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Digest

Modern reproductive techniques, including artificial insemination, in vitro fertilization and surrogate motherhood, offer new hope to childless couples. I explore the secular legal, ethical and religious views concerning these methods. This analysis determines if there is guidance to be derived from the principles found in *halacha* for today's liberal Jew.

In the chapter on artificial insemination, I investigate the differing attitudes of Rabbis Eliezer Waldenberg, Y'chiel Yaakov Weinberg and Moshe Feinstein. I find that the most liberal view, that of Feinstein, allows artificial insemination using either a donor's or husband's semen.

In the next chapter I explore Waldenberg's objections to in vitro fertilization. I discover that he uses a non-halachic source to support his halachic position, making his *halacha* somewhat suspect. An article by Rabbi Moshe Tendler, a physician concerned with medical ethics, questions the societal ethics of the procedure.

The chapter on surrogate motherhood includes an article by Rabbi Dr. J. David Bleich on host mothers. I note his analogy between surrogacy and embryo transplants.

The last chapter includes a presentation of medieval Biblical commentators on two examples of surrogacy in the Bible:

Abram/Sarai/Hagar and Jacob/Rachel/Bilhah. Their commentary provides psychological insight into the process of surrogacy.

I conclude that of the objections raised in the *halacha*, the one which most Reform Jews would share is the concern that a child would be created who would enter into a forbidden relationship with a relative of its biological father. The societal ethics of all these procedures is something which would concern all Jews. After considering the question from the standpoint of Jewish law, as well as that of Christian and secular ethicists, I find there is guidance to be found from the principles in the *halacha*.

"Even in Old Age They Shall Bear Fruit":
Aspects of the Attitude of Jewish Law toward Artificial Insemination,
In Vitro Fertilization and Surrogate Motherhood

by Donna G. Adler

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DEDICATION

The Midrash says that as long as the voices of children are heard in the houses of study, we will survive. I dedicate this thesis to our son, Aaron Carl - Menachem Mendel Adler, for no greater gift is there than the laughter of a child.

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INTRODUCTION

Time was when the only recourse a barren woman had was an appeal for either divine intervention¹ or the use of a surrogate: the assignment of her slave as the receptacle for her husband's seed.² In our day, medical science and technology have increased the options. Among these options are: Artificial Insemination, In Vitro Fertilization and Surrogate Motherhood. For the infertile couple desiring parenthood, the technical/biological solutions are relatively clear and simple. The moral problems, however, are more complex.

This study will examine these moral problems through the *halacha*, Jewish law. *Halacha*, in Hebrew means "a going" or "way". It is the name given to the legal part of Judaism, and reflects the belief that through the laws and observances incumbent upon a person, the Jew learns "the way to go."³ The decision to use the *halacha* as an area of investigation is well founded. For two thousand years the *halacha* has guided Jews in responding to new challenges.

1. I Samuel 1:10.
Genesis 18:10-14.
Genesis 25:21.
Genesis 29:31.
Genesis 30:2.
II Kings 4:16 ff.

2. Genesis 15:2.
Genesis 16:2-4.
Genesis 30:4.
Genesis 30:9 ff.

3. "Halakhah," Encyclopaedia Judaica, 1972, ed.

Reproductive technology is one of today's most important challenges. The first commandment to humankind was: "be fertile and increase."⁴ Is normal marital coitus the only way this commandment may be observed? To answer this question, it is essential to determine the halachic view regarding these new reproductive methods. Do the new technologies allow the individual to fulfill the command to procreate? Are these techniques compatible with the values and principles of traditional Jewish law?

In Judaism, religion and ethics are inextricably intertwined. For this reason, the writer will focus on the ethical issues raised by these new methodologies through an investigation of religious opinion. By examining other religious views, we can obtain a broader perspective on the universal ethical concerns common to various religions. Aware that the ethical concerns are not exclusively Jewish, Jewish thought on the subject will be compared with that of the two dominant religious groups in the United States. The Roman Catholic, Protestant and Jewish positions regarding artificial insemination, in vitro fertilization, and surrogate motherhood will be examined.

The method of developing Jewish statutes is stipulated in the *halacha*. When a new issue arises, a search is made of the *halacha* for a legal precedent. If none is found, the decisor looks for sources regarding parallel issues. For example, although obviously no woman was injected

4. Genesis 1:28.

with a donor's sperm in Talmudic times, an analogy is found in the case of the woman who is impregnated by semen left in bath water.⁵ The questions of adultery and paternity are common to both situations. This commonality allows the legal authority to rule on the new issue: artificial insemination.

A variety of contemporary halachic authorities have dealt with the issue of modern reproductive technologies. By studying representative writings of the leading halachic authorities the Jewish point of view will be investigated. This will not be an exhaustive inquiry into the entire *halacha* on our theme, but rather a selective study of each technology: artificial insemination, in vitro fertilization and surrogate motherhood. The information found in each responsum considered will enable an evaluation of objections raised to the particular procedure. This will clarify whether or not the problems presented preclude an acceptance of these methodologies by Jews who seek direction from the principles in the *halacha*. If the procedures are permissible, the responsa will be used as a guide to determine the circumstances under which each reproductive technique may be utilized.

The study will begin with a brief explanation of the medical process, then will include an historical overview of the technique. The official stand of the Roman Catholic Church and the view of conservative and liberal Protestants will follow. A consideration of

5. Babylonian Talmud *Chagigah* 14b.

some of the secular legal problems will lead to the halachic view of the method of reproduction under discussion. A separate chapter will be devoted to each of the modern technologies. The last chapter will consider the implications for Reform Jews.

This investigation requires a review of current information regarding modern infertility. Research indicates that one out of ten American couples today is infertile.⁶ Couples are described as infertile when they have been unable to conceive for over one year.⁷ In 1986, the National Center for Health reported "that close to half of the married women between the ages of fifteen and forty-four suffer from some degree of infertility."⁸ Infertility rates are rapidly rising.⁹ 1986 figures document infertility to include "roughly 2.7 million U.S. couples, about one in every six attempting to conceive An estimated 500,000 couples (in the United States) can be helped only by the new alternatives."¹⁰

6. Maleia Olson, R.N., and Nancy J. Alexander, Ph.d., In Vitro Fertilization and Embryo Transfer (Portland: The Oregon Health Sciences University, 1986), p. 14.

7. Olson, p. 14.

8. Susan Abramowitz, "A Stalemate on Test-Tube Baby Research," The Hastings Center Report (hereafter HCR), 14, No. 1 February (1984), p. 5.

9. Keith Schneider, "Repro Madness," New Age Journal, Jan. 1986, p. 38.

10. Schneider, p. 38.

Between 1964 and 1982 there has been a 177% increase in infertility among women aged 20-24 (the most fertile period in a woman's life).¹¹

[For women] . . . the most common reason for infertility is a blockage or abnormality of the fallopian tubes. These thin, flexible structures, which convey the egg from the ovaries to the uterus, are where fertilization normally occurs. If they are blocked or damaged or frozen in place by scar tissue, the egg will be unable to complete its journey.¹²

Men are infertile, as well. Male sterility and deficiencies account for 40% of the couples experiencing difficulty in becoming pregnant. The most common problems in men are low sperm count and blocked sperm ducts. Among all men, 15% have varicose veins on the left testicle, which often reduces sperm production.¹³

In addition, other factors exist which contribute to infertility. While a man's sperm count can be affected by insecticides and other chemicals, a woman's ovulation can be interrupted because of stress or continuous exercise. Estrogen, a female hormone necessary for reproduction, can be withheld when a woman has insufficient body fat.¹⁴

11. Schneider, p. 38.

12. Claudia Wallis et al., "The New Origins of Life," Time Magazine, 10 Sept. 1969, p. 46.

13. Wallis, p. 50.

14. Wallis, p. 50.

Couples, who in their twenties postponed their decision to start a family, find in their thirties that their postponement is a finality. Adoption as an option has become increasingly more difficult as fewer white infants are available. State licensed adoption agencies have multiple year waiting lists. Foreign adoptions often take two years or more. Most assuredly, couples who are comfortable raising a child not genetically their own are frustrated in their attempts to find a child through traditional channels. It is apparent that many couples who truly want children must seek other means.

Artificial insemination is one reproductive technique which is utilized when conception is difficult or impossible. It can be appropriate in situations when the husband's sperm count is too low for successful impregnation. Several batches of ejaculate are collected and then injected into the woman. This is called pooling.¹⁵ When the husband's sperm is used, pooling is called Artificial Insemination by Husband, or AIH.¹⁶ If the husband is sterile or if AIH also proves unsuccessful and another man's sperm is used, the process is called Artificial Insemination by Donor or AID.¹⁷

15. Karen Labacqz ed., Genetics Ethics and Parenthood (New York: The Pilgrim Press, 1983), pp. 3-4.

16. Harmon L. Smith, Ethics and the New Medicine (Nashville: Abingdon, 1970), p. 56.

17. Smith p. 56.

A second method of reproduction developed over the past twenty years is In Vitro Fertilization. A woman's egg(s) is (are) extracted, placed in a petrie dish and mixed with her husband's sperm.¹⁸ If the man is sterile, a donor's sperm can be used.¹⁹ When the fertilized egg starts to divide it is implanted in the woman's uterus.²⁰ It is interesting to note that when a child is conceived through sexual intercourse there is a 30% probability of a live birth. Only 20% of IVF fertilized eggs result in a pregnancy, and of these only approximately 13% develop into a fetus.²¹

The third method of reproduction is Surrogate Motherhood, in which a couple enlists the aid of a female third party. Depending upon the medical needs of the couple, this process can utilize either artificial insemination or in vitro fertilization (with the egg of the wife or of the surrogate).²² During the pregnancy the surrogate's inability to work is financially compensated for by the couple to whom she agrees to give the baby when it is born.²³ Unique to this birth is the legal contract signed by the couple and the surrogate mother. The couple

18. Richard M. Restak, Premeditated Man (New York: Penguin, 1977), pp. 53-54.

19. Roger D. Kempers, M.D., "The New Reproductive Technologies," Fertility and Sterility 46, No. 3, Supplement I, Sept. (1986), p. 39S.

20. Wallis, p. 49.

21. Olson, p. 35.

22. Kempers, p. 62s.

23. Noel P. Keane, The Surrogate Mother (New York: Everest House, 1981), p. 16, 48.

contract for the surrogate's services which terminate upon the birth of the baby.²⁴

Modern medicine has produced new tools to give infertile couples the opportunity for parenthood. With that chance comes choice. It is a choice with an awesome responsibility, for these technologies raise difficult moral questions. There exists an added question for traditional Jews taught from birth to follow the first commandment to be "fertile and increase." Are these options halachically acceptable? Must the commandment to have children consider the method of their procreation? Is there a way to allay the fears of those who oppose these methods and to provide guidance to those Jewish couples who desperately want children within the spirit of the *halacha*? Does the *halacha* accept these technological advances in order to offer childless couples the only hope of parenting?

24. Keane, The Surrogate Mother, pp. 121-128.

Chapter 1

ARTIFICIAL INSEMINATION

1.1 Medical Procedure

"Artificial insemination is the attempt to fertilize a woman by a means which is a substitution for natural intercourse. With the aid of instruments, semen is deposited in a woman's vagina, cervical canal, or uterus, in order to produce a pregnancy."¹ There are three types of artificial insemination: 1) homologous, by which the semen employed is obtained from the husband (AIH); 2) heterologous, in which it comes from a third-party donor, (AID); and, 3) AIHD, when the husband's semen is mixed with a donor's semen, combining the two kinds of insemination. The most common reasons for the use of AIH include deformity of the male organ, impotence, inability to ejaculate, dyspareunia and vaginal spasm. AID is frequently utilized when the husband is sterile, suffers from an hereditary disease or for eugenic reasons.²

Estimates indicate that each year between 6,000 and 10,000 children, almost 1% of all births, are born in the United States as a result of artificial insemination.³ The first recorded instance of artificial

1. Norman St. John-Stevás, Life, Death and the Law (New York: The World Publishing Company, 1961), p. 116.

2. St. John-Stevás, p. 116.

3. Noel P. Keane, P.C., "Draft Testimony for Hearing to Senator John H. Dunne," Albany, New York, 16 October 1986, p. 3.

insemination is found in the Talmud.⁴ It will be discussed in detail in the section on *Halacha*.

