *Hagar* to *Abram* to conceive his first child, *Ishmael*[211], and *Rachel* gave *Bilhah* to *Jacob* to conceive *Dan*

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206 Jacob, Walter, "Surrogate Mother", in Jacob, Walter, ed., American Reform Responsa, Central Conference of American Rabbis, New York 1983, 505.

207 *Ibid.*

208 B.T. *Haggigah* 15a. Shmuel replied that semen must have been "*yoreh kahatz* — shot like an arrow" in order that it be able to fertilize, but the *Gemara* retorted that the semen had been "shot like an arrow" into the tub. *Ibid.*

209 Commentary to the *Tur*, Y.D. 195

210 Jacob, "Surrogate Mother", Op cit. 505.

211 Gen. 16:1-11.

and *Napthali*.[212] Once again, however, the RC saw significant differences from the question posed. In each of the biblical situations, the biological mother was part of the household and continued to play a role in the child's life.[213]

The RC had the benefit of two prior RC responsa on the subject of artificial insemination. Thirty years earlier, Rabbi Solomon Freehof wrote for the RC that such a child would be "*kasher*".[214] However, Rabbi Alexander Guttman had concluded that the prior sources dealing with accidental insemination were insufficient to decide for or against permitting artificial insemination, but he recognized that there had been no illicit intercourse.[215] Based upon all of those sources, the RC concluded that the children born through the use of a surrogate are legitimate, "as long as the surrogate is not married."[216]

The RC recognized that sexual relations between a man and a married woman is adulterous. Because there would be no sexual penetration with surrogacy, the RC considered this procedure to be the same as artificial insemination from an unknown donor and, therefore, permissible. However, because of the importance of the "*mitzvah* of procreation [which] ought to be encouraged in every way possible", the RC hesitantly permitted the use of a married surrogate.[217]

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212 Gen. 30:3-8.

213 Jacob, "Surrogate Mother", Op cit. 506.

214 Freehof, Solomon B., "Artificial Insemination", *Op cit.* 501 (emphasis in original). Rabbi Freehof relied upon the commentary of the *Bah* to the *Tur*, Y.D. 195, that there was no illicit intercourse and, therefore, the child is not a *Mamzer*. *Ibid.*

215 Guttman, Alexander, "Artificial Insemination", *Op cit.* 502-504.

216 Jacob, "Surrogate Mother", Op cit. 506-507.

217 Jacob, "Surrogate Mother", Op cit. 507.

Committee on Jewish Law and Standards

The earlier CJLS responsum, by Rabbi David H. Lincoln, raised similar questions:

> "The wife has had a hysterectomy and the husband's sperm is fertile; and a gentile, divorced woman has agreed to be artificially inseminated with the husband's sperm. Should the procedure prove successful, the surrogate mother would hand over the child at birth. Is this arrangement permissible? Does it matter whether the surrogate mother is gentile or Jewish; married or single?"[218]

After reviewing the recent rabbinic literature on artificial insemination, Rabbi Lincoln noted "that all of these writings come to the same conclusion: the child born of a non-Jewish mother is not Jewish." Rabbi Lincoln mused that while the baby may be converted, he questioned, whether "we [the CJLS] really want to encourage a Jewish father to have a non-Jewish child."[219]

Assuming the "permissibility, even if not [the] desirability, of surrogate motherhood", he turned to the issue of a suitable surrogate.[220] Relying on Rabbi Moshe Feinstein, he concluded, as did the RC, that the marital status of the mother is inconsequential, because there is no *bi'ah* (sexual intercourse) and, therefore, a child born through such arrangement would not be *mamzer* (illegitimate).[221] Rabbi Lincoln concluded his discussion by noting that this type of arrangement, like artificial insemination, has the potential for incest. He also noted that there might be "something unsavory about the whole process".[222] Nevertheless, Rabbi Lincoln ultimately concluded, as did the RC, that "[i]n spite of these reservations . . . [t]he mitzvah of having

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218 Lincoln, David H., "Surrogate Motherhood", in CJLS Proceedings 1986-1990, *Op cit.* 3.

219 Lincoln, "Surrogate Motherhood", Op cit. 4.

220 *Ibid.*

221 *Ibid.* See also *Iggerot Moshe,* E.H. Part 1:10, 71; Part 2:11.

222 Lincoln, "Surrogate Motherhood", Op cit. 5. He suggested it might be akin to "*ma'asei mitzrayim* — immorality of Egypt." *Ibid.*

children is so great that we should not deny couples the opportunity. If, however, the surrogate mother is not Jewish, the child requires conversion."[223]

Writing a decade later, Rabbi Elie Kaplan Spitz opened by observing that the CJLS "dealt with the possibility of ovum surrogacy in 1988 [and] concluded: [t]he mitzvah of having children is so great we should not deny couples the opportunity."[224] But as Rabbi Spitz noted, "[t]hat opinion was written while there was still relatively little experience with ovum surrogacy. Gestational surrogacy had not yet taken place."[225] With that introduction, he responded to the following questions: "Is it permissible to 1. Use an ovum surrogate; 2. Pay her for her services; 3. Employ a gestational surrogate?" and "4. Is the mitzvah of procreation met through a surrogate birth?"[226]

Rabbi Spitz, having noted the prior responsum by Rabbi Lincoln for the CJLS, nevertheless stated that "Jewish law lacks direct precedent for surrogate birth."[227] And while *halakhic* authorities have agreed that "a couple has no duty to resort to surrogacy to fulfill the mitzvah of procreation, [there was conflict regarding] whether an infertile couple may choose to do so."[228] Rabbi Spitz devoted several pages to the medical and secular legal issues regarding

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223 Lincoln, "Surrogate Motherhood", *Op cit.* 5.

224 Spitz, Elie Kaplan, "On the Use of Birth Surrogates", in Responsa 1991-2000, *Op cit.* 529. Rabbi Spitz noted that the pain suffered by infertile women extended to Biblical figures, such as Rachel "*hava li vanim v'im ayin meitah anokhi*" — "Give me children , or I shall die." Gen. 30:1.

225 *Ibid.* In "ovum surrogacy", both the egg and the womb of the surrogate are used. In "gestational surrogacy", an *in vitro* fertilized egg from the parents are implanted into the womb of the surrogate. Spitz, "On the Use of Birth Surrogates", *Op cit.* 530, 531.

226 Spitz, "On the Use of Birth Surrogates", *Op cit.* 529.

227 *Ibid.* Rabbi Spitz then observed that most of the prior rabbinic debate "focused on theoretical risks." *Ibid.* In a footnote to that statement, Rabbi Spitz stated that he could not find an Orthodox rabbi in favor of ovum surrogacy and that "among non-Orthodox rabbinate, opinions are divided." He then cited a selection of rabbinic views. Spitz, "On the Use of Birth Surrogates", *Op cit.* 529-30 n.1.

228 Spitz, "On the Use of Birth Surrogates", *Op cit.* 529-530.

surrogacy before moving on to the Jewish law values implicit in such an arrangement.

The first issue that Rabbi Spitz confronted was procreation — the first *mitzvah* found in the Torah.[229] So important is this commandment that the Talmud allows a man to sell a *Sefer Torah* in order to take a wife who would enable him to fulfill that *mitzvah*.[230] Rabbi Spitz next addressed third party intervention, prime examples of which are found in the Torah. Rabbi Spitz looked at two Biblical analogues — *yibum* (levirate marriage) and *shifhah* (a handmaiden).[231] *Yibum* is akin to sperm donors. The matriarchs, Sarah, Rachel and Leah, each employed a *shifhah* to bear their children. Because those handmaidens were subservient to the matriarchs, it was the latter who gave their children their names.[232] In Biblical families, unlike surrogates today, the *shifhah* was a member of the family and helped to raise the children she had borne.[233]

Rabbi Spitz realized that today sex and procreation through modern techniques are separated, so monogamy would not be an issue. Yet, several similarities between a *shifhah* and a modern surrogate do exist: a *shifhah* was employed as a last resort to ensure transmission of the husband's genetic line. Its use was permitted even though adoption was an option, even in Biblical times. The Torah recognized the role of the intended mother and assigned rights to her,

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229 Spitz, "On the Use of Birth Surrogates", *Op cit.* 535. *"p'ru urvu u'milu et ha'aretz* — be fruitful and multiply and fill up the earth." Gen. 1:28. God promised the Patriarchs that their descendants would be "like stars in the heavens and sands of the sea." *Ibid.*, citing *e.g.*, Gen. 22:17. However, human efforts were required to fulfill God's promise and on more than one occasion, humans were not up to the task. *Ibid.*, citing B.T. *Niddah* 31a. And on more than one occasion, they had to resort to third party intervention. *Ibid.*, citing *e.g.*, Gen. 30:3.

230 B.T. *Megillah* 27a. *"Ein mukhrin sefer torah elah . . . v'lisa ishah* — one may only sell *a Sefer Torah* . . . to take a wife." In support, the Gemara quotes Isaiah 45:18: *"Lo tohu v'ra'a lashevet y'tzarah* — He did not create [the earth] as a void; he formed it for habitation."

231 Spitz, "On the Use of Birth Surrogates", *Op cit.* 536. *See* Gen. 16:2, 30:3. The Torah uses two words for this status, *shifhah* and *amah.* Spitz, "On the Use of Birth Surrogates", *Op cit.* 536 n.42.

232 Spitz, *On the Use of Birth Surrogates, Op cit.* 537.

233 *Ibid.* Rabbi Spitz noted that a *shifhah* was engaged in a polygamous arrangement; subsequently, such arrangements were outlawed by Rabbeinu Gershom's *takkanah* in the 10th century C.E. Spitz, "On the Use of Birth Surrogates", *Op cit.* 537-538.

including the rights to adopt and name. The child was recognized as a descendent of the husband and was permitted full rights of inheritance from him.[234]

Looking at the first directive clause of Genesis 1:28, "*p'ru urvu u'milu et ha'aretz v'khiv'shuha*" — "be fruitful and multiply and fill the earth and conquer it", Rabbi Spitz focused on the word "conquer it", which he said is "a mandate to be God's partner in maintaining and assisting nature."[235] And by that, he meant, the practice of medicine.[236] He acknowedged that while rabbis accept the practice of medicine, they may disagree about its ethical implications.[237] He further noted, as had the RC, that many rabbis have ignored recent scientific data; rather, they focused on extreme theoretical scenarios to register opposition to proposed therapies.[238]

Looking at these ethical and legal objections, Rabbi Spitz noted that private arrangements would not bind a *bet din*, "because traditionally parents do not have the right to independently determine the status of their children."[239] While it is illegal in the United States (and repugnant to the Jewish law) for a mother to receive payment when she gives her child up for adoption, and some states have equated surrogacy to adoption in that connection, nevertheless, Rabbi Spitz noted that there are some significant difference between the two.[240]

In a surrogacy arrangement, the genetic father will be the intended father of the child and both he and his wife accept responsibility for the child from the moment of conception. And there is a smaller potential for duress because the surrogate must have made her decision to give

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234 Spitz, "On the Use of Birth Surrogates", *Op cit.* 537.
235 Spitz, "On the Use of Birth Surrogates", *Op cit.* 540.
236 *Ibid.*
237 Spitz, "On the Use of Birth Surrogates", *Op cit.* 541.
238 *Ibid.*
239 Spitz, "On the Use of Birth Surrogates", *Op cit.* 542.
240 *Ibid.*

up the child before the procedure can be commenced. Moreover, the pregnancy is not unplanned, as it is in many adoption situations.[241] Rabbi Spitz asserted that "the best interests of a child is served if the child is loved, cared for, and nurtured, which has little to do with the manner of conception and gestation."[242] Accordingly, he held that surrogacy is not baby-selling unless there is exploitation.[243]

Rabbi Spitz next considered the issue of *oshek*, here translated as "exploitation", which as he noted, is condemned by Jewish law.[244] Broadly speaking, he asserted that it reflects a moral condemnation against taking advantage one's distress, weakness, or inexperience. According to Rabbi Spitz, some have argued that *oshek* is inherently present in all surrogacy arrangements.[245] He further noted that this was one place where the fears were more theoretical than real.[246] Thus, he concluded that surrogacy is not exploitative and that if one must pay a woman for the use of her womb, "it provides women the opportunity to give the blessing of a child to a couple in need and allows the surrogate to get paid legitimately for her efforts."[247]

Inasmuch as surrogacy is a medical procedure, Rabbi Spitz examined the medical risks. As Rabbis Dorff and Mackler had done in their respective responsa, Rabbi Spitz opened with the

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241 Spitz, "On the Use of Birth Surrogates", *Op cit.* 543.

242 Spitz, "On the Use of Birth Surrogates", *Op cit.* 544.

243 *Ibid.*

244 *Ibid.* This is derived from the Biblical injunction: "*lo ta'ashok et rei'eikha*" — "You shall not defraud your fellow." Lev. 19:13.

245 Spitz, "On the Use of Birth Surrogates", *Op cit.* 544 & n.91.

246 Spitz, "On the Use of Birth Surrogates", *Op cit.* 544-545. Some have equated surrogacy with slavery, but Rabbi Spitz disabuses that notion. He noted that the surrogate makes her choice of her own free will, she may have the right to withdraw, and she is not permanently ceding the use of her womb. Spitz, "On the Use of Birth Surrogates", *Op cit.* 545.

247 Spitz, "On the Use of Birth Surrogates", *Op cit.* 545.

general *halakhic* prohibition against a person risking his or her life without sufficient reason.[248] Some have opposed surrogacy, arguing that because a woman has no *hiyuv* (obligation) to give birth for another woman, she is unreasonably risking her life by doing so.[249] Yet, Rabbi Spitz countered that although a woman has no *hiyuv* to procreate, she does so with the same risk as a surrogate.[250] He concluded that a woman with higher than normal health risks should not be a surrogate and that any surrogate should ensure that she is of sound health.[251]

Rabbi Spitz also looked at the effect of *asmakta*, which he defined for this purpose as meaning the surrogacy contract can be relied upon "only if we can reasonably presume that the intentions of both parties are serious, deliberate, and final."[252] In this context, the question is whether a woman, in fact, can make a final decision to relinquish a child that has not even been conceived at the time of the agreement.[253] He resolved the issue by concluding that an ovum surrogate may withdraw from the agreement prior to the child's birth;[254] however, after birth, it would be assumed that the child goes to the genetic father and his wife. He further asserted that if the surrogate asserted her maternal rights after birth, the burden would be on her to

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248 *Ibid.*, citing B.T. *Hullin* 10a, as well as B.T. *Berakhot* 32b; B.T *Shabbat* 32a; B.T. *Bava Kamma* 15b, 80a, 91b; *Mishneh Torah, Hilkhot Rotzei'ah* 11:4-5; and *Shulhan Arukh*, Y.D. 116:5 (Isserlies Gloss), O.H. 173:2. *See also* Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 495 & n.85 (p. 83, *supra*) and Mackler, "In Vitro Fertilization", *Op cit.* 515 & n.18 (p. 87 *supra*).

