

# **Contraception**

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שאלה—When is contraception permitted within Jewish law and what classical teachings should guide the decision to employ it? When contraception is permitted, does Jewish law determine which contraceptive method is preferable? Does Jewish law distinguish between contraceptive methods initiated prior to intercourse and “emergency” or other contraception introduced only after intercourse? What does Jewish tradition teach about an adolescent obtaining contraception without a parent’s consent?

תשובה—

## **Overview:**

Judaism has always promoted marriage and raising children as mitzvot in themselves, as well as the foundation that enables the fulfillment and transmission of many other mitzvot. The relevant sources start in the very beginning of Genesis, with all humans being enjoined to follow the lead of Adam and Eve: “Thus shall a man leave his father and mother and cling to his wife, so that they become one flesh” (Genesis 2: 24). The tradition recognizes the value of the marital bond, including its physical component, separate from the issue of procreation. Additionally, rabbinic texts discuss how many children a couple should have and when their obligation to “be fruitful and multiply, fill the earth and master it” (Genesis 1:28) had been completed. Finally, the obligation to protect one’s physical and mental health is a cornerstone of Biblical and rabbinic law. The sages discussed contraception explicitly, albeit in different terms and with different understandings of the human reproductive system. In cases where having another child would present physical or mental challenges to one of the parents, the rabbis permitted contraception of various types. Nevertheless, the use of contraception was always considered against a backdrop of sexuality within marriage and of a commitment to raising children. This teshuvah will apply classical rabbinic values to today’s experience and technology.

## **I. Relevant Halakhic Principles/ Concerns**

The Jewish discourse on contraception has identified four possible concerns that might incline against the unrestricted use of contraception 1) השחתת זרע לבטלה – the prohibition

forbidding the unnecessary destruction of seed 2) סרוס – the prohibition against castration 3) מניעת פרו ורבו – avoiding the mitzvah to be fruitful and multiply and 4) the reluctance to encourage sexual activity outside of normative Jewish bounds. A ruling permitting the use of contraception first must show that efforts to prevent pregnancy do not raise any of these concerns or that the concern raised is outweighed by an even greater Jewish principle which is upheld through the use of contraception. Our discussion will begin by exploring each of the concepts in detail. Our analysis will show that השחתת זרע לבטלה and סרוס both factor heavily in determining which particular forms of contraception are preferable over others, but neither one can serve as a basis to prohibit the use of contraception generally. It will further show that מניעת פרו ורבו and the concern about encouraging unhealthy sexual behavior direct committed Jews to make decisions about contraception cautiously with an eye towards fulfilling the mitzvah of פרו ורבו; however, within the bounds specified, neither one of these concerns is sufficient to prohibit the use of contraception altogether. We will then turn our attention to the major classical discussions of contraception. Building on what we have learned, we will evaluate the most common contemporary contraceptive methods and discuss which most successfully avoid any of the concerns listed above. Finally, we will turn our attention to Jewish teachings that might inform our approach to issues of parental consent for the use of contraception by adolescents.

## **1. השחתת זרע לבטלה – The Destruction of Generative Seed for Naught<sup>1</sup>**

The wasting of generative seed is not an absolute prohibition, The destruction of semen for naught is forbidden by Joseph Caro in the *Shulkhan Arukh* with spectacularly florid language. In contrast to the terse legal tone that characterizes most of the work, Caro writes regarding זרע השחתת זרע that עון זה חמור מכל עבירות שבתורה—this transgression is more serious than all of the sins in the Torah.<sup>2</sup> He later cites Rabbi Elazar's midrashic interpretation of Isaiah 1:15 suggesting that one who had emitted seed into his hand is akin to a murderer.<sup>3</sup> There is no doubt that this prohibition holds a special status in Jewish law. In fact, David Feldman's comprehensive work on the topic shows that the language in the codes appears positively restrained when compared to the hyperbolic discussions of this prohibition in many Kabbalistic texts.<sup>4</sup>

Caro's primary definition of the specific act forbidden borrows from the Tannaitic euphemism דש מבפנים וזורה מבהוץ—threshing on the inside and winnowing on the outside.<sup>5</sup> However, it is clear that he reads the prohibition more broadly than *coitus interruptus* to include, at least, both masturbation and marrying a prepubescent girl. The

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<sup>1</sup> The term זרע השחתת זרע is used interchangeably in rabbinic texts with זרע לבטלה and הוצאת זרע לבטלה.

<sup>2</sup> אבן העזר כג:א.

<sup>3</sup> גדה יג ע' ב citing אבן העזר כג:ב.

<sup>4</sup> David Feldman, *Marital Relations, Birth Control and Abortion in Jewish Law* (Schocken, New York: 1975), pp. 114–119. The research in this work is impeccable. Our arguments here are greatly indebted to Rabbi Feldman.

<sup>5</sup> יבמות לד ע' ב and תוספתא גדה ב:ו.

latter conclusion is of most relevance to this discussion because if intercourse with a woman biologically unable to conceive is considered *השחתת זרע*, then it is possible that intercourse with a fertile woman in a situation where conception is prevented through the use of a contraceptive device or other means may also constitute a violation of the prohibition. However, Jewish legal decisors, including Caro himself, are unanimously and unambiguously clear that a couple not only may but *must* engage in sexual relations while the wife is pregnant, after menopause and in other situations when she is unable to conceive.<sup>6</sup> Consequently, Caro's concern cannot be that normal intercourse with a woman at a time when she is unable to conceive by itself violates the prohibition against *השחתת זרע*. Observing this point, Rabbi Shmuel ben Uri Shraga Faivish, the author of the *Beit Shmuel*, (17<sup>th</sup> Century, Poland) rules that marrying a prepubescent girl does not violate *השחתת זרע*; rather, Caro forbids it because it causes the man to delay his fulfillment of *פרו ורבו*—the mitzvah to be fruitful and multiply.<sup>7</sup> The interpretation of the *Beit Shmuel* offers a reading of Caro that avoids any internal inconsistency and is therefore normative. Postponing *פרו ורבו* will be addressed in the next section. We can proceed here confident that nothing in the *Shulkhan Arukh* indicates that intercourse where conception is prevented violates the prohibition of *השחתת זרע*.

To understand the full scope of the prohibition and its relationship to contemporary contraceptive methods, we must examine its source. Identifying that source, however, is not a straightforward matter. Most knowledgeable Jews assume that the prohibition against *השחתת זרע* derives from the story of Er and Onan in Genesis 38:6–10.

וַיִּקַּח יְהוּדָה אִשָּׁה לְעֵר בְּכוֹרוֹ וְשָׁמָּה תָמַר  
וַיְהִי עֵר בְּכוֹר יְהוּדָה רַע בְּעֵינֵי יְקֹוֹק וַיְמַתְהוּ יְקֹוֹק  
וַיֹּאמֶר יְהוּדָה לְאוֹנָן בֶּן אֵל אִשְׁתְּ אֶחָיו וַיְבִים אֹתָהּ וַיְרַע לְאֶחָיו  
לְאֶחָיו וַיֵּדַע אוֹנָן כִּי לֹא לוֹ יִהְיֶה הַזֶּרַע וְהָיָה אִם בָּא אֵל אִשְׁתְּ אֶחָיו וַשְׁחַת אֶרְצָהּ לְבִלְתִּי נָתֹן זֶרַע  
וַיֵּרַע בְּעֵינֵי יְקֹוֹק אֲשֶׁר עָשָׂה וַיָּמָת גַּם אֹתוֹ.

Judah took a wife for Er his first-born; her name was Tamar. But Er, Judah's first-born, was displeasing to the Lord, and the Lord took his life. Then Judah said to Onan, "Join with your brother's wife and do your duty by her as a brother-in-law, and provide offspring for your brother." But Onan, knowing that the seed would not count as his, let it go to waste whenever he joined with his brother's wife, so as not to provide offspring for his brother. What he did was displeasing to the Lord, and He took his life also.

Er's sin is not specified but it is widely accepted in the classical interpretive tradition that he was punished for the same act as his brother Onan. While the biblical language seems to indicate that Onan committed an act of *coitus interruptus* and this reading is confirmed by several midrashic sources, the interpretation offered by the Talmud is that the prohibited act was one of *השמיש שלא כדרכה*—non-vaginal intercourse.<sup>8</sup> Regardless of

<sup>6</sup> and מרדכי יבמות פ' ב, תוספות יבמות יב ע' ב ד"ה שלש drawing from many earlier sources including אבן העזר כג:ה.

<sup>7</sup> בימוקי יוסף פ' ה בית שמואל אבן העזר כג:א.

<sup>8</sup> יבמות לד ע' ב.

which reading one prefers, in both, the two men were punished following a sexual act in which conception was impossible. Neither the motives of the characters nor the specific rationale behind the severe punishments are made clear.

A broader reading would focus on the latter part of the verse, the motive rather than the specific means: beyond wasting his seed, Onan is also circumventing the Levirate system by which he is obliged to father children with his older brother's widow, thereby maintaining his lineage. It is easy to imagine Onan's disinterest in fathering a child that will be considered his brother's. The Torah may be primarily concerned with Onan's selfish refusal to build up his brother's household. The severity of his punishment may well be due to combination of his transgressions. The motive behind Er's sin is much harder to understand. The Talmud speculates that he may have wished to avoid risking Tamar's beauty with the physical challenges of a pregnancy.<sup>9</sup> The biblical commentary of Rabbi Yoseif Bekhor Shor (Yosef ben Yitzhak, France, 12th century) suggests שמא לא היה רוצה בצער גידול בנים שיש בני אדם שאינן חוששין רק להנאתם—“that he did not want the trouble of raising children; for there are people who only worry about what is best for themselves.”<sup>10</sup>

The Talmudic interpretation and that in the *Bekhor Shor* both share readings of the text where the reasons for avoiding pregnancy are quite shallow. While we have been referring to the prohibition for convenience sake as השחתת זרע, the full term is השחתת זרע לבטלה—the destruction of generative seed *for naught*. There is a redundancy in the term itself suggesting that violation of the prohibition requires not only “destruction” of the seed but also “destruction” *for no purpose whatsoever*. Certainly the particular reasons for Er's behavior suggested by the Talmud and the *Bekhor Shor* qualify as “for naught.” However, these readings do not preclude other situations in which seed might be emitted outside of procreative intercourse for a halakhically valid purpose. Such cases would fall outside the bounds of the prohibition

For example, one such halakhically valid purpose is proposed by the tanna Rabbi Eliezer who suggests to the husband of a nursing mother that the couple engage in *coitus interruptus* lest a second pregnancy diminish the mother's milk and harm the suckling infant.<sup>11</sup> While Rabbi Eliezer's ruling in this specific case was rejected by his contemporaries, Rabbi Moshe Feinstein (20<sup>th</sup> Century, U.S.) concludes from the discussion that cases must exist in which seminal emissions outside of procreative intercourse are not considered to be השחתת זרע לבטלה. After noting that in other discussions Rabbi Eliezer rules even more strictly than his contemporaries in true cases of השחתת זרע לבטלה, Feinstein writes,

דזרע לבטלה שאסור אין פירושו לבטלה מהולדה שהוא בכל אופן שאי אפשר להוליד בהוצאה כזו אלא פירושו לבטלה ממש בלא צורך אבל ביש צורך כגון למצות עונה אף שא"א להוליד בהוצאה כזו לא הוי זה לבטלה ומותר.<sup>12</sup>

<sup>9</sup> *Id.*

<sup>10</sup> בכור שור ברא' לה' ז'

<sup>11</sup> יבמות לד ע' ב'

<sup>12</sup> אגרות משה א"ה א:סג.

...with respect to [the destruction of] seed for naught, which is forbidden, the definition of “for naught” is not “nullified from the possibility of procreation such that it is impossible to procreate through such an emission;” rather, the definition of “for naught” is literal—for no need at all. However, when there is a valid need, for example to fulfill the mitzvah of pleasure [within marriage], even in a case when it would be impossible to procreate through such an emission, it is not considered “for naught” and, thus, is permissible.