1.2 History

Before the eighteenth century, information on the subject of artificial insemination is extremely limited. In the fourteenth century, we find Arab Sheiks used the procedure on animals in their war effort.⁵ In the seventeenth century John Swammerdam, a Leyden physician, experimented with artificially inseminating fish.⁶ His work was successfully concluded in 1742 by Ludwig Jacobi.⁷ Forty-two years later a professor of natural philosophy at Pavia, the priest scientist Abbe Lazario Spallanzini, artificially inseminated an insect. This was followed by a successful impregnation of an amphibian and a spaniel.⁸

The first artificial insemination of humans occurred in 1785. Dr. John Hunter inseminated a woman utilizing fertilizing fluid from her husband.⁹ It was not until the doctor's demise that this information

4. Babylonian Talmud *Chagigah* 14b.

5. St. John-Stevas, p. 116.

6. St. John-Stevas, p. 117.

7. St. John-Stevas, p. 117.

8. St. John-Stevas, p. 117.

9. Joseph Fletcher, Morals and Medicine (Boston: Beacon Press, 1960), p. 105.

became public knowledge. Also, in France, another physician published a series of ten experiments. He claimed a successful insemination in 1838, and eight successes (including a set of twins) from the ten experiments, in 1868. All of his experiments utilized the husbands' semen.¹⁰

At the Women's Hospital in New York in the mid 1800's, Dr. Marion Sims inseminated six women a total of fifty-five times and achieved one success. Even though he was successful with an insemination using the husband's sperm, he was forced to stop his work. In 1866, just after the Civil War, the American public was not ready to accept AIH as a method of reproduction.¹¹ Dr. Sims announced that he had "given up the practice altogether . . . and left it to others who may have the curiosity, leisure, courage and perseverance to experiment further in this direction."¹² It took until 1909 for another American physician, A.D. Hard, to continue with Dr. Sims's work. Dr. Hard used the sperm of a donor to fertilize a woman whose husband was sterile.¹³

10. St. John-Stevas, p. 117.

11. Joseph Fletcher, Morals and Medicine (Boston: Beacon Press, 1960, p. 105.

12. Fletcher, Morals, p. 105.

13. St. John-Stevas, p. 117.

1.3 The Catholic View

The outcry which greeted Dr. Sims in the middle of the nineteenth century has not subsided to this day. Although there does not seem to be the same public concern regarding artificial insemination as there was a century ago, the debate regarding its acceptability continues. The Roman Catholic Church and its theologians ask the same questions today which were asked at the time of early experimentation. Does AIH or AID tear the fabric of marriage? Is this a form of adultery? Who has the legal responsibility for the child? Should the method of procreation be considered in legal custody decisions?

The Catholic view on artificial insemination has remained consistent, from the first Canon Law in 1897 to the most recent statement, almost a century later. According to Catholic doctrine, two issues must be considered when investigating the question of artificial insemination: 1) "spilling seed in vain," and 2) adultery.

Official Church policy is that marriage is to provide a framework for procreation. In 1952, in a address to Italian midwives, Pope Pius XII stated:

The use of the natural inclination to generate is lawful only in matrimony, in the service of and according to the order of the ends of marriage. . . . If nature had aimed exclusively or even primarily at a mutual gift and mutual possession of couples for pleasure . . . then the Creator would have adopted another plan in the formation and constitution of the

natural act. But this act is completely subordinated to and ordered in accordance with the sole great law of 'generatio et educatio prolis,' the fulfilling of the primary end of matrimony as the origin and source of life.¹⁴

One would think, therefore, that the Church would have no difficulty with artificial insemination using the husband's sperm. This, however, is not the case. Although adultery is not in question when the semen is obtained from the husband, the question of "seed spilled in vain"¹⁵ is at issue. It is this commandment which determines an acceptable method of procuring semen necessary for insemination.

The principal methods of obtaining the sperm are the following: masturbation, *coitus interruptus*, puncturing the testicle, massaging the prostate gland to stimulate other vesicles which produce semen, and retrieving the semen from the vagina after intercourse.¹⁶ Medical experts state that puncturing the testicle is the least effective method of procuring semen and massaging the prostate gland only produces semen by chance.¹⁷ To the Church, masturbation is not an acceptable manner of obtaining semen. And *coitus interruptus* is also morally unacceptable, due to the prohibition against "spilling seed in vain." While the official Catholic *sine qua non* for true coitus is

14. Smith, pp. 62-63.

15. Genesis, 38:7-10.

16. Fletcher, Morals, p. 111.

17. St. John-Stevas, p. 125.

ejaculation into the vagina, in *coitus interruptus* orgasm takes place outside of intercourse.¹⁸

Removing semen from the vagina after intercourse appears to be the least objectionable method of retrieving sperm. Since the completed act of coitus precedes the removal, *coitus interruptus* objections do not exist. Some Catholics advocate the retention of the syringe in the vagina until all of the sperm have been gathered so that, "the ordination of semen to generation," will not be broken, even for a few moments.¹⁹ This last method is called "assisted" insemination rather than "artificial" insemination because it does not interfere with coitus.²⁰

To some Catholic authorities, artificial insemination is acceptable when a condom is used. Others require perforation of the condom so that the escape of some semen can make natural procreation a possibility.²¹

18. St. John-Stevas, p. 126.

19. St. John-Stevas, p. 126.

20. St. John-Stevas, p. 127.

21. St. John-Stevas, p. 125.

The earliest Roman Catholic pronouncement on the issue of artificial insemination is a decree from the Holy Office on May 17, 1897,²² in which the procedure was labeled immoral. A later reconsideration of artificial insemination resulted from the realization that masturbation was not the sole method of procuring semen. In 1919 Father Vermeersch advocated using testicular puncture and massaging the prostate gland. Both methods, he proposed, provide no venereal pleasure or abuse.²³ Father Gerald Kelly asks, "Are not the married parties in very much the same situation regarding propagation as the individual is in regard to self preservation? So it seems that married people when unable to generate by the normal means of sexual intercourse, may use abnormal means, provided that the means be not sinful."²⁴

Between 1949 and 1951 the question was further investigated. According to the Catholic Church, moral sexual intercourse may occur only between husband and wife. Coitus must be exclusively for procreation, and there must be no impediment to that purpose. "Specifically, human sexual congress, in order to be authentic, must involve intravaginal ejaculation by the husband and retention of the semen (or at least no deliberate expulsion of it) by the wife."²⁵ It is this statement

22. Immanuel Jakobovits, Jewish Medical Ethics (New York: Bloch Publishing Co., 1959), p. 245.

23. St. John-Stevas, p. 124.

24. St. John-Stevas, p. 125.

25. Smith, p. 64.

which, according to the Catholic view, is the reference point when clarifying the allowability of artificial insemination.

In a Catholic book on ethics, doctors are warned:

[In the Catholic view,] the process of procreation is the exercise of a faculty in a definite way and not a surgical operation. To exercise that faculty apart from sexual intercourse is a perversion of the faculty: it is simple masturbation. Hence artificial insemination involves masturbation and is therefore grievously sinful.²⁶

In his 1949 Address to Catholic doctors, Pope Pius XII officially adopted the majority view and stated unequivocally that artificial insemination was "absolutely to be rejected."²⁷ In his 1951 Address to Italian Midwives, Pius XII amplifies his reason for condemning artificial insemination.

To reduce the cohabitation of married persons and the conjugal act to a mere organic function for the transmission of the germ of life would be to convert the domestic hearth, sanctuary of the family, into nothing more than a biological laboratory. The conjugal act in its natural structure is a personal action, a simultaneous and immediate cooperation of the parties, which, by the very nature of the actors and the particular character of the act is the expression of that mutual self giving which, in the words of the Holy Scripture, effects the union 'in one flesh'. . . . This is much more than the union of two life-germs, which can be effected also artificially, that is, without the natural action of the spouses. Hence, in our allocation of

26. Father A. Bonnar, The Catholic Doctor (London: Burns, Oates and Washbourne, 1944), p. 86.

27. "Artificial Insemination," The New Catholic Encyclopedia, 1967 ed., 1, p. 923.

29 September 1949 to the International Congress of Catholic Doctors, we formally exclude artificial insemination from marriage.²⁸

The words, "in one flesh," explain how the Catholic view of marriage relates to the prohibition against artificial insemination. "Marriage entails exclusive bodily possession of each spouse by the other."²⁹ Each spouse is seen to have exclusive rights to the sexual and reproductive organs of the other. Since artificial insemination

substitutes another action for 'natural sexual intercourse,' it is held to be morally objectionable. Moreover, on the principle of exclusive bodily rights to sexual and reproductive organs by the married couple, AID is judged to be adulterous as the invasion of the wife's reproductive system by another not her husband.³⁰

Hence, AID is forbidden since it is considered adultery and, even though AIH is not considered adultery, it is still prohibited because of the unnaturalness of the act of artificial insemination.

Pope Pius XI, in his Encyclical on Christian Marriage, quotes St. Augustine on Conjugal Honor: "What belongs to either of the parties by reason of this contract sanctioned by the divine law, may not be denied, or permitted any third person."³¹ In Pope Pius XII's "Address

28. "Artificial Insemination," Encyclopedia, pp. 924-925.

29. Smith, p. 65.

30. Smith, p. 65.

31. Smith, pp. 62-63.

to Second World Congress on Fertility and Sterility," on May 19, 1956, he confirmed his previous view.

Artificial fecundation exceeds the limits of the rights which spouses have acquired by the matrimonial contract, namely, that of fully exercising their natural sexual capacity in the natural accomplishment of the marital act. The contract in question does not confer on them a right to artificial fecundation, for such a right is not in any way expressed in the right to the natural conjugal act, and cannot be derived from it. Still less can one derive it from the right to the 'child,' the primary 'end' of marriage. The matrimonial contract does not give this right, because it has for its object not the 'child' but the 'natural acts' which are capable of engendering a new life and are destined to this end. It must likewise be said that artificial fecundation violates the natural law and is contrary to justice and morality. . . . the use of certain artificial means designed only to facilitate the natural act or to enable that act, performed in a natural manner, to attain its end [are not excluded].³²

Father Donald McCarthy, Director of The Pope John XXIII Center in 1984, has a different focus. Instead of considering the couple, his main concern is the embryo. He writes, "An embryo has the right to an unimpaired sense of identity when born the true child of a married couple."³³

32. St. John-Stevas, pp. 125-127.

33. Donald McCarthy, "Ethics and Embryo Rights," Origins, 23 August 1984, 14, No. 11, pp. 174-176.

1.4 Conservative Protestant View

Conservative Protestants share the Catholic view of AID. The two movements part company concerning AIH. Under the proper circumstances, AIH is considered lawful and moral by conservative Protestants. In 1945, the Church of England Commission was appointed to study both AIH and AID. In the summer of 1948, a Commission was appointed by the Archbishop of Canterbury. On March 16, 1949, the House of Lords, discussing the Legitimacy Laws, found AID to be "contrary to Christian principles."³⁴ The 1945 Commission's report culminated in a House of Lords debate in February, 1957. The government then announced it would appoint a departmental committee to thoroughly investigate the practice of AID. Lord Feversham was appointed head of the committee.³⁵ Artificial insemination using the husband's sperm was recommended only if there were just cause. Should the husband be physically or psychologically unable to participate in coitus or should the wife suffer from vaginal spasm, AIH would be considered lawful and morally unobjectionable.³⁶

The Archbishop's Commission permitted masturbation for the purpose of AIH, but only as a last resort. The Commission indicated that if the function of masturbation were for procreation, it would lose the

34. Fletcher, Morals, p. 108.

35. St. John-Stevas, p. 118.

36. Fletcher, Morals, p. 108.

character of self-abuse, and would not be forbidden.³⁷ However, the Archbishop's Commission asked, "On what rational ground is it urged that while sexual desires ought not to be indulged at will, parental desires may be?"³⁸ For the Christian then, there is no validity to the belief that every woman has the right to bear a child, for unless children are born within the framework of marriage, "no such claim is recognized."³⁹

Proponents of conservative Protestant Christianity believe that what is in the Bible is the Christian obligation. The Bible is their "paper pope."⁴⁰ Considering the Bible as their Code, "there is no ambiguity or equivocation about the appropriate context for human coitus: one should either marry or abstain from sexual intercourse."⁴¹ Yet, there is no explicit instruction in the canon of conservative Protestantism on the issue of artificial insemination. The Archbishop's Commission pointed out that the claim that AID creates a family is incorrect, for the true structure of a family is "the community of parents and the children begotten by them."⁴² Feversham's condemnation of AID was based upon this idea. AID could subvert our social system which is

37. St. John-Stevas, p. 123.

38. St. John-Stevas, p. 149.

39. St. John-Stevas, p. 137.

40. Smith, p. 67.

41. Smith, p. 67.

42. St. John-Stevas, p. 144.

based upon monogamous marriage.

The Protestant Episcopal Diocese of Northern Indiana condemned AID as "contrary to God's will, of an adulterous nature, and harmful to the sanctity of family and individual life."⁴² The secretary of the Department of Christian Citizenship condemned AID in a Methodist Conference in England in 1958.⁴⁴ The Lutheran Established Church in Sweden has said, "there is certainly nothing in the Bible that could be interpreted as suggesting that a woman can fulfill her highest task, motherhood, by the agency of a man other than her husband."⁴⁵ In Paris, France, Professor of Divinity M. Marchal rejected AID as "conflicting with the principle of monogamous marriage."⁴⁶

AID has been called a human revolt against both God's creative power and the authority of the Scriptures. "For it is precisely by coming together, this spiritual, sentimental and physical union, that humankind participates in the act of creation; in other words: every authentic creation is consummated in love, that is, through God's love for us, to whom He has given these powers. If we refuse to recognize this love and this unity, we are committing an offense against life and against divine love."⁴⁷

42. Fletcher, Morals, p. 110.

44. St. John-Stevas, p. 139.

45. St. John-Stevas, p. 139.

46. St. John-Stevas, p. 139.

47. St. John-Stevas, p. 139.

1.5 Liberal Protestant View

In AI, liberal Protestants focus on the word love. A command, to the liberal Protestant, must never be considered without knowledge of the immediate problem.