249 Spitz, "On the Use of Birth Surrogates", *Op cit.* 545 & n.100.

250 Spitz, "On the Use of Birth Surrogates", *Op cit.* 546. Rabbi Spitz referred to Rabbi Dorff's paper, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 500 and he said that Rabbi Dorff believed that risks are lower than that from kidney donation from a live donor, which is *halakhicly* permitted. Spitz, "On the Use of Birth Surrogates", *Op cit.* 546.

251 Spitz, "On the Use of Birth Surrogates", *Op cit.* 546.

252 Spitz, "On the Use of Birth Surrogates", *Op cit.* 546. *Asmakhtah* literally means "support" and is designed to assure predictability in contractual relations. Spitz, "On the Use of Birth Surrogates", *Op cit.* 547.

253 Spitz, "On the Use of Birth Surrogates", *Op cit.* 546-547.

254 This conclusion would create a problematic situation in secular law, because the genetic father would have the legal obligation of support for the child, which presumably he would not have conceived, but for the agreement of the surrogate to relinquish the child at birth.

demonstrate why the contract should not be enforced.[255]

Next, Rabbi Spitz looked at *davar shelo bo l'olam*, which he said in this context means a contract for something that is not yet in existence.[256] Although surrogacy would be a prime example of this, he concluded, as did the Sages, that such contracts would be valid if they referred to the parties, all of whom existed at the time of contracting.[257] The last issue in this area analyzed by Rabbi Spitz was family integrity. He concluded that not only was there no evidence that a surrogate harmed the family unit, but on the contrary, there was anecdotal evidence that it strengthened the family.[258]

In conclusion, Rabbi Spitz noted the principle of *dina d'malkhuta dina*, so that his conclusions would be subject to any restrictions or prohibitions contained in state or federal laws. However, it was his conclusion that surrogacy is *halakhicly* permitted.[259] One the issue of *p'ru urvu*, he concluded that as it only applied to the male, if his sperm was being used to fertilize the ovum, the *mitzvah* would be satisfied by a child produced through surrogacy[260] And finally, he concluded that an infertile couple was not obligated to hire a surrogate, as it constituted extraordinary means of conception and gestation. A couple would only be required to employ natural means to fulfill the *mitzvah* to procreate.[261]

In a separate *t'shuvah*, Rabbi Mackler took a quite different position on the permissibility

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255 Spitz, "On the Use of Birth Surrogates", *Op cit.* 547.
256 Spitz, "On the Use of Birth Surrogates", *Op cit.* 547, citing *Tosefta Nedarim* 6:7.
257 Spitz, "On the Use of Birth Surrogates", *Op cit.* 547.
258 Spitz, "On the Use of Birth Surrogates", Op cit. 548.
259 Spitz, "On the Use of Birth Surrogates", *Op cit.* 549.
260 *Ibid.*
261 *Ibid.*

of surrogacy than did his colleague, Rabbi Spitz.[262] He agreed with Rabbi Spitz that "the real life experience of an infertile couple, for whom surrogacy could provide a child, bears great weight." Remarking that in a previous responsum he had reflected on the Jewish value of procreation and that such a couple were not required to use modern technologies to produce children, because their value as persons did not depend on their doing so, he concluded that based on the evaluation of all the parties involved, "surrogacy cannot be recommended by halakhah and would be ill-advised in most cases."[263]

Rabbi Mackler began by confirming his prior position that, according to the *halakhah*, maternal identity is determined primarily by gestation and birth.[264] Asserting that a mother's love is a combination of biological, emotional and intellectual responses, he suggested that the Hebrew word for intense love — *raḥamin* — must be related to the word for womb — *reḥem*.[265] And he further argued that Jewish law and ethics would not agree that a gestational surrogate serves merely as an incubator, nor would it refer to her as a "tummy mummy". The baby is in her womb and she is its mother.[266]

Rabbi Mackler's analysis of potential harm and exploitation also differed from the conclusion reached by Rabbi Spitz. Rabbi Mackler's principal concern was for the children,

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262 Rabbi Mackler expressed the hope that his differences with Rabbi Spitz would be in the nature of a *maḥloket l'sheim shamyim* — a disagreement in the name of heaven. Mackler, "Surrogate Parenting", *Op cit.* 552. Both this *t'shuvah* and the one by Rabbi Spitz received only six votes — the minimum number to constitute an official position of the CJLS. Neither responsum garnered even a plurality of votes and Rabbi Mackler's *t'shuvah* actually received more "no" votes than "yes" votes. There is a third paper, Mackler, Aaron, L. & Elie Kaplan Spitz, "On the Use of Birth Surrogates", Responsa 1990-2000, *Op cit.* 526, which clarifies the differences between the two responsa and sets forth guidelines for the Conservative rabbinate.

263 *Ibid.* Rabbi Mackler was referring to his *t'shuvah*, "In Vitro Fertilization" *Op cit.* 510 ff.

264 Mackler, "Surrogate Parenting", *Op cit.* 553. He further noted that this conclusion was the only position on maternal identity approved by the CJLS. *Ibid.*

265 Mackler, "Surrogate Parenting", *Op cit.* 553.

266 *Ibid.*

whom he felt were being treated as commodities, though he would not want harm to befall any of the parties involved.[267] He argued that the lack of litigation commenced by surrogates is misleading because those who are victims of *oshek* were the ones least likely to sue. In sum, he felt that there was not enough data for him to conclude that *oshek* was not a real problem.[268]

While Rabbi Spitz used references to the matriarchs and their *shifhot* as analogous to modern day surrogacy, Rabbi Mackler held that those relationships would not be acceptable today. He asserted that it would be ethically inappropriate to "use people", in part because they are "*b'tzelem elokim*" — created in God's image.[269] He also asserted that *halakhah* had, *de facto*, abolished the use of a *shifha* and *yibum*. Therefore, despite features common to surrogacy, he felt that those procedures raised too many ethical problems in our time.[270]

Even were the problems cited found to be unproven and uncertain, he noted that there remained the question as to how Jewish law should treat them. Rabbi Mackler asserted that "*[s]afek oshek* [a possible exploitation] does not carry the same decisive power as *safek pikuah nefesh* (possible saving of a human life) . . . ."[271] He believed that *halakhah* shares the "'serious reservations'" of the American Fertility Society Ethics Committee and others. Thus, he concluded that "[s]urrogacy cannot be recommended by halakhah, and would be ill-advised in

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267 Mackler, "Surrogate Parenting", *Op cit.* 554. He referred to cases where the parents refused to accept a child, born with birth defects, or of the wrong gender, from a surrogate. Other concerns dealt with the psychological effect on the surrogate's own children. *Ibid.* And then there was the interference in the sexual relatioship between the married surrogate and her husband. Mackler, "Surrogate Parenting", *Op cit.* 554-555.

268 Mackler, "Surrogate Parenting", *Op cit.* 555.

269 *Ibid.*

270 *Ibid.*

271 *Ibid.* Relying on the opinion of the Ethics Committee of the American Fertility Society, Rabbi Mackler believed, as do they, that "potential harms of surrogacy merit great caution, if not rejection". *Ibid.*

most cases."[272]

However, in light of Rabbi Spitz's paper, Rabbi Mackler admitted that it was less clear whether his "reservations are strong enough to support an absolute prohibition of surrogacy in all cases."[273] Therefore, he left a small window where grounds to permit surrogacy might be found in a particular case. In such event, he set forth certain requirements: A couple contemplating surrogacy must undergo counseling and consider other alternatives, including adoption. The decision to proceed must be unanimous. The surrogate would be *halakhicly* recognized to be the child's mother. She would retain the absolute right to contest the assumption of custody, based on the best interests of the child (and local law).

The surrogate must be permitted to consider abortion when that would relieve a serious threat to her health. She must not be paid any amount beyond her expenses, to avoid baby-selling or the purchase and sale of parental relationships. In any such agreement, concern must be given to the rights of the child, as well as to the surrogate's existing children and exploitation of any party must be avoided.[274]

In conclusion, Rabbi Mackler sounded a further note of caution and concern. Because a child born to a Jewish surrogate is *halakhicky* Jewish, it would be problematic to allow such children to be raised as non-Jews, or to limit Jewish surrogacy to Jewish couples. He did not see how *halakhah* could permit either of those alternatives. Moreover, to permit Jewish couples to use non-Jewish surrogates, but not permit the reciprocal opportunity, would bring into question the Jewish commitment to *darkhei shalom*.

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272 Mackler, "Surrogate Parenting", *Op cit.* 556.

273 *Ibid.*

274 Mackler, "Surrogate Parenting", *Op cit.* 556-557.

Embryonic and Fetal Stem Cells

Responsa Committee

During this past decade, many new biomedical techniques have become available. One of those involves the use of human stem cells which might provide treatments for a number of serious or fatal diseases. Stem cells may be taken from aborted fetuses, or from embryos or zygotes created in the laboratory. A rabbi inquired of the RC whether "[a]ccording to Jewish law and tradition, [was] it permissible to utilize human embryos and aborted fetuses in stem cell research?"[275]

The RC began its inquiry by first looking at the science of stem cells. Stem cells are a type of cell that is unique in that it is uncommitted to any specific function and remains so until it receives a signal to develop into a specialized cell. Those stem cells which come from embryonic or fetal tissue are "pluripotent" — they have the capacity to develop into almost all of the more than 200 different known cell types. Adult stem cells lack this capacity.[276] At the time of the responsum, researchers had succeeded in isolating pluripotent stem cells from a 4 to 5 day old human embryo, or blastocyst, and growing them in a laboratory setting.[277]

It was (and is) hoped that diseases which ravage the body by destroying organs and cell

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275 "Human Stem Cell Research, 5761.7".

276 The RC based its scientific description upon the report entitled *Stem Cells: Scientific Progress and Future Research Directions*, prepared by the National Institutes of Health of the U.S. Department of Health and Human Services, June, 2001 (available at www.nih.gov/news/stemcell/scireport.htm), and particularly the report's "Executive Summary," numbered as pp. ES-1 to ES-10. According to that report, embryonic stem cells are derived from a group of cells called the inner cell mass, part of the early embryo, or blastocyst, and fetal stem cells are found in fetal tissue that was destined to be part of the gonads. "Stem Cells", *Op cit.* ES-2. "Human Stem Cell Research", *Op cit.* & n.2.

277 The RC cited Thompson, James A., *et al.*, "Embryonic Stem Cell Lines Derived from Human Blastocysts," *Science* 282 (1998), 1145 ff and Shamblott, M., *et al.*, "Derivation of Pluripotent Stem Cells from Cultured Human Primordial Germ Cells", *Proceedings of the National Academy of Sciences* 95 (1998), 13726 ff. "Human Stem Cell Research", *Op cit.* & n.3.

tissue, such as Parkinson's disease, Alzheimer's disease, diabetes, chronic heart disease, liver failure, cancer, multiple sclerosis, and spinal cord injury, might be cured or controlled by manipulating stem cells to generate new tissue to replace that which the diseases had destroyed. It was (and is) further hoped that it might become possible to create whole organs for use in transplantation, given the ongoing shortage of donor organs available for such a purpose. Finally, it was (and is) hoped that the study of embryonic stem cells would give scientists a better understanding of genetics and human development, including the causes of birth defects, and, thereafter, aid in the effort to correct or prevent them.[278]

To derive fetal stem cells, one must make use of aborted fetuses and to derive embryonic stem cells, one must destroy the embryo.[279] The RC believed that it could not ignore the inherent moral questions,

> "even when that research carries the prospect of important medical breakthroughs. . . . On the contrary: the demand that we behave in an ethical manner, a demand that is central to our concern as religious people, does not cease to apply to us when we enter the laboratory."[280]

Thus, the RC asked:

> "Is this procedure coherent with the duties imposed upon us by our Jewish moral tradition as we Reform Jews best understand it? Are we permitted to abort the human fetus and to destroy the human embryo for the purpose of medical experimentation? If so, are we permitted to create embryos and fetuses intentionally in order to use them subsequently in this manner?"[281]

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278 "Human Stem Cell Research", *Op cit.*

279 The RC specifically concluded that in destroying the embryo, researchers "must kill the human organism at its earliest stage of development." "Human Stem Cell Research", *Op cit.*

280 Human Stem Cell Research", *Op cit.*

281 *Ibid.* In answering those questions, the RC noted that it did not "claim to have resolved all problems with absolute certainty [and] hoped . . . that [its] *teshuvah* [would] suggest a fruitful way for . . . Reform Jews to think and to talk about the moral issues connected with stem cell research". *Ibid.*

In reaching its answer, the RC reiterated that Jewish tradition holds the practice of medicine to be a *mitzvah*, or a religious duty. It noted that although the Torah does not explicitly require the practice of medicine, the Rabbinic Sages deduced from Ex. 21:19 that a physician is permitted to do so, but they did not hold that this verse obligated him to do so.[282] It was post-talmudic authorities, such as *Ramban*, who wrote that the "permission" is in fact a *mitzvah*[283], because medicine falls under the category of *pikuah nefesh*, the saving of life, an act that takes priority over virtually all the other religious obligations set forth in the Torah.[284] According to the RC, that conclusion reflected the predominant[285] Jewish attitude toward the practice of medicine. Thus, "'when one who delays in [healing the sick], it is as if he has shed blood.'"[286] According to the RC, "medicine" today is a scientific discipline,

> "defined by the canons and practices of a scientific community. Among these canons and practices is the insistence that medicine is an *experimental* science,

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[282] B.T. *Bava Kama* 85a, a *midrash* on *rapo yirapei*. *See also* Maimonides in his *Commentary to the Mishnah* [*Nedarim* 4:4], who decides that medicine is a *mitzvah* from Deuteronomy 22:2, s.v. *vahashevoto lo*, which B.T. *Sanhedrin* 73a reads as implying a duty to rescue. To him, medicine is an obligatory, rather than merely a permitted, practice. "Human Stem Cell Research", *Op cit.* & nn.5-6.

[283] . "Human Stem Cell Research", *Op cit.* & n.7, citing *Torat Ha'adam*, H.D. Chavel, ed., Mosad Harav Kook, Jerusalem, 1964, 41-42.