Feinstein here cites the mitzvah of עונה—the injunction to engage in regular marital relations—as one halakhically valid basis for a seminal emission to take place outside of procreative potential without violating the prohibition against wasting generative seed for naught. It is important to remember that this narrowing the scope of what is included in the prohibition comes in the context of a case of *coitus interruptus*—the exact act of Er and Onan, following a plain reading of the text. Presumably, in cases where there is no זורה מבחוץ but rather the act is indistinguishable from procreative sexual activity, one might find even more room for leniency.

Rabbi Asher ben Yehiel, the fourteenth-century decisor also known alternatively as the Rosh and Asheri (France, Germany, then Spain), was asked about a case in which a married woman has an anatomical obstruction—אוטם—preventing normal intercourse. Though the details are unclear, one infers from Asheri’s restatement of the question that the obstruction permits the husband to penetrate the wife’s labia temporarily; however, the semen consistently spills out after the completion of the sexual act. He ruled,

יראה שהוא אסור; כיון דלעולם הוא זורה בחוץ, קרינן ביה: ושחת ארצה; ואע"פ שלפעמים הוא דש מבפנים, מכל מקום, כיון שלעולם הוא זורה מבחוץ, אסור.<sup>13</sup>

It appears that [sexual activity in this case] is forbidden. Since he always winnows on the outside, the verse “he would cast his seed on the ground” applies to him. Even though sometimes he may thresh on the inside, nevertheless, because he always winnows on the outside, it is forbidden.

Interestingly, Asheri goes on to contrast the case before him with that of a woman employing a מוך—an absorbent device inserted internally which will be discussed in greater detail further on. Asheri would permit intercourse in the latter case, writing,

דהתם היא משמשת כדרך כל הארץ, אע"פ שאין זרעו ראוי להזריע, מידי דהוה אעקרה וזקנה וקטנה.

[such a woman] engages in sexual activity in the same way as everyone else; even though his seed will not implant, it is analogous to [intercourse with] a barren woman, a post-menopausal woman or a woman too young to become pregnant [all of which are permitted].

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<sup>13</sup> שו"ת הרא"ש כלל לג ס' ג.

This responsum highlights an important distinction that is maintained in many later legal rulings.<sup>14</sup> When the seminal emission occurs outside of the vagina, the verse from the story of Er and Onan—"he would cast his seed upon the ground"—applies and השחתת זרע is at issue.<sup>15</sup> When the seminal emission is internal, even though procreation may be impossible for other reasons, זרע השחתת does not apply. Asheiri explicitly refers to intercourse which the introduction of a contraceptive method has rendered non-procreative as היא משמשת כדרך כל הארץ—"normal intercourse." Of course, when we discuss modern contraceptive methods, we will see that some specific means of preventing pregnancy today—namely barrier methods—may be analogous to an external seminal emission and therefore much closer to השחתת זרע. The key point at this stage of our argument is that intercourse with the use of contraception does not by definition fall within the bounds of the prohibition as long as the emission is internal.

Asheiri explicates this point in his commentary on the Talmud. He writes,

דלא מיקרי השחתת זרע אלא במי שגורם ע"י חימום שמוציא זרע לבטלה . . . אבל לאחר שנעקר הזרע מן הגוף לא שייך ביה השחתתה.<sup>16</sup>

[The prohibition against] the wasting of seed for naught only applies when one causes an emission by masturbation or arousal, which is in itself causing the seed to go for naught... but after the semen has been emitted from the body, the prohibition against its destruction does not apply.

The laws of השחתת זרע govern the way in which semen is emitted. Acts that inhibit the reproductive capacity of semen following emission may invite concerns about forestalling fulfillment of the mitzvah to be fruitful and multiply (to be discussed below), but they do not cause an emission of semen to become a violation of השחתת זרע. This conclusion is supported by a distinction made in a responsum of Rabbi Hayim Sofer which was later confirmed by Rabbi Avrohom Yeshaya Karelitz, (1878–1953), known as the *Hazon Ish*.<sup>17</sup> Sofer distinguishes between the improper emission of seed and the destruction of seed following emission. While the former constitutes a clear violation of השחתת זרע, the latter stands outside of the prohibition.

<sup>14</sup> See, e.g., רמ"א אבן העזר כג:ה.

<sup>15</sup> The interpretative trend has become increasingly lenient even with respect to situations where completion of sexual activity without withdrawal is not always possible. For example, Rabbi Eliezer Deutsch (early 20<sup>th</sup> Century, Germany) permits marital relations in a case similar to that before the Rosh because, in the case before Deutsch, expulsion of the penis was not guaranteed every time, שו"ת פרי הסדה א:עז. Similarly, Rabbi Avraham Sofer (19<sup>th</sup> Century, Pressburg) permitted marital relations in a case even more similar to that before the Rosh on the grounds that medical technology might someday make normal intercourse possible between the couple, שו"ת כתב סופר א"ה כו.

Note also that the CJLS and other halakhic authorities have not applied the prohibition of השחתת זרע to external emissions of semen during the process of infertility treatment. See Ellior Dorff, *Artificial Insemination, Egg Donation and Adoption*, CJLS Responsa EH 1:3.1994; Aaron Mackler, *In Vitro Fertilization*, CJLS Responsa EH 1:3.1995 and sources cited therein.

<sup>16</sup> תוספות הרא"ש יבמות יב ע' ב.

<sup>17</sup> חזון איש אבן העזר לו:ב-ג. See also שו"ת מהנה חיים ס' נג.

So far, we have assumed that השחתת זרע constitutes a biblical prohibition and we have concluded that an internal seminal emission does not fall under the prohibition of השחתת זרע simply because there is no possibility of procreation. We will now explore whether that prohibition is indeed biblical and if it is possible that even when a particular form of contraception appears on its face to involve השחתת זרע whether one might still find a way to permit it in some instances when other halakhic concerns take precedent.

The biblical basis for the prohibition of השחתת זרע, something we have assumed up until this point, is far from clear. The term itself borrows language from Genesis 38:9 lending credence to Rabbi Vidal of Tolosa's claim that the root of the prohibition lies in the story of Er and Onan.<sup>18</sup> However, this a narrative section of the Torah from which few mitzvot are generally derived. Further, as we noted above and as Rabbi David Feldman explains in greater detail, the exact sins for which Er and Onan were punished are not obvious.<sup>19</sup> Rabbi Jacob Emden concludes that the story of Er and Onan, at best, serves as a "hint" to the prohibition. He writes, "[the prohibition] is not mentioned explicitly in the Torah; rather only through a hint."<sup>20</sup>

Given this uncertainty, a host of alternate biblical sources have been proposed as the basis of the prohibition. One common claim begins with the observation that adultery is forbidden several times in the Torah. Employing a hermeneutic of economy, some rabbinic exegetes view the repeated injunctions as broadly prohibiting immoral behavior not specified elsewhere in the Torah.<sup>21</sup> Maimonides represents one of many who view השחתת זרע as forbidden on these grounds.<sup>22</sup> Still others point to a form of the root ש'ח'ת employed in Genesis 6:12—"for all flesh had corrupted its ways on earth"—as suggesting that one of the sins for which God decided to flood the world in the time of Noah was the direct spilling of seed onto the earth.<sup>23</sup> A comment in the Tosafot proposes that the prohibition is included within the positive command to be fruitful and multiply.<sup>24</sup> Ibn Ezra finds it in Leviticus 18:6's injunction against coming "near anyone of his own flesh to uncover nakedness."<sup>25</sup> Rabbi Jacob Ettlinger (19<sup>th</sup> century, Germany and Denmark) wonders if it might lie in the command at Deuteronomy 20:19 prohibiting wanton destruction.<sup>26</sup> Each of these claims, despite their various exegetical merits, has occasioned significant objections. The reader here need not determine which single basis for the prohibition he or she finds most compelling. It is sufficient for the reader to acknowledge that biblical exegetes and legal decisors share no consensus as to the origins of the prohibition. The various biblical grounds proposed for the prohibition seem to

<sup>18</sup> מגיד משנה יד ה' איסורי ביאה כא:ט.

<sup>19</sup> Feldman, *supra* note 4, pp. 144–165.

<sup>20</sup> שו"ת משיבת נפש ס' יה *see also* משפט ספרים א:כ.

<sup>21</sup> גדה יג ע' א.

<sup>22</sup> ספר מצות קטן ס' רפב and פירוש למשנה סנהדרין ז:ד.

<sup>23</sup> מגן אברהם א"ה ג:יד and רש"י נדה יג ע' א *See also* ראש השנה יב ע' א and סנהדרין קה ע' ב. Many authorities object to this proposal because it implies that one might be punished without having received prior explicit warning. *See, e.g.,* ערוך לגר נדה יג ע' א and משנה למלך מלכים יז.

<sup>24</sup> תוספות סנהדרין נט ע' ב ד"ה והא.

<sup>25</sup> אבן עזרה ויקרא יח:ו.

<sup>26</sup> בנין ציון ס' קלז.

serve more as אסמכתות—biblical supports for rabbinic enactments—than as explicit biblical commands.<sup>27</sup>

Recognizing the uncertain etiology of the prohibition, Maimonides states that there is no punishment for a violation of השחתת זרע since there is no explicit biblical injunction.<sup>28</sup> Rabbi Moshe Trani (16<sup>th</sup> Century, Italy) equivocates when ruling if the prohibition is biblical or rabbinic, and the clearest reading of his statement suggests that he leaves the matter unsettled.<sup>29</sup> Perhaps the strongest argument for the non-biblical nature of the prohibition is made by Rabbi Yehoshua Heschel ben Yoseif of Krakow (19<sup>th</sup> Century, Poland), who astutely notes Rav's statement in the Talmud that the transgressor of השחתת זרע is subject to a rabbinic ban—גידוי. Since such bans can apply only to the violation of rabbinic enactments and not biblical law, he argues that השחתת זרע must be understood as rabbinic in nature.<sup>30</sup>

We argued above that the use of contraception by itself during intercourse does not constitute a violation of השחתת זרע even if the prohibition is understood to be biblical. Here we have shown that השחתת זרע need not necessarily be understood as a biblical prohibition at all. Considering the prohibition a rabbinic enactment certainly does not permit one concerned with Jewish law to ignore it. In the vast majority of instances this distinction between biblical and rabbinic prohibitions can rightly be viewed as purely academic. However, rabbinic enactments can be temporarily set aside or outweighed when they come into conflict with biblical obligations, pressing needs or risks to health.<sup>31</sup> Thus, should we determine that a particular form of contraception causes a seminal emission to become השחתת זרע, we still may not find that the prohibition of השחתת זרע constitutes an obstacle to permitting that particular contraceptive when it facilitates the mitzvah of עונה or serves a health benefit. Further on, we will apply this principle to various contemporary contraceptive means.

## 2. סרוס – Castration

Though the Bible does not offer a clear rule explicitly forbidding the castration of a human being, twice it prohibits men with damaged or maimed genitalia from entering into “the assembly of the Lord” - a statement understood to forbid marriage. The rabbinic discussions of these verses uncover two separate prohibitions.<sup>32</sup> One prevents a man—פצוע דכא—from marrying if his genitalia have been seriously injured, wounded, cut or crushed by the direct act of another man. The second forbids the permanent sterilization of either a man—סריס—or an animal by chemical or surgical means such as a vasectomy.

<sup>27</sup> ערוך לגר נדה יג ע' א and שו"ת פני יהושע א"ה ב:מד.

<sup>28</sup> פירוש למשנה סנהדרין ז:ד.

<sup>29</sup> מנחת יחיאל ב:כב as understood in קריאת ספר ליד איסורי ביאה כא:ט.

<sup>30</sup> נדה יג ע' ב citing שו"ת פני יהושע א"ה ב:מד.

<sup>31</sup> See Joel Roth, *The Halakhic Process* (Moresheet, New York: 1986), pp. 153–204.

<sup>32</sup> אבן העזר ה:א-יג.



There is some debate about whether the extension of the prohibition against *סרוס* to include women is biblical or rabbinic in nature.<sup>33</sup> Regardless, most decisors who have considered the issue agree that a hysterectomy, oophorectomy (removal of the ovaries) or tubal ligation for purposes of preventing pregnancy alone, without other medical indications, would generally be included in the prohibition.<sup>34</sup> However, both Rabbis Moshe Feinstein and Eliezer Waldenberg have permitted such operations for women when no other contraceptive means are safe.<sup>35</sup>

Caro applies the prohibition to men even when the sterilization is effected by medical or chemical means instead of surgery. However, he permits women to drink a sterilizing potion—called here a “cup of roots”—so that they will not give birth.