. . .love is the only unconditional claim placed upon us, that the divine intention can never be located in the context of a particular command, and that nothing less than freedom from ethical rigorism and knowledge of situational problems equip us for genuinely responsible decisions and actions."⁴⁸

Liberal Protestants' concern is for the greatest good; it focuses on "relief of suffering and the satisfaction of human needs."⁴⁹ They do not accept the opinion that AID will be abused and will tear the fabric of our society. Only those who cannot achieve parenthood in the normal fashion will avail themselves of AID. This is a small minority of the world population. "Provided the married couple and their doctor have conscientiously considered all the relevant circumstances of their marriage and the implications of the use of AID, most of the objections to its use would fall to the ground."⁵⁰

Such advocates of AID do not see marriage as a legal bond, but rather, as a personal bond. Dean Matthews, speaking against the Archbishop's

48. Smith, p. 69.

49. St. John-Stevas, p. 148.

50. St. John-Stevas, p. 148.

report, says he is a Christian and not a Stoic. As a Christian, he must "judge AID from the standpoint of the Christian ethic and not from that of the law of nature."⁵¹ According to Matthews, even the law of nature must be judged by the law of love, for God is love. Reverend Joseph Fletcher concurs:

The claim that AID is immoral rests upon the view that marriage is an absolute generative as well as sexual monopoly; and that parenthood is an essentially, if not solely physiological partnership. Neither of these ideas is compatible with a morality that welcomes emancipation from natural necessity, or with the Christian ethic which raises morality to the level of love (a personal bond), above the determinism of nature and the rigidities of the law as distinguished from love.⁵²

Roman Catholics and conservative Protestants agree: the method of procreation can not be separated from the result. Therefore, both groups condemn AID. Although it is every Christian's duty to have children within a marriage, introducing a third party, even without sexual intercourse, is breaking the marriage bond of husband and wife promised exclusively to one another. Liberal Protestants, by viewing the marital relationship as primarily one of emotional commitment rather than legal commitment, consider the emotional benefits of AID and can support it as well as AIH.

1.6 Secular Legal View

51. St. John-Stevas, p. 149.

52. Fletcher, Morals, p. 139.

Legal judgments regarding artificial insemination and the rights of the couple and child, have been rendered on a case by case basis, at times one judgment contradicting another. In 1921, the Canadian case of *Orford vs. Orford* was heard. Alimony was denied in this instance of AID, not because AID was determined to be illegal, but rather, due to the fact the husband had not given his consent to the insemination by a donor.⁵³ Judge Orde "went on by way of dictum, not ruling, to say that the criterion of adultery is not sexual intercourse (as the common law holds) but the voluntary surrender by a wife of her reproductive faculties to another person."⁵⁴ As the husband had not consented to the process of AID, Judge Orde stated to the Supreme Court of Ontario that "If it was necessary to do so, I would hold that [AID] in itself was 'sexual intercourse.'"⁵⁵

Approximately twenty years later in the Cook County Illinois Circuit Court, Judge Feinberg ruled that even if there were no consent to AID by the husband it could not be considered adultery, and was not, in itself, grounds for a divorce based upon the charge of adultery (1945).⁵⁶ The Judge indicated the donor's act was "too remote from the actual insemination to establish his complicity."⁵⁷

53. Fletcher, Morals, p. 108.

54. Smith, p. 61.

55. Smith, p. 62.

56. Fletcher, Morals. p. 108.

57. Smith, p. 61.

Two years later, in 1947, two other cases were tried in different parts of the country. In Cincinnati, Ohio a divorce was granted to a man who had not consented to his wife undergoing AID. Upon returning home from the war the husband found his wife pregnant by means of AID. It was the "breach of marital confidence rather than a claim of adultery"⁵⁸ that was considered grounds for the divorce. In New York, Supreme Court Judge Greenberg ruled the husband of AID children had the same rights as a foster parent. However, his written opinion stated, "the propriety of procreation by the medium of artificial insemination is in the field of sociology, morals or religion."⁵⁹

In 1948, in the case of Strnad vs. Strnad, a New York judge ruled that in the case of consensual AID, the children are considered the same as any children born in a normal fashion within a marriage. Visitation rights were granted the husband, as well as the right of consent prior to the former wife's new husband adopting the AID child.⁶⁰ In the same year, in England, a court ruled that an AIH child was illegitimate, even though both the parents were legally married and the natural father was the husband. The marriage was annulled on the grounds that it was never consummated.⁶¹

58. Fletcher, Morals, p. 109.

59. Fletcher, Morals, p. 109.

60. Fletcher, Morals, p. 109.

61. Fletcher, Morals, p. 115.

Though it had been ruled that if the husband consented AID could not be considered adultery, the same court later ruled "that artificial insemination by a third-party donor, with or without the husband's consent, constitutes adultery on the part of the wife."⁶²

A decade later, in 1967, a California couple were in court regarding their divorce. This was not a usual case, since the divorce had occurred six years earlier. At the time of the divorce Mrs. Sorenson had refused any financial support from her husband for the care of their AID son, Christopher. In 1966, illness forced Mrs. Sorenson to apply for welfare assistance. Mr. Sorenson was charged with violating the state statute which makes "willful nonsupport of a legitimate child a misdemeanor."⁶³ He was found guilty since "all children born in wedlock are presumed the legitimate issue of the marital partners."⁶⁴

Acting in 1964, Georgia was the first state to legitimate artificial insemination.⁶⁵

Of the twenty-eight states that have adoption laws governing AID, fifteen of them require that a

62. Eugene I. Pavalon, "Human Rights and Health Care Law," The American Journal of Nursing, 1980, p. 178.

63. Smith, p. 59.

64. "The Child of Artificial Insemination: Status and Rights," Time Magazine, April 14, 1967, pp. 79-80, in Smith, p. 59.

65. Pavalon, p. 180.

physician file the husband's consent form with the state. About one-half of the AID statutes are premised on the assumption that a physician or someone under a physician's supervision will perform the insemination. Statutes in an additional four states specify that the process must be done by a physician. In Georgia, performing AID without a medical license is a felony punishable by up to five years imprisonment. In addition, the law in the three jurisdictions of Idaho, Oregon and New York prohibit known carriers of genetic defects and diseases and venereal diseases from being sperm donors.⁶⁶

There are no federal statutes to regulate this relatively new method of reproduction. Thus, the issue remains confused.

There are those who condemn AIH as immoral and AID as adulterous. Others see no problem with AIH since the husband's sperm is used, even if it is in an unusual manner. There are also those who see AIH and AID simply as ways to alleviate the sorrow of childless couples. The law, in its inconsistencies and self-contradictions, represents all these contradictory views.

66. Kempers, p. 115.

1.7 Halachic View

There is disunity in secular law and in Jewish law as well. A survey of the vast halachic material on artificial insemination is summarized in an article by Rabbi David M. Kroiger in Noam.⁶⁷ These are the halachic questions raised regarding artificial insemination using husband's semen:

1. May the husband produce sperm for this purpose or is this "spilling seed in vain?"⁶⁸
2. Does the child born belong to the husband *vis a vis*:
 - a. inheritance
 - b. mourning
 - c. levirate marriage
3. Is the child "fatherless?"
4. What is the law regarding a child conceived during menstruation, the time when a woman is said by the Torah to be "ritually impure"/*tamei*?
5. Has the husband fulfilled the commandment: be fruitful and multiply⁶⁹?

The following are the halachic questions raised regarding artificial insemination by a donor:

1. Is AID forbidden:
 - a. by the Torah (as a forbidden relationship)
 - b. by rabbinic decree?

67. David M. Kroiger, "Artificial Insemination," Noam, 1 (5718), pp. 111-123.

68. Genesis 38:7-10.

69. Genesis 1:28.

2. Is the woman forbidden to her husband according to the law of adultery, and if so, is this a case in which she is also forbidden to the semen donor?
3. Is the child born legitimate?
4. If the child born is a girl, is she forbidden to marry a High Priest?
5. If the donor is anonymous, is the child considered the illegitimate child of an unknown father?

A multiplicity of views exists on each subject. Rather than report these studies in their entirety, this investigation will concentrate on the rulings of three outstanding twentieth century decisors: Rabbis Eliezer Y'hudah Waldenberg, Y'chiel Yacov Weinberg and Moshe Feinstein. Their responses and reasons are presented below.

Although relatively new technologically, the problem of artificial insemination is not new halachically. It appears in the Talmud in the story of the woman who went to bathe and claimed to have become pregnant from semen already in the water. (*Chagigah* 15a) The legal questions raised by this occurrence are used by the Rabbis as a foundation for their discussion of the permissibility of artificial insemination.

The sources that follow will serve as the focus for the analysis of the authorities:

. . . Ben Zomah was asked: May a High Priest marry a maiden who has become pregnant (yet who claims she is still a virgin)? Do we take into consideration

Samuel's statement, for as Samuel said: I can have repeated sexual connections without (causing) bleeding (i.e. with the woman remaining a virgin) or is the case of Samuel rare, but we do consider the possibility that she may have conceived in a bath (into which a male has discharged semen)? (Babylonian Talmud *Chagigah* 14b-15a)

. . . a woman may lie on her husband's sheets but should be careful not to lie on another man's sheets lest she become pregnant from his sperm. Why are we not afraid that she may become pregnant from her husband's sperm and the child will be conceived of a menstruating woman? The answer is that since there is no forbidden intercourse, the child is completely legitimate, even from the sperm of another, just as Ben Sirah was legitimate. However, we are concerned about the sperm of another man because the child may eventually marry his sister... (*Haggahot S'mak* by Rabbi Perez ben Elijah of Corbeil)

The above quotation refers to the story of Ben Sirah, who according to a midrashic legend, was conceived without sexual intercourse. The prophet Jeremiah was forced to emit his semen into the bath. His daughter then bathed in the very same water and became pregnant, giving birth to Ben Sirah. (*Likutei Maharil* by Rabbi Yacov Moellin Segal)

To interpret the discussion of the alleged virgin and the High Priest, the following Biblical remark is utilized:

. . . if a woman conceive seed and bear a male child, then she shall be unclean for seven days. (Leviticus 12:2)

The issue in question is not the woman's permissibility to the High Priest, but rather, must the pregnant woman bring a sacrifice after

giving birth. (Babylonian Talmud *Chagigah* 14b commentary of Rabbi Chananel ben Chushiel)

Do not lie with your neighbor's wife and defile yourself with her. (Leviticus 18:20)

. . . but a virgin of his own people shall he take to wife. (Leviticus 21:14)

. . . be fertile and increase. (Genesis 1:28)

A man should not marry the pregnant wife of another or the nursing wife of another, even though she has been divorced or widowed, until after the child has been born or until she has stopped nursing. Should she conceive while pregnant, it would be impossible to identify which part of the child came from the second man. There could be a danger to the fetus because of sexual intercourse with the second man, as he may not be as considerate with another man's child. If she conceives while nursing, her milk could be spoiled and the child would not have enough milk to survive. (*Y'vamot* 36b, 42a)

Judah got 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 [spill on the ground] whenever he joined with his brother's wife so as not to provide offspring for his brother. (Genesis 38:6-9)

The preceding passage describes the levirate marriage which is commanded in Deuteronomy 25:5ff:

When brothers dwell together and one of them dies and leaves no son, the wife of the deceased shall not be married to a stranger outside of the family. Her husband's brother shall unite with her: take her as his wife and perform the levir's duty. The first son that she bears shall be accounted to the dead

brother, that his name may not be blotted out in Israel. But if the man does not want to marry his brother's widow, his brother's widow shall appear before the elders in the gate and declare, 'My husband's brother refuses to establish a name in Israel for his brother; he will not perform the duty of a levir.'

In levirate marriage the brother who is obligated to provide a child for his deceased male sibling is called *yibum*. The ritual for the childless widow's acceptance of the levir's refusal to marry her is known as *chalitzah*.

1.8 Rabbi Eliezer Waldenberg

The first decisor whose ruling we will study is Eliezer Waldenberg, the rabbi of *Shaarei Zedek* Hospital in Jerusalem and a leading scholar on medical *halacha*. In his responsa collection, *Tzitz Eliezer*, this acknowledged expert discusses artificial insemination. (Vol. 3, No. 27)

Waldenberg, The *Tzitz Eliezer*, is asked: what is the law regarding artificial insemination and the child who is born as a result of the procedure? May a husband and wife use artificial insemination if the husband cannot father children, yet the wife wants children and the couple does not wish to separate?⁷⁰

70. Waldenberg, p. 126.

To extrapolate the rabbinic law on artificial insemination, Waldenberg cites the Talmudic question asked of Ben Zoma: is a pregnant virgin allowed to marry a High Priest? Waldenberg compares the pregnant virgin with a married woman. If it is possible for the virgin to get pregnant and retain her status of virginity and, therefore, marry the High Priest, then it is possible for the woman to get pregnant, through artificial insemination, retain her status (as faithful) and not be required to leave her husband. The Talmud, trying to clarify how a virgin could be pregnant, tells of Sh'muel, who claims he can have sex without destroying the sign of virginity.