[284] The RC cited for the positive duty to save the lives of those in danger as being derived from Lev. 19:16: "*lo ta'amod al dam rei'ekha*" — "do not stand idly by the blood of your fellow" and also B.T. *Sanhedrin* 73a; Mishneh Torah, *Hilkhot Rotzei'ah* 1:14; and the *Shulhan Arukh*, H.M. 426. For the conclusion that this obligation outweighs virtually all other duties imposed by the Torah, the RC cited B.T. *Yoma* 85b, from a *midrash* on Lev. 18:5; also Mishneh Torah, *Yesodei Hatorah* 5:1 and *Shulhan Arukh* Y.D. 157:1. Even though the Talmud does not explicitly identify medicine with *pikuah nefesh*, *Ramban* noted that the *halakhic* literature requires that the laws of *Shabbat* and *Yom Kippur* be set aside when, in the opinion of a physician, their observance would endanger life, citing M. *Yoma* 8:5-6 and B.T. *Yoma* 83b. The RC directed us to *Shulhan Arukh,* O.H. 328-329, 618, where these rules are summarized. *See also Arba Turim* and *Shulhan Arukh*, Y.D. 336:1. "Human Stem Cell Research", Op cit. nn.8-9.

[285] The RC noted that one stream of thought in the classical and medieval Jewish texts condemns the practice of medicine as an affront to God's sovereignty and a lack of faith in God's power to heal, citing a discussion in its responsum, "Physicians and Indigent Patients" 5754.18, in Teshuvot for the Nineties, *Op cit.* 373-374 & n.1-6. The RC also noted that this position was rejected by mainstream *halakhic* authorities, citing "Physicians and Indigent Patients" *Op cit.* & nn.7-9. "Human Stem Cell Research", *Op cit.* n.10.

[286] "Human Stem Cell Research", *Op cit.*, quoting from *Shulhan Arukh*, Y.D. 336.1.

founded upon extensive, carefully controlled laboratory and field research."[287] According to the RC, the scientist who tests and develops a therapy is engaged in the *mitzvah* of healing, just as is the physician who administers that therapy to the patient.

However, the RC cautioned that the commandment to save a life reflects the tradition's demand that life be respected and honored, which carries with it a limitation upon medical practice. Thus, one is not allowed to commit murder, even if it will lead to healing for another.[288] According to the RC, this idea is linked in our classical texts to the concept of "*yehareg ve'al ya'avor*" — "One must submit to death rather than violate this prohibition".[289] And so, this leads to the RC's conclusion that while under certain carefully specified conditions, it is morally permissible to conduct medical experimentation upon human subjects, one is forbidden to sacrifice his or her the life, for murder may not be used as a means of healing.[290]

The RC then asked if this prohibition against murder, which would protect an infant only one day-old,[291] would apply as well to the human organism in its prenatal stage, because if it did, stem cell research could not be deemed moral under Jewish law. Moreover, it continued, even if the destruction of a fetus or embryo did not constitute murder under Jewish law, one could not *ipso facto* conclude that it would be "permitted." It asserted that the principle of "respect for

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287 "Human Stem Cell Research", *Op cit.* On the attitude of Reform Judaism toward science and its procedures, the RC referred us to its prior responsum, "Compulsory Immunization" 5759.10, section 3, "A Note on Scientific Evidence." "Human Stem Cell Research", *Op cit.* n.12

288 "We may do anything in order to heal disease, provided that we do not violate thereby the prohibitions against idolatry, sexual immorality, or murder", citing B.T. *Pesahim* 25a-b; Mishneh Torah, *Yesodei Hatorah* 5:6. According to the RC, "Sexual immorality" is traditionally identified by the list of prohibited acts of intercourse in Lev. 18. "Human Stem Cell Research, *Op cit.* n.14.

289 B.T. *Sanhedrin* 74a-b. "Human Stem Cell Research", *Op cit.* n.15.

290 "Testing Emergency Medical Procedures Without the Consent of the Patient" 5755.11, in Teshuvot for the Nineties,*Op cit.* 381-389. "Human Stem Cell Research", *Op cit.* n.16.

291 M. *Niddah* 5:3; Mishneh Torah, *Hilkhot Rotzei'ah* 2:6. "Human Stem Cell Research", Op cit. n.17.

human life" is a general moral commitment to the sanctity of human life and that, at some ascertainable point, a human life is protected from another's power to control, manipulate, or destroy.[292]

Accordingly, the RC turned its attention to the status of the prenatal human organism. It asked, whether and under what circumstances might one destroy a prenatal human organism for the advancement of medicine and, ultimately, the goal of *pikuah nefesh.* The RC had to determine whether the fetus and the embryo possessed a status that is legally inferior to that of a day-old infant. If that status could be determined to be inferior, then the RC might concede that, under certain circumstances, it would be morally justifiable to allow the embryo's destruction for the sake of medical research.[293]

According to the RC, the traditional Jewish discussion of the status of the fetus customarily begins with the following:

> "If a woman experiences life-threatening difficulty giving birth, the fetus is dismembered in her womb and removed limb from limb, for her life comes before its life [*mipnei shechayeha kodmin lechayav*]. Once the major part of [the fetus] has emerged, it may not be harmed, for one person [*nefesh*] is not sacrificed on behalf of another."[294]

The RC read this text as clearly requiring abortion in such a case, but noted that post-talmudic authorities had disagreed as to the basis for the ruling. Maimonides saw the fetus as a "*rodef*" — a "pursuer" — that threatened the life of the mother and who, like all pursuers, may be killed if

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292 "Human Stem Cell Research", *Op cit.* n.18.

293 "Human Stem Cell Research", *Op cit.*

294 M. *Ohalot* 7:6. Some texts, including the printed version of B.T. *Sanhedrin* 72b and *Rashi* s.v. *yatza rosho,* read "*rosho*" — "its head", in place of "*rubo*" — "the major part of it". "Human Stem Cell Research", Op cit. & n.19.

necessary to save its victim from death.[295] *Rashi*, on the other hand, wrote that so long as the fetus had not emerged from the womb, it was not a "*nefesh*" — a full legal person, and its mother's life took precedence over its own.[296] Once emerged, it acquired the status of a *nefesh* and "one *nefesh* is not sacrificed on behalf of another."[297]

Rashi, the RC concluded, provided the better and more coherent reading of the *Mishnah*.[298] It asserted that as Jewish law did not regard the fetus as a *nefesh*, the killing of a fetus would not be considered or punished as an act of murder under the *halakhah*.[299] And since the fetus possessed an inferior legal status to that of its mother, according to the RC, a number of *halakhic* authorities would permit abortions in situations where the mother's life was not endangered by the birth of the child, but where the abortion would be necessary for her physical or mental health.[300]

The RC acknowledged that although a fetus did not qualify as a *nefesh*, the *halakhah* nonetheless accorded it a high degree of protection. The RC noted that Jewish law prohibits

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295 Mishneh Torah, *Hilkhot Rotzei'ah* 1:9. On the law of the *rodef*, which the Rabbis derive from Lev. 19:16, see M. *Sanhedrin* 8:7 and B.T. *Sanhedrin* 73a. "Human Stem Cell Research", Op cit. & n.20.

296 B.T. *Sanhedrin* 72b, s.v. *yatza rosho*. "Human Stem Cell Research", Op cit. & n.21.

297 *Ibid.*

298 The RC asserted that *Rashi* had the better interpretation because it fit with the *Mishnah*'s use of the word *nefesh* to describe the infant upon its emergence from the womb, but not prior to that point. It argued that *Rambam*'s *rodef* explanation, although followed by many traditional Jews, was difficult to understand because if it were permissible to destroy a fetus because its birth endangered its mother's life, why would we not be able to destroy it after its head, or major part, had emerged from the womb, when it continued to endanger her life. Therefore, it believed that the distinction must be based upon a difference in status between fetus and its mother. *See* "Abortion to Save Siblings from Suffering" 5755.13, in Teshuvot for the Nineties, *Op cit.* 171-176. "Human Stem Cell Research", *Op cit.* n.22.

299 "Human Stem Cell Research", *Op cit.* n.23, citing M. *Niddah* 5:3 and its Talmudic commentary on Lev. 24:17, B.T. *Niddah* 44b, .

300 These are discussed in "Abortion to Save Siblings from Suffering" 5755.13, *Op cit.* 171-176. "Human Stem Cell Research", *Op cit.* n.23.

feticide in the absence of serious cause.[301] Yet, it also noted that the laws of *pikuah nefesh* might be applied to a fetus; thus, one would be required to violate the laws of *Shabbat* or *Yom Kippur* if necessary to save its life.[302] According to the RC, "the fetus . . . is a *potential* person, a '*nefesh* in becoming,' so that 'we violate one Sabbath on its behalf so that it may one day keep many Sabbaths.'"[303] A fetus may occupy a lower legal status than other human beings, but according to the RC, it *is* a human being".[304]

Because a fetus is not a *nefesh* and because its mother's life and health take precedence over it's own life, the RC was confident that it could permit abortion in circumstances other than mortal danger to her. Yet, as a "potential *nefesh*," it condoned abortion only for truly weighty justifications; "we do not encourage abortion, nor favor it for trivial reasons, nor sanction it 'on

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301 The RC cited Avraham, A.S., Nishmat Avraham Vol. 3, 220-222, for a summary of views. It noted that "most Orthodox *poskim* during the preceding century and more have taken the position that abortion is forbidden *de'oraita*, as a matter of Torah law, [while o]thers, saw the prohibition as *d'rabbanan*, based upon Rabbinic law." "Human Stem Cell Research", *Op cit.* n.25. The RC also asserted that regarding the definition of the "serious cause" that might override it, "those authorities who follow Maimonides' line of reasoning tend to restrict abortion to cases in which the mother's life is endangered by the birth of the fetus, defined as a *rodef*." "Human Stem Cell Research", *Op cit.* n.26.

302 In a long footnote, the RC noted that this "is a complicated yet vitally important point of *halakhah*". It referred to B.T. *Arakhin* 7a-7b, where the *gemara* "reported in the name of *Shmuel* that when a woman dies during labor on *Shabbat* a knife may be carried through the public thoroughfare [an otherwise prohibited act] in order to cut open her womb and save the fetus." It noted that this statement was cited as *halakhah* in the Mishneh Torah, *Hilkhot Shabbat* 2:15, and in the *Shulhan Arukh*, O.H. 330:5. Moreover, it noted that an 8th-century Geonic text had extended this provision to earlier stages of the pregnancy. *Halakhot Gedolot*, ed. Hildesheimer, 319; Venice ed., 31c. *Ramban* observed that this permit to violate the *Yom Kippur* prohibitions applies when the fetus, and not necessarily the mother, is endangered by fasting. "'Even though the laws of *pikuah nefesh* do not in principle apply to the fetus [for the fetus is not a *nefesh* at all], we set aside the laws of *Shabbat* and *Yom Kippur* in order that it may survive to perform *mitzvot* in the future.'" *Ramban* stressed that we are obliged to override the laws of *Shabbat* and *Yom Kippur* even on behalf of the fetus that is less than forty days old, "when it possesses no vitality (*hayut*) at all". *Torat Ha'adam*, *Op cit.* 28-29. The RC also noted that not all *Rishonim* [early authorities] agreed with *Ramban*'s interpretation. "Human Stem Cell Research", *Op cit.* n.27.

303 The RC referred to B.T. *Yoma* 85b and B.T. *Shabbat* 151b, on Ex. 31:16: "the Israelites shall keep the Sabbath...throughout their generations as an everlasting covenant". Although those references apply that *midrash* to *nefashot* and not to a fetus *in utero*, *Ramban* extended the rule "we violate one Sabbath on its behalf" to a fetus. *See Torat Ha`adam*, 29. "Human Stem Cell Research", *Op cit.* n.28.

304 "Human Stem Cell Research", *Op cit.*

demand.'"[305] Thus, the RC has held that abortion should *not* be performed for reasons other than "serious maternal anguish," — a real set of difficulties faced by a particular woman.[306]

The destruction of fetal life for any other reason would stand in direct conflict with the RC's commitment to the sanctity of that life. Therefore abortion for the purpose of harvesting fetal tissue for use in medical experimentation, even though the goal of that experimentation is the advancement of science toward new life-saving therapies would not be sanctioned by the RC.[307] On the other hand, if a pregnancy had been terminated for a reason that the RC would regard as morally sufficient, it would permit the use of the aborted fetus in medical experimentation, because it had long approved of autopsies for scientifically valid purposes.[308] The use of fetal tissue and organs would qualify for the RC's approval, so long as the research was not the actual motivation for the abortion.[309]

Having examined the sources dealing with a fetus, the RC then turned its attention to the legal status of the embryo — a fertilized egg that does not reside *in utero*. Because it believed that the classical sources did not envision the possibility that a human embryo might exist and develop in a petri dish, the RC wondered how they could speak to its legal status. On the other hand, those sources did discuss the fetus at its earliest stages of development. The Talmud states that prior to its fortieth day of gestation the fetus, lacking form, is to be regarded as "*maya*

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305 "Human Stem Cell Research", *Op cit.* n.27, citing "When is Abortion Permitted?", in Contemporary American Reform Responsa, No. 16, (January, 1985), *Op cit.* 27.

306 "Human Stem Cell Research", *Op cit.* n.31, citing "Abortion to Save Siblings from Suffering" 5755.13, *Op cit.* 176.

307 "Human Stem Cell Research", *Op cit.*

308 "Human Stem Cell Research", Op cit. n.32, citing Lauterbach, Jacob, Z., "Autopsy", in American Reform Responsa, No. 82, (1925), *Op cit.* 278 ff; *Rabbi's Manual*, CCAR Press, New York,1988, 247.

309 "Human Stem Cell Research", *Op cit.*

be'alma" — "mere water".[310] Thus, it noted that some hold that "'when an abortion is indicated for medical reasons, it is best to perform it prior to the fortieth day of gestation. The law is much more lenient at that point inasmuch as the fetus prior to forty days is *maya be'alma*.'"[311]

That abortion might be permissible under some circumstances prior to the fortieth day did not mean to the RC that it could not be prohibited at all.[312] However, the fortieth day distinction did indicate to the Committee that a human organism at this earliest stage of its development possessed a lesser legal status than that possessed at a later stage and, in turn, suggested that it exercised a lesser claim to protection.[313]

Applying this lesser status to an embryo, the RC asked if one was "permitted to violate the laws of *Shabbat* if . . . necessary to 'save' the embryo and to allow it to continue its development in the petri dish."[314] The RC cited a responsum by R. Shmuel Halevy Wasner that one was required to violate *Shabbat* for a fetus, and, apparently, even for a fetus prior to the fortieth day, but not for an embryo that had not yet been implanted into the womb.[315] The RC posited that if one was not required to protect the embryo from death, *halakhah* might not

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310 B.T. *Yevamot* 69b. The RC noted that this designation is not based upon scientific observation as it understood that term today. "Human Stem Cell Research", Op cit. n.33.