המשקה כוס של עיקרין לאדם או לשאר בעלי חיים כדי לסרוס, הרי זה אסור, ואין לוקין עליו. ואשה מותרת לשתות עיקרין כדי לסרוס עד שלא תלד.<sup>36</sup>

One who gives a man or any other animals a “cup of roots” to drink in order to sterilize him, this is forbidden but the man is not flogged. However, a woman is permitted to drink a “cup of roots” in order to sterilize her so that she will not give birth.

The “cup of roots” and its capacity to serve as an analogue for contemporary contraception will be discussed below. For our purposes here, it is sufficient to note that the “cup of roots” was understood to be a permanent sterilization technique. The prohibition of *סרוס* is not concerned with temporary contraceptive methods that could be

<sup>33</sup> Arguments that the prohibition is biblical include אגרות משה א"ה א:יג, ד:לד and ביאור הגר"א א"ה ה:כה. Arguments that it is rabbinic include חתם סופר א"ה א:כ and טור ושולחן ערוך אבן העזר ה:יא, יד איסורי ביאה טז:יא עם מגיד משנה.

<sup>34</sup> אגרות משה א"ה א:יג, ד:לג-לד.

<sup>35</sup> Waldenberg sets out his general guidelines for contraception and offers the order of priority. Tubal ligation is low on the order of priorities but permitted in cases where no other method is effective or safe. Waldenberg says it is not a matter of *per se* פיקוח נפש because the options of celibacy or divorce are available, but that these options would cause such severe hardship and possibly financial hardship that the operation would be preferable. He says the majority of *poskim* consider *סרוס* for women to be a rabbinic prohibition and that the actual source is the prohibition on harming oneself (*habalah*), so that if the procedure is done in a medically safe and painless way, with the woman's consent, it does not fall under this category. Furthermore, it is possible to reverse the procedure and reinstate fertility, unlike the Biblical concept of sterility or *סרוס* and finally, the woman is a passive participant, under anaesthetic—so is not really party to the action even if it were forbidden, but that it is preferable for a gentile doctor to perform the operation just in case the Jewish one would be liable. See also *infra* note 97.

Feinstein gives more weight to the Gra (Vilna Gaon) who considers *סרוס* even for women to be a biblical prohibition, and he says even if it is a rabbinic prohibition, not every rabbinic prohibition can be superseded just for the reasons of discomfort (*tzaar*), however in the end he concludes that in the specific case of a woman who can not use other methods, celibacy or divorce would be a great discomfort (*tzaar gadol*) and leave her like an *agunah* (an anchored woman) so that he calls this case an unusual circumstance (*shaat hadhak*) in which the decisors are almost forced into a corner to permit it. He harmonized the Gra's view by saying that the other *rishonim* were also teachers of the Gra and that we can follow the majority, especially since some like the Rashba consider there to be no prohibition at all.

<sup>36</sup> שולחן ערוך אבן העזר ה:יב.

discontinued at any time.<sup>37</sup> With respect to men, both surgical and chemical methods are equally problematic. For women, the prohibition has not traditionally been understood to include chemical methods. Even surgical methods may be permitted for women in some instances.

### **3. מניעת פרו ורבו—Avoiding the Mitzvah To Be Fruitful and Multiply**

The first couple, Adam and Eve, was charged with the command to “be fruitful and multiply” shortly after land and sea animals received the same imperative.<sup>38</sup> Interestingly, rabbinic exegetes often locate the source of the mitzvah to procreate elsewhere in the Bible. Rashi, for example, follows the Talmud in arguing that the mitzvah stems from the command given to the children of Noah after the flood.<sup>39</sup> In the same comment, Rashi also echoes a rabbinic tradition that one who fails to observe this mitzvah is to be considered as one who has shed blood. The importance of this mitzvah cannot be overlooked. A Talmudic passage indicates that “Have you fulfilled the mitzvah to be fruitful and multiply?” is one of the first three questions a man is asked during divine judgment.<sup>40</sup>

Hillel and Shammai debate the bounds of the biblical command.<sup>41</sup> Shammai rules that a man has not discharged his obligation until he has fathered two sons. Hillel, whom the halakhah follows, is satisfied if a man has fathered a son and a daughter. The Talmud testifies that this is a minimal standard and that there is an additional rabbinic obligation to continue having more children after the requisite two. Two separate non-Pentateuchal verses are referred to in order to describe this non-biblical obligation. The first, *לשבת*--to populate, derives from Isaiah 45:18, *לֹא תְהִי בְרֵאשִׁית לְשִׁבְתָּ יִצְרָה*, “[God] did not create [the world] a waste; rather *to populate* He formed it.” Since some offspring will die before reproducing, the rabbinic argument follows, sufficiently “populating” the world—that is, maintaining population stability—requires that couples have more than two offspring.<sup>42</sup> A man cannot be said to have fulfilled the commandment until he has fathered two children who themselves have reproduced. *לשבת* can best be understood as a rabbinic expansion of the biblical command to ensure that the biblical command is fulfilled.

The second rabbinic injunction further expands the biblical imperative. *לערב*--into the evening, derives from Ecclesiastes 11:6, *בבקר זרע את זרעך ולערב אל תנח זרעך*—“Sow your seed in the morning and do not hold back your hand *into the evening*.” The verse is understood midrashically as demanding that a man continue to produce offspring “into

<sup>37</sup> הלכות יעקוב ג:סב and מנחת יצחק ה:קכו, אגרות משה א:סב.

<sup>38</sup> Genesis 1:22 and 1:28.

<sup>39</sup> תוספות יבמות סה ע' ב ד"ה ולא וראו. See also Genesis 9:7 referencing רש"י.

<sup>40</sup> שבת לא ע' א.

<sup>41</sup> משנה יבמות ו:ו.

<sup>42</sup> יבמות נב ע' א and משנה עדיות א:יג. See

the evening” of his life; that is, a man should never stop fathering children.<sup>43</sup> While this rabbinic injunction was not universally accepted in its day, the Talmud cites the affirmation of Rav Mattena that the later halakhah holds it to be valid. Post-Talmudic commentators debate the strength of לערב—the obligation to father children indefinitely. Rabbi Yitzhak Alfasi views it as a standard rabbinic commandment.<sup>44</sup> Rabbis Zerahia ben Yitzhak HaLevi Gerondi and Asher ben Yehiel both rule that this commandment is easily superseded when it conflicts with other commandments.<sup>45</sup> Nahmanides sets the level of obligation even lower calling it דרך ארץ—a general custom that one should attempt follow but not a strict rabbinic regulation.<sup>46</sup> According to this view, there is no punishment for the transgressor. Codifying Nahmanides’ interpretation into law, Rabbi Yehiel Michael Epstein writes in his *Arukh HaShulchan*,

דזהו כעין הידור מצוה ומנהג דרך ארץ כמ"ש ואם יש איזה עיכוב בדבר אין כופין אותו לכך.

This is a type of embellishment to the commandment, a general custom, and if there is any impediment, we do not compel a man to fulfill it.<sup>47</sup>

With respect to לערב, we see that fathering as many children as possible may be viewed as the ideal way to fulfill the mitzvah in the classical texts but that it is not necessary. When legitimate obstacles make such life choices difficult, one may fulfill the mitzvah of פרו ורבו with the rabbinic minimum.

The Talmud recounts a debate as to whether the mitzvah of פרו ורבו applies to both men and women or just men.<sup>48</sup> Though the debate is not settled in the text itself, the later halakhic tradition has almost unanimously viewed the obligation as applying only to men. Rabbis Kassel Abelson and Elliot Dorff describe this interpretation as “counterintuitive” given the Mishnah’s clear indication that it understands the biblical text, on its face, to mean that both Adam and Eve were told simultaneously to “be fruitful and multiply.”<sup>49</sup>

Jewish tradition views the obligation to have children as responsibility shared among parents. A comment in the Tosafot clearly indicates that the author believes women to be obligated to the rabbinic extension of לשבת even if she is not bound to the biblical command.<sup>50</sup> Later responsa and codes temper this sentiment somewhat, but they retain a sense that a woman is actively involved in the fulfillment of the mitzvah at least, even if she is not directly commanded herself.<sup>51</sup> Rabbeinu Nissim sees the woman as assisting her husband in the fulfillment of his mitzvah.<sup>52</sup> Though it might not be a direct violation of the mitzvah of פרו ורבו for her to intentionally avoid becoming pregnant, a woman

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<sup>43</sup> יבמות סא ע' ב-סב ע' ב.

<sup>44</sup> רי"ף יבמות סב ע' ב.

<sup>45</sup> רא"ש יבמות סב ע' ב(פ' ו ס' ט) *id. ad loc.*, and המאור הגדול.

<sup>46</sup> רי"ף יבמות סב ע' ב טז מלחמת השם.

<sup>47</sup> ערוך השולחן, אבן העזר א:ח.

<sup>48</sup> יבמות סה ע' ב-סו ע' א.

<sup>49</sup> Kassel Abelson and Elliot Dorff, “Mitzvah Children,” CJLS Responsa, EH 1:5.2007.

<sup>50</sup> תוספות בבא בתרא יג ע' א *see also*; תוספות גטין מא ע' ב ד"ה לא תהו.

<sup>51</sup> *See, e.g.*, בית משה אבן העזר ה:יא, and ערוך השולחן אבן העזר א:ד.

<sup>52</sup> חידושי ר"ן קידושין מא ע' א.

behaving in such a way as to inhibit procreation would minimally represent a missed opportunity to participate in a central mitzvah.<sup>53</sup>

Some responsa cite the exemption of women from the mitzvah of פרו ורבו as a צד היתר—ground for a lenient ruling.<sup>54</sup> The argument follows that only the man can be obligated unreservedly since pregnancy and childbirth were dangerous to a woman’s health in the ancient world and remain so today. Thus, they permit a form of contraception employed exclusively by the woman—e.g. hormonal contraception—that does not involve the man engaging in any direct action causing him to undermine the prohibition against spilling seed while also protecting the women’s health and autonomy.<sup>55</sup> Though we have not presented a full argument here that the mitzvah should be reconsidered as applying to both men and women equally, our commitment to an egalitarian halakhic method prevents us from relying on this arbitrary distinction in our final conclusion.<sup>56</sup> In a modern Jewish relationship, both parties should be equally involved in the decision to employ contraception. Whatever responsibility falls on one should be shared equally with the other. We are aware that hormonal contraception, the method that this teshuvah will conclude is most preferable, currently places the burden of use solely on the woman. Should similarly safe and effective hormonal contraception become available for men, we find no reason that the burden should remain on the woman.

Having explored the bounds of the commandment as set in the halakhic discourse, it is necessary to consider the nature of the obligation. פרו ורבו is not a מצוה עשה שהזמן גרמא—a mitzvah that must be fulfilled at a specific time, such as the waving of the lulav and etrog on the morning of Sukkot. Neither is it a positive mitzvah that one must actively fulfill at all times, such as the command in Exodus 23:7 to “stay far away from falsehood.” Rather, פרו ורבו is most accurately understood as a mitzvah demanding a particular lifestyle—a lifestyle that includes parenthood.<sup>57</sup> A Jew who is able to become a parent is required to become a parent. Active decisions that prevent one from becoming a parent (e.g., commitments to celibacy, surgical sterilization absent health reasons, a refusal to have children) should rightly be considered acts of מניעת פרו ורבו—avoiding the mitzvah to be fruitful and multiple.<sup>58</sup> However, decisions to delay pregnancy for a time, if they fit into a larger life plan that includes a desire to fulfill the mitzvah in the future

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<sup>53</sup> *But cf.* גדה כ ע' ב (suggesting that women have a biblical obligation to serve their husbands’ sexual needs).

<sup>54</sup> *See, e.g.* מנחת יצחק א"ה ח' ב ס' טז, אגרות משה ח' א א"ה ח' א ס' סב. Because pregnancy and childbirth were frequently dangerous to a woman’s health in the ancient world, it could not be commanded for a woman to fulfill.