Since the penalty for illicit sex is that the woman must leave her husband, the first issue Waldenberg considers is: is AI adultery? The question then arises: if a woman became pregnant by intercourse with someone who did not break her hymen, does this change the status of the woman? What actually makes her forbidden to the High Priest? Waldenberg cites the conclusion in the above passage to indicate that whether the case of Sh'muel is frequent or rare is inconsequential. We assume the woman became pregnant through semen left in a bath, thus without sexual intercourse.

Therefore, it seems that only the act of sexual intercourse makes a woman ineligible to marry a High Priest. Sh'muel's comment, that in order for a pregnancy to occur the sperm must be ejaculated with force, is an attempt to discredit the idea that a woman can be impregnated

from sperm remaining in bath water. The response that sperm in the bath water could have such force seems to imply that a conception by semen in a bath is a realistic cause of pregnancy. This provides the analogy to artificial insemination where pregnancy occurs without intercourse.

This discussion may seem theoretical; however, the issues raised are germane to this study's question. What is the effect of artificial insemination upon the wife's marriage? If the conclusion of the above passage had been to forbid the High Priest to marry the woman, we would have to conclude that artificial insemination could not be permitted. Since the status of the woman inseminated would change, artificial insemination would be seen as adultery and the woman would be required to leave her husband. But it is clear from this passage that sexual intercourse is required to prohibit the woman from marrying the High Priest. Hence the sex act itself would be required to forbid the artificially-inseminated woman to her husband.

Rashi states that the woman is trustworthy. (i.e., we believe her claim that she still is a virgin.) *Tosefot* interprets Rashi to mean: if she says she is a virgin and if what Sh'muel does is common, then she is trustworthy. But, does this mean she is trustworthy to say, "I had intercourse and I am a virgin," and thus be permitted to marry a High Priest? This does not explain if this one (the pregnant virgin) became pregnant via Sh'muel's method. This does not tell us anything about a

woman who becomes pregnant from semen left in bath water. Therefore, we assume those who asked Ben Zoma: "may a pregnant virgin marry a High Priest," did not have in mind the possibility that a woman could become pregnant from semen left in bath water.

Waldenberg then adduces the case of a High Priest who marries a woman, finds her a virgin and only later discovers she must have been pregnant when he married her. If we suspect that she had intercourse like that of Sh'muel (without breaking the hymen) we must conclude she is forbidden to the High Priest since she had intercourse. However, if we conclude her pregnancy occurred from semen in bath water, then she would not be forbidden to the High Priest. Implied in this is that artificial insemination would be allowed, since no actual intercourse occurred.

Thus, according to Waldenberg, in the first interpretation of Rashi: she is trustworthy, we believe she may marry a High Priest since, in the first understanding, actual intercourse is required to prohibit her from marrying a High Priest. In the second interpretation: she is trustworthy, we assume she is a virgin and anyone will find her to be a virgin and thus it does not matter if she is pregnant or how she became pregnant.

Yet, according to the first interpretation, if we suspect she became pregnant in Sh'muel's way, she should be forbidden to marry the High Priest since intercourse had occurred. But, she is permitted to marry the High Priest if her hymen is intact. The entire question revolves around whether Sh'muel's claim, that one can have repeated sexual connections without causing bleeding, is a real possibility and a frequent occurrence. If it is a rare thing we cannot be sure others will find her a virgin and since we cannot be sure, she will be forbidden to the High Priest, since we assume the High Priest will not find her a virgin.

Accordingly, we understand the words of *Tosefot* as "she claims" to be a virgin. If one thinks Sh'muel's method of intercourse is frequent, her claim of virginity can be trusted. But Rashi's interpretation is that she only claims to be a virgin. Is her assertion of virginity to be believed? Rashi believes that even if Sh'muel's method of intercourse is frequent, we accept the pregnant virgin's claim of virginity and thus intercourse is not a factor in allowing her to marry a High Priest, rather it is the fact she is a virgin. Implied from this is that artificial insemination would be permitted, since no intercourse is involved.

To this point, according to Rashi, it seems we should understand the question to Ben Zoma ("may a pregnant virgin marry a High Priest?") as asking, can Sh'muel be believed, and if so, is she considered a virgin

since she has the sign of virginity, her hymen? Or if the case of Sh'muel is rare, must we prove she is a virgin? We maintain that Sh'muel's manner of intercourse is infrequent. Therefore, we do not pay attention to it and hold her to be a non-virgin and forbidden to a High Priest.

However, Ben Zoma responded that we must still be concerned with the possibility that this pregnant virgin did become pregnant without intercourse, through semen left in the bath water. The question remains: may she, then, marry a High Priest?

Rabbi Joel Sirkis, in his *Bayit Chadash*, his commentary on Rabbi Jacob ben Asher's *Tur Yoreh Deah*, 195, eliminates the confusion regarding the *Tosefot's* interpretation of Rashi. He consistently amends *Tosefot* to read: if the case of Sh'muel is not frequent we believe her, since it would be illogical to say (intercourse maintaining the hymen is frequent) she is a virgin and eligible to marry a High Priest. The word *ei* has two meanings in Hebrew. By utilizing the meaning "not", instead of "if", we read if Sh'muel's method of intercourse is not rare, she is considered a non-virgin and is forbidden to marry a High Priest.

Thus, we may conclude that it is intercourse which forbids her to marry the High Priest and the pregnancy from the bath may be compared to

artificial insemination. Hence, according to Waldenberg, to this point artificial insemination is not considered adultery.

However, Waldenberg says that the analogy between the virgin and the artificially-inseminated woman is not a valid one inasmuch as the question in AID is not one of lost virginity. One must look further at the sources. The verse, "If a man is found lying with another man's wife" (Deuteronomy 22:22) does not mention the word "virginity" as a prerequisite for a woman to be prohibited. It appears then, even without the loss of virginity a woman can be considered an adulteress. Returning to the question at hand, it would seem from this source that the artificially-inseminated woman might be prohibited to her husband. Yet this remains unclear.

Rabbi Chananel B. Chushiel gives a completely different interpretation to the passage concerning the High Priest. He rules that the question to Ben Zoma deals with the impurity of birth, and not whether a woman is forbidden to her husband. Intercourse is required to produce the impurity. Even if it is clear that to marry the High Priest all that is required is virginity, and even if we accept the claim that artificial insemination does not change the status of the wife, this does not mean the wife may intentionally be artificially inseminated because we still have the prohibition: "You shall not have carnal relations with your neighbor's wife. . . ." (Leviticus 18:20)

The *Tzitz Eliezer* sums up this aspect of the discussion by stating that although virginity is not in question, the presence of semen in her womb may imply that this woman is forbidden to her husband. Chananel indicates that the method of how that seed got inside of her is crucial to the argument. The verse specifically states "lying together," indicating that sexual intercourse is necessary for a woman to be obligated to leave her husband.

Waldenberg then offers the comment of Rabbi Moshe ben Nachman (Ramban) on the verse, "Do not have carnal relations with your neighbor's wife and defile yourself with her." (Leviticus 18:20) In the Hebrew text the root of the word "seed" is used in the sentence. It is because this word appears that Ramban states that the woman is not allowed to return to her husband because of the fact that there is seed (sperm) inside her, and not because of how the sperm got there. This supports Waldenberg's deduction in the previous paragraph: since there is seed inside of her she is forbidden to her husband, whether or not she engaged in prohibited intercourse.

Continuing the discussion of the woman being permitted to return to her husband, the *Tzitz Eliezer* cites two commentaries on the following statement in *Sefer Mitzvot Katan (SMK)*: "A menstruating woman may lie on her husband's sheets but she may not lie on another man's sheets lest she become impregnated from semen he has left on his sheets."

Judah Rozanes, (*Mishneh Lamelech* to Rambam) questions why a woman who is menstruating would be allowed to lie on her husband's sheets. If she became pregnant, would not the child be a child born through intercourse with a menstruating woman, and is this not against the prohibition in Leviticus 18:19, "Do not come near a woman during her period of uncleanness to uncover her nakedness"? His conclusion is that this *halacha*, the prohibition of a woman to her husband, applies only to the act of sexual intercourse.⁷¹ This implies artificial insemination would be permitted.

Since there is no sexual intercourse involved with a woman simply lying on sheets, why even prohibit her from lying on another man's sheets? The response clarifies that he considers paternity to be the real issue; the prohibition of lying on another man's sheets is to protect the child. The child is legitimate and yet, because of his origin, he could unknowingly marry his sister. Therefore, according to this commentator, since there is no prohibited sexual intercourse, the child is legitimate. Hence, it appears an artificially-inseminated woman would not be required to leave her husband, since no forbidden intercourse has taken place.

⁷¹. *Mishneh Lamelech* (*Mishneh Torah*, *Hilchot Ishut* 15:4).

The second commentator, J. Eybeschuetz⁷² (*B'nei Ahuvah*), disagrees with the interpretation that sexual intercourse is necessary for the woman to be forbidden to her husband. He states that the *Mishneh Lamelech* misunderstood the *Sefer Mitzvot Katan*. *B'nei Ahuvah* says the correct interpretation of Lev. 18:20 is that it is the semen in her womb which prohibits her to her husband. He concludes that she may not return to her husband. Thus, AID would not be allowed.

Waldenberg rejects a third comment, from H. J. D. Azulai (*Birkei Yosef*) who asserted that the *Sefer Mitzvot Katan* referred to both the husband and wife lying on the sheets of another man, thus creating a question of paternity. Waldenberg says this is a forced explanation since the *SMK* actually writes the words "forbidden intercourse." Sexual intercourse, and not paternity, is the key to understanding this passage. Therefore, artificial insemination would be allowed since there is no sexual intercourse.

The *Tzitz Eliezer* disagrees with the *Birkei Yosef's* interpretation that the period of waiting only applies to normal sexual intercourse, and this was only mentioned regarding the sheets, because forbidden marriage was being discussed. However, he continues, even if we grant that the *Birkei Yosef's* comment leaves us in doubt as to exactly what the *SMK* meant, we are still left with the problem stated above: the

72. *B'nei Ahuvah* (*Hilchot Ishut* 15:6).

possible improper release from the -levirate marriage and the possible incestuous marriage of the child, once s/he reaches adulthood.

Waldenberg states that some commentators believe the prohibition against adultery includes the manner by which the semen enters the womb. Hence, to these commentators, semen in the womb prohibits the woman to her husband regardless of the manner by which it enters the womb. This would prohibit AID on grounds of adultery. Most commentators, however, define adultery as an illicit act of sexual intercourse. Those commentators who think that without intercourse there is no adultery permit the pregnant virgin to marry the High Priest since coitus has not occurred. Presumably, they would not prohibit AID on grounds of adultery. Waldenberg concludes that a married woman who claims to be pregnant from AID is not to be believed (without evidence), as her child's paternity by her husband is assumed.

Yet Waldenberg adds, even if AID is not considered adultery, and even if the child is not illegitimate, the procedure is prohibited on the basis of *Yebomot* 42a: a rabbinic decree designed to prevent unlawful marriage and improper *chalitzah*. (see below)

Waldenberg then considers the question of artificial insemination itself. Is artificial insemination by donor permitted even if it is not considered adultery? The first issue raised is: must there be a

waiting period from the time of insemination to the woman's return to her husband? Waldenberg adduces the passage in the Talmud which discusses a divorcee's or widow's required waiting period before remarriage. (Yeb. 42a)

In *Y'vamot* 42a the verse: "to be a God unto you and to your offspring after you. . . ." (Genesis 17:7) is utilized to show that enough time must pass so there can be a distinction between the seed of the first husband and the second. Again, the concern is that the child would think he was the son of the second husband. His existence would appear to be proof that, should his mother's second husband die without issue, she could marry anyone she chose. This son, thought to be from her second husband, would release her from the obligation of levirate marriage or *chalitzah*. Additionally, in the future, the child might unknowingly enter into a forbidden marriage, e.g., marry the daughter of his actual father.

According to the *SMK*, the question of paternity remains and, therefore, the prohibition remains, even if lying on another man's sheets and absorbing his semen does not constitute adultery. Waldenberg takes this one step further, concluding that artificial insemination by donor may not be considered adultery, yet, due to the concern about paternity, it must be prohibited. He compares the period of waiting to the prohibition of lying on another man's sheets, and decides that the

purpose of each is to eliminate any question of paternity.

Waldenberg then considers the next question: does the semen donor fulfill the commandment to procreate and is the child considered as belonging to the semen donor? If we are concerned lest the child grow up to marry the relatives of his biological father (those relations forbidden to him by Lev. 18), then we should conclude that the child is the legal child of the semen donor in all respects. This, in fact, is the position of *Mishneh Lamelech* (*Hilchot Ishut* 15:4) and *Beit Sh'muel* (*Even Haezer* 1, note 10).

However, the *Birkei Yosef* disagrees. He suggests that the statement, "he is his child in all matters," applies only in matters of stringency: i.e., we consider the child as the father's son only when that determination leads to halachic restrictions on his behavior, e.g. to forbid the child to marry relatives of the biological father. This does not, however, necessarily mean the child is considered the son of the semen donor for purposes of leniency: i.e., to release the father from the obligation to procreate.

Waldenberg, in response to *Birkei Yosef* and those who doubt that artificial insemination fulfills the commandment to procreate, contends that this statement, the strictest view, may only refer to unintended pregnancy. The statement "he is his [the donor's] son in all matters"

may refer to the fact that there is intent to sire a child. In the case of the bath or the sheets, the woman's pregnancy is accidental. From the beginning, in artificial insemination there is intent to have a child. Therefore, the child could be considered the donor's son in all matters.