311 "Human Stem Cell Research", *Op cit.* n.35, citing *Resp. Tzitz Eliezer* 7:48, ch. 1, *Op cit.*. 190-191 (R. Eliezer Yehudah Waldenberg). The RC also cites *Resp. Chavat Ya'ir*, no. 31 (R. Ya'akov Emden); *Resp. Achiezer* 3:65 (R. Chaim Ozer Grodzinsky) ; and *Resp. Seridey Esh* 3:127, 341 (R. Yechiel Ya'akov Weinberg).

312 "Human Stem Cell Research", *Op cit.* n.36, citing *Resp. Iggerot Moshe*, H.M. 2:69 (R. Moshe Feinstein).

313 "Human Stem Cell Research", *Op cit.*

314 *Ibid.*

315 "Human Stem Cell Research", *Op cit., citing Resp. Shevet Halevy* 5:47. "Human Stem Cell Research", *Op cit.* n.38. Rabbi Wasner reasoned that the law of *pikuah nefesh* was applicable to a fetus, because most fetuses would survive, be born, and become *nefashot*. In Jewish ritual terms, such a fetus would likely become a *ben mitzvah*, a person subject to the obligations of Torah; accordingly, the principle "we violate one Sabbath on its behalf so that it may one day keep many Sabbaths" would apply. He was unable to say that most embryos would "likely" develop into *nefashot*, because they were not implanted in the womb — a minimum qualification. The embryo, therefore, possessed a legal status inferior to that of the fetus and, so, according to the RC, Jewish law imposed no positive duty to "save" its life. *Ibid.*

explicitly prohibit, and might even permit, its destruction.

The RC cited as an example, the procedure of in vitro fertilization (IVF), which requires the creation of many more embryos than can be implanted into the womb of the woman who donated the eggs or of a "host mother." The RC relied on two leading contemporary *halakhists*, who had held that one was permitted to discard excess embryos, since there was no possibility they would become *nefashot*, because there had been no intention to implant them in a womb.[316] The RC (and CJLS) had previously reached a similar conclusion.[317] The RC held that it was permissible to destroy excess embryos for two reasons[318] and, therefore, it concluded that embryos may be utilized in human stem cell research, a conclusion shared by other leading scholars in the field of Jewish medical law and ethics.[319]

The RC then looked at the issue of whether embryos might be created for the sole purpose of medical research. Positing an argument in favor of an affirmative answer, the RC made an analogy to excess embryos created during the IVF process. However, with IVF, one did

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316 "Human Stem Cell Research", *Op cit.* n.40, citing *Sefer Assia* 8 (1995), 3-4 (R. Chaim David Halevy), and *Techumin* 11 (1991), 272-273 (R. Mordekhai Eliahu). The latter held that it was forbidden to destroy embryos that were intended for implantation and that one may discard only those embryos that would not be implanted and, therefore, have no possibility of further development. *Ibid.*

317 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.*

318 First, the RC accepted the Jewish legal doctrine of the *nefesh* — that the human organism did not become a full legal person until birth. Excess embryos, unlike a fetus or an embryo that was intended for implantation, had no possibility to become a *nefesh*. While the RC would not condone the wanton destruction of embryos, it would permit their destruction for causes of lesser gravity than in the case of abortion. Second, discarding excess embryos was an important element of IVF and made possible the fulfillment of the *mitzvot* of healing and procreation. Moreover, the RC had extended this permit to cover medical experimentation. If one was permitted to destroy excess embryos, the RC concluded that one might use them in experimentation aimed at the advancement of medicine, to the fulfillment of the *mitzvah* of *pikuah nefesh*. . "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* "Human Stem Cell Research", *Op cit.* & nn. 41-43.

319 The RC cited the testimony of Rabbi Elliot Dorff and Rabbi Moshe Dovid Tendler in National Bioethics Advisory Commission, *Ethical Issues in Human Stem Cell Research: Volume Three, Religious Perspectives* (June, 2000, Rockville MD), available at www.bioethics.gov/reports/past_commissions/nbac_stemcell3.pdf. "Human Stem Cell Research", *Op cit.* & n.44.

not create excess embryos with the explicit intention to destroy them; the excess embryos were the necessary and unavoidable by-product of the procedure. The RC had permitted those excess embryos to be discarded, not because of their "inferior" legal status, but because one had no choice except to discard them. And since they were to be destroyed, it found it acceptable that such destruction be accomplished for research that might lead to the discovery of life-saving therapies. However, by granting such permission, the RC did not inevitably require the conclusion that "one may create human embryos *explicitly in order to* destroy them, even for medical purposes".[320]

The RC then posited that if the *mitzvah* of *pikuah nefesh* overrides virtually all other religious and moral obligations imposed in the Jewish tradition, then surely it must justify the creation and destruction of a human embryo in pursuit of that *mitzvah*. According to the RC, this established a mathematical argument which assigned relative values to a human organism at different stages of its development, imagining a conflict between the life of a *nefesh* and the life of an embryo, which the *nefesh* automatically would win. The RC believed that this approach totally ignored the moral values inherent even in a "*nefesh* in becoming".[321] It did not mince its words:

> "Although the fertilized egg may be called an 'embryo,' a 'zygote,' or a 'blastocyst', these labels can mask the fact that we have here a human *being*, an organism that contains all the genetic material that would, under the proper conditions, develop into a full legal person."[322]

As a leading medical text quoted by the RC, states: "The time of fertilization represents

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320 "Human Stem Cell Research", *Op cit.* (Emphasis in original).

321 *Ibid.*

322 *Ibid.* (Emphasis in original).

the starting point in the life history, or ontogeny, of the individual."[323] Thus, to the RC, an embryo may not have attained the status of a *nefesh*, and its unjustified termination may not be defined as "murder", but it is a human being, and is entitled to the sanctity of all human life.[324]

Because a fetus is not classified as a *nefesh*, one would be permitted to make the otherwise unjustifiable decision to sacrifice its life on behalf of the life, health, or extreme anguish of its mother, but that decision would be made in light of the actual and direct danger that the continuation of the pregnancy poses to a specific woman. As the RC held, however, a fetus's lower status would not justify its destruction for the sake of medical research that *might* yield results that *might* be helpful to some as-yet unknown persons in the distant future.[325]

The RC believed that the same considerations applied to an embryo. A zygote's status under Jewish law may be lower even than that of a fetus; for this reason, the RC could countenance the destruction of excess embryos created as part of the IVF procedure and their use in medical research. However, it would not accept that this lower status would permit the creation of embryos for no other purpose than to destroy them in furtherance of research that might well not lead to therapeutic benefits for some unknown person in an uncertain future. Such permission would stretch the definitions of *pikuah nefesh* and *refuah* beyond plausible

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[323] *Ibid.*, citing Carlson, Bruce M., Patten's Foundations of Embryology, McGraw-Hill, New York, 1996, 3.

[324] "Human Stem Cell Research", *Op cit.* In its most minimal definition, according to the RC, sanctity requires the recognition that human life is at some point inviolate, that it lies beyond human reach and manipulation and that this is the single greatest moral distinction between human and all other forms of life. The RC found no reason to assume that this awe and reverence for human life did not apply to human life even at the embryonic stage, for even there, there exists the supreme potential for humanity. On the other hand, The RC acknowledged that animals can be brought into the world with the express purpose of being killed to serve human purposes. *Ibid.*

[325] "Human Stem Cell Research", *Op cit.* Although not cited as such, this conclusion seems to have applied the principle of *l'faneinu*, that the person to benefit be in existence and close at hand, from the 18th century responsum on autopsy, *Noda B'Yehuda* Y.D. no. 210 (R. Ezekiel Landau).

boundaries and, indeed, would be incompatible with the RC's commitment to the sanctity that exists within those embryonic human lives.[326]

The RC emphasized that its decision was made in light of the current scientific situation. The question before the committee dealt with a research protocol that might some day lead to discoveries that would offer therapeutic benefit to actual patients. Because any such benefit was many steps and, possibly, many years removed from medical reality, the RC did not consider the research to be *pikuah nefesh*. However, were that reality to change — specifically, were science to develop from stem cell research real therapies to treat life-threatening illnesses like those mentioned at the outset of this responsum — then the Committee's answer might well be altered. Then, the RC might conclude, for two reasons, that the need to derive the necessary stem cell material overrides its concern for the life of an embryo: first, because there is no Jewish legal prohibition against the destruction of an embryo; and second, because the real prospect that this material would provide therapeutic benefit to an actual patient would definitely qualify the therapy as *pikuah nefesh*. The RC acknowledged that this matter would require further careful study, not only by itself, but by all who were concerned with Torah and its application to the fateful moral choices that we are called upon to make.[327]

In conclusion, the RC held that

> 1. The practice of medicine is a *mitzvah*, partaking of the duty to save life. Because medicine is an experimental science, the *mitzvah* of medical practice includes medical research as well as the direct treatment of patients. For this reason, we are encouraged by the dramatic therapeutic prospects offered by research into human stem cells.

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326 *Ibid.*

327 *Ibid.*

2. All human life, including prenatal human life, possesses an inherent sanctity that requires our respect and honor and that conflicts with the demand that we destroy it for our own purposes, even medical purposes.

3. The fetus is not a *nefesh*. Abortion is therefore permitted for reason of the life or health of the mother. It is *not* permitted in order to obtain fetal tissue for medical research. The tissue of fetuses that have been aborted for morally justifiable causes, however, may be utilized in that research.

4. The legal status of the embryo that exists outside the womb is inferior to that of the fetus. There is no duty to save it from death, nor is there an explicit prohibition against its destruction. For this reason, it is permissible to discard the excess embryos created as part of the procedure of in vitro fertilization and, by extension, to use them for purposes of stem cell research. It is permissible for scientists to make use of the already existing lines of stem cells in possession of scientists.

5. It is not permissible to create embryonic human life for the purpose of destroying it in medical experimentation. It *might* be permissible, however, to create and destroy embryonic human life in order to derive stem cell material that would be used as medical therapy for actual patients.[328]

Committee on Jewish Law and Standards

Two questions were posed to the CJLS:

1. May embryonic stem cells from frozen embryos originally created for purposes of procreation or embryonic germ cells from aborted fetuses be used for research?

and

2. May embryonic stem cells from embryos created specifically for research, either by combining donate sperm and eggs in a petri dish or by cloning be used for research?[329]

Rabbi Dorff began his *t'shuvah* by looking at the nature of stem cells, and why scientists have an interest in researching them. His response was to quote from a document issued in May, 2000 by

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328 "Human Stem Cell Research", *Op cit.*

329 Dorff, Elliot N., "Stem Cell Research" Y.D. 336.2002, 1.

the Director of the National Institutes of Health entitled "Stem Cells: A Primer."[330] As did the RC, Rabbi Dorff looked at the differences between "adult" stem cells and "embryonic" stem cells.[331]

Rabbi Dorff then reviewed the potential uses of stem cells, which included learning about cell specialization, developing and testing drugs more safely and efficiently, and developing cell therapies.[332] He then looked at the potential sources of embryonic stem and germ cells, which he found to be aborted fetuses,[333] frozen embryos destined to be discarded,[334] stem cell "farms", which are supplies of cells donated specifically for research and not overcoming infertility,[335] somatic nuclear cell transfer, where a nucleus is removed from an egg and a somatic sell is fused with it,[336] extraction of a cell from an embryo, as is done for preimplantation genetic diagnosis ("PIGD"),[337] or the use of an egg cell alone.[338]

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330 *Ibid,* citing "Stem Cells: A Primer,. National Institutes of Health", May 2000, pp. 1-2, found at . http://www.nih.gov/news/stemcelll/primer.htm.

331 He also noted that scientists were interested in Embryonic Germ Cells, which he defined as "cells from the gonadal ridge in the early embryo that in the process of the fetus' development are set aside and protected from maturing. They migrate through the fetus to the ovary or testes, where they form the egg and sperm cells. If removed from the fetus and grown in culture, they behave much like embryonic stem cells."
Dorff, "Stem Cell Research", *Op cit.*, 2.

332 Dorff, "Stem Cell Research", *Op cit.* 2-4.

333 Dorff, "Stem Cell Research", *Op cit.* 4-5.

334 Dorff, "Stem Cell Research", *Op cit.* 5-6.

335 Dorff, "Stem Cell Research", *Op cit.* 6.

336 Dorff, "Stem Cell Research", *Op cit.* 6-7. As of the date of the *t'shuvah*, this was still a theoretical method; no stem cells had been produced in that manner. Dorff, "Stem Cell Research", *Op cit.* 7

337 Dorff, "Stem Cell Research", *Op cit.* 7. One cell of an eight cell blastocyst is removed. The other seven cells are capable of forming an entire human being once implanted in a womb. This, too, was but a theoretical possibility at the time of the *t'shuvah*. *Ibid.*

338 Dorff, "Stem Cell Research", *Op cit.* 7. By shooting an electric stream through an egg, the egg can be fooled into thinking that it has been fertilized, and it will begin to produce a blastocyst. However, there is no possibility that it will produce a human being, because unless it has been fertilized by a sperm, the blastocyst dies within a few days. Nevertheless, during the brief time it exists, the blastocyst created in this manner can create a line of embryonic stem cells. *Ibid.*

Having dispensed with the preliminaries, Rabbi Dorff then looked at theological issues.[339] Rabbi Dorff asserted that

> "no legal theory that ignores the theological convictions of Judaism is adequate to the task, for such theories lead to blind legalism without a sense of the law's context or purpose. Conversely, no theology that ignores Jewish law can speak authoritatively for the Jewish tradition, for Judaism places great trust in law as a means to discriminate moral differences in similar cases, thus giving us moral guidance."[340]

Thus, he affirmed that his responsum would draw both on theological and legal sources.

A primary tenant is that "our bodies belong to God; we have them on loan during our lease on life. God, as owner of our bodies, can and does impose conditions on our use of our bodies."[341] Among those conditions is the requirement that humans seek to preserve human life and health. Thus, humans also have a duty to seek to develop new cures for their diseases. Rabbi Dorff asserted that this includes developing and using any therapies that can aid in taking care of our bodies and the fact that human beings created a specific therapy, rather than finding it in nature, does not make that therapy an illegitimate one. At the same time he reaffirmed that all human beings, regardless of ability, or disability, are created in the image of God and must be valued as such.[342]

However, Rabbi Dorff reminded us that humans are not God and so, one must take whatever precautions necessary to ensure that his or her actions do not harm himself or herself

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339 Dorff, "Stem Cell Research", Op cit. 7. For more on these and other fundamental assumptions of Jewish medical ethics, and for the Jewish sources that express these convictions, Rabbi Dorff directed us to Dorff, Elliot N., Matters of Life and Death: A Jewish Approach to Modern Medical Ethics, Jewish Publication Society, Philadelphia, 1998, Chapter 2. Dorff, "Stem Cell Research", Op cit. 7 n.9.