<sup>55</sup> Even if women were clearly obligated to the mitzvah of *pru u'rvu*, this would not preclude the leniencies allowing contraception and abortion in cases where women’s physical and mental health are concerned; these leniencies are based on Biblical values of taking care of one’s body and health and would be weighed against the value of *pru u'rvu*. Similarly, this does not change the calculus for *halakhic* arguments permitting the use of infertility treatments.

<sup>56</sup> See Abelson and Dorff, *supra* note 49, for one articulation of this argument in more detail.

<sup>57</sup> It has been called מצוה שאין לה זמן מוגדר—a mitzvah that has no fixed time for its fulfillment. *See* שו"ת אבני נזר י"ד ס' שצה(ו).

<sup>58</sup> Simultaneously, we reaffirm the notion that Jewish tradition views with no moral judgment infertility, an inability to find a mate and other situations of אינס where people who wish to become parents are unable to procreate.



Closely related to such considerations of emotional well-being is the concept of שלום בית—promoting domestic harmony. A full analysis of the concept is well-beyond the scope of this responsum. It should be sufficient here to note that the halakhic tradition has exempted individuals even from a range of biblical obligations when the absence of an exemption might cause significant discord within a family. In his work *Terumat HaDeshen*, Rabbi Israel Isserlin (15<sup>th</sup> century Germany) permits a widowed man to remarry a barren woman in a situation when failing to do so might otherwise lead to the man's entering into a quarrelsome marriage with another woman. Isserlin's ruling cites the dictum דדהינן בשביל קטטה מיבום לחליצה—“for the sake of avoiding strife, a levir may be absolved of his obligation to marry his sister-in-law.”<sup>64</sup> Though in this case Isserlin employs שלום בית to exempt a man who has already fulfilled פרו ורבו from the rabbinic extension of לערב, the basis for his rule in the Talmud is a case when a man is exempted from levirate marriage—a biblical obligation. Consequently, שלום בית might serve as a צד התר to permit temporary delay even when the biblical mitzvah of פרו ורבו has not yet been fulfilled.

We advise rabbis applying this ruling to the cases before them not to distort the concept of שלום בית by employing it as a miscellaneous “catch-all” to permit any behavior. Nevertheless, with respect to the use of contraception, שלום בית should direct rabbis to incline towards permissive rulings for newly-married couples who need additional time to strengthen their emotional bonds prior to facing the challenges of parenthood; for couples who have recently had a child and the introduction of another child soon afterwards might cause discord; for couples who have determined that spacing children is more conducive to a functional marriage and positive parenting; for couples very heavily burdened by the economic hardships of having a child; and for all similar situations when the well-being of the family or the marital relationship is threatened.<sup>65</sup> Considerations of שלום בית may also influence the choice of contraceptive method; it needs to be one that both people agree on and does not negatively impact the frequency and quality of their physical relations. We refer the reader back to our discussion of פרו ורבו as a mitzvah demanding that one who is able adopt a lifestyle that includes parenthood. When a couple is committed to a realistic plan to raise children, temporary delays in having children to better enable a couple to fulfill their own overall plan to procreate should not be considered acts of פרו ורבו. However, marrying and having children ought not be delayed intentionally beyond a time of reasonable fertility and the best chances to obtain healthy outcomes for parents and child.<sup>66</sup>

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<sup>64</sup> יבמות מד ע' א citing תרומת הדשן א:רסג.

<sup>65</sup> Rabbi Eliezer Waldenberg explicitly prohibits rabbis from weighing economic considerations when deciding whether a particular couple is permitted to use contraception. See ציץ אליעזר ט:נא(ב). Issues of finances and livelihood should only play a determining factor in our analysis when they are so great that ignoring them would introduce a significant threat to שלום בית. We expect such occasions to be both rare and temporary. Poverty alone does not warrant an exemption from the mitzvah of פרו ורבו. See שו"ת בני בנינים ה' ב ס' לה.

<sup>66</sup> Abelson and Dorff, *supra* note 49. Further, this discussion should not be misinterpreted to imply that today a man should hesitate to marry, or remain married, to a woman who cannot birth a child, or that a woman should hesitate to marry or remain married to a man who is infertile, regardless whether either partner has biological children. In our day, the obligation to have children can be fulfilled through artificial means and adoption.

Further, all of the צדי היתר and reasons not to view temporary postponement of the mitzvah as problematic that have been discussed above are applicable even before the minimum rabbinic requirement of one boy and one girl have been met. Certainly, a couple who already has two children could employ contraception in all of these situations plus others as well. While לערב—having as many children as possible—may be considered in the classical tradition as the ideal way to fulfill the mitzvah and while Rabbis Dorff and Abelson have offered a cogent argument encouraging Jews to have three or more children, we understand that contraception can play a very helpful role in allowing couples to maintain good marital relations, in ensuring the well-being of the family, and in creating situations conducive to additional childbirth later on.<sup>67</sup>

#### **4. Healthy Sexual Decision-making**

Some voices in the contemporary discourse on contraception worry that increased information regarding and access to contraception might encourage unhealthy sexual decision-making, promiscuous behavior, and sex outside of marriage. Strikingly, this concern is absent in most of the major halakhic discussions of contraception to date, playing only a peripheral role in a few scattered responsa.<sup>68</sup> Dr. Avraham Steinberg summarizes the Jewish fear to the degree that it exists as “the concern that a casual attitude to contraceptive use may contribute to a lower level of sexual morality.”<sup>69</sup> When shades of this theme emerge in teshuvot, generally it is mentioned in passing as a potential concern but not as a reason by itself to forbid a particular form of contraception in a given case absent other restrictive factors.

To properly assess the weight that this concern should hold in the discussion, one must first evaluate the evidence confirming or denying its validity. Such an endeavor is difficult. Because dozens of factors coincide when an individual makes a decision about sexual behavior, isolating the role of any one factor is all but impossible. Scientific data do not exist suggesting that access to effective birth-control together with accurate information about its use increases an individual’s number of sexual partners. To the contrary, solid evidence shows that restricting access to effective birth control and information about it has no impact on the number of partners per individual or the frequency of risky sexual behavior across a population. At the same time, such restrictions have been shown to increase unwanted pregnancies and abortions.<sup>70</sup> One recent study followed a large cohort of adolescent girls and observed the impact that access to emergency contraception—the form of contraception currently most feared as enabling promiscuity—had on behavior. The study confirmed that those girls who had

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<sup>67</sup> See אבן העזר א:ה, ערוך השולחן, and Abelson and Dorff, *supra* note 49.

<sup>68</sup> Admittedly, this may be because most rabbis who have been asked to rule on the use of contraception in a particular case are asked by married couples.

<sup>69</sup> Avraham Steinberg, *Encyclopedia of Jewish Medical Ethics, Vol. I*, trans. Fred Rosner, Feldheim, New York: 2003, pg. 249.

<sup>70</sup> See, e.g., C. Trenholm, B. Devaney, K. Fortson et al., “Impacts of Abstinence Education on Teen Sexual Activity, Risk of Pregnancy and Risk of Sexually Transmitted Diseases,” *Journal of Policy Analysis and Management*, Spring, 2008, 27(2):255–276.

easy access to emergency contraception engaged in risky sexual behavior in exactly the same proportion and frequency as those who did not have easy access.<sup>71</sup>

Encouraging the use of good judgment in sexual decision-making is a value that we hold dearly. We strongly encourage individuals to pursue sexual relationships within the guidelines set by the Rabbinical Assembly's *Rabbinic Letter on Human Intimacy*, which affirms that sexual relations within marriage represent the highest ideal in Jewish tradition.<sup>72</sup> It reads, "Only marriages can attain the holiness and communal sanction of *kiddushin* because it is the marital context which holds out the most promise that people can live by those views and values in their intimate relationships."<sup>73</sup> Therefore, our argument that permission to use contraception does not encourage unhealthy sexual decision-making should not be misinterpreted by the reader as an endorsement of non-marital sex.

We believe that the mechanism for limiting unhealthy sexual activity should be a communal effort that includes encouraging good judgment in personal and sexual decision-making: providing effective sexual education, modeling healthy relationships, and helping parents, teachers, rabbis, youth group leaders, and other role models to discuss these matters with their children at appropriate occasions. Attempting to reduce promiscuity by creating a situation in which people who choose to have sex outside of normative sexual relationships face disincentives or obstacles to obtaining appropriate contraception is profoundly ineffective. Further, it is harmful to those who become pregnant as a result and will only increase the number of abortions—a far more significant halakhic concern than the use of contraception.

## **II. Permissibility of Contraception**

Our discussion to this point has shown that the prohibitions of זרע and סרוס do not forbid the use of contraception altogether. Instead, they favor some contraceptive means over others—a point to be explored further below. The concern that contraception will encourage unhealthy sexual decision-making or risky sexual behavior is not supported by scientific evidence and cannot serve as the basis for a Jewish prohibition against contraception. The most significant halakhic obstacle to the use of contraception is the delay and possible evasion of the mitzvah to procreate. Therefore, within marriage, contraception can only be permitted when necessary for the physical or emotional well-

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<sup>71</sup> Cynthia Harper, Monica Cheong, Corinne Rocca et al., "The Effect of Increased Access to Emergency Contraception Among Young Adolescents," *Obstetrics & Gynecology* (Sep. 2005) 106(3):483–491. For a popular treatment of this subject, see Margaret Talbot, "Red Sex Blue Sex," *The New Yorker*, (Nov. 3, 2008), available at [http://www.newyorker.com/reporting/2008/11/03/081103fa\\_fact\\_talbot](http://www.newyorker.com/reporting/2008/11/03/081103fa_fact_talbot).

<sup>72</sup> Elliot Dorff, "*This Is My Beloved, This Is My Friend*": *A Rabbinic Letter on Human Intimacy* (New York: Rabbinical Assembly, 1996); reprinted in Elliot Dorff, *Love Your Neighbor and Yourself: A Jewish Approach to Modern Personal Ethics* (Philadelphia: Jewish Publication Society, 2003).

<sup>73</sup> *Id.*, pg. 31.



being of a family member or when it represents one temporary element of a larger life plan to have children in a way that respects the other needs of the family members. Since the well-being of both the parents and the child could be compromised following an undesired pregnancy outside of marriage, this outcome should be avoided. While the rabbinic preference remains to achieve this through abstinence, contraception is permissible.

### **III. Preferred Means of Contraception**

Once the decision to use contraception is made, careful consideration must be given to the particular contraceptive means. Our discussions of *השחתת זרע* and *סרוס* have suggested that some modern means of contraception may introduce various halakhic challenges. Before our direct consideration of which particular forms of contraception are preferable, we will turn to the classical rabbinic discussions of contraception for guidance.

#### **1. מוץ—An Absorbent**

The Talmudic sages knew of several methods for preventing pregnancy. The mitzvah of *עונה* made abstinence within marriage halakhically unviable. The laws of *niddah* made timing intercourse to periods of reduced fertility difficult. At one point, the Talmud refers to a series of post-coital exercises designed to inhibit fertilization.<sup>74</sup> The method appears to have obtained rabbinic acceptance, but no evidence suggests that it was widely practiced or particularly effective. It was not suggested in the other places where rabbis discuss prevention of pregnancy.

The most common contraceptive method discussed in rabbinic literature is a *מוץ*—a tuft of wool inserted into the vagina either prior to intercourse in order to block sperm from entering the cervix or following intercourse in order to absorb recently deposited sperm. One source reports that it was common for prostitutes to use a *מוץ*.<sup>75</sup> On its face, the passage offers neither approbation nor condemnation for the practice. It is simply descriptive.

The most direct discussion of the permissibility of the *מוץ* is found in a baraita,

תני רב ביבי קמיה דרב נחמן, שלש נשים משמשות במוץ: קטנה, מעוברת, ומניקה; קטנה - שמא תתעבר ושמא תמות, מעוברת - שמא תעשה עוברה סנדל, מניקה - שמא תגמול בנה וימות. . . דברי ר"מ; וחכ"א: אחת זו ואחת זו - משמשת כדרכה והולכת, ומן השמים ירחמו, משום שנאמר שומר פתאים ה'.<sup>76</sup>

<sup>74</sup> כתובות עב ע' א.

<sup>75</sup> נדה ג ע' א-ב.

<sup>76</sup> יבמות יב ע' ב.