Nevertheless, a number of commentators deny that the semen donor fulfills the commandment to procreate in this way, since the act of fertilization is not done directly, but is facilitated by a third party. In any event, according to both views regarding whether the donor has fulfilled the commandment, AID is forbidden on the grounds that when the child grows up, he might marry a relative of his biological father, or the child's mother may be improperly released from the obligation of the levirate marriage or *chalitzah*.

*Chelkat M'chokeik*⁷³ inquires: does the husband of a woman impregnated in bath water fulfill the commandment to procreate, and is the child his son in all matters? He refers to the story of Ben Sirah and asserts that the statement "he is his son" applies to the occurrence in the bath. Therefore, intent is not germane.

Yet, *B'nei Ahuvah* comments that although he may be considered his son, the son cannot be held accountable for violating the commandment, "he who strikes his father or mother shall be put to death" (Exodus 21:15).

73. *Shulchan Aruch Even Haezer* 1, note 8.

This is because it is unclear who left the semen in the bath; therefore, the child cannot be held accountable. This also indicates that the child may have a unique status; he may be considered his son in some respects, but not in others.

Waldenberg concludes this section by reiterating the thought that all the commentators, including those who say the semen donor fulfills the commandment to procreate, would still prohibit AID, on the grounds of the rabbinic decree.

Waldenberg then examines a new question: is the woman considered pregnant by a man other than her husband (*meineket chavero*)? This law, found in *Even Haezer* 13:11, prohibits a woman to her husband when she is carrying or nursing another man's child. This is a rabbinic decree, and the rabbis apply their decrees only to cases which are frequent, normal occurrences. Artificially-induced pregnancies, such as from the bath water, are infrequent. Therefore, according to *Birkei Yosef*, the decree does not apply.

Birkei Yosef, however, is not sure of this conclusion. *Birkei Yosef* suggests the possibility that the ruling of Ben Zoma preceded the rabbinic decree. It is possible that Ben Zoma dealt with the question on the basis of Toraitic and not rabbinic law. For had he considered

rabbinic law, he may have applied the decree to this case and forbade the woman to the High Priest.

Waldenberg then states that it is impossible to compare an intentional act, artificial insemination, with an unintentional act, pregnancy from the bath. He says that the intention of artificial insemination is pregnancy. Thus, the rabbinic decree, according to Waldenberg, would apply and the woman must not reside with her husband during pregnancy.

The next question considered is: may a man emit semen for artificial insemination for AID, or is this considered wasting seed? This refers to whether or not a man may donate sperm to a sperm bank. S. M. Schwadron, The Maharsham, permits AIH only in critical situations. This is not the case in AID, as the man is selling his sperm to the sperm bank. Waldenberg states that the prohibition applies as much to the donor as to the woman, for the following reasons: the donor is producing seed spilled in vain, and the child might, when grown, marry a prohibited relative. Therefore, the rabbinic prohibition applies both to the male donor and to the female recipient of sperm.

Waldenberg summarizes his rulings as follows:

1. Many decisors forbid AID equating it with adultery. They state that except in intercourse with her husband, the Torah considers as "adultery" every manner by which seed of any other male enters the body of a married woman. Yet the opinion of the rest of the decisors is that since no prohibited

intercourse has occurred, AID is not considered adultery. However, if we know a woman is pregnant and she says it is not from her husband we do not accept her claim of AID, but rather consider her an adulteress.

2. Artificial insemination by a donor is absolutely forbidden.

3. Most decisors say that the child is the son of the semen giver in every respect. There are some who consider the child to be the donor's only in the strictest legal sense.

4. *Meineket chavero*, pregnant by a man other than her husband, whether she be pregnant from sperm left in bath water or from AID, may not marry until she completes her nursing. *Meineket chavero*, who was impregnated through artificial insemination, must separate from her husband until after the birth and nursing period is over. If the husband's consent has been given for artificial insemination, he still must give her a divorce, even if he is a *kohen* and would be forbidden to remarry her.

5. A man is forbidden to give semen for the purpose of AID and any physician who complies with the request to perform AID is breaking a most important *halacha*, the prohibition of spilling seed in vain.

6. The essence of the matter is that to cause seed to enter the womb of another man's wife is a foul abomination and causes the *Sh'china* to depart from Israel. "A garden locked is my own bride, a fountain locked, a sealed up spring." (Cant. 4:12)

1.9 Rabbi Y'chiel Yaakov Weinberg

Y'chiel Yaakov Weinberg, born in Pilwishki, Lithuania in 1885 is our second decisor. He studied in the *y'shivot* of Slobodka and Mir and was appointed rabbi of Pilwishki in 1907. During World War I, Weinberg studied at the University of Gissen, Germany. There he received a doctorate, writing his thesis on the *mesorah*. After his university

studies, Weinberg was appointed rabbi of the Charlottenberg district of Berlin where he lectured on Talmud and *halacha*.

Rector of the *Rabbiner Seminar Fuer Das Orthodoxe Judentum*, he returned to East Europe when the Nazis closed the school. Unable to escape the concentration camps, Weinberg, surviving in ill health, settled in Montreux, Switzerland, where he later died. His early studies in the *y'shivot* of Eastern Europe enabled Weinberg, mainly through his writings, to introduce the Eastern point of view to German Orthodoxy.

His responsa are titled *Sridei Eish*. Weinberg offers us scholarship that demonstrates a familiarity with modern problems. He maintained close relationships with leading Talmudists of his time while remaining aware of the general literature, as well. Seen as a link between Eastern and Western Jewry, Weinberg is our second halachist.⁷⁴ His discussion on artificial insemination is found in *Sridei Eish*, Vol. 3 No. 5.

Rabbi Weinberg rules that artificial insemination may be allowed under certain conditions. He differentiates between semen given by a donor and semen given by the husband. He concludes that he can find no halachic reason to prohibit AID, but questions the advisability of the process. He emphasizes that his responsum is not to be relied on as

74. "Weinberg, Jehiel Jacob," Encyclopaedia Judaica, 1972, ed.

permission. Yet, the principles he introduces may provide direction for this study.

The first topic Weinberg considers is AIH. Some rabbis prohibit AIH on the grounds of seed spilled in vain. Even though AIH would make procreation possible, and the first commandment is to be fertile and increase, we do not relax a prohibition in order to make it possible to fulfill a positive commandment. (*Y'vamot* 90b) Many of the later commentators have allowed the extraction of semen for fertility testing. If this is the case, then the semen extracted for AIH should be permitted and not considered "in vain." Even if we say that the father does not fulfill the commandment to procreate, we cannot say AIH is "in vain" since a child may be the result. Rabbi David ben Samuel, *The Taz*, in his commentary on *Shulchan Aruch*, *Yoreh Deah*, 195, states that in order to fulfill the commandment, action must be involved. *The Taz* feels that AI does not qualify as the necessary kind of action. In response, Weinberg cites the case of a man who already has children and then converts to Judaism. (*Y'vamot* 62a) The law states he has fulfilled his obligation even though when he had his children as a non-Jew he would not have been bound by the commandment. In other words, he performed the commandment by "abnormal," non-commanded means. Moreover, if the father were to die, his wife would be freed from the obligation of a levirate marriage, since the father has living offspring. Weinberg concludes that the manner of conception does not affect the fulfillment of the commandment, implying that AIH would be an acceptable way to observe the commandment.

Weinberg next examines the question: who is the father in a case of artificial insemination? In the case of AIH there can be certain difficulties. The doctor might not use the husband's sperm or might mix the husband's sperm with a donor's without informing the husband, perhaps to spare him the pain of knowing he is sterile. This could create legal problems. The husband would think that the child was his and the child, not knowing his lineage, could enter into a forbidden marriage. Or, the husband's wife could think she were released from the obligation of a levirate marriage or *chalitzah*. For this reason, we cannot rule that such a child exempts his mother from *chalitzah*. We can regard him as the son of the semen donor only for purposes of legal stringency.

Is AID adultery and is the artificially inseminated wife permitted to have sexual relations with her husband? Weinberg comments on J. L. Tzrealson who, in his commentary, *Maarchei Lev*, No. 73, concludes that AID is adultery on the basis of the word "seed" in Lev. 18:20. The Hebrew word "seed" indicates that, as long as there is seed in the woman, adultery has occurred. This implies that intercourse is not necessary for a woman to be an adulteress: AID is adultery. Weinberg, however, states that we cannot draw new halachic conclusions directly from Biblical verses by means of our own *midrashim*; we must rely on the Talmud and the halachic authorities for the accepted legal interpretations of Biblical texts.

SMK, cited in *Bach in Tur Yoreh Deah* 195 makes it clear that there is no adultery without intercourse. A menstruating woman is allowed to lie on her husband's sheets but not on another man's sheets, lest she become pregnant. If the concern were prohibited intercourse, she should also be forbidden from lying on her husband's sheets since no intercourse is allowed during the menstrual period. The fact that she is only prohibited from lying on another man's sheets indicates that the concern is for the child and its paternity.

Rabbi Moshe ben Maimon (Rambam) rules that whether or not the act of sexual intercourse is intentional the child is considered legitimate. (*Isurei Biah* 15:1) We could say this contradicts *SMK*. However, Weinberg focuses on the words "sexual intercourse," and says since there is no coitus in AID, it cannot be considered adultery. Absorption of semen without penetration cannot be considered adultery.

Lesbians, who transfer a husband's semen by lesbian activity (*Y'vamot* 76a) are considered unchaste. However, this activity is not considered prohibited sexual intercourse since there is no penile penetration.

On the same subject, Weinberg cites the case of the woman whose husband divorces her. She is allowed to remarry without a waiting period

(Y'vamot 41a). If a divorced woman marries immediately after her divorce, there is the possibility she could be pregnant from her first husband. Concern for adultery should require a waiting period to be sure the woman is not already pregnant. Since no waiting period is required, we may infer that there is no question of adultery, even if she is carrying another man's child at the time of her new marriage. Thus, as long as there is no intercourse with another man, she is not considered an adulteress; similarly, AID cannot be considered adultery.

Weinberg's summary of why AID should be prohibited asserts:

1. The child may unknowingly enter an incestuous marriage.
2. The child may improperly release his mother from the obligation of a levirate marriage or *chalitzah*, thinking the baby to be her husband's child.
3. There could be false inheritance claims.
4. Wives could claim they became pregnant through artificial insemination to hide their adultery.
5. AID is repulsive and an abomination of Egypt (in other words the most repulsive).

Weinberg suggests that using sperm from Gentile donors could eliminate some, if not all, halachic objections.

1.10 Rabbi Moshe Feinstein

The last decisor on the permissibility and legal ramifications of artificial insemination is Rabbi Moshe Feinstein. A leading halachic authority of our time, Feinstein was born in Uzda, near Minsk, Belorussia, in 1895. His father, a rabbi, provided the boy's early education. Feinstein himself became rabbi of Luban, near Minsk where he remained until his emigration to the United States in 1937. In New York he became the *Rosh Y'shivah of Metivta Tiferet Jerusalem*.

Feinstein was president of the Union of Orthodox Rabbis and Chairman of the American Branch of the *Moetzet G'dolei HaTorah* of Agudat Israel. He was instrumental in raising funds for Israel's Orthodox educational institutions. Willing to investigate issues raised by progress, Feinstein often ruled on the problems presented by modern science and technology. He was well known for his volumes of commentary, published under the name of *Igrot Moshe*. Until his death in 1986, Feinstein continued to decide halachic questions. An important halachic authority of our time, Feinstein, our third decisor, was a leader in American Orthodoxy.⁷⁵

Feinstein questions whether artificial insemination should be considered illicit sexual intercourse and if it is not, whether the resultant impregnation should be comparable to sexual intercourse. He also investigates the relationship of the child to both its biological

75. "Feinstein, Moshe," Encyclopaedia Judaica, 1972, ed.

and adopted father. (*Igrot Moshe*, Volume 10, Nos. 10, 11, 71)

Feinstein is asked about a husband and wife who have been married for ten years and have been unable to conceive. According to doctors, the husband is sterile. As the wife became pregnant through AID without her husband's consent, may she continue to live with her husband?⁷⁶ Feinstein answers that since there is no forbidden intercourse she is allowed to cohabit with her husband. She is prohibited to her husband, halachically, only if there is prohibited sexual intercourse, not because the semen is from another man. Feinstein makes it clear that only if extra-marital coitus is involved may the child be considered illegitimate. Even if the donated semen is that of a relative, the child is legitimate.

Feinstein, in considering the status of the child, institutes the "Rov" or "majority" principle. This states that in cases where we do not know the status of something, we can assume, with some limitations, that it takes on the character of the "rov", the multitude. (*Chulin* 11a and 11b). Thus, in the matter of artificial insemination by donor, not knowing the status of the donor, we can assume that the donor is a Gentile for three reasons. First, most of the population are not Jews. Second, most people who become donors are not Jews. Third, only those Jews who do not respect *halacha* become donors because they are unaware

76. Moshe Feinstein, *Igrot Moshe*, 10, No. 10.

of the possible complications (assuming that the non-observant are a minority of Jews).