340 Dorff, "Stem Cell Research", Op cit. 7.

341 *Ibid.*

342 Dorff, "Stem Cell Research", Op cit. 7-8.

or the world in the very effort to improve them.[343] Finally, Rabbi Dorff noted that animals, too, are part of God's world and, as much as possible, deserve to be protected from pain whenever humans interact with them (*tza'ar ba'alei hayyim*). However, as only human beings, are created in the image of God, "we may and should use animals for medical research before we experiment on human beings".[344]

Rabbi Dorff then turned to Jewish views on genetic materials. He noted that because human embryonic germ cells are procured from aborted fetuses, the status of abortion immediately presents itself. During the greater part of gestation — specifically from the 41st day until birth — the Rabbis classify the fetus as "the thigh of its mother"[345] He asserted that the law prevents humans from amputating their thigh at will, because one is forbidden to inflict injuries on himself or herself.[346] On the other hand, if the thigh were to turn gangrenous, according to Rabbi Dorff's view, then one has the positive duty to have that thigh amputated in order to save his or her life. He then quoted from the CSLS' official position on abortion:

> "Jewish tradition is sensitive to the sanctity of life, and does not permit abortion on demand. However, it sanctions abortion under some circumstances because it

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343 Dorff, "Stem Cell Research", *Op cit.* 8.

344 *Ibid.* Rabbi Dorff also noted that
"[b]ecause the Jewish tradition requires it and because the research methods scientists use demand it as well, this responsum will assume that scientists have done all their initial experiments of any proposed therapy on animals and turn to using human cells only when they have learned all they can from animal experiments and when those experiments suggest good reasons to hope that the therapy will work in humans."
Ibid.

345 Dorff, "Stem Cell Research" *Op cit.* 8 & n.11, citing B.T. *Hullin* 58a: "*rabi eliezer savar ubar yerekh imo hu v'rabi y'hoshu'a savar ubar lav yerekh imo hu*" — "Rabbi Eliezer holds that a fetus is the thigh of its mother and Rabbi Joshua holds that a fetus is not the thigh of its mother"; B.T. *Sanhedrin* 80b, where the position that the fetus is the thigh of its mother is just assumed; and elsewhere, *e.g.*, B.T. *Gittin* 23b and B.T. *Bava Kamma* 78b.

346 Dorff, "Stem Cell Research", Op cit. 8 & n.12, citing M. *Bava Kamma* 8:6.

> does not regard the fetus as an autonomous person. This is based partly on the Bible (Exodus 21:22-23), which prescribes monetary damages where a person injures a pregnant woman, causing a miscarriage. The Mishnah (*Ohalot* 7:6) explicitly indicates that one is to abort a fetus if the continuation of pregnancy might imperil the life of the mother. Later authorities have differed as to how far we might go in defining the peril to the mother in order to justify an abortion. The Rabbinical Assembly Committee on Jewish Law and Standards takes the view that an abortion is justifiable if a continuation of pregnancy might cause the mother severe physical or psychological harm, or when the fetus is judged by competent medical opinion as severely defective. The fetus is a life in the process of development, and the decision to abort it should never be taken lightly. Before reaching her final decision, the mother should consult with the father, other members of her family, her physician, her spiritual leader and any other person who can help her in assessing the many grave legal and moral issues involved."[347]

Therefore, he concluded that if a fetus had been aborted for legitimate reasons under Jewish law, then the aborted fetus may be used to advance our efforts to preserve the life and health of others. He also noted that Jews are urged to make their organs available for transplant to enable other people to live.[348] Thus, he contended if humans may and even should use the bodies of human beings to enable others to live, *kal vahomer* — all the more so — that humans use a part of a body — the fetus — for that purpose.[349]

According to Rabbi Dorff, the Jewish law of abortion is more restrictive than American and Canadian law. He acknowledged that some North American Jews abort their fetuses for reasons not justified by Jewish law. And although in North America, one would presume that the majority of aborted fetuses are not Jewish, Rabbi Dorff contended that the Rabbis understood the

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[347] Dorff, "Stem Cell Research", Op cit. 9 & n.13, quoting from Bokser, Ben Zion & Kassel Abelson, "A Statement on the Permissibility of Abortion", in CJLS Proceedings 1980-1985, *Op cit.* 37.

[348] "Dorff, "Stem Cell Research", *Op cit.* 9, citing Matters of Life and Death, *Op cit.* Chapter 9 and Prouser, Joesph., "*Hesed* or *Hiyuv*? The Obligation to Preserve Life and the Question of Post-Mortem Organ Donation" [YD 336.1995], in Responsa 1990-2000, *Op cit.* 175 ff. According to Rabbi Prouser's *t'shuvah*, post-mortem donation of vital organs and tissue constitutes *pikuah nefesh* and is obligatory, rather than optional.

[349] "Stem Cell Research", *Op cit.* 10.

Noahide laws, given to all descendants of Noah, to forbid abortion altogether or, according to another opinion, to allow it only if the mother's life is at stake.[350]

Does research using embryonic stem cells from aborted fetuses constitute a *mitzvah ha-ba'a b'aveirah* — a commanded act accomplished through a sin — so that it would be forbidden to use the materials themselves? According to Rabbi Dorff, the Talmud, restricts that construction to prohibiting those individuals who committed a wrongful act from benefitting from it. After the fact, the Talmud specifically permits the community to benefit from such a sin in performing a commanded act of its own, a *mitzvah d'rabbim*.[351] Thus even if Jewish law would not condone the particular abortion, once it has been done, Rabbi Dorff asserted that we may use the aborted fetus for a sacred purpose like curing diseases and saving lives.[352]

Rabbi Dorff noted that using aborted fetuses to do research is not as directly and clearly permitted as using them for then existing cures themselves,[353] but since aborted fetuses would otherwise just be discarded or buried, he concluded that we may and should extend the permission to use them for research that holds out the hope for curing diseases and saving lives. According to Rabbi Dorff, what the Talmud states and what Rabbi J. David Bleich recognized is

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350 Dorff, "Stem Cell Research", *Op cit.* 8 & n.15, citing B.T. *Sanhedrin* 57b; Mishneh Torah, *Hilkhot Melakhim u'Milhamoteihem* 9:4. Rabbi Dorff noted that another view is that this extension of the *Noahide* laws was intended, on the contrary, as a protest against the widespread Roman practice of abortion and infanticide. He cited Jakobovits, Immanuel, Jewish Medical Ethics, Bloch Publishing Co., New York, 1959, 181, based on Weiss, *Dor Dor Ve-Dorshav* 2:22. But he also noted that this creates a problem, because elsewhere, the Talmud stated that *Noahide* laws may not be more stringent than Jewish law, citing B.T. *Sanhedrin* 59a. To resolve this dilemma, Rabbi Dorff noted that *Tosafot* seek to show that *Noahides* may also avail themselves of the permission in Jewish law to abort to save the mother's life or health; *Tosafot* to B.T. *Sanhedrin* 59a, s.v. *leika.*

351 Dorff, "Stem Cell Research", *Op cit.* 9-10, & n.16, citing B.T. *Berakhot* 47b and B.T. *Gittin* 38b.

352 Dorff, "Stem Cell Research", *Op cit.* 10.

353 In this statement, Rabbi Dorff appears to be referring to the principle of *l'fanienu*, derived from Rabbu Landau's responsum on autopsy, *Noda B'Yehudah* Y.D. No. 210, but it is apparent he is not keen on applying it here, or to the creation of embryos specifically for research. *See* note 374, *infra.*

that t he results of a prohibited act may be used for sacred purposes without in any way condoning the prohibited act.[354]

Thus, Rabbi Dorff held that if a fetus was aborted in accordance with the dictates of Jewish law, humans clearly have the right to use it for research purposes. And even if it was not aborted for reasons sanctioned by Jewish law, he held that there are sufficient grounds in Jewish law to permit using it for research intended to produce cures for human ailments.[355] Rabbi Dorff noted that because stem cells for research purposes can be procured from sperm and eggs mixed together in a petri dish and cultured, in light of the controversy over abortion, scientists would have a greater interest in stem cells from frozen embryos created by infertile couples using the IVF process. He then addressed the status of such early embryos in Jewish law.[356]

Rabbi Dorff referred to the Talmudic rule that "during the first forty days of gestation, the

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354 Dorff, "Stem Cell Research", *op cit.* 10 & n.17. Rabbi Dorff noted that even Rabbi J. David Bleich, who objects to federal funding of research on fetal tissue lest that encourage abortion, permits using organ tissue obtained from a homicide victim because "'[u]tilization of the body of the victim for scientific purposes could not conceivably be construed as an endorsement of the antecedent homicide'". He also permits the use of scientific data obtained through immoral experimentation, as in the case of the Nazi experiments. See Bleich, J. David, Contemporary Halakhic Problems, Ktav and Yeshiva University Press, New York, 1995, Vol. iv, 171-202 and 218-236. Rabbi Dorff also noted that another Orthodox *posek*, Rabbi Moshe Tendler, in his testimony to the National Bioethics Advisory Commission, invoked a different source to justify the use of aborted fetuses — *Mishneh Torah, Hilkhot Kilayim* 9:3. Thus, even though biblical law prohibits cross-breeding of any two species of animal, such as a horse and a donkey, the product of such an illicit mating, the mule, may be used for the benefit of the owner, even though a biblical prohibition was transgressed. Tendler, Moshe David, "Stem Cell Research and Therapy: A Judeo-Biblical Perspective", in *Ethical Issues in Human Stem Cell Research*, vol. III: *Religious Perspectives* (Rockville, MD: National Bioethics Advisory Commission, June, 2000), p. H-4. On the other hand, Rabbi Dorff also noted that Rabbi Avram Reisner had concluded that the laws of cross-breeding were treated by *Rashi* and other authorities as a special case and could not legitimately be extended to other areas of the law. Reisner, Avram, "Curiouser and Curiouser: Genetic Engineering in Nonhuman Life", in Mackler, Aaron L., ed. Life and Death Responsibilities in Jewish Biomedical Ethics, Jewish Theological Seminary of America, New York, 2000, 506-522. Dorff, "Stem Cell Research", *op cit.* 10 & n.17.

355 Dorff, "Stem Cell Research", *Op cit.* 10.

356 "Stem Cell Research", *Op cit.* 10.

embryo is "*maya b'alma*" — "simply water"[357] Today, however, we understand that the fertilized egg cell has all the DNA it requires to produce a human being, so Rabbi Dorff emphasized that humans must respect human embryos (and sperm and eggs), as the building blocks of human procreation.[358] He posed the following question:

> "even if we may ultimately use embryonic stem cells for research, what level of respect should we ascribe to them, especially those outside the womb where they have no potential for becoming a human being, and how should that level of respect find expression in action?".[359]

One view that he rejected was that since sources were silent about embryos existing outside the womb, and since no law existed on that subject, humans may do with those embryos whatever one wished. Instead, he posited that where no precedents on point exist, decisors should seek to apply foundational Jewish concepts and values.[360] Moreover, he contended that when past rulings did not seem to give moral or legal direction, identifying Jewish concepts and values that could reasonably apply to the situation at hand would be the proper method to apply, for it had the advantage of enabling the tradition to speak to new circumstances in a way that, while not a direct conclusion from the tradition, was strongly rooted in it.[361]

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[357] *Ibid.* & n.18, citing B.T. *Yevamot* 69b. Rabbi Dorff supplied other sources for this forty day time frame, *e.g.*, M. *Niddah* 3:2; M. *Niddah* 3:7. In addition, he noted that *Rambam*, who was a physician, had said that even on the forty-first day the figure of a human being is "'very thin'", and that within forty days "'its shape is not yet finished'". Mishneh Torah, "*Hilkhot Issurei Bi'ah*" 10:2. And the *Shulhan Arukh* specifies that it is a vain prayer (*tefillat shav*) if a man prays after the fortieth day that his pregnant wife be carrying a boy, for by the forty-first day the gender of the child had already been determined.. O.H. 230:1. But Rabbi Dorff also noted that M. *Berakhot* 9:2, on which this is based, does not mention the limitation to the period after forty days. "Stem Cell Research", *Op cit.* 10 & nn.19-22.

[358] "Stem Cell Research", *Op cit.* 10. Rabbi Dorff noted that this is generally understood to entail a ban on abortion except for therapeutic purposes even during the first forty days. *Ibid.*

[359] "Stem Cell Research", *Op cit.* 10.

[360] "Stem Cell Research", *Op cit.* 10-11. Rabbi Dorff noted in passing that determining whether or not existing precedents are relevant is also a matter of judgment. "Stem Cell Research", *Op cit.* 11.

[361] "Stem Cell Research", *Op cit.* 11. For a more complete review of the methodologies, Rabbi Dorff referred us to Matters of Life and Death: A Jewish Approach to Modern Medical Ethics, *Op cit.* Appendix. *Ibid.* n.24.

Rabbi Dorff concluded that the *talmudic* classification of a fetus in the uterus up to forty days of gestation as "simply water" is useful in assessing the status of a fetus existing outside the womb, provided that view is not undermined by modern science. If the *talmudic* view was only outdated science, Rabbi Dorff asserted that he could not reasonably rely on that precedent.[362] Fortunately, according to Rabbi Dorff, modern science supports the *talmudic* understanding. He referred to Rabbi Immanuel Jakobovits, who noted that the

> "forty days is, by our obstetrical count, approximately fifty-six days, for the Rabbis counted from the woman's first missed menstrual flow, while doctors today count from the point of conception, which is usually about two weeks earlier."[363]

Rabbi Dorff noted that at 56 days of gestation by obstetrical count, the basic organs have already appeared in the fetus. Moreover, he noted, that we now know that it is exactly at eight weeks of gestation that the fetus begins to get bone structure and therefore looks like something other than liquid.[364] Rabbi Dorff surmised that "the Rabbis probably came to their conclusion about the stages of development of the fetus because early miscarriages indeed looked like 'merely water,' while those from 56 days on looked like a thigh with flesh and bones."[365] After all, "even the Rabbis who proclaimed the embryo in the first forty days to be 'simply water' clearly . . . knew that from that water a child might develop, unlike any glass of drinking

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362 "Stem Cell Research", *Op cit.* 11.

363 Jakobovits, Jewish Medical Ethics, *Op cit.* 275, contains his estimation that forty days in Rabbinic counting amounts to just under two months in modern obstetrical count. "Stem Cell Research", *Op cit.* 11 & n.25.

364 In an interesting aside, Rabbi Dorff noted that the forty day marker came originally from Aristotle, and it was adopted by Augustine and Aquinas. Moreover, he noted, the Catholic Church itself did not hold that a fertilized egg immediately became a person until 1869, at the First Vatican Council and that change did not occur in Canon Law until 1917. "Stem Cell Research", *Op cit.* 11 n.26.