Rav Bibi taught before Rav Nahman: Three women use an absorbent—a child, a pregnant woman and a nursing mother. A child—lest she become pregnant and die. A pregnant woman—lest her fetus become a *sandal*. A nursing mother—lest she wean her child prematurely and he dies...these are the words of Rabbi Meir. The sages say, both [women in these three categories] and [women not in these three categories] have intercourse in the usual way; mercy will come from the heavens as it is said, “God protects the innocent.”

There are two debates among commentators: one on the meaning of the Hebrew (may or must) and the other on whether the מוֹךְ may be used before or after intercourse. The Hebrew term משמשה, translated here as “use,” is ambiguous in its context. It could correctly be understood either as “may use” or “must use.” Both readings were proposed by early interpreters of the text. Rashi preferred “may use.” Following this reading, both Rabbi Meir and the sages agree that women outside of these three categories are prohibited from using a מוֹךְ during intercourse. Rabbi Meir, fearing the tragic outcomes specified, permits an exception to the general prohibition for women in the three categories listed. The sages believe that the prohibition against using a מוֹךְ during sex is so strong that no exception can be made even for women in these three categories. Underlying this reading is an assumption that the מוֹךְ—at least when inserted prior to intercourse—renders the seminal emission השחתת זרע as the semen is inhibited by a foreign object.

Rabbeinu Tam, alternatively, preferred “must use.” Following his reading, the debate is entirely different. Both Rabbi Meir and the sages agree that all women may use a מוֹךְ. The sages view women in these three categories as no different from other women; consequently, they too may or may not use a מוֹךְ as they wish. Rabbi Meir, on the other hand, views these women as especially vulnerable; consequently, he mandates that they must use a מוֹךְ to prevent harm. He concurs with the sage that women not in such danger may use a מוֹךְ at their own discretion. According to Rabbeinu Tam, the debate here is not about how far a prohibition against the מוֹךְ extends. In fact, there is no prohibition against the מוֹךְ at all. Rabbi Meir and sages disagree instead about whether Jewish law should mandate the מוֹךְ when there is a possible health risk to pregnancy.

Interestingly, Rabbeinu Tam agrees with Rashi, his grandfather, that a מוֹךְ inserted prior to intercourse would cause the emission to be a violation of השחתת זרע. He describes it as כמטיל זרע על העצים ועל האבנים—as if one spilled his seed on wood and stones. Therefore, Rabbeinu Tam believes that the מוֹךְ described here must be a post-coital absorbent that allows the emission to take place without any interference. Intercourse proceeds as normal, without the interference of a foreign object, and the semen is later rendered non-procreative. He makes the comparison to intercourse with a barren woman which is definitely non-procreative and yet undeniably permissible.

Readers of the text following Rashi and Rabbeinu Tam have had to determine which interpretation they find most plausible. Strong arguments have been made either way and need not be rehearsed at length here. We favor the reading of Rabbeinu Tam for the

reasons given by many *Rishonim*: Rashi's reading has the Sages actively forbidding a woman from taking precautions to prevent endangering herself or her child; this seems highly implausible.<sup>77</sup> It is much more consistent with related rabbinic teachings to adopt a reading in which the Sages would permit such precautions even if they are unwilling to mandate them.<sup>78</sup>

As to the second debate, the halakhically-oriented commentary of Rabbi Morechai ben Hillel cites Rashi's son-in-law, Rabbi Yehudah bar Natan—Rivan—in favoring the reading of Rabbeinu Tam.<sup>79</sup> He permits the use of a מוך after intercourse but is silent on the use of a מוך inserted prior to intercourse. In the responsum cited above, Asheiri permits even a pre-coital מוך describing intercourse with a מוך in place as “intercourse in the normal manner”-משמשת כדרך כל הארץ היא.<sup>80</sup> Rabbi Solomon Luria reaffirms Asheiri's permission for all women to use a pre-coital מוך, rejecting the opinion of Rabbeinu Tam that intercourse with a מוך already in place would constitute זרע השחתת זרע.<sup>81</sup> He interprets the *baraita* in light of other rabbinic texts where a מוך is clearly used prior to intercourse and does not meet with rabbinic disapproval in the Talmud.<sup>82</sup> Luria asserts that Rabbeinu Tam has no basis to argue that the מוך here would be any different. His ruling is affirmed in several later responsa. Rabbi Isaiah Karelitz, author of *Hazon Ish*, labels Luria's insight on this point רוח הקודש—divinely inspired.<sup>83</sup> Consequently, this interpretive tradition holds that intercourse with a מוך does not violate זרע השחתת זרע.

However, this reading of the *baraita* is not universally accepted. Rabbi Meir Posner does not voice a preference for either the reading of Rashi or Rabbeinu Tam, but he asserts that it is best to rule strictly and to forbid the use of a מוך even after intercourse.<sup>84</sup> Similarly restrictive rulings were reached by Rabbi Akiva Eger, his son-in-law, Rabbi Moses Sofer, and Rabbi Jacob Ettlinger, who goes so far as to forbid the use of a מוך even in situations where there is a risk of physical harm.<sup>85</sup> Despite this restrictive tradition, we find the approaches of Asheiri and Luria to follow from more plausible readings of the *baraita* and ultimately we concur with their more permissive halakhic rulings.

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<sup>77</sup> See, e.g., א' יבמות יב ע' א, שיטה מקובצת כתובות לט ע' א and חידושי ריתב"א יבמות יב ע' א.

<sup>78</sup> The counterargument claims that if the risk were significant at all, the sages would certainly have permitted use of the מוך but since the danger to the women in these categories is so extremely remote, the sages did not feel compelled to grant an exception to the prohibition. See חמדת שלמה ס' מו שו"ת אור and שו"ת חמדת שלמה ס' מו גדול ה' א' ס' לא.

<sup>79</sup> מרדכי יבמות פ' א.

<sup>80</sup> שו"ת הרא"ש נדה ג ע' ב. A comment made by Asheiri in שו"ת הרא"ש כלל לג ס' ג suggests that he has reached a conclusion contrary to that cited here. This comment is discredited, however, by most contemporary decisors. See, for example, Rabbi Moshe Feinstein who writes of the seemingly inconsistent comment, שאינו מלשון הרא"ש וגם הם דברי טעות שתלמיד טועה כתב זה—“this is not the writing of the Rosh, but the words of a mistaken student who erred by writing this.” אגרות משה ח' א א"ה א:סג.

<sup>81</sup> ים של שלמה יבמות א:ח.

<sup>82</sup> Later commentators vary in how limited a use they assume was accepted for the מוך. See Feldman, *supra* note 5, pp. 172–173.

<sup>83</sup> חזון איש א"ה לח:ב.

<sup>84</sup> בית מאיר א"ה כג.

<sup>85</sup> בית מאיר א"ה כג, שו"ת רקע"א עא, בנין ציון קלו. Twentieth-century rulings which follow in this tradition include חמדת שלמה מו, ישמח לב י"ד ד, דברי יששכר קלה.

The authority that Luria commanded might have been sufficient to dictate a more lenient trend in subsequent legislation. Instead, his writings were insufficiently available, and other commanding authorities were unaware of their existence. Without his permissive lead to guide them, luminaries such as Rabbi Akiva Eger and the Hatam Sofer, and others, analyzed the matter on their own and came to cautious conclusions because “I have seen no precedent authority that permits.” Their own influence and prestige being so substantial in Hungary, in the rest of Europe, and in the Jewish world generally, a non-permissive school arose that inspired such statements as “How can I permit, seeing that Eger and Sofer have forbidden?” With the discovery of Luria’s bold analysis, based as it was on both precedent and logic, such statements began to give way to others, as “Had Eger and Sofer seen what Luria wrote, they never would have forbidden.”<sup>86</sup>

Having traced considerations of the מוך through rabbinic and halakhic texts, we must now wonder what the implications of this discussion are for contemporary contraceptive methods. Consistent with our conclusions above, the discussion of the מוך teaches that intercourse with no possibility of procreation does not necessarily violate the prohibition of השחתת זרע. Nevertheless, it does suggest that intercourse in the context of some particular forms of contraception may constitute השחתת זרע. Though Asheiri and Luria rule more permissively and do not view the use of a מוך inserted prior to intercourse to be השחתת זרע at all, we have observed that many authorities read the *baraita* as teaching that a foreign object that physically prevents sperm from entry past the cervix is comparable to כמטיל זרע על העצים ועל האבנים—as if one spilled his seed on wood and stones. Such a reading would then strongly favor contraceptive methods that permit natural unobstructed intercourse and inhibit the reproductive capacity of the sperm through other means—e.g., hormonal contraception. Though we accept Asheiri’s and Luria’s rulings, the plausibility of the reading offered by Eger and his followers together with the weight such a reading has been given in subsequent halakhic discussions should incline us towards preferring forms of contraception other than barrier protection when all issues of safety and efficacy are equal, despite our confidence that barrier protection is not, by law, prohibited. Regardless of Posner’s claim to the contrary, we see no coherent way to read the *baraita* that would prohibit the use of a מוך following intercourse—the modern analogue being a post-coital douche.

## **2. כוס של עקרין – The “Cup of Roots”**

Despite the profound implications that the above *baraita* holds for contemporary discussions of contraception, it is virtually ignored in most classical halakhic compendia. Discussions of contraception in the codes focus exclusively on another contraceptive means discussed in rabbinic literature, כוס של עקרין—the “cup of roots”—a sterilizing potion also sometimes called כסא דעקרתא—the “cup of infertility.” The Tosefta states clearly,

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<sup>86</sup> Feldman, *supra* note 4, pg. 300.

האיש אין רשאי לשתות עיקרין שלא יוליד והאשה רשאה לשתות עיקרין שלא תלד.<sup>87</sup>

A man is forbidden to drink the cup of roots in order to sterilize himself  
but a woman may drink the cup of roots in order to sterilize herself.

The basis of the prohibition against men employing this contraceptive method is the rabbinic concern to avoid סרוס, discussed above. Because the biblical prohibition against סרוס falls only on men, the rabbinic prohibition of an act short of סרוס—the ingestion of sterilizing chemicals—should only fall on men as well.<sup>88</sup>

The Talmud recounts the story of Rabbi Hiyya's wife, who had difficulty in previous childbirth, disguising herself to ask for a halakhic ruling from her husband. When he ruled that the mitzvah of פרו ורבו did not apply to women, she drank כוס של עקרין in order to permanently sterilize herself. When Rabbi Hiyya realized her deception, he expressed disappointment that he would not have an additional children, but he did not suggest that her actions had violated any prohibition.<sup>89</sup> We saw above that the Tosefta's ruling permitting כוס של עקרין to women is codified without qualification.<sup>90</sup>

What is striking about the rabbinic כוס של עקרין and its prominence in later halakhic sources is that it invites no discussion at all about a possible violation of השחתת זרע. Through this unanimous opinion of the *poskim* we see an additional confirmation of our conclusion that intercourse with a woman even when there is no possibility of reproduction does not represent an act of השחתת זרע. This is true even when the sterilizing agent is permanent; certainly then there would be no concern of השחתת זרע with the introduction of a chemical that renders a woman temporarily infertile, such as the hormonal contraceptive methods to be discussed below. The only concern with a כוס של עקרין is one of סרוס. Currently, no male hormonal contraception is approved for use in the United States. The agents in development have serious drawbacks and are far from market. Should a male hormonal contraceptive become available that, like hormonal contraception for women, can be stopped easily with a quick resumption of fertility, we would likely permit its use as the prohibition discussed here is specific to permanent chemical sterilization—the only form known to the Sages and later codifiers.

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<sup>87</sup> תוספתא יבמות ח:ב.

<sup>88</sup> This argument interprets the version of the statement commonly printed today. *But see* the textual variant: האיש אין רשאי לשתות עיקרין שלא יוליד והאשה לא רשאה לשתות עיקרין שלא תלד. “A man is forbidden to drink the cup of roots in order to sterilize himself and a woman may not drink the cup of roots in order to sterilize herself.” This variant reading then challenges validity of halakhic conclusions drawn from the story of Rabbi Hiyya and his wife *infra*. The version cited above is the version accepted by later authorities. *See infra* note 90.

<sup>89</sup> יבמות סה ע' ב.

<sup>90</sup> טור שם, סמ"ג ל"ת קכ ויד איסורי ביאה טז:יב; *see also* שולחן ערוך אבן העזר ה:יב.