Even if a doctor assures a woman that the donor is a Jew, Feinstein states we cannot believe that the semen is indeed from a Jew, since the physician might have (untruthfully) said this, thinking that Jewish semen would be more acceptable to a Jewish woman. Using the "*Rov*" principle eliminates any suspicion of the child being excluded from the community. And since there is no intercourse, the woman would not be forbidden to a *kohen*. However, when AID is performed without the husband's consent, he is not required to support the child. This means that if the husband has not agreed to the AID, then the child belongs to the donor.

Feinstein discusses a case of AID in which a doctor mixed the husband's semen with another man's semen without informing the husband (*Yoreh Deah* 71). Feinberg cites Rashi's commentary on the statement in *Sotah* 42a, referring to a woman who is impregnated by more than one man. *Tosefot* concludes that one child can result from the union of the sperm of more than one man with the single *ovum* of a woman. Should this be scientifically possible, it would mean that various parts of the child could have a different paternal lineage. It would seem to apply in AIDH. However, Feinstein clarifies that since we know the husband is incapable of producing children, from the statement in the Talmud we

cannot determine that AIDH is prohibited.

Feinstein repeats the view of Taz, that using another man's sperm is forbidden by SMK's statement that a woman is not allowed to lie on another man's sheets. From this we could conclude that a woman is forbidden to become pregnant from another man, even if there is no sexual intercourse. Feinstein, however, indicates that the concern of the SMK is not the pregnancy, but that the child born could marry his biological father's daughter or enter into some other incestuous marriage. This would not be of concern if the sperm came from a Gentile donor, since the forbidden relationships apply only to Jews.

Considering the question of paternity, Feinstein examines the rabbinic requirement of a marital separation after AID. He indicates that rabbinic decrees apply only to that which is common, the normal case. Therefore, if the doctor has declared the husband to be sterile, it is not normal to think the husband would regain the ability to father a child. Thus, for Feinstein, there is no question of paternity and no need for a separation.

The question of the child's legitimacy is not an issue for Feinstein. He writes that even if we follow the minority view (that illegitimacy can occur without intercourse), according to *halacha*, intercourse with a non-Jew does not produce an illegitimate child. Artificial

insemination can not be held to be adultery. Illegitimacy, according to Feinstein, can only occur from intercourse. Hence, artificial insemination cannot be prohibited on the grounds of adultery, and based on the "Rov" principle, we can assume that the semen is from a Gentile.

Feinstein draws on Y'vamot 76a to indicate the method to be used to procure semen. The Talmud states:

Rabbi Judah stated in the name of Samuel: If it [the membrum] had a small perforation which was closed up, the man is deemed unfit if the wound reopens when semen is emitted, but if it does not reopen he is deemed fit. . . . Rabah, the son of Rabbah, sent [this question] to Rabbi Joseph: will our master instruct us how to proceed (to test whether the semen will reopen the closed perforation). The other replied: Warm barley bread is taken and placed on the man's anus. Thereby the flow of semen sets in, and the effect can be observed. . . . said Abaye, [women's] colored garments are dangled before him [exciting his passions, thus causing semen emission].

Feinstein concurs with these two methods and further asserts the acceptability of *coitus interruptus* or the use of a condom. He states that the concern of violating the commandment "*lo tinaf*," do not commit adultery, is eliminated if manual means are not used. To Feinstein, there is no problem of seed spilled in vain, since this seed is specifically intended for impregnation.

In a later note⁷⁷, Feinstein writes that he did not intend these responsa to be a blanket *heter*, permission, for anyone who wishes to use artificial insemination by donor. He has no difficulty with the process of artificial insemination, if the husband's sperm is used. Yet, he does not close the door to AID. He does not say that his previous reasoning is wrong, but rather that great care must be taken with any halachic decision regarding artificial insemination. There can be no blanket permission, lest this be abused. He concludes that each case must be considered individually and may be allowed if it is critical for the couple and a great Rabbi approves it. Although Feinstein never defines "critical," and even though he feels there must be a fence to protect the community from the possible abuse of artificial insemination by donor, Feinstein avers AID may be permitted under certain conditions.

77. Moshe Feinstein, a letter in the section regarding artificial insemination from non-Jewish seed, in *Harofei Laor Hahalacha*, Jerusalem, 5740, p. 101.

Chapter 2

IN VITRO FERTILIZATION

2.1 Medical Procedure

The second of the new reproductive technologies, In Vitro Fertilization - often called "test tube babies"- has very little to do with test tubes. "In vitro" means in glass. The name of the process is taken from the site of fertilization: a glass petrie dish.

The woman is given fertility hormones to encourage the ripening of several eggs at once. Once tests indicate ovulation has occurred, she is anesthetized, and an incision is made near the navel. Inert gas pumped into her body expands the abdominal cavity and separates the organs, allowing the physician to find the eggs with the help of an instrument called a laparoscope. Using the incision already made, the laparoscope locates the eggs and, by a second incision, the doctor removes them through suction with a small hollow needle.

The doctor utilizes a microscope to determine if the operation has succeeded in procuring at least one *ovum* (egg). The *ovum* or *ova* are carefully washed and then placed in a glass petrie dish. They are kept at the proper temperature and pressure, free from contaminants and within a culture medium of salts, nutrients and (sometimes) blood

serum. The objective is to imitate the environment of the human body as much as possible.

The sperm are prepared by bathing them in a solution to remove the chemicals which prevent them from penetrating the egg once contact has been made. The sperm are then added to the *ovum* in the petrie dish. Once the fertilized egg undergoes the appropriate number of divisions (usually after two days), it is implanted into the uterus through the cervix by means of a tiny hollow tube. If the fertilized *ovum* implants itself in the uterine, wall the woman has become pregnant.¹ Compared to 30% in a "normal" pregnancy, only 20% of these embryos result in a pregnancy and only 13% develop into a baby.²

2.2 History

Although the first baby conceived through in vitro fertilization (IVF) was born in 1978³, fertilization outside of the body was not a new phenomenon. In 1936, Dr. Gregory Pincus of Harvard University united a rabbit egg and sperm.⁴ Eight years later, Dr. John Rock of Harvard said he fertilized a human egg outside the body and saw it divide into

1. Olson, pp. 16, 21-34.

2. Olson, p. 35.

3. Olson, p. 1.

4. Peter Gwynne, "All About That Baby," Newsweek, 7 August 1978, p. 68.

three cells.⁵ In 1961, Italian scientist, Dr. Daniele Petrucci announced that he had kept an embryo alive for twenty-nine days. He destroyed it and stopped his work when the Vatican condemned his research.⁶

It was not until the mid-1960's that researchers were successful in fertilizing mammalian eggs on a regular basis. By discovering the process enabling sperm to penetrate the egg, C. R. Austin of Cambridge University and M. C. Chang of the Worcester Foundation for Experimental Biology in Shrewsbury, Massachusetts, laid the groundwork for the first human "test tube" baby.⁷

Dr. John Marston of the University of Birmingham, in his research with rhesus monkeys, made successful implantations after only one cell division.⁸ Drs. Patrick Steptoe and Robert Edwards also succeeded with the first human test tube baby when they altered the time of implantation.⁹

5. Gwynne, p. 68.

6. Gwynne, p. 68.

7. Peter Turner, "The First Test Tube Baby," Time, 31 July 1978, pp. 58-70.

8. Walter Sullivan, "Implants of Monkeys May Explain Success With Human Embryo," New York Times, 25 July 1978, Sec. A, p. 1.

9. Sullivan, Sec. B, p. 10.

According to Dr. Edwards, between twenty and forty percent of women suffer from defective oviducts. Surgery will help only seventeen percent of these women.¹⁰ The first successful test tube experiment, Louise Brown's birth, was the culmination of more than ten years work: Drs. Steptoe and Edwards attempted more than sixty implants before this success.¹¹

Gynecologist Howard Jones, with his wife, endocrinologist Georgeanna Seeger Jones, founded the first American IVF clinic in Norfolk, Virginia, in 1978.¹² By 1985, more than two thousand babies were born throughout the world via IVF; twenty percent of these in the United States.¹³ Currently, an IVF baby is born every day somewhere in the world.¹⁴

Some moralists consider it unethical to create a baby in a test tube. In 1975, ethics and the question of safety for both the mother and the embryo, resulted in The United States Department of Health, Education and Welfare being prohibited from funding any human fertilization research experiments. A national ethics board was formed to help solve

10. "Mixed Blessings," Editorial, New York Times, 30 August 1978, Sec. B, p. 16.

11. Turner, p. 66.

12. Wallis, p. 48.

13. Richard A. McCormick, "Therapy or Tampering? The Ethics of Reproductive Technology," America, 7 December 1985, pp. 396-403.

14. Schneider, p. 37.

the problem. This board is now defunct with little hope of its renewal.¹⁵ A group in Birmingham, Alabama, established in vitro guidelines in the hopes of filling the lacuna left by the demise of the ethics board. This committee was founded by the American Fertility Society.¹⁶ Recently, a 94 page report was issued by the American Fertility Society's Ethics Committee.¹⁷

According to LeRoy Walters, Director of the Center for Bioethics at Georgetown University's Kennedy Institute, the morality of in vitro fertilization in the clinical setting is a 'stagnant issue'.¹⁸ Yet, is it? Theologians and ethicists are still discussing it and articles are still being written both supporting and opposing IVF.

2.3 Catholic View

In 1978, when the world first heard of the doctors' success with the procedure, Roman Catholic theologians expressed grave reservations. They compared IVF to artificial insemination, and decided IVF was an unlawful tampering with God's will.¹⁹ Their initial concern, best

15. Abramowitz, p. 5.

16. Schneider, p. 73.

17. Kempers, pp. 1-94.

18. Abramowitz, p. 6.

19. Gwynne, p. 67.

described by Father William Smith of the Archdiocese of New York, was the possible misuse of the new process.

"It's the conception argument backwards. Pius XII talked about not wanting to change the home into a laboratory. I call it switching the marital bed into a chemistry set."²⁰ The strongest opposition, among Catholics, came from those who saw IVF as an unwarranted interference with the natural way of reproduction ordained by God.²¹

Father Donald McCarthy, Director of Education at the Pope John XXIII Medical-Moral Research and Education Center in St. Louis, Missouri, maintained the same view six years later. In 1984 he stated:

As a matter of fact, many serious ethicists, myself included, also believe that the very technique of in vitro fertilization violates the rights of human embryos on the ground that they have a right to be conceived in an act of personal self-giving and conjugal love, rather than through a series of technical acts in a sterile laboratory.²²

One year before this, the Catholic Bishops of Victoria, Australia, stated in their report to a committee formed to study this question, "In pursuit of the admirable end of helping an infertile couple to conceive and have their baby, I.V.F. intervenes in their supreme

20. "To Fool (or Not) Mother Nature," Editorial, Time, 31 July 1978, p. 69.

21. John L. Marlow, "A Rush of Test Tube Babies Ahead?" Editorial, U.S. News and Report, 7 August 1978, p. 23.

22. McCarthy, p. 174.

expression of mutual love. It separates 'baby-making' from 'love-making.'²³

Not all Catholics agree. A few, like Father Karl Rahner, draw a different conclusion from this statement issued in 1982 by Pope John Paul II: "I condemn, in the most explicit and formal way, experimental manipulations of the human embryo, since the human being, from conception to death, cannot be exploited for any purpose whatsoever."²⁴ Rahner, hearing those words and admitting that the personhood of the embryo is anything but clear, stated, "It would be conceivable that, given a serious positive doubt about the human quality of the experimental material, the reasons in favor of experimenting might carry more weight, considered rationally, than the uncertain rights of a human being whose very existence is in doubt."²⁵

In 1983, the Catholic Bishops of England submitted their evidence to the Government Committee of Inquiry into Human Fertilisation and Embryology. In this statement they said, as did McCarthy above, "children have the right to be born the true child of a married couple,

23. McCormick, p. 398.

24. McCormick, p. 402.

25. McCormick, p. 402.

and thus to have an unimpaired sense of identity."²⁶ Their concern with IVF stemmed from "a severing of procreation from sexual intercourse."²⁷

They differentiated between the child, born through sexual intercourse, and the IVF child.

Thus the IVF child comes into existence, not as a gift supervening on an act expressive of marital union, and so not in the manner of a new partner in the common life so vividly expressed by that act, but rather in the manner of a product of a making (and indeed, typically, as the end-product of a process managed and carried out by persons other than his parents).²⁸

They conclude, "The essential conditions of the IVF child's origin, on the other hand, tend to assign this child, in its inception, the same status as other objects of acquisition. The technical skills and decisions of the child's makers will have produced, they hope, a good product, a desirable acquisition."²⁹ The Bishops recommend adoption as the most viable solution to infertility, for it respects the "dignity of the child and can obviously contribute greatly to the well-being of our society."³⁰ Thus, to most Roman Catholic theologians IVF is unnatural, unlawful and unethical.