365 "Stem Cell Research", *Op cit.* 11.

water!"[366]

Rabbi Dorff asserted that an embryo situated outside a woman's womb, where it can never become a human being, even with current technology, is at most "simply water". Therefore, he concluded that when a couple agrees to donate embryos for medical research, respect for those embryos must be superceded by one's duty to seek a cure for disease.[367] Although he wondered what would happen if humans could gestate a human being entirely outside a woman's womb in some sort of machine, he concluded that such machines were not likely to be available for a long time.[368]

Rabbi Dorff was careful to note that his argument that an embryo is less than a person was based upon the characteristics of the early embryo itself.[369] He concluded that frozen embryos originally created for purposes of overcoming infertility but which were no longer intended to be used for that purpose may be discarded, or used for good purposes, such as the production of stem cells for medical research. Rabbi Dorff further asserted that couples should be encouraged to donate their extra embryos and any fetuses that they abort to such efforts. He believed that donating such materials for purposes of research is minimally an act of *hesed*, and

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366 *Ibid.*

367 *Ibid.* Rabbi Dorff reiterated that in such circumstances, we were not killing a human being, as we would be if we were to remove a person's heart before death; but were only taking a part of an object that had not yet achieved the status of a formed fetus, let alone a human being. *Ibid.*

368 "Stem Cell Research", *Op cit.* 11.

369 Dorff, "Stem Cell Research", *Op cit.* 12. Rabbi Dorff explained that scientists only are able to use embryos during the first fourteen days of gestation to procure stem cells, at which time the neural streak appears. During that early period, the embryo in a petri dish is characterized by its low level of cell organization, the short period of time that it will remain in this state, and its incapacity to live on its own. Thus if there existed good scientific reasons support the talmudic precedent, Rabbi Dorff concluded that an embryo of or less than fourteen days of gestation is can be justifiably classified as "mere water", even it were it within a woman's uterus. *Ibid.*

possibly, even a *mitzvah*.[370]

Regarding the creation of embryos specifically for medical research, Rabbi Dorff agreed that the justification of using materials that would just be discarded anyway was not apposite; however, he concluded that creating embryos specifically for research is nevertheless permissible under one condition.[371] Procuring eggs from a woman for that purpose uses drugs to produce hyperovulation, and there is some evidence that repeated use of such drugs increases a woman's risk of ovarian cancer and other maladies. Rabbi Dorff noted that such risks may be undertaken to overcome a woman's own infertility, and he had previously held it was permissible for a woman to donate eggs once or twice to infertile couples.[372] Although exposing women to such risks for medical research is less warranted, Rabbi Dorff believed that the demonstrated risks are minimal for one or two cycles, especially if she had been pre-screened and deemed safe to undergo the procedure, and so, he held that a woman may donate eggs for this purpose with those

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[370] Dorff, "Stem Cell Research", *Op cit.* 12. Rabbi Dorff did not contend that men or women have a duty to donate their sperm or eggs for this purpose. *Ibid.* Moreover, Rabbi Dorff assumed that the donors are not compensated financially. As Rabbi Joel Roth noted in his *t'shuvah* on kidney donation, Roth, Joel, "Organ Donation: Parts I-IV", in Responsa 1991-2000, *Op cit.* 309-314, monetary compensation for organs raises *halakhic* problems and although stem cells have developed even less toward human status than a full organ, according to Rabbi Dorff, Rabbi Roth's difficulties and arguments in that regard would, apply to stem cells as well. Dorff, "Stem Cell Research", *Op cit.* 12 & n.27.

[371] Dorff, "Stem Cell Research", *Op cit.* 12. Rabbi Dorff noted that it would not amount to murder to destroy an embryo outside the uterus, but classical Jewish law forbids "wasting seed" (*hashatat zera*). *See* Gen. 38:8-10. Rabbi Dorff also noted that the Mishnah and *Talmud* forbid a man from touching his penis lest he induce it to become hard and ejaculate, citing B.T. *Niddah* 13a-b, and that later Jewish sources use the phrase *hashatat zera*, citing, *Tosafot* on B.T. *Yevamot* 12b, s.v. *shalosh nashim mishm'ut b'mokh* and B.T. *Ketubot* 39a, s.v *shalosh nashim m'shamshu b'tokh*; *Shulhan Arukh*, E.H. 23. Dorff, "Stem Cell Research", *Op cit.* 12 n.29. Rabbi Dorff argued that procuring the sperm for this purpose through masturbation would not constitute "wasting seed" for here the purpose of masturbating would be specifically to use the man's semen for the consecrated purpose of finding ways to heal illnesses. Dorff, "Stem Cell Research", *Op cit.* 12-13.

[372] Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 500. *See also* Dorff, Elliot N., "Artificial Insemination, Egg Donation, and Adoption," *Conservative Judaism* 49:1 (Fall, 1996), pp. 48-50; reprinted in Life and Death Responsibilities in Jewish Biomedical Ethics, *Op cit.* 81-84, and in Matters of Life and Death: A Jewish Approach to Modern Medical Ethics, *Op cit.* 106-107. Dorff, "Stem Cell Research", *Op cit.* 13 & n.31.

limitations.[373]

Rabbi Dorff also dealt with two other objections to creating embryos intentionally for research — that the embryo is potential life, and that this procedure creates a slippery slope and that human creation will lose its mystery and holiness.[374] In response, Rabbi Dorff asserted that with an embryo in a petri dish, one is balancing a potential life against the probability of actual treatments for serious diseases. In addition, he asserted that those embryos were being employed in "another holy cause" — curing serious diseases, so it would not demean the birth process in any way.[375]

Looking at other potential methods for obtaining fetal stem cells, Rabbi Dorff noted that obtaining those cells by removing a single cell from an embryo was without *halakhic* or medical problems. The embryo itself is at most "simply water" and the embryo from which the cell was taken can still develop normally after implantation in a woman's womb.[376] Cloning, on the other hand, raised significant challenges for him. He contended that in this case, one was dealing with therapeutic cloning and with cells or, at most, organs, which may be discarded, if necessary, in the process of perfecting the technique. If and when perfected, he contended that this method should have priority as the source of stem cells for cures since it produces tissues from the patient

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373 Dorff, "Stem Cell Research", *Op cit.* 13. He also noted that the same concerns about the risks in procuring human eggs and limitations on the donation would apply to using eggs to obtain stem cells from cloning procedures or from parthenogenesis. *Ibid.* This issue was not raised by the RC, although a previous rsponsum had noted the medical risks of such medications. "The Fertility Pill" No. 44, in Reform Responsa for Our Time, *Op cit.* 209-211.

374 A third possible objection had been alluded to earlier, that of the lack of direct connection to an existing patient and potential therapy. *See* note 353, *supra.* Rabbi Dorff seems to have subsumed the *l'faneinu* principle in his balancing of potential life against the probability of a therapy for an existing patient and concluded that the balance fell in favor of finding the therapy.

375 Dorff, "Stem Cell Research", *Op cit.* 13-14.

376 *Ibid.*

himself / herself and thus does not pose the problems of recipient rejection. He cautioned, however, that cloning may be used only for therapeutic, and not for reproductive, purposes.[377]

Along those same lines, Rabbi Dorff expounded on the issues of the communal responsibility for health care[378] and the distinction between the use of technology for cure, and the use of technology for enhancement. With respect to the latter, he believed there must be a "clear line", even though he asserted that "enhancement and therapy do not present a neat and clear dichotomy; they rather lie on a spectrum, where the ends are easy to define but the middle is murkier."[379] Rabbi Dorff noted that people's expectations continually change as medicine develops and, therefore, what appears to be enhancement today may look like therapy tomorrow.[380]

Summing up, Rabbi Dorff held that we both may and should take the steps necessary to advance stem cell research and its applications. Human beings have a duty to heal and, as a corollary, to develop means to heal. Genetic materials, including embryos, lack the status of a

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377 Dorff, "Stem Cell Research", *Op cit.* 14 & n.32. Rabbi Dorff noted that the same day that the CJLS approved this responsum (March 13, 2002), the Union of Orthodox Jewish Congregations of America and the Rabbinical Council of America approved this same position — opposing reproductive cloning but supporting therapeutic cloning, citing Cooperman, Alan, "Jewish Groups Back Therapeutic Cloning: Orthodox Leaders Break with the Right," *The Washington Post*, March 13, 2002, A04. *Ibid.*

378 Dorff, "Stem Cell Research", *Op cit.* 14. According to Rabbi Dorff, Jewish tradition sees the provision of health care as a communal responsibility. At the same time, he acknowledged that Jewish tradition does not demand socialism, and the United States has adopted a modified capitalistic system. He concluded that it would be necessary to balance access to applications of the new technology with the legitimate right of a private company to make a profit on its efforts to develop and market applications of stem cell research. On Judaism's view on communal responsibilities in the distribution of health care, Rabbi Dorff referred us to Dorff, Elliot N. & Aaron L. Mackler, "Responsibilities for the Provision of Health Care," in Life and Death Responsibilities in Jewish Biomedical Ethics, *Op cit.* 479-505, and to Matters of Life and Death: A Jewish Approach to Modern Medical Ethics, *Op cit.* Chapter Twelve. *Ibid.*

379 Dorff, "Stem Cell Research", *Op cit.* 14. As an example of the opposite ends, Rabbi Dorff suggested that research in ways to cure cancer, neurological diseases, etc., is clearly therapeutic; Jews, who have been the brunt of campaigns of eugenics, are especially sensitive to creating a model human being that is to be replicated in our time and in times to come. *Ibid.* & n.35.

380 Dorff, "Stem Cell Research", *Op cit.* 15.

person or even part of a person within the womb, and outside the womb they certainly are not entitled to any greater protection than those which reside within a womb. Nevertheless, embryos and even gametes themselves deserve our respect, for they have the potential to become human beings.[381]

In accordance with Jewish law, stem cells may be procured from all of the following sources, ranging from the most desirable to the least desirable: a. Aborted fetuses. b. Frozen embryos originally created for overcoming infertility which the couple has now decided to discard but has agreed to donate for stem cell research instead. c. A cell taken from an embryo and grown independently. d. Embryos created specifically for medical research by combining sperm and eggs donated for that purpose, by cloning (SCNT), or by parthenogenesis.[382]

Rabbi Dorff concluded that humans should also pursue healing methods that can be developed from adult stem cells, but such efforts must neither replace, nor impede, attempts to develop healing methods from embryonic stem cells. The pursuit of this research, must ensure that its applications are available to all who need it. Rabbi Dorff limited his responsum only to stem cell research conducted for purposes of curing diseases. [383]

Thus, Rabbi Dorff's answer to question 1 was "yes."

> "After scientists have accomplished all that they can toward a given goal through animal experiments, (1) human embryonic germ cells from aborted fetuses and embryonic stem cells from (2) frozen human embryos originally created for purposes of procreation not only may, but should be aggressively used for research into creating cures for a number of human diseases."[384]

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381 Dorff, "Stem Cell Research", *Op cit.* 15.
382 Dorff, "Stem Cell Research", *Op cit.* 15-16.
383 Dorff, "Stem Cell Research", *Op cit.* 16.
384 Dorff, "Stem Cell Research", *Op cit.* 16.

And his answer to question 2 was also "yes."

> "Embryonic stem cells from embryos created specifically for research, either by (3) combining donated sperm and eggs in a petri dish, (4) by cloning, or (5) by extracting a cell from an early embryo, may also be used for research to provide therapies for diseases, but only if the woman donating the eggs does so only once or twice and is pre-screened to avoid undue risks to her own health."[385]

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385 *Ibid.*

Analysis and Conclusion

As Rabbi Elliot Dorff, the current chair of the CJLS, has written: "Rabbinic sources, after all, did not contemplate the realities of modern medicine; nor, for that matter, did American legal sources as late as the 1940s."[1] Consequently, Jewish legal sources began to address modern medical techniques and procedures a little more than half a century ago. And given the rapid increase in biomedical knowledge and practice during that time, it is not surprising that "second looks" at the procedures reviewed in this paper may have utilized different approaches, or may, in fact, have differed from those originally published. As Rabbi Alexander Guttmann wrote almost 60 years ago:

> "I do not claim that the last word has been said on artificial insemination and 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."[2]

Due to the inherent difficulties in comparing earlier responsa with later ones when the medical landscape had become more developed and refined, I have evaluated the responsa on three subjects at the beginning of life — artificial insemination, egg donation and IVF; surrogacy; and stem cells — as a unit only where necessary.

At first blush, it is easy to see why Rabbi Walter Jacob believed that there might a basis for joint meetings, if not joint *t'shuvot*, of the RC and the CJLS. The *t'shuvot* on artificial insemination, in vitro fertilization, surrogacy and embryonic stem cell research reached essentially the same conclusion on the overriding issues, whether the inquiry was addressed to

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[1] Dorff, Elliot, N., Matters of Life and Death: A Jewish Approach to Modern Medical Ethics, *Op cit.* 412, reprinted in Dorff, Elliot N., ed., The Unfolding Tradition: Jewish Law after Sinai, *Op cit.* 350.

[2] Guttmann, Alexander, "Artificial Insemination", *Op cit.*, 504.

the RC, or to the CJLS.[3] Moreover, on most of the minor issues subsumed within those overriding issues, both committees were in substantial agreement as well.

The basic approach to *halakhic* decision making by both the RC and the CJLS in addressing those biomedical issues was quite similar. To a very great extent both committees utilized the same classical and modern sources in analyzing the factual situation raised by their respective inquiries. But a closer analysis exposed a few significant differences, some arising from the nature of the two committees themselves and some from other factors.

First, there is an apparent difference between the committees in the manner in which they viewed the usefulness of prior rabbinic sources which they believed might have had some relevance to the issues reviewed in this paper. Although Rabbi Freehof, in his responsum, seemed to accept those classical sources as a basis for his conclusion,[4] Rabbi Guttmann found them to be wholly inapposite, because those "Talmudic and Rabbinic sources do not discuss, nor even mention, artificial insemination as understood (and practiced) in our day. . . ."[5] Therefore, he concluded that "[i]t is hardly possible to draw safe conclusions from the theoretical accidental insemination found in Jewish sources to the artificial insemination of our day."[6]

In its responsum on IVF, written 45 years after Rabbi Guttmann's paper, the RC expressed its discomfort over the fact that while *Rambam*'s scientific judgment may have been

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3 Both committees held that Artificial Insemination, In Vitro Fertilization and Surrogacy were permissible techniques for overcoming infertility and that it was permissible to use embryonic stem cells for research.

4 "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 analogies to artificial insemination . . . ." Freehof, "Artificial Insemination", *Op cit.*, 501.