## Contemporary Contraception

Having analyzed the relevant halakhic principles underlying the rabbinic considerations of the מוך and the עקרין של כוס, we are now ready to apply those principles directly to the forms of contraception available today. Some forms of contraception are halakhically prohibited in all cases unless there is a medical necessity beyond the prevention of pregnancy. Abstinence within marriage is prohibited because it violates the mitzvah of עונה. Surgeries such as a vasectomy, tubal ligation or tubal obstruction are prohibited because, unless done for reasons of health, they constitute an act of סרוס.<sup>91</sup> Fertility awareness strategies, commonly referred to as “the Rhythm Method,” are not by definition prohibited, but because the implementation of such methods makes simultaneous observance of עונה and טהרת משפחה so difficult, they are unlikely to serve as a viable option for most religious Jewish couples.<sup>92</sup>

The choice of which method to employ should be made in conversation with a physician who can help the individual evaluate specific health risks that may influence the decision and determine which methods may prove most effective given an individual’s lifestyle, personality, age, goals and family situation. We take seriously the principle underlying the rabbinic dictum המירא סכנתא מאיסורא—avoiding harm is a more serious concern than violating a prohibition. *The primary factors in deciding among these options must be safety and efficacy.*<sup>93</sup>

The following methods of contraception will be discussed in order of their preferability within Jewish tradition from most preferable to least preferable; however, *this ranking holds only in a situation when all the methods are presumed to be equally safe and effective for a given individual.* If a woman elects to employ a method of contraception farther down the list for reasons of safety or efficacy specific to her circumstances, she may rest assured that such a choice represents a halakhically valid decision, fully justified within normative Jewish practice. The following list should not be misunderstood as a moral ranking of contraceptive methods but rather it serves as a set of guidelines to help a woman or a couple to use traditional Jewish values when selecting among options that are determined to be equally safe and effective for her.

## Hormonal Contraception

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<sup>91</sup> Rabbi Yitzhak Ya’akov Weiss rules that a vasectomy, even when the spermatic cords are tied and not cut, violates both the prohibition of סרוס and פצוע דכא ויב, יג, פצוץ דכא.

<sup>92</sup> The scientific community puts the failure rate of the rhythm method at 25% compared to the “withdrawal” method’s failure of 17%. “Estimates of contraceptive failure from the 2002 National Survey of Family Growth.” *Contraception*, Jan. 2008; 77(1):10–21.

<sup>93</sup> As rabbis, it would neither be prudent nor proper for us to give medical advice. The determination of what means of contraception will offer the best risk/benefit profile for a given individual should be made in consultation with a qualified healthcare professional in consideration of the best available medical evidence.

Hormones designed to inhibit ovulation may be ingested orally, injected into the muscles, or slowly released into the blood stream via implanted rods, a transdermal patch or a removable vaginal insert. Regardless of the method of administration, hormonal contraception is most analogous to the כוס של עקרין —the significant difference is that the כוס של עקרין caused permanent sterilization while hormonal contraception can be stopped at any time with a speedy resumption of fertility afterward.<sup>94</sup> Because the כוס של עקרין presented no concern of השחתת זרע as it allows intercourse to proceed unimpeded by a foreign object, hormonal contraception represents the most preferable halakhic method of birth control at present when it is at least as equally safe and effective for a particular woman as other means of birth control would be given her unique health and behavioral profile.

The different methods of administration allow for varying doses of slightly different hormones. The most important factors in deciding on a method of administration should be limiting the health risks that each option might pose for a specific individual and the ability of a woman to comply with the delivery protocols—that is, a woman likely to forget to take a pill daily might find a weekly patch to be more effective, etc. However, in the event that all methods of administration present an equal safety profile and efficacy rate for a particular woman, Jewish tradition would incline towards preferring a pill, a patch or an insert. Each of these methods can be stopped easily, and baseline fertility can be resumed with minimal delay. Intramuscular injections (in the US, depot medroxyprogesterone acetate, sold under the brand name Depo-Provera) require a slightly longer delay before fertility returns. Implants (currently sold under the brand names Implanon and Jadelle) can always be removed with a quick resumption of fertility afterwards, but because a physician is necessary for their removal, delays are likely. However, since the possible delays in returning to full reproductive ability are not extensive following the decision to discontinue implants or injections, the halakhic preference against them is slight and could easily be outweighed by other factors for a particular individual.<sup>95</sup>

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<sup>94</sup> The reader might wonder if hormonal contraception delivered via a vaginal insert (currently sold in the United States under the brand name NuvaRing) should be considered more analogous to the מוץ since a foreign object remains in the vagina during intercourse. This analogy however is false as the ring neither blocks entry of sperm past the cervix nor does it absorb semen. Intercourse with a similarly constructed insert without the hormones would result in pregnancy rates equivalent to intercourse with no contraception at all.

<sup>95</sup> Hormonal contraception can also be used to regulate, delay or altogether eliminate menstrual cycles. The most common protocols include 21 days of active agent followed by 7 days without, allowing for monthly cycles; 84 days of active agent followed by 7 days without, allowing for one cycle every three months; or active agent without interruption, allowing for the indefinite suppression of menstruation. Couples will likely wish to consider how the various cycle options would affect the dynamics and rhythms of their sexual relationship, from the perspective of the framework of טהרת המשפחה and other physical psychological, emotional and esthetic considerations. For discussions of the terminology, background, meaning, and evolving practices of טהרת המשפחה see recent responsa of the CJLS, "Mikveh and the Sanctity of Family Relations, An Introduction" by Rabbi Miriam Berkowitz, "Mikveh and the Sanctity of Being Created Human" by Rabbi Susan Grossman, "Observing Niddah in Our Day" by Rabbi Avram Reisner, and "Reshaping the Laws of Family Purity for the Modern World" by Rabbi Miriam Berkowitz, *available at* [http://www.rabbinicalassembly.org/law/new\\_teshuvot.html](http://www.rabbinicalassembly.org/law/new_teshuvot.html).

## Intrauterine Devices (IUDs)

An intrauterine device (IUD) is small T-shaped object inserted into the uterus by a healthcare professional. The exact mechanism by which IUDs prevent pregnancy is not well-understood. It is widely believed that the exposure of the uterus to a foreign body initiates an inflammatory reaction that is toxic to sperm. Should fertilization nevertheless occur, the mucus developed in response to the inflammation inhibits implantation. Despite the concerns of some prior halakhic authorities who feared that the device might actively destroy implanted embryos, current scientific evidence strongly supports that an IUD does not function as an abortifacient,<sup>96</sup>

At present, un-medicated or inert IUDs are not approved for use in the United States though they are common worldwide. The only IUDs available for use by women in the United States release copper ions (sold under brand name Paragard) or progestin (sold under the brand name Minera). Though the specific mechanisms of action vary depending on the specific device implanted, all can be considered equivalent from a halakhic standpoint since no solid evidence suggests that any IUD interferes with live pregnancy after implantation.

Though an IUD is a foreign object, it cannot properly be considered analogous to the מוץ since it does not prevent entry of the sperm past the cervix. Sperm transverse the cervix in exactly the same manner as they would without the implantation of the device. Consequently, no violation of זרע השחתת exists even according to the opinion of those who hold more strictly than we do and view intercourse with a מוץ in place as a possible violation of the prohibition. Rabbi Immanuel Jakobowitz expressed hesitance about permitting an IUD, not because it violates זרע השחתת but because he feared that it might effect an abortion.<sup>97</sup> As noted above, the scientific evidence today does not support this concern, and it is not echoed in the later opinions of such contemporary Orthodox decisors such as Rabbis Eliashiv, Auerbach and Neuwirth.<sup>98</sup> Rabbi Eliezer Waldenberg initially ruled that a diaphragm should be preferred over an IUD since the diaphragm does not actively lead to the destruction of sperm.<sup>99</sup> However, he later reversed his earlier ruling, favoring the use of an IUD over both a diaphragm and even oral contraception because of its safety and efficacy.<sup>100</sup>

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<sup>96</sup> Roberto Rivera, Irene Yacobson and David Grimes, "The mechanism of action of hormonal contraceptives and intrauterine contraceptive devices." *American Journal of Obstetrics and Gynecology*, Nov. 1999; 181:1263–1269 and Joseph Stanford and Raphael Mikolajczyk, "Mechanisms of action of intrauterine devices: Update and estimation of postfertilization effects." *American Journal of Obstetrics and Gynecology* 2002; 187:1699–1708.

F. Alvarez, V. Brache, E. Fernandez et al., "New insights on the mode of action of intrauterine contraceptive devices in women." *Fertility and Sterility*, 1988; 49:768–773.

<sup>97</sup> ישראל יאקאבאוויטש, "שאלות והערות בעניינים רפואיים שונים," ג' ו:רעב.

<sup>98</sup> נשמת אברהם אבן העזר ה:יב(ג, ז).

<sup>99</sup> ציץ אליעזר ח' ט ס' נא.

<sup>100</sup> ציץ אליעזר ח' י ס' כה(י).



Rabbi Moshe Feinstein prohibited the use of an IUD altogether.<sup>101</sup> While he did note the above concerns, the primary basis for his ruling was the irregular bleeding caused by early IUDs and the difficulty that such bleeding would impose on women observing the laws of *tohorat mishpahah*. Such bleeding is much less common with contemporary IUDs than was the case when Feinstein offered his ruling. Nevertheless, it still occurs, especially within the first several months of use; since it is uterine bleeding, it still requires separation and immersion, unless one follows the recommendation of Rabbi Susan Grossman to disregard the status of *zavah* (irregular bleeding) altogether.<sup>102</sup>

## Diaphragms & Cervical Caps

A diaphragm is an individually fitted rubber device inserted prior to intercourse which blocks the cervix. The term “cervical cap” could refer to a number of similar barrier devices including the Prentif cap, FemCap and Lea’s Contraceptive. Cervical caps do not require individual fitting by a trained clinician, but because their mechanism of action is so similar to that of the diaphragm, they can be considered as equivalent for halakhic analysis. At first, the diaphragm appears to represent a much closer analogue to the מוֹך than an IUD because its primary means of function is to prevent entry of sperm past the cervix. However, most early authorities considering the diaphragm and its predecessors reject this analogy and find the diaphragm to be much less halakhically problematic than the מוֹך. Many decisors who view the מוֹך as generally forbidden to women nevertheless permit the diaphragm on the grounds that it does not absorb the sperm and destroy it; rather, a diaphragm simply prevents live sperm from entering the uterus. Rabbi Shalom Shwardon likened use of the diaphragm to intercourse with a pregnant woman which, of course, is permissible—in both cases, סגור פי המקור—the entryway to the uterus is closed.<sup>103</sup> Rabbi David Hoffman leaves no room for doubt in his ruling,

שיסתום הרופא או חכמה את פי הרחם בסתימה ראויה ובוזה אין אני רואה שום צד ונדנוד איסור הואיל ואין משחיתין את הזרע אלא שמונעין את הזרע מליכנס לרחם.<sup>104</sup>

That a physician or midwife seals the entrance to the womb with an appropriate covering, in this I see no basis for or suggestion of a prohibition since it does not destroy the seed but rather it prevents the seed from entering the womb.

Rabbis Feinstein and Isaac Weisz are the two twentieth century decisors who expressed the greatest reservations about the use of a diaphragm.<sup>105</sup> Both reject Shwardon’s assessment and view a diaphragm as closely analogous to the מוֹך. Since both of these

<sup>101</sup> אגרות משה א"ה ח' ג' ס' כא וח' ד' ס' סט.

<sup>102</sup> Susan Grossman, "Mikveh and the Sanctity of Being Created Human," CJLS Responsa, YD 183.2006b; *see also* Nishmat Avraham YD 187:4 (discussing whether extensive uterine bleeding with a non-hormonal etiology, such as polyps in the uterine, requires immersion).

<sup>103</sup> שו"ת מהרש"ם ח' א' ס' נה.

<sup>104</sup> מלמד להועיל ח' ג' ס' יח.