26. Catholic Church Bishops of Great Britain, "In Vitro Fertilisation Morality and Public Policy," 2 March 1983, p. 14.

27. Catholic Church, p. 14.

28. Catholic Church, p. 21.

29. Catholic Church, p. 24.

30. Catholic Church, p. 27.

2.4 Conservative Protestant View

Those outside the Catholic world are divided in their view of the efficacy of IVF towards the betterment of society. Jeremy Rifkin, a Jewish political activist, maintains a viewpoint similar to conservative Protestants when he writes in his 1983 book Algeny, "two futures beckon us. . . from a world teeming with life, a world spontaneous, unpredictable, dynamic, rhapsodizing, we descend to a world stocked with living gadgets and devices, a world running smoothly, effortlessly, quietly, without feeling."³¹

"The whole idea of destroying our descendants, of fabricating the next generation, of making reproduction synonymous with manufacturing, is already in the picture,"³² warns Protestant theologian Paul Ramsey of Princeton University. In his book, Fabricated Man, he writes, "hypothetical children can be thought of as actualities to be improved at risk, and one can even contemplate permitting harm to come to them (with abortion as an escape prepared for the injured) for the sake of knowledge."³³

31. Schneider, p. 37.

32. Gwynne, p. 71.

33. Paul Ramsey, Fabricated Man (New Haven: Yale University Press, 1970), p. 121.

In order to guarantee that this horrendous situation does not come about, Ramsey declares, "the decisive moral verdict must be that we cannot rightfully get to know how to do this without conducting unethical experiments upon the unborn, who must be the mishap (the dead and retarded ones) through whom we learn how."³⁴ Thus, "Before a child is at all actual he has no title to be born. Men and women have no unqualified right to have children. The treatments for the prevention of cystic fibrosis . . . and other chromosomal abnormalities are continence, not getting married to a particular person, not having any children, using three contraceptives at once or sterilization."³⁵

Paul Ramsey's reaction to the birth of the IVF baby in 1978 did not deviate from his writing eight years earlier: "... test tube procreation is 'immoral' because of the uncertainties involved; the parents' right to have children is never so absolute as to justify such 'induced risk' to the child."³⁶ It should be noted that this same theological perspective is held by Dr. Leonard Kass, a Jewish biochemist at the University of Chicago, who states, "If there are risks involved in a medical procedure, then the patient must be appraised of the risk and must consent to it."³⁷ Obviously, this is impossible with an embryo. Consequently, any IVF is considered "in the

34. Michael Hamilton, ed., The New Genetics and the Future of Man (Grand Rapids: William B. Eerdmans Publishing Co., 1972), p. 30.

35. Ramsey, p. 120.

36. "To Fool," p. 69.

37. Restak, p. 65.

class of unethical experiments upon human subjects."³⁸ Because of the super-stimulation of the woman to create more than one egg, Kass expresses the concern that "Here, nascent lives are being deliberately created despite certain knowledge that many of them will be destroyed or discarded. The embryos discarded here are wanted, at least for a while; they are deliberately created, used for a time, and then deliberately destroyed."³⁹

Kass is not merely concerned with the rights of the embryo; he sees the fabric of society being destroyed.

If the depersonalization of the process of reproduction and its separation from human sexuality dehumanize the activity that brings new life, and if the manufacture of human life threatens its humanness, these together add up to yet another assault on the existence of marriage and the human family.⁴⁰

In Premeditated Man, Kass is quoted as saying,

There is a powerful moral objection to the implantation experiments. It does not rest upon arguments about the will of God or about natural rights. Instead, it rests upon that minimal principle of medical practice: do no harm. In these prospective experiments upon the newborn, it is not enough not to know of any grave defects: one needs to know with some confidence that there will be no

38. Restak, p. 65.

39. Hamilton, p. 34.

40. Hamilton, p. 54.

such defects - or at least no more than there are without the procedure.⁴¹

Kass, afraid of those who think that their task is to improve the world, warns,

We stand in much greater danger from the well-wishers of mankind, for folly is much harder to detect than wickedness. The most serious danger from the widespread use of these techniques will stem not from desires to breed a super race, but rather from the growing campaign to prevent the birth of all defective children in the name of population control, 'quality of life,' and the supposed 'right of every child to be born with a sound physical and mental constitution, based on a sound genotype.' Thus says the retiring (but not reticent) President of the American Association for the Advancement of Science, genetecist Bentley Glass, in his presidential address: 'No parents will in that future time have a right to burden society with a malformed or a mentally incompetent child.' These are not the words of a dictator but of a gentle biologist.⁴²

Kass' response to the news that a baby had been born through IVF was, "The first step serves as a precedent for the second and the second for the third, not just technologically but also in moral arguments. Perhaps a wise society would say to infertile couples: 'We understand your sorrow but it might be better not to go ahead and do this.'"⁴³ In 1984, Kass offers an alternative, "Why not spend this money on discovering the causes of infertility or the prevention of tubal obstruction?"⁴⁴

41. Restak, p. 64.

42. Hamilton, p. 39.

43. Gwynne, p. 71.

44. Abramowitz, p. 6.

IVF, however, is not merely beneficial for women with infertility problems. Laboratory fertilization can permit conception with the sperm of men who have low sperm counts. Fewer sperm are needed to fertilize an egg in a glass dish than one in the female reproductive tract. But the issue Kass raises is the relative good of IVF, whether the money spent on IVF research is worth the cost in resources and human effort. The case against IVF questions the use of monies which could otherwise be used for better education for the disadvantaged young, or research for incurable diseases or decent survival for the elderly.⁴⁵

Ramsey's and Kass' concern about risk is countered by the idea that "the laboratory procedure only mimics what nature does inside the reproductive system. It is estimated that a large percentage of embryos, some specialists say more than half, are shed by the body in the earliest stages of development."⁴⁶ Research suggests that

In practice, about 67 percent of the fetuses that are conceived in the human body don't make it out of the womb alive. Each year in the United States about 6 million fetuses abort spontaneously or die in the uterus, most of them so early in gestation that the mother doesn't even realize she is pregnant.⁴⁷

45. Herbert T. Krimmel, "The Case Against Surrogate Parenting," The HCR, 13, No. 5 October (1983), p. 39.

46. "Successful Laboratory Conception Intensifies Debate Over Procedure," New York Times, 27 July 1978, Sec. A, p. 16, Col. 2.

47. Gwynne, p. 72.

Donald Chalkley of the National Institute of Health states, "When a husband and wife go to the bedroom and experiment, the experiment will fail two-thirds of the time."⁴⁸

Dr. Edwards, in the Quarterly Review of Biology, published at the State University of New York at Stony Brook, responds to his critics' castigations that he destroys life, by challenging the view "that human life begins at a single, sharply defined moment, that of fertilization."⁴⁹ To the worry that defective embryos will go unnoticed and then will be implanted, "specialists say, it is unlikely (for the damaged embryo) to be successfully carried to birth."⁵⁰ The science fiction writer, Isaac Asimov is convinced that the new reproductive technology can be controlled. "Scientists develop a potentiality. . . . Governments and people decide how to use that potentiality."⁵¹

2.5 Liberal Protestant View

In 1978, Arthur Dyck, a United Church of Christ layman and a professor of ethics at Harvard University, requested that more stress be placed upon reproductive research in the United States. He denied that experimentation interferes with divine prerogatives. "No one says we

48. Gwynne, p. 72.

49. "Successful," p. A-16.

50. "Rush," p. 22.

51. Gwynne, p. 71.

should meekly submit to natural disasters such as hurricanes. Nature sets limits but it's our task to improve on nature and try to perfect the process because we value the life God has given us."⁵²

The liberal Protestant view is best exemplified by Rev. Joseph Fletcher who proposes situational ethics as a way of approaching the new reproductive methods. He asserts, "Whether any of these things [AI, ovum implantation, in vitro fertilization, . . .] is morally licit would depend, I believe, upon the particular case and the social situation. Sometimes they could be right, sometimes wrong. All depends on whether they contribute to the fulfillment of human need."⁵³

Fletcher concludes,

Our task, if we are to avoid what Gerald Leach has called a 'biocracy' is to achieve a consensus built around a humanistic ethic that is not meta-rational or based upon faith assumptions, but derives its cogency from shared values and reportable experience. I am convinced that such an ethic would be consequential, not a priori; selective and situational, not categorical. That is, it would not condemn laboratory reproduction as such but would condemn it only when it appears that its means or ends are incompatible in the circumstances with human needs, as we discover them by common consent and verifiable reasoning.⁵⁴

52. "Rush," p. 23.

53. Hamilton, p. 85.

54. Hamilton, p. 88.

2.6 Secular Legal View

The legal judgments on IVF are few. The same year Louise Brown was born, the couple Doris and John Del Zio sued the hospital where the container holding Mrs. Del Zio's fertilized egg was purposely unsealed by a physician. They were awarded \$50,000.00 in damages.⁵⁵ In 1979, the Illinois legislature made "any doctor who undertakes such a procedure [IVF] the legal custodian of the embryo and liable for possible prosecution under an 1877 law against child abuse."⁵⁶

In Pennsylvania, a law was enacted to enable monitoring of IVF. The law provides that anyone conducting IVF experiments must file quarterly reports with the Department of Health. The reports include the names of all professionals involved or assisting in the procedures, the locations of the IVF procedures, the addresses of the persons or institutions sponsoring the procedures, the number of eggs fertilized, the number of embryos destroyed or discarded, and the number of women implanted with embryos. However, reporting the names of the donors or recipients is not required.⁵⁷

Science has moved much more rapidly than our legal system. Possibilities, previously never considered, necessitate action. As more experimentation occurs, more laws will be required to provide guidelines.

55. Wallis, p. 55.

56. Wallis, p. 55.

57. Kempers, p. 10 S.

2.7 Halachic View

Jewish law is unique in this respect: although these reproductive methodologies are new, modern halachists find a basis for their rulings in the tradition. The episode of the woman inseminated in the bath is used as a basis for *halacha* regarding artificial insemination which is then applied to in vitro fertilization. As in the previous chapter, the more restrictive and the more lenient views will be investigated.

2.8 Rabbi Eliezer Waldenberg

Rabbi Eliezer Waldenberg is asked by a physician if in vitro fertilization may be allowed.⁵⁸ The doctor cannot see any difference between artificial insemination and in vitro fertilization. He suggests there are lenient views which permit AI. Waldenberg replies that many consider AI to be impermissible, he being one of those who forbids AID.

The physician is referred to Waldenberg's own responsum: anyone who has any hope the couple can have children the way "normal" couples do, must not be in any hurry to allow even AIH. All natural means must be tried prior to allowing AI. But, if ten years of childlessness have passed in the marriage (and if skilled and knowledgeable doctors have

58. Eliezer Waldenberg, "Tzitz Eliezer," Volume 15, No. 45, pp. 115-120.

determined there is no possibility the woman can become pregnant from sexual intercourse) among those who permit artificial insemination, there is a conflict as to how the process of AI may be applied. In this responsum he writes that some say AI may not take place during *niddah*, a woman's monthly time of ritual impurity. Others allow the insemination during menstruation. Some permit her to be inseminated during her "white days," (seven clean days) after she has gone to the *mikvah*.

Waldenberg expresses his concern that in IVF as well as AI the husband's seed not be mixed with another man's seed. Waldenberg states that since donor insemination is permitted by the Ministry of Health, there is no way to assure that care will be taken to perform IVF only with the married couples' sperm and egg. According to him, for this reason alone, IVF cannot be allowed.

Further, in IVF, the test tube remains in the laboratory. Unlike AIH, where a woman can be immediately inseminated with her husband's semen, IVF necessitates leaving the fertilized egg in the laboratory for days. In this time, the *ovum* can become incorrectly identified and unscrupulous scientists can take advantage of the situation.

All of the above is based on the assumption that IVF is halachically equivalent to AI. But, says Waldenberg, IVF is a much more serious

problem than AI. Therefore, the *halacha* must be more stringent when considering IVF. In AIH, the husband's seed is inserted directly into his wife's womb. Whether this achieves pregnancy or not, there is no seed spilled in vain, and the law regarding this is the same as that applying to natural sexual intercourse from which pregnancy does not occur. In IVF, if the implantation does not lead to pregnancy, seed has been spilled in vain. Since more than one fertilized egg is implanted to increase the chances of pregnancy, and not all of the ova necessarily result in a live baby, the remaining seed is spilled in vain.

If doctors do not wish to implant all the ova which have become fertilized, they could decide to use them for another woman. Waldenberg assumes IVF is only used when the woman has the problem of infertility; therefore, he states that since the commandment to be fertile and increase is not incumbent upon the woman, the procedure is unnecessary. If the impediment preventing pregnancy is on the wife's side, the husband still remains under the prohibition of seed spilled in vain.

Waldenberg continues his halachic analogy of AI to IVF. He summarizes the answers given by various authorities to the question of the fulfillment of the commandment to procreate by means of AI in his Responsa, Vol. 9, No. 91. Some say the child belongs to the donor of the semen and is his child in all matters. Some say that only in

matters of halachic stringency is he the donor's child. Some say, even if the child is considered his son, the donor has not fulfilled the commandment to procreate. Still others argue that the child is not at all related to the donor.

According to Waldenberg, all these authorities would agree that by means of IVF the semen donor does not fulfill the commandment to procreate. In AI, the semen goes directly into the womb by artificial means. Yet, the rest of the process is the same as the natural process of pregnancy. For this reason some authorities can accept AI as "natural" in the sense that it fulfills the commandment to procreate within the context of almost normal marital relations.