5 Guttmann, "Artificial Insemination", *Op cit.*, 501.

6 Guttmann, "Artificial Insemination", *Op cit.*, 504.

accurate as of the twelfth century, it certainly was no longer accurate at the time of the responsum.[7] As a result, it argued that decisors ought to employ the "best science available, rather than enslave [their] scientific judgments to standards which science itself has long since abandoned."[8] It went so far as to argue that *halakhic* reasoning by analogy was "ill-equipped" to deal with modern scientific innovation, for

> "there may simply be no precedents or source materials in talmudic literature that offer plausible guidance to us in making decisions about these contemporary scientific and medical issues."[9]

Therefore, it concluded that

> "given [the RC's] positive attitude as liberal Jews towards modernity in general, it is surely appropriate to rely on the findings of modern science rather than upon tenuous analogies from traditional sources to render what we must consider to be *scientific* judgments."[10]

Looking at most of those same classical sources, the CJLS was similarly discomfited. It acknowledged that

> "the first three sources are all rulings after the fact [*b'di'evad*] of insemination. Using them for rulings of artificial insemination, then, whether such rulings be stringent or lenient, will require [us] to ignore this disanalogy. . . . Moreover, the first three sources discussed in this section, the one's that explicitly contemplate the possibility of artificial insemination, are so unlike the contemporary conditions in which the question of the permissibility of artificial insemination arises that one wonders whether they can seriously serve as a legal resource for our questions."[11]

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7 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 2.

8 *Ibid.*

9 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 3.

10 *Ibid.* This position follows from the RC chair's declaration that Reform decisors "follow the lead of Maimonides and other great theorists of Jewish law who hold that the correct halakhic ruling is not determined by the weight of precedent, but by the scholar's honest and independent interpretation of the sources." Washofsky, *Introduction,* Teshuvot for the Nineties, *Op cit.* xxviii.

11 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 467.

Nevertheless, Rabbi Dorff, writing for the CJLS, did employ those sources as *halakhic* precedents. From those sources, the CJLS was willing to accept that there existed in the *halakhah*, the possibility of conception without intercourse, that artificial insemination did not lead to adultery or incest,[12] and did not support illegitimacy (*mamser*), and that the sperm donor would be the legal, as well as the biological, father.[13] Thus, while questioning the relevance of the traditional rabbinic sources, the CJLS would not discard them in their entirety as being "tenuous analogies from traditional sources [used to support] *scientific* judgments."[14]

The current chair of the CJLS has written that

> "Judaism has historically depended upon a judicial mode for resolving moral quandaries, blending exegeses of the Torah and later rabbinic literature, precedents and customs to arrive at a decision. Accordingly, almost all Jews who have written about biomedical issues in our day have used Jewish legal sources primarily, if not exclusively."[15]

Rabbi Dorff observed that it is difficult to apply legal sources to biomedical issues for there is but a paucity of such sources. As a result, he found it "surprising that there are any precedents whatsoever on many of the subjects that currently concern us."[16] And when there are such precedents, he observed that there are "difficulties in applying them to contemporary

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12 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 465-466.

13 *Ibid.*

14 *See* "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 3.

15 Dorff, Elliot, N., Matters of Life and Death: A Jewish Approach to Modern Medical Ethics, Jewish Publication Society, 1998, Appendix — The Philosophical Foundations of My Approach to Biomedical Ethics, 405, reprinted in Dorff, Elliot N., ed., The Unfolding Tradition: Jewish Law after Sinai, Aviv Press, New York, 2005, 344. Much, though not all, of what follows regarding the use of *halakhic* precedents to resolve contemporary biomedical issues, was written by Rabbi Dorff for his *t'shuvah*: "A Jewish Approach to End-Stage Medical Care", in CJLS Proceedings 1986-1990, 65 ff, and particularly, 67-77.

16 Matters of Life and Death, *Op cit.* 408; reprinted in The Unfolding Tradition, *Op cit.* 347. (Emphasis in original).

circumstances."[17]

By framing the issue of IVF, not with reference to the act — conception without intercourse — but with reference to the intended objective — here, the treatment of the disease of infertility,[18] the RC was able to utilize traditional rabbinic sources in a way that made sense to it in this modern context.[19] Because the CJLS and the Conservative Movement view themselves as bound to (and by) the *halakhah*,[20] the CJLS appears more willing to accommodate earlier rabbinic rulings in some fashion.

Rabbi Dorff utilized a distinction posited by Ronald Dworkin — the difference between rules, on the one hand, and principles and policies, on the other. According to this view:

> "Rules are norms to which there are no exceptions; they must either be followed at all times or they must be changed. If rules conflict with each other, the conflict must be resolved by a higher-order rule specifically created to govern the authority and application of rules. A principle or policy . . . is a general guideline, set for either moral reasons (our "principles") or pragmatic ones (our "policies"), which can admit of exceptions when weighed against other moral or practical concerns."[21]

Rabbi Dorff believed that what many Jews think of as "rules" in the *halakhah* are really

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17 *Ibid.*

18 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1 & n.2.

19 As the current RC chair has also written: "As an expression of our identification with the Jewish heritage, we seek to uphold traditional halakhic approaches whenever fitting. But we reserve for ourselves the right to judge the degree of 'fit.'" Washofsky, *Introduction*, in Plaut & Washofsky, Teshuvot for the Nineties, *Op cit.* xxix.

20 "All of us . . . are committed to the indispensability of Halakhah for authentic Jewish living." *Emet Ve'Emunah*, *Op cit.* 24. *See also* Waxman, Mordecai, ed., Tradition and Change — The Development of Conservative Judaism, Burning Bush Press, New York 1958, 20; Dorff, Elliot N., Contemporary Judaism: Our Ancestors to Our Descendants, United Synagogue of Conservative Judaism, New York 1996, 49 ("*Conservative Judaism requires observance of the laws of classical Judaism . . . .*") (Emphasis in original).

21 Matters of Life and Death, Op cit. 408-409; reprinted in The Unfolding Tradition, *Op cit.* 347.

"principles" or "policies".[22] Accordingly, he asserted that decisors

> "must interpret Judaism's general rules as policies, not inviolable rules; that even general policies must be applied with sensitivity to the contexts of specific cases; and that [they] must nevertheless maintain a legal method in making [their] legal decisions [in] apply[ing] Judaism to modern medicine."[23]

Returning to the issue at hand, applying ancient precedents to modern medical science, he noted that "depending on laws and precedents from times past to arrive at decisions about contemporary medical therapies all too often amounts to sheer sophistry."[24] He further acknowledges that manipulating the text to mean what a decisor wants it to mean is, in another form, the legal method. Stretching precedents to make them relevant is necessary to "retain continuity and authority in current decisions."[25] So,

> "if a decision is going to be *Jewish* in some recognizable way, it *must* invoke the tradition in a serious, not perfunctory way. One *can* do this without being devious or anachronistic *if one does not pretend that one's own interpretation is its originally intended meaning (its* peshat*) or its only possible reading.*"[26]

The manner in which the decisor framed the issue(s) presented, at least with respect to those issues explored in this paper, accounts for a proportion of the real or apparent differences between the RC and the CJLS. For example, the RC framed the issues arising from IVF in terms

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22 As an example, he posits that we are taught (and the Orthodox responsa stress) that life is sacred and Jews must preserve even small moments of it (*hayyei sha'ah*). Yet, there are places in the Torah that command Jews to take a life (execution, or to kill a *rodef* – one pursuing another with the intent to kill him) and other places where Jews are required to sacrifice their own lives (rather than murder, submit to idolatry or incest). Thus, the commandment "*lo tirtzah*" — "you shall not murder" — and *hayyei sha'ah*, according to Rabbi Dorff, are really principles to preserve life, and not rules. Matters of Life and Death, *Op cit.* 409-410; reprinted in The Unfolding Tradition, Op cit. 348.

23 Matters of Life and Death, *Op cit.* 412, reprinted in The Unfolding Tradition, *Op cit.* 349-350.

24 Matters of Life and Death, *Op cit.* 412-413; reprinted in The Unfolding Tradition, *Op cit.* 350.

25 Matters of Life and Death, *Op cit.* 413; reprinted in The Unfolding Tradition, *Op cit.* 350.

26 *Ibid.*

of the practice of medicine.[27] Because the RC chose to approach the question in this manner, it was necessary that it decide the following questions: whether infertility was a disease, whether IVF was a medical treatment for that disease and, ultimately, whether IVF was *r'fuah b'dukah* — a tested and proven treatment.[28] Because the RC had determined that, at the time of its responsum, IVF was not a tested and proven therapy, it concluded that infertile couples were not required to make use of it.[29]

The CJLS also concluded that infertile couples were not required use IVF, or egg donors (an issue not presented to, or raised by, the RC[30] in connection with the IVF *she'ela*), but reached that conclusion through a different route. For the CJLS, the issue of *p'ru urvu* was a principal pivot point. Because the CJLS concluded, as did the RC, that if the male partner was medically unable to procreate, he would not be required to do so. And because he was not required to procreate in such circumstance, the CJLS concluded that the male partner and his wife were not required to utilize IVF (or an egg donor).[31] Thus, while reaching the same ultimate conclusion — IVF was not required — the CJLS never touched the issue of *r'fuah b'dukah* and the RC did not

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27 *Ibid.*

28 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1; "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 3.

29 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 3 & n.39. In his *t'shuvah* on artificial insemination for the CJLS, Rabbi Dorff did, in fact, note the success rate (or lack thereof) as one of the reasons why infertile couples had no obligation to employ modern technology. Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 469.

30 However, there was a much older Reform responsum on egg donation. "The Transplanted Ovum", in Freehof, Solomon B., New Reform Responsa, HUC Press, 1980, 213 ff. Rabbi Freehof based his analysis on the responsa he and Rabbi Guttmann had written on artificial insemination. "The Transplanted Ovum", *Op cit.* 214. He concluded that the procedure is valid and the child is to be considered the offspring of the married couple — the woman who carried the child to term and the man whose sperm was used to fertilize the donated egg. "The Transplanted Ovum", *Op cit.* 217-218

31 Mackler, "In Vitro Fertilization", *Op cit.* 515. Rabbi Mackler also relied on (and cited) Rabbi Dorff's *t'shuvah* on artificial insemination. *See* Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 473.

utilize the *mitzvah* of *p'ru urvu* to resolve the issue of *hovah*, even though it, too, had concluded that this *mitzvah* was not required of one unable to perform it.[32]

On the other hand, the RC noted in its responsum that given its commitment to gender equality, with respect to *p'ru urvu*, it would apply the same requirements to men and women alike.[33] In supporting this statement, the RC noted that some authorities "hold that women do partake in a related requirement, derived from Isaiah 45:18 (*lashevet yetzarah*)".[34] The CJLS did not address this possibility.

Although the discussion is not as clear in the RC responsa as one might like,[35] it appears as though both committees do not view artificial insemination as "wasting seed", for as the CJLS *t'shuvah* states: "producing semen for the for the specific purpose of procreating cannot plausibly be called wasting it . . . ."[36] Both committees also agreed on several other issues, such as lack of moral objection[37] to those reproductive techniques, that there existed a demographic reason to consider employing them,[38] that Jews should extend their compassion to those suffering from

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32 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 2.

33 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 1-2. *See also* Gates of Mitzvah, A-1, 11: "it is a *mitzvah* for a man and a woman, recognizing the sanctity of life and the sanctity of the marriage partnership, to bring children into the world."

34 "created for habitation" — God created the world for us to populate. "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 1. In an extensive footnote, the RC traced the derivation of this requirement. *Ibid.* n.14.

35 Guttmann, "Artificial Insemination", *Op cit.*, 504.

36 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 472, 500; *see also* Mackler, "In Vitro Fertilization", *Op cit.* 515.

37 Such as adultery, illegitimacy and incest.

38 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 2; Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 492-493.

fertility problems,[39] the legal status of an embryo less than forty days after fertilization[40], and that it was permissible to dispose of "excess" embryos created during these procedures.[41]

However, in the artificial insemination / IVF responsa there were two areas where the RC and the CJLS differed because the RC had not taken up those issues — personal status and pre-implantation genetic diagnosis ("PIGD")[42] — and one issue where there was a clear difference of opinion — parental status, particularly that of the mother. In the former case, the CJLS recognized that one needed to know whether the donor had been a *Kohein*, *Levi*, or *Yisrael*, because the child would adopt his biological father's status.[43] On the other hand, the child will use the Hebrew name of his adoptive father.[44]

As for PIGD, which the RC did not discuss, the CJLS believed that there was a relationship between allowing PIGD for a prenatal diagnosis and permitting the abortion of a

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39 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 4; Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 493-494.

40 Both the RC and the CJLS agree that, like a fetus of that age, an embryo is, at most, *maya b'alma.* "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1; Mackler, "In Vitro Fertilization", *Op cit.* 520 n.42.

41 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 1; *see* Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 498; Mackler, "In Vitro Fertilization", *Op cit.* 520, though Rabbi Mackler ultimately concluded that the issue was beyond the scope of his paper. *See* Dorff, "Stem Cell Research", *Op cit.* 12.

42 I was unable to locate a RC responsum dealing with this subject.

43 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 478. But if the DI's identity is unknown, or he is not Jewish, the child is a *Yisrael.* The RC in a responsum: "The Transplanted Ovum", *Op cit.* 217, had also held that ordinarily, the child follows the status of his father, even though in another responsum: "A *Kohen* and *Torah* Honors", *Op cit.* 36, it stated that "Among us as Reform Jews the *kohen* and the Levite possesses no special status and both the honors as well as the disabilities which remain among Orthodox Jews are disregarded by us. . . ." On the other hand, the Conservative Movement also has recognized the doubtful nature of *Kohanim* in the last century and, as a result, has permitted dispensing with their honors and disabilities as well. *E.g.*, Rabinowitz, Mayer, "Kohen or Rishon?", in CJLS Proceedings 1985-1990, *Op cit.* 437; Goodman, Arnold M., "Solemnizing a Marriage Between a Kohen and a Convert", in Responsa 1991-2000, *Op cit.* 599.

44 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 483 n.59. Rabbi Dorff based his conclusion on Reisner, Avram Israel, "On the Adoption and Conversion of Patrilineal Children", CJLS Proceedings 1985-1990, *Op cit.* 157 ff. The RC's position on naming mirrors that of the CJLS: When naming an adoptive child, the RC has held that the name to be provided would be *ben-* or *bat-*, and then the name of the adopting parents. "Adoption and Adopted Children", *Op cit.* 206.

fetus with a severe genetic disease.[45] The CJLS held that couples may choose to undergo IVF and utilize PIGD to avoid having a child with a severe genetic disease. However, the CJLS concluded that IVF should not be used for the purpose of sex selection, except in connection with the potential for sex-linked diseases.[46]

With respect to parental identity, there was a clear difference between the committees, although, for a time, it did not appear that way. The RC responsum, applying modern scientific techniques and knowledge, held that the parents of the child were the sperm and egg donors and that a child raised by parents other that those donors became the adopted child of such parents, and they, in turn, were the child's ultimate parents.[47] That had been the original opinion of the CJLS, as well.