<sup>105</sup> מנחת יצחק ח' א' ס' קטו. אגרות משה ח' א' ס' סג.

authorities, in contrast to us, view the מוֹךְ as forbidden to women not at an elevated health risk, they permit the use of a diaphragm only in limited instances of medical necessity. Though we are neither convinced that a diaphragm should be viewed as an analogue to a מוֹךְ nor that the use of the מוֹךְ is to be permitted only in as narrow a range of circumstances as they prescribe, we take Feinstein's and Weisz's opinions into account when we rule that there is a slight halakhic preference for the IUD over the diaphragm assuming all issues of safety and efficacy are equal for a particular woman. Since even the concerns of Feinstein and Weisz can be addressed adequately through the use of hormonal contraception or an IUD, such means of contraception should be preferred when possible.

Of note, current medical guidelines do not recommend use of a diaphragm or cervical cap without the simultaneous use of a spermicide.<sup>106</sup> Our understanding of השחתת זרע, outlined above, limits the prohibition to the improper emission of seed and not the destruction of seed following emission; so, we do not consider the use of a spermicide to violate השחתת זרע. Nevertheless, another reason that we find a halakhic preference for hormonal contraception and IUDs is that neither of those two methods involves the active destruction of sperm which, even if not a technical violation of the prohibition, remains sub-optimal.

## Sponges

The contraceptive sponge is a small circular disk moistened with tap water prior to insertion permitting a proper fit. The only sponge sold in the US at present, the Today sponge, contains spermicide as a secondary means of contraception. An untreated sponge would have exactly the same halakhic status as a מוֹךְ. That is, according to our analysis of the sources above, it would be permitted to all women. The addition of the spermicide invites the concerns noted in our discussion of the diaphragm and causes the contemporary sponge to be less halakhically preferable even though it is permissible.<sup>107</sup>

## Condoms

The term condom describes a membrane made of latex or a similar substance used to create a barrier between the penis and vagina during intercourse. The term "female condom" refers to a plastic cup inserted into the vagina and anchored by an external ring. Though used differently, both will be considered as equivalent for halakhic purposes since both serve as a complete barrier preventing semen from entering the vagina. A condom does not simply prevent sperm from passing the cervix, but it keeps sperm outside of the vagina altogether. For this reason, most decisors worry that the use of a

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<sup>106</sup> L. Cook, K. Nanda, and D. Grimes, "The Diaphragm with and without Spermicide for Contraception: A Cochrane Review," *Human Reproduction*, Apr. 2002, 17:4, 867–869.

<sup>107</sup> Another drawback of diaphragm or contraceptive sponge is that they must be inserted prior to intercourse, thus adding a certain amount of inconvenience and reducing spontaneity. Since this affects *onah*, the marital pleasure aspect of the relationship, a couple may weigh them as relevant factors.

condom may violate the prohibition of *השחתת זרע*. The emission of semen directly onto the membrane, following this view, constitutes a contemporary version of Rabbeinu Tam's articulation *על האבנים ועל העצים ועל האבנים ועל העצים ועל האבנים ועל העצים*—as if one spilled his seed on wood and stones.

Definitive rulings regarding the use of a condom vary significantly, but unqualified permission to use a condom cannot be found in the responsa literature. Rabbis Moshe Feinstein and Dov Weidenfeld prohibit the use of a condom even to prevent a physical danger to the woman.<sup>108</sup> A broader group of decisors permit it only in limited circumstances to prevent danger, *i.e.*, if the woman would be at a health risk were she to become pregnant, or when no other contraceptive means would be safe and effective.<sup>109</sup> Many others who permit the use of a condom, do so only when the minimum requirement of *פרו ורבו* (a boy and a girl) has already been fulfilled and a transgression of *השחתת זרע* would be at most rabbinic.<sup>110</sup>

Even though we accept that intercourse with a *מוך* does not violate *השחתת זרע*, we do not consider a condom as analogous to a *מוך* because, with a condom, the emission is interrupted. However, our analysis above that the prohibition of *השחתת זרע* seems to be rabbinic in nature allows us to permit the use of a condom when it is the best means available for one to fulfill a biblical obligation such as the *mitzvah* of *עונה*. Even in such cases however, the above contraceptive methods should be preferred whenever possible. One advantage to the condom is that it has almost no side effects—a benefit not shared to the same degree by other effective contraceptive methods.<sup>111</sup> It is also cheap and easily available. However, it can fail even when used properly.<sup>112</sup> The condom may be used by anyone for whom no other contraceptive means are safe and available.

Also of note, the above discussion has focused exclusively on preventing pregnancy. The condom has a second important function: to reduce the spread of sexually transmitted diseases—a benefit that no other contraceptive method provides to the same degree. While a full discussion about healthy sexual decision-making is far beyond the scope of this responsum, it is clear that anyone engaging in sexual activity carries a responsibility to themselves and their partner to take all appropriate precautions necessary for avoiding sexually transmitted diseases. When a condom represents the best way to meet this obligation, there is no doubt that the possible violation of a rabbinic prohibition—*השחתת זרע*—is far outweighed by the much more serious consequences of contracting or transmitting a life-altering disease. The prohibition, while serious, is not so immutable that a person's health should be jeopardized in order to observe the strictest interpretation of it. However, for monogamous relationships in which both partners are tested and found to be disease-free prior to having sex, this benefit of the condom is less relevant.

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<sup>108</sup> דובב משרים ה' א' ס' כ and אגרות משה א"ה ה' ג' ס' כא וז' ד' ס' טז.

<sup>109</sup> See, e.g., (ג-ב) נא' ט' ס' ציץ אליעזר ה' ט' נא' (ב-ג).

<sup>110</sup> בית יצחק א"ה א:צא and שו"ת אחיעזר ה' ג' ס' כד(ה).

<sup>111</sup> For some, the use of a condom will inhibit *עונה*. This certainly represents a halakhic concern of significant magnitude to factor into a couple's decision-making.

<sup>112</sup> M.J. Rosenberg and M.S. Waugh, "Latex Condom Breakage and Slippage in a Controlled Clinical Trial." *Contraception*. Jul. 1997; 56(1):17–21.

## Postcoital (Emergency) Contraception

The term postcoital contraception—commonly called “emergency contraception”—refers to any drug or device employed after intercourse to prevent pregnancy. One effective method is to insert an IUD within 72 hours of intercourse. However, because of the expense and necessary involvement of a trained clinician to place the device, it is rarely used for this purpose. Far more common today is the administration of hormonal agents that prevent pregnancy in a variety of different ways. Though several hormonal agents may be used, clinical guidelines currently recommend a high dose of levonorgestrel (sold in the US under the brand name, Plan B) taken as quickly as possible following intercourse or two smaller doses taken twelve hours apart by women for whom the higher dose is contraindicated.<sup>113</sup>

Levonorgestrel and other postcoital contraceptive agents function almost identically to hormonal contraception administered prior to intercourse inhibiting fertilisation of any eggs released by any sperm that is still active and by causing changes to the endometrium to prevent implantation of the fertilised egg. Were both contraceptive means equally safe and effective, we would see no significant basis for a halakhic distinction between them, and we would permit postcoital hormonal contraceptive in all cases when pre-coital hormonal contraception is permitted. Ironically, the former is closer to what the stricter interpreters of the *braita* of the three women would permit, though the latter is intuitively more palatable to many today because it avoids the unfounded concerns about the proximity to abortion. However, the efficacy of levonorgestrel as emergency contraception is difficult to assess and is widely presumed to be less effective than pre-coital hormonal contraception.<sup>114</sup> Further, though no confirming data is available at present, some physicians have expressed concerns about possible health risks were a woman to use it repeatedly over time.<sup>115</sup> Consequently, postcoital hormonal contraception should never be a couple’s preferred method for preventing pregnancy, but when another contraceptive has failed, was used improperly or not used at all, emergency hormonal contraception constitutes an acceptable halakhic measure.

It is important to clarify the mechanism of post-coital hormonal treatment. The exact mechanism of action varies from person to person depending on a range of factors, including when in the cycle the hormone is administered. Levonorgestrel may delay ovulation, interfere with fertilization, interrupt tubal transport, prevent implantation by altering endometrial receptivity, or cause regression of the corpus luteum—a remnant of the follicle following ovulation necessary to maintain pregnancy. Regardless of how the agent works for a particular individual, the pregnancy preventing action always takes

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<sup>113</sup> American College of Obstetricians and Gynecologists. “Clinical Management Guidelines for Obstetrician-Gynecologists,” *ACOG Practice Bulletin*. 69, Dec 2005.

<sup>114</sup> Liang Cheng, A. Metin Gulmezoglu, Gilda Piaggio et al., “Interventions for Emergency Contraception.” *Cochrane Database Systems Review*, April 16, 2008, CD001324.

<sup>115</sup> United Nations Development Programme; United Nations Population Fund; World Health Organization; World Bank Special Programme of Research, Development and Research Training in Human Reproduction, Task Force on Post-Ovulatory Methods of Fertility Regulation. “Efficacy and Side Effects of Immediate Postcoital Levonorgestrel Used Repeatedly for Contraception,” *Contraception* 2000;61:303–308.

place *prior to implantation*. Peer-reviewed data shows that emergency contraception is completely ineffective once a conceptus has implanted and pregnancy has begun; it functions through a variety of means to prevent the implantation of a fertilized embryo.<sup>116</sup> Therefore, although emergency contraception can interfere with the implantation of a zygote, it should not be confused with the “abortion pill” or any other abortifacient which terminates a pregnancy after it has begun.

Abortions are sometimes induced medically, but not with levonorgestrel. The only FDA-approved protocol for a medical abortion at present calls for an oral dose of mifepristone—a synthetic steroid sold in the US under the brand name Mifeprex and commonly referred to as RU-486—followed two days later by a dose of prostaglandin to induce contractions. The FDA has approved the use of mifepristone as an abortifacient until the 49<sup>th</sup> day from the start of the woman’s last period. Mifepristone terminates a pregnancy after the embryo has implanted by blocking progesterone, a hormone necessary to maintain pregnancy. Confusion between medically induced abortions and emergency contraception is common.<sup>117</sup> Since full-dose mifepristone is intended to terminate a developing pregnancy, it should be viewed as an abortifacient.<sup>118</sup>

Our broad permission for emergency contraception rests on a premise that pregnancy begins with the implantation of the fertilized egg in the wall of the uterus—usually about five days after fertilization, which itself may occur up to 72 hours after intercourse. Acts preventing implantation are thus viewed as contraceptive, and acts terminating pregnancy after implantation are viewed as abortive. Since setting the start of pregnancy at implantation may not be intuitive, we must support our claims above by explaining why we view implantation as the proper starting point for pregnancy from a halakhic perspective.

Lending credence to the counterclaim that pregnancy might begin prior to implantation, the rabbinic counting of the length of a pregnancy begins from the time of intercourse, not implantation.<sup>119</sup> However, it is important to note that prior to Leeuwenhoek’s invention of the microscope, very little was known about the specific mechanism of pregnancy. Most historians believe that the female ovum was not even identified until

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<sup>116</sup> Anna Glasier, “Emergency Postcoital Contraception,” *New England Journal of Medicine*, 1997 337:1058–1064.

<sup>117</sup> Complicating matters further is the fact that some physicians administer a small dose of mifepristone shortly after intercourse to function as emergency contraception instead of levonorgestrel. This limited use of low-dose mifepristone within the first five days of intercourse should be halakhically equivalent to the use of levonorgestrel as emergency contraception and permissible. However, the more common use of full-dose mifepristone to induce an abortion following implantation should be distinguished from the use of mifepristone as an emergency contraceptive.

<sup>118</sup> No CJLS teshuvah has yet addressed this question directly. There are times when abortion is permitted in Jewish law, particularly during the first 40 days which is when full-dose mifepristone is administered. The following CJLS responsa discuss abortion generally: David M. Feldman, “Abortion: The Jewish View” HM 425:2.1983a; Robert Gordis, “Abortion: Major Wrong or Basic Right?” HM 425:2.1983b; Ben Zion Bokser, Kassel Abelson, “Statement on the Permissibility of Abortion” HM 425:2.1983c; Kassel Abelson, “Prenatal Testing and Abortion” HM 425:2.1983d; Isaac Klein, “A Teshuvah on Abortion” HM 425:2.1983e.

<sup>119</sup> נדה לה ע' א-ב.