Writing for the CJLS, Rabbi Dorff, in the original version of his responsum as approved by the CJLS, had held in line with his conclusion that the sperm donor was the child's father, that the egg donor would be its mother.[48] However, after the CJLS approved Rabbi Mackler's subsequent responsum on IVF,[49] he changed his conclusion in the printed version.[50] Thus, having recognized that a child's religion is that of the woman who delivers him, and that for a first born, it is the one "who opens the womb", he ultimately concluded that the woman who

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45 Mackler, "In Vitro Fertilization", *Op cit.* 516, citing Abelson. Kassel, "Prenatal Testing and Abortion", in CJLS Proceedings 1980-1985, *Op cit.* 3 ff.

46 Mackler, "In Vitro Fertilization", *Op cit.* 517.

47 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 3, citing "*Kaddish* for Adoptive and Biological Parents" (5753.12), in Plaut & Washofsky, Teshuvot for the Nineties *Op cit.*

48 This meant that the child of a non-Jewish egg donor born to a Jewish mother would require conversion. Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 497 n.91.

49 Mackler, "In Vitro Fertilization", *Op cit.* 510 ff.

50 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 497 & n.91.

bears the child is his or her mother.[51]

The RC responsum rejected the analogy of a proselyte who converted after becoming pregnant, but before giving birth, as "inapt" because it dealt with religious, rather than biological identity.[52] Thus, the RC's conclusion, based on modern scientific understanding, separated religious from biological identity. The CJLS' conclusion appeared to merge those two identities and favored the traditional understanding,[53] which was not surprising given the movement's stated intent to conserve tradition whenever possible.

The first CJLS paper on surrogacy was written three years after the one from the RC. The RC responsum looked only at the ultimate question: was surrogacy permitted? Finding reports of the biblical concubines, the *midrash* of an inter-uterine transfer from Leah to Rachel (and vice versa) and talmudic sugya on concubinage to be inapposite, it turned to the classic sources on pregnancy without intercourse and the prior sources on artificial insemination (including the prior RC responsa by Rabbis Freehof and Guttmann) as more closely analogous. As a result, it concluded that like a child born as a result of artificial insemination, a surrogate would be acceptable if she were unmarried.[54]

Rabbi David Lincoln, writing for the CJLS, simply reviewed the material on artificial

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51 Dorff, "Artificial Insemination, Egg Donation and Adoption" *Op cit.* 497 & nn. 88-89.

52 "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.* 2-3. Yet, "The Pregnant Proselyte", No. 25, in Freehof, Solomon, B., ed., Modern Reform Responsa, HUC Press, New York, 1971, 143-148, suggests that the fetus does not have a separate biological identity. Were it not deemed to be part of its mother (here, the woman in whose womb it resides), abortion would be considered murder, even were the mother's life in danger. "The Pregnant Proslyte", *Op cit.* 145.

53 Nevertheless, the CJLS, on more than one instance, stressed that the maternal gamete donor will affect the child's ultimate health and well-being and, thus, its biological identity.

54 Jacob, "Surrogate Mother", Op cit. 505-507.

insemination and assumed the "permissibility . . . of surrogate motherhood."[55] But each committee found a moral concern, both trumped by the *mitzvah* of procreation. For the RC, it was a married surrogate. However, measured against that *mitzvah* and the fact that adultery requires sexual penetration and so, the RC "hesitantly permit[ed] the use of a married surrogate mother . . . ."[56] For the CJLS, it was a non-Jewish surrogate. Concerned whether the CJLS should be encouraging Jewish fathers to have non-Jewish babies, the *t'shuva* ultimately permitted such an arrangement, because of the strength of that *mitzvah*.[57]

There were three surrogacy papers approved by the CJLS. The latter two, written thirteen years after the first, were contemporaneous and their ultimate conclusions were diametrically opposed to one another. As Rabbi David Fine has written about the CJLS:

> "[S]ince since a paper is usually approved when achieving six or more votes in its favor, there are times when the CJLS passes multiple papers on the same question. . . . Other times the CJLS papers openly conflict in their conclusions [and, therefore,] there are times when it offers multiple options on interpretations."[58]

The CJLS *t'shuvot* are addressed to the Conservative rabbinate, and it is the individual rabbi who holds the ultimate decision making authority for his or her congregation. And while the CJLS' conclusions are not binding on the individual rabbis, an official opinion[59] does carry with it the imprimatur of movement authority. Thus, a Conservative rabbi may rely on either surrogacy opinion and know that he has the weight of the movement behind his decision.

The RC responsa, while addressed to the inquiring rabbi, appear to serve a different

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55 Lincoln, "Surrogate Motherhood", Op cit. 4.

56 Jacob, "Surrogate Mother", Op cit. 507.

57 Lincoln, "Surrogate Motherhood", Op cit. 4.

58 http://www.rabbinicalassembly.org/docs/CJLS_and_Multiple_Opinions.doc.

59 An official opinion is one receiving at least six votes, as did each of the surrogacy *t'shuvot*.

purpose. The RC has stated that the members of its movement were seeking "guidance, not governance,"[60] although Rabbi Walter Jacob later wrote that Reform Jews "are no longer satisfied with guidance but seek governance."[61] He also reported to the CCAR that a procedure ostensibly was in place for the circulation of dissenting opinions,[62] although it seems as though there have been few, if any, such published opinions in the bioethics area.[63] Because "Reform Jews . . . place a high value upon personal freedom in the realm of religious observance,"[64] would a lay population looking for guidance would be assisted by two opinions with diametrically opposing conclusions? Moreover, since RC

> "*teshuvot* are advisory opinions . . . are intended to serve as arguments in favor of a particular approach to a particular issue of observance, [and t]heir 'authority,' whatever we mean by that word lies in their power to persuade,[65]

it would seem to be counterproductive for one to seek to persuade by means of opposing conclusions. In any event, multiple and opposing opinions are characteristic (though not universally so) of the CJLS.

The gravamen of the difference between the *t'shuvot* of Rabbis Spitz and Mackler related to their opposing views on the relevance of *levirate* marriage and *shifhot* to modern surrogacy[66] and, more importantly, to their differing views on the ethical issue of *oshek*, or exploitation of the

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60 *E.g.*, Freehof, Solomon B., Reform Responsa, HUC Press, Cincinnati, 1960, 22.

61 Jacob, Contemporary American Reform Responsa, *Op cit.* xxi.

62 Jacob, *1977 Report, Op cit.* 96. Dissent from an CJLS *t'shuvah* do exist, but because they garnered fewer than six votes, they are considered individual opinions. CJLS Proceedings 1986-1990, *Op cit.* iii.

63 The concurrent opinions of Rabbis Feehof and Guttmann on artificial insemination is as close to a dissent as I have found. Dissents from RC responsa often take the form of an article in "Reform Judaism", or as a resolution at a CCAR or URJ convention.

64 "In Vitro Fertilization and the *Mitzvah* of Childbearing", 5758.3, *Op cit.* 3.

65 Washofsky, *Introduction*, in Plaut & Washofsky, Teshuvot for the Nineties, *Op cit.* xxvii.

66 Spitz, "On the Use of Birth Surrogates", *Op cit.* 536-538; Mackler, "Surrogate Parenting", *Op cit.* 554-555.

surrogate.[67] Given the time lapse of fifteen years between the RC's responsum and these papers, it is not surprising that possible examples of such prohibited conduct might have surfaced in those intervening years. Nevertheless, Rabbi Spitz believed those issues to be more theoretical than real.[68]

The RC and CJLS responsa on stem cells were written about one year apart. For the most part, they utilize a similar approach, though they may differ in the language employed. After looking at the scientific background, both responsa begin with medicine — the RC looking at medicine as a *miztvah*[69] and that it encompasses the development of life-saving therapies,[70] and the CJLS looking at the obligation to care for our bodies, which it wrote are on loan to us from God, and our duty to seek cures for disease.[71] Both responsa speak of "respect for human life" which they hold encompasses both a fetus — living inside a womb — and an embryo — existing outside of a womb.

For the RC, this is a "*nefesh* in becoming,"[72] for as it wrote:

> "Although the fertilized egg may be called an 'embryo,' a 'zygote,' or a 'blastocyst', these labels can mask the fact that we have here a human *being*, an organism that contains all the genetic material that would, under the proper conditions, develop into a full legal person."[73]

For the CJLS, it is the "building blocks of human procreation,"[74] for it recognized that a fertilized

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67 Spitz, "On the Use of Birth Surrogates", *Op cit.* 545; Mackler, "Surrogate Parenting", *Op cit.* 555-556.

68 Spitz, "On the Use of Birth Surrogates", *Op cit.* 544-545.

69 "Human Stem Cell Research", *Op cit.* & nn.5-6.

70 "Human Stem Cell Research", *Op cit.* & n.13.

71 Dorff, "Stem Cell Research", Op cit. 7-8.

72 "Human Stem Cell Research", *Op cit.*

73 *Ibid.* (Emphasis in original).

74 "Stem Cell Research", *Op cit.* 10.

egg cell has all the DNA it requires to produce a human being.[75] And, in turn, this colored their respective views on abortion, which are virtually identical. Both committees have rejected abortion on demand, even during the first 40 days when an embryo is *maya b'alma* — simply water.[76] Both committees recognized that the potential for stem cell therapy would be *pikuah nefesh* — saving lives — and, therefore, would permit the destruction of embryos for that purpose.[77]

Looking at the acquisition of fetal stem cells, which come from aborted fetuses, both the RC and the CJLS held that the abortion should have been performed for an *halakhicly* justified purpose,[78] but after the fact, according to the CJLS, even one performed for an unsanctioned purpose might be used to create stem cells.[79] However, there were two small areas where the committees differed. The CJLS, unlike the RC did not examine the sources which held that one may not violate the *Shabbat* restrictions to "save" an embryo from expiring.[80] And the RC, unlike the CJLS, did not look at the possible scientific basis behind *maya b'alma*.[81]

There was one major area where the two committees differed. The CJLS held that

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75 *Ibid.*

76 "Human Stem Cell Research", *Op cit.* n.27, citing "When is Abortion Permitted?", in Contemporary American Reform Responsa, No. 16, (January, 1985), *Op cit.* 27; "Stem Cell Research", *Op cit.* 10. Nevertheless, the approaches taken by the two committees in discussing the abortion issue differs substantially, though not because they would disagree on the sources each had cited, or their application.

77. "Human Stem Cell Research", *Op cit.* & nn. 41-43, citing "In Vitro Fertilization and the Status of the Embryo", 5757.2, *Op cit.*; "Stem Cell Research", *Op cit.* 10.

78 "Human Stem Cell Research", *Op cit.*; "Stem Cell Research", *Op cit.* 10.

79 "Stem Cell Research", *Op cit.* 10 & nn.16-17.

80 "Human Stem Cell Research", *Op cit.*, *citing Resp. Shevet Halevy* 5:47. "Human Stem Cell Research", *Op cit.* n.38. Rabbi Wasner reasoned that the law of *pikuah nefesh* was applicable to a fetus, because most fetuses would survive, be born, and become *nefashot*. In Jewish ritual terms, such a fetus would likely become a *ben mitzvah*, a person subject to the obligations of Torah; accordingly, the principle "we violate one Sabbath on its behalf so that it may one day keep many Sabbaths" would apply. He was unable to say that most embryos would "likely" develop into *nefashot*, because they were not implanted in the womb — a minimum qualification.

81 "Stem Cell Research", *Op cit.* 11 & n.25, citing Jakobovits, Jewish Medical Ethics, *Op cit.* 275.

embryos may be created specifically for stem cell research,[82] while the RC held that they may not.[83] The RC did not cite a source for its conclusion; however, there is a classic rabbinic source which would provide a firm foundation for its conclusion. Rabbi Ezekiel Landau, in his classic 18th century responsum on autopsy[84] applied the principle of *l'faneinu*, that the person to benefit be in existence and close at hand. Although the CJLS noted that using aborted fetuses to do research is not as directly and clearly permitted as using them for then existing cures themselves[85] and that with an embryo in a petri dish, one is balancing a potential life against the probability of actual treatments for serious diseases,[86] it did not consider (or at least mention) the principle of *l'faneinu*.

It appears from this limited sample that there is no single reason why RC and CJLS responsa differ on the details while reach virtually the same ultimate conclusions. Some can be attributed to the underlying movement philosophies, some can be attributed to makeup of the committees, some to the philosophy of a particular author and some to the approach taken to address an issue. A recent Rabbinic thesis transformed into a published article concluded, as regards the CJLS *t'shuvot*:

> "[T]hese *teshuvot* do result from a process that is unique in its own right. Certainly, not Reform and definitely not Orthodox, responsa of the CJLS are

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82 Dorff, "Stem Cell Research", *Op cit.* 12. Rabbi Dorff noted that it would not amount to murder to destroy an embryo outside the uterus, but classical Jewish law forbids "wasting seed" (*hashatat zera*). *See* Gen. 38:8-10. Rabbi Dorff argued that procuring the sperm for this purpose through masturbation would not constitute "wasting seed" for here the purpose of masturbating would be specifically to use the man's semen for the consecrated purpose of finding ways to heal illnesses. Dorff, "Stem Cell Research", *Op cit.* 12-13.

83 "Human Stem Cell Research", *Op cit.*

84 *Noda B'Yehuda* Y.D. no. 210.

85 Dorff, "Stem Cell Research", *Op cit.* 10.

86 Dorff, "Stem Cell Research", *Op cit.* 13-14.

indicative only of the Conservative movement which they seek to guide."[87]

Similarly, it has been stated that

> "[l]egal reasoning is rather embedded *within* the practices and the culture of specific legal communities . . . [and l]ike law in general, *halakhah* is a species of practice, an endeavor that is always *situated* within a particular community of legal interpretation."[88]

Therefore, "[i]f halakhic practice always takes place within a *particular* community of interpretation, we should not be surprised that very different sorts of interpretation and consensus will emerge from different halakhic communities."[89] Perhaps not very different, but different enough so that while one may well reach similar conclusions, those conclusions are reached through different paths.

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[87] Starr, Aaron, L., "Tradition vs. Modernity: The CJLS and the Shaping of Conservative Halakhah", *Conservative Judaism*, Vol. 58, Fall 2005, 15.

[88] Washofsky, Mark, *Against Method: Liberal Halakhah Between Theory and Practice*, in Jacob, Walter, ed., Beyond the Letter of the Law, Rodef Shalom Press, Pittsburgh, 2004, 50, 51. This article is also available online at *http://huc.edu/faculty/faculty/washofsky/againstmethod.pdf.*

[89] Washofsky, Mark, *Against Method, Op cit.* 52-53.

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