1828.<sup>120</sup> Consequently, the wisdom of our Sages was limited by the incomplete scientific understanding of their day. Further, as implantation can only be detected with the assistance of modern testing equipment, the rabbinic direction to count from the time of intercourse may have been nothing more than a very practical suggestion for a time when no other starting point could have been contemplated. New scientific or medical information need not always trump halakhic precedent, but it must be addressed directly by halakhic authorities lest the tradition sever itself from the world which it governs.<sup>121</sup> David Feldman offers several compelling examples of how rabbis have adjusted the halakhic discourse surrounding pregnancy as new technologies allowed for a more accurate understanding of the process.<sup>122</sup> For us not to follow in this path would represent an abdication of our responsibility to employ all of our faculties for the sake of making proper halakhic judgments.

Today, implantation is accepted with broad consensus throughout the medical community as the starting point of pregnancy. The American College of Obstetricians and Gynecologists declares, “Conception is the implantation of the blastocyst . . . A pregnancy is considered to be established only after implantation is complete.”<sup>123</sup> Definitions used by the National Institute of Health and the Food and Drug Administration are similar. It is with implantation that a woman’s hormonal system begins to respond to the embryo, initiating the cascade of physiological changes associated with pregnancy. Even the most sensitive pregnancy test will display a negative result prior to implantation. Further, it is estimated that between one-third to one-half of all fertilized embryos fail to implant.<sup>124</sup> From the woman’s perspective, this is indistinguishable from menstruation. Certainly, such a woman is not generally considered as having lost a pregnancy.

The CJLS has already adopted several responsa holding that an embryo in a laboratory does not have the status of a fetus because implantation represents a necessary condition for pregnancy.<sup>125</sup> We find no significant halakhic difference between a fertilized egg in a Petri dish and one in a fallopian tube. Neither can properly be considered as on a trajectory towards life until implantation has occurred—an outcome that is far from certain and depends on other factors in both cases.<sup>126</sup>

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<sup>120</sup> See, e.g., Joseph Needham, *A History of Embryology* (Cambridge: University Press, 1934).

<sup>121</sup> See Roth, pp. 234–35 cited in Miriam Berkowitz, *Reshaping the Laws of Family Purity for the Modern World*, CJLS Responsa, p. 22. See also Daniel Rosenak, *Infertility and its Ethical and National Repercussions: Studies in the Laws of Family Purity in the Light of Changing Realities* (publication forthcoming) pp. 47–48 (describing “*nishtanu ha- tiv'im*”).

<sup>122</sup> Feldman, *supra* note 4, pp. 140–143.

<sup>123</sup> American College of Obstetricians and Gynecologists, “Terms Used in Reference to the Fetus,” *Terminology Bulletin*, 1, Sept. 1965.

<sup>124</sup> I.D. Cooke, “Failure of implantation and its relevance to subfertility,” *Journal of Reproduction and Fertility*, Supplement I (1988) 36:155–159.

<sup>125</sup> Elliot Dorff, “Stem Cell Research,” CJLS Responsa, YD 336.2002 and Mark Popovsky “Choosing Our Children’s Genes: The Use of Preimplantation Genetic Diagnosis,” CJLS Responsa, EH 1:5.2008.

<sup>126</sup> Several prominent Catholic scholars have similarly argued that emergency contraception is not abortion. Austriaco, Nicanor Pier Giorgio, “Is Plan B an abortifacient? A critical look at the scientific evidence,” *National Catholic Bioethics Quarterly*, 2007 Winter; 7(4): 703–707; Daniel P. Sulmasy, “Emergency

Consequently, we view emergency contraception—which prevents implantation—as halakhically equivalent to hormonal contraception administered prior to intercourse.<sup>127</sup> The halakhic preference for precoital use of hormonal contraception rests primarily on the presumed safety and efficacy benefits for most women.

## Parental Consent or Notification for Adolescent Use of Contraception

The *Rabbinic Letter on Intimate Relations*, incorporated by this teshuvah, affirms that *the Jewish values governing permissible sexual relationships are inconsistent with sexual activity during adolescence*; other decisors of Jewish law have affirmatively prohibited non-marital sex altogether.<sup>128</sup> Consequently, in an ideal Jewish setting, the use of contraception would be a moot issue for minors. We encourage all those involved to help teens “recognize that sexual intercourse is not an isolated act with little or no effect on the rest of our lives. . . . Sex should be seen . . . as one important part of our human existence which is tied to all the other parts and which therefore affects, and is affected by, the totality of our lives.”<sup>129</sup> When a teen engages in sex because of peer pressure, a series of harmful consequences may result. However, Jewish adolescents do have sexual relationships, and an honest halakhic consideration of the issues must not ignore this fact.<sup>130</sup>

A full acknowledgement of this insight should lead the adolescent to discuss his or her sexual behavior with parents and other trusted adults. We encourage the adults involved in those conversations to provide accurate information about contraception and the prevention of sexually transmitted diseases. Were these conversations to occur in all situations, we would hope that a child’s seeking access to contraception without a parent’s knowledge would prove to be rare. However, we further recognize that these conversations do not always happen and that some adolescents will seek to obtain contraception without the consent or knowledge of a parent.

At first, it might appear that Jewish tradition holds a bright-line standard for the capacity to consent for oneself—the age of *bar/bat mitzvah*. Those who have not yet become *bar/bat mitzvah* are halakhically considered minors and would need parental approval.

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contraception for women who have been raped: must Catholics test for ovulation, or is testing for pregnancy morally sufficient?,” *Kennedy Institute of Ethics Journal*, Dec. 2006; 16(4): 305–331.

<sup>127</sup> Even though Rabbis Shlomo Auerbach and Yehoshua Neuwirth both rule much more restrictively than we do with respect to contraception generally, they both concede that emergency contraception does not function as an abortifacient and may be employed following coerced sex. (נשמת אברהם חושן משפט תכה:ב(כג).

<sup>128</sup> See, e.g., י"ו, אסורי ביאה, משנה תורה, רמב"ם, משנה תורה, אסורי ביאה, י"ו.

<sup>129</sup> Dorff, *Rabbinic Letter*, *supra* note 72.

<sup>130</sup> See, e.g., Institute for Informal Jewish Education, Brandeis University, “The Jewish Adolescent Study” (2005), available at <http://www.brandeis.edu/ije/resources/research.html>.

Those who have become *bar/bat mitzvah* are considered adults and, though parental assent would be greatly preferred, it would not be absolutely required. However, in practice, Jewish law has not applied this standard in all cases, preferring instead definitions of majority narrowly-tailored for a specific purpose; for many situations, adulthood does not begin until a later chronological age.<sup>131</sup> In others, the beginning of adulthood varies depending on the person's intellectual, emotional, financial or other status.<sup>132</sup>

Previous halakhic sources have not addressed the question of parental consent for contraception, and there is little precedent for which particular standard should be applied here. One discussion in the Talmud proposes setting the age of consent for a woman at the age when she is able to bear children,

133. אמר רב ספרא: בנים הרי הם כסימנים. ואית דאמרי: בנים עדיפי מסימנים.

[Bearing] children serves as a sufficient determinant of adulthood [even in the absence of classic markers or chronological age]. Some say that [bearing] children represents a better determinant of adulthood [than classic markers or chronological age].

Though the ability to bear children would make a poor test for adulthood across the board, we argue here that it constitutes the best halakhic test for majority with respect to questions of consent for contraception because it is consistent with the best scientific data available at present. That is, laws requiring parental consent or notification for access to contraception up until the age of 16 or 18 have repeatedly been shown to increase the number of abortions, teen pregnancies, and sexually transmitted diseases without decreasing the frequency of adolescent sexual activity.<sup>134</sup> Those who argue for mandating parental involvement in the decision-making process do so because they believe that mandating such involvement will foster an environment in which adolescents make safer decisions. Unfortunately, the best evidence available does not support this belief and, in fact, shows that such mandates lead to less healthy decision-making across

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<sup>131</sup> For example, a person's right to sell his father's land and a man's obligation to engage in military or Temple service begin at the age of twenty. See *יד כלי המקדש ה:טו*.

<sup>132</sup> A son still supported by his father financially is considered a minor for many purposes even after the age of thirteen. See *ע' רע*.

<sup>133</sup> *בבא בתרא יב ע' ב*.

<sup>134</sup> Diane Reddy, Raymond Fleming, Carolyne Swain, "Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services," *Journal of the American Medical Association*. Aug 14, 2002;288(6):710–714; Madeline Zavodny, "Fertility and Parental Consent for Minors to Receive Contraceptives," *American Journal of Public Health*, Aug 2004;94(8):1347–1351; Rachel Jones, Heather Boonstra, "Confidential Reproductive Health Care for Adolescents," *Current Opinion in Obstetrics and Gynecology*. 2005;17:456–460; Rachel Jones, Alison Purcell, Susheela Singh, Lawrence Finer, "Adolescents' Reports of Parental Knowledge of Adolescents' Use of Sexual Health Services and Their Reactions to Mandated Parental Notification for Prescription Contraception," *Journal of the American Medical Association*, Jan. 19, 2005; 293(3):340–348.



a population. Further, the evidence suggests that such mandates can increase the likelihood of acts of domestic violence.<sup>135</sup>

The reader is strongly cautioned against misunderstanding our adoption of this standard as a statement that parents need not be involved in the sexual or medical decision-making of their adolescent children. To the contrary, Jewish tradition places great value on consistent, direct communication between parents and children and argues that parents should be actively involved in the major life decisions made by adolescents. Further, it demands that clergy, teachers and other adults behave in ways that facilitate and model this communication. The adolescent who elects not to involve his or her parents in such an important decision clearly acts against the intent of these deep-seated Jewish values. Our point here is simply that Jewish law does not directly mandate parental consent or notification for access to contraception. Instead, the tradition seeks to involve parents in the lives of their children by creating environments and establishing relationships that are conducive to robust parent-child communication.

## **Summary/ Psak:**

Jewish law enjoins those who are physically and mentally able to procreate and raise children to have a minimum of two offspring. A recent opinion of the CJLS has increased this to three whenever possible.<sup>136</sup>

Contraception may be used before, after, and in between pregnancies if there is a compelling physical or emotional well-being justification. However financial concerns that go beyond obtaining basic necessities and other issues of convenience are not generally considered sufficient reasons.

Safety and efficacy are the primary criteria for determining the most halakhically preferable means of contraception. Because the medical and behavioral issues affecting safety and efficacy will vary for each couple, it is a decision that should be made with a healthcare professional and blanket halakhic generalizations should be eschewed.

Assuming that all aspects of safety and efficacy with respect to more than one contraceptive method are equal for a particular couple, the couple is advised to follow the order set out in this teshuvah for most to least preferable means:

- \* Hormonal contraception (the pill, implants, vaginal insertion, transdermal patch).
- \* Intrauterine device- copper or hormonal (IUD)
- \* Diaphragm, Cervical cap
- \* Sponge, including spermicidal gel; spermicidal gel in combination with another method.

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<sup>135</sup> Reddy, Fleming, Swain, *supra* note 134. See also Carol Ford & Abigail English, “Limiting Confidentiality of Adolescent Health Services: What Are the Risks?” *Journal of the American Medical Association*, 2002; 288:752–753.

<sup>136</sup> Dorff and Abelson, *supra* note 49.

\* Condoms

\* Emergency contraception (“the morning after pill”) –only after the fact and not for regular use.

If a woman elects to employ a method of contraception farther down the list for reasons of health, safety or efficacy specific to her circumstances, she may rest assured that such a choice represents a halakhically valid decision, fully justified within normative Jewish practice.

Birth control of any means is far preferable to abortion. Every effort should be made to ensure access to and accurate information about contraception for all who might engage in sexual intercourse. The concern that such measures will encourage risky sexual activity or promiscuity is unsupported by scientific evidence and insufficient to warrant the increased health risks born by those in communities where access to contraception is limited.

This teshuvah views full-dose mifepristone intended to terminate a developing pregnancy as an abortifacient. As such, a determination of its halakhic permissibility should be considered in light of the Jewish laws on abortion and not the laws of contraception discussed in this Teshuvah.

Jewish tradition places great value on consistent, direct communication between parents and children. Parents should be actively involved in the major life decisions made by adolescents. However, Jewish law does not mandate parental consent or notification for access to contraception. Where there is concern for the safety of the adolescent or the threat of domestic abuse, care should be taken to be particularly lenient in this area.