IVF, however, deviates completely from normal marital relations. The coupling of sperm and egg takes place outside the body, in a petrie dish, by the agency of a third party. Since a commandment must be carried out in the manner proscribed in the Torah, and this certainly is not as the Torah proscribes, there remains no question that the commandment has not been fulfilled.

Waldenberg states that as soon the egg is removed from the womb, the connection between the woman and the *ovum* is broken. He then quotes Rambam, "It is impossible that the limbs of a man should exist

separately while being truly the part of a man."⁵⁹ From this Waldenberg concludes that just as the limbs of a man cannot exist separately, neither can the seed of a woman exist separately, i.e. outside the body.

This comment allows Waldenberg to state that it is the physical connection to the body which makes the egg truly human. He then compares being in a Gentile womb to being outside of the body (outside of a Jewish body), based on the comment in *Kiddushin* 69a that any child of a Canaanite woman is like a child in the uterus of an animal. The *Tosafot Yom Tov* to *Kiddushin* 3:12 extends this concept to the child of a Jewish father and Gentile mother. The fact that the father may convert the child does not alter the law that there is no familial relationship between them. When the embryo is created in a place where there is no connection of family, like the womb of a Gentile, the biological father has no familial relationship to the child. Waldenberg uses the idea expressed in *Moreh N'vuchim* in order to expand the *halacha* in *Kiddushin* 3:12 to the case of IVF. According to this analysis, the glass petrie dish in IVF is equivalent to the womb of a Gentile woman.

IVF also takes place outside the woman's uterus. When it is argued that the *ovum* in the petrie dish is that of a Jewish woman, Waldenberg adduces the Rambam to demonstrate that this *ovum* no longer belongs to

59. *Moreh N'vuchim*, Part 1, Ch.72, p. 187.

her. Therefore, for a man's offspring by means of artificial insemination to be related to him, conception must take place inside the uterus.

Waldenberg then focuses on IVF as a stepping stone to further technological advances, with each experiment more abhorrent than the previous one. In the first stage, fertilization is accomplished outside of the uterus. The next step is total gestation outside of the uterus. In the next phase neither an egg and nor a sperm are used. Instead, nuclear material is removed from an *ovum* and the nuclei from another cell are transplanted into this *ovum*. This process, called cloning, allows the egg no function other than housing the new genetic material. There is no conception, for egg and sperm never meet.

If there is no family connection with a child born outside the uterus, Waldenberg asks whether those birthed can be called "children," since not only did their "birth" take place outside of the uterus, but the entire pregnancy occurred outside of the uterus. He fears that the entire process of procreation will become something that takes place in the laboratory, and the result will be "laboratory creatures" with no lineage. He expresses his fear that the lack of supervision in the laboratory will lead to unconscionable experimentation, problems with halachic lineage, and reproduction without humanity. Waldenberg concludes by saying that rabbinic decisors must set boundaries to warn

against the spiritual danger awaiting those who close their eyes to the problems.

2.9 Rabbi Moshe Tendler

Rabbi Moshe Tendler, a bacteriologist born in 1926, is known in the medical world from his work to develop drugs to control cancer. He taught Talmud and biology at Yeshivah University and is active in the field of bioethics. His medical knowledge enables him to respond to the question of IVF from a medical point of view; and his knowledge of Talmud enables him to look at the medical problem halachically and ethically. His response to the question of the halachic acceptability of IVF contains his experience in both the medical and legal domains. It is for this reason that Tendler's view of the new reproductive technology of IVF is investigated.⁶⁰

Tendler begins his comment by asking: "Is this [IVF] a case of 'from all trees of this garden you may eat' or is this a branch of 'the tree of knowledge from which you must not eat?'"⁶¹ Tendler clarifies his position, namely, that the dangers of the procedure are insignificant, and so the prohibition against causing injury to ourself or others is not relevant. He then questions the relative benefits and risks.

60. "Tendler, Moshe," Encyclopaedia Judaica, 1972, ed.

61. Moshe Tendler, "Rabbinic Comment: In Vitro Fertilization and Extrauterine Pregnancy ('Test Tube' Baby)," The Mount Sinai Journal of Medicine, 51, No.1 January-February (1984), pp. 7-11.

After he acknowledges that much of the risk is unknown, Tendler concludes that for a couple who really want a child genetically their own, the risks of IVF are no more unusual than those which may be incurred in the management of "natural" pregnancy.

Tendler differentiates between experimentation and therapy. Any new medical procedure necessitates asking the question: is this therapy or experimentation? He responds to his own question by indicating that the lack of literature on the work of Steptoe and Edwards makes this a difficult query to answer.

Finding no IVF experimentation using primates, Tendler asks: "From an ethical standpoint, is it proper to move from lower animals to humans without going through primate experimentation?"⁶² Tendler admits that sometimes the circumstances require a leap of faith. "If there is a woman pleading that she wants her baby - 'if not I shall die' -then the move to clinical use makes sense. If not, something unethical was done."⁶³

He then considers what he calls paternal factors. Tendler does not consider the acquisition of semen for IVF to be seed spilled in vain. According to Tendler, this process does not waste seed, but rather

62. Tendler, p. 8.

63. Tendler, p. 8.

causes the seed to perform its proper function, impregnating an egg. If semen used for a fertility test is not wasted, semen produced for the purpose of creating a child is not wasted, even if all of it does not fertilize an egg.

Tendler cannot understand all the commotion regarding the paternity of the resultant child. He sees no difference between AI, in which the child is conceived artificially and IVF, in which the child is conceived artificially, taking a detour to the petrie dish on the trip to the uterus. Tendler writes that the detour does not introduce any new factors.

In any honest analysis using Biblical ethics, there is no doubt as to the legal paternity of this child. A child conceived by artificial insemination is clearly the child of the one who donated the genetic material. There is no question on that issue, nor is there really much of a question concerning bastardy.⁶⁴

According to Tendler, the fertilized egg in the petrie dish has no claim to being human. Until the egg has been placed in its natural environment, where its full potential can be achieved, it is not considered human. To discard a fertilized egg at this point is not abortion. Yet, Tendler adds, such an act may not be equated with "nothing."

64. Tendler, p. 9.

Two aspects of danger to the fetus are considered: malformation and publicity. To Tendler, malformation falls in the category of causing injury to someone else. The only way a risk to another becomes an ethical consideration is if the person who assumes the risk benefits from the consequences. Tendler states that the risk to the fetus does not exist, unless the procedure is done. Since it is the procedure which allows the fetus to be born, there is a benefit to the fetus, albeit a risk, as well.

Regarding the danger involved in publicity, Tendler feels "scientific progress did not require the publicity to which the child [Louise Brown] was exposed."⁶⁵ He states that those who were involved acted unethically.

Tendler concludes his article by stating that his concern is not about the artificiality of the procedure, but rather, for societal ethics. He refers to the "slippery slope" of the "technological domino theory."⁶⁶ Tendler states that "scientists have the right, indeed the duty, to open many doors. But they must be bound by the ethical and moral standards of society."⁶⁷ The "slippery slope" according to Tendler, "in biblical phraseology, is the warning to Cain, who was trying to rationalize killing his brother. Abel, his brother, was not eugenically

65. Tendler, p. 10.

66. Tendler, p. 10.

67. Tendler, p. 11.

desirable when viewed from Cain's vantage point."⁶⁸ Tendler's view of new reproductive methods is summed up in the last few sentences of his commentary.

It is our responsibility to open new doors but it is also our responsibility to use our minds with the insight to master nature. We must have a commitment to do well. To do well means to accept an objective yardstick of human morality, a yardstick that governs scientists and embryo alike. If we do so, we need not fear a 'brave' new Huxleyan world, but can rather expectantly and eagerly await the contribution of multiplying technologies to the betterment of all.⁶⁹

2.10 Rabbi Walter Jacob

Rabbi Walter Jacob chairs the Responsa Committee of the Central Conference of American Rabbis. More than ninety years of responsa literature has been gathered by this committee. Having done a thorough search for responsa regarding bio-medical ethics, Jacob adds the Reform Jewish perspective to this study's investigation of *halacha* and in vitro fertilization.⁷⁰

In 1978, Jacob was asked if a Jewish couple who otherwise could not have children is permitted to utilize IVF, and if it is permitted to fertilize several such eggs, to store some of the embryos while

68. Tendler, p. 11.

69. Tendler, p. 11.

70. Walter Jacob, Editor, American Reform Responsa (New York: Central Conference of American Rabbis, 1983), p. 562.

implanting others.⁷¹ Rabbi Jacob first refers to Hillel's principle that every couple must have two children to fulfill the commandment to procreate,⁷² and then refers to Moshe Feinstein's responsum, *Igrot Moshe Even Haezer* 10, regarding the procurement of semen. By approaching IVF through examining decisors' opinions regarding the sperm, Jacob seems to concur with Tendler's assertion that the place of fertilization is inconsequential. Jacob's responsum draws an analogy between AI and IVF. He concludes that, as in AI, as long as the husband's semen is utilized there is no problem. If the frozen sperm is to be used for procreation of husband and wife, he sees no difficulty. What happens when a donor's frozen sperm is utilized? Jacob acknowledges this problem, yet offers no solution.

71. Walter Jacob, "Test Tube Baby" Responsum, 1978.

72. Babylonian Talmud, *Y'vamot* 62a.

Chapter 3

SURROGATE MOTHERHOOD

3.1 Medical Procedure

Webster's Dictionary defines surrogate as "substitute."¹ The term "surrogate mother" first appeared in the medical journal Obstetrics Gynecology News in February 1977. In surrogate motherhood, a second woman takes part in the process of pregnancy and birth that is ordinarily the role of the couple with whom the child will live. Surrogate pregnancy may be achieved in two ways: by means of AI or IVF.

IVF can be employed in one of three ways. First, the egg may be taken from the woman in the couple (hereafter known as the wife) and carried to term by the surrogate. Second, it may be taken from the wife, implanted in the surrogate, washed out of the surrogate after a short time, and then implanted in the wife. Third, the egg may be taken from the surrogate and implanted in the wife. When these techniques are used, the process is called Surrogate Embryo Transfer (SET).

SET was developed by Dr. John E. Buster, Professor of Obstetrics and Gynecology at Harbor UCLA Medical Center with the aid of his research

1. A. Merriam Webster, Webster's Third New International Dictionary (Rockville Center, New York: Merriam Publishers, 1966).

team. This new procedure, which enables surrogate pregnancy without surgery, consists of five steps:²

1. Synchronization of ovulation times between embryo donor and the recipient woman.
2. Insemination of the donor woman with sperm from the infertile recipient's husband.
3. Lavage, or washing out, of the donor's uterus after approximately five days following fertilization.
4. Recovery of the embryo from the lavage fluid.
5. Transfer of the embryo to the recipient's uterus.

The distinguishing factor which makes the enabling female a surrogate is that she does not keep the baby. The expenses she incurs during the pregnancy are paid for by the couple. Upon birth, the baby is given to the couple and the surrogate's job is complete. The couple's need for a substitute no longer exists. The relationship that has developed during the process between the surrogate and the couple determines whether or not the parties will remain in contact, and if so, the nature and depth of that communication.

3.2 History

The first child of a surrogate pregnancy was born on September 6, 1976. An advertisement for a surrogate had been placed in the San Francisco Chronicle on April 14-15, 1975, and by December of that year the

2. George J. Annas, "Surrogate Embryo Transfer: The Perils of Parenting," The HCR, 14, No. 1 June (1984), pp. 25-26.

process was completed: the surrogate had been chosen, artificial insemination was performed, and pregnancy achieved.³

During the same period and unaware of the California birth, a couple sought help from Michigan attorney Noel Keane to establish a similar arrangement. By the end of 1976, Keane had decided to help this couple. On January 19, 1977 a campus newspaper accepted their advertisement for a surrogate mother. A reporter who read the classified ad suggested that a story about them would help let others know of the couple's plight. When the reporter's interview was published, over two hundred responses were received.⁴

Today, Noel Keane has two thriving practices which handle surrogate motherhood arrangements: his original law office in Dearborn, Michigan, and a clinic in New York City.⁵ Nationwide, there are thirteen additional organizations specializing in surrogate motherhood.⁶

3. Keane, The Surrogate Mother, p. 34.

4. Keane, The Surrogate Mother, p. 35.

5. Elizabeth Kolbert, "In Court Battle for Baby M," New York Times, 23 August 1986, pp. 25, 41.

6. "Hi-Tech Babies," Nova, WCET, 4 November 1986.

The directors' differing philosophies are reflected in the way their clinics operate. Keane requires that the potential surrogate have two meetings with a psychiatrist to determine if the surrogate applicant is a suitable candidate.⁷ Directors of a California clinic require four months of screening before accepting a surrogate and, once pregnant, the surrogate is required to visit a psychologist on a monthly basis.⁸ In Maryland, the required monthly session with a psychologist also continues after the surrogate becomes pregnant.

At Maryland's National Center for Surrogate Parenting, director Harriet Blankfeld is present at every birth.⁹ In Philadelphia, the director of Surrogate Mothering Ltd. refuses to allow meetings between couples and surrogates. It is her belief that the direct contact may further complicate an already difficult situation.¹⁰ In contrast, at the Surrogate Parent Program of Los Angeles, psychologist Nina Kellogg insists that trust is the key to making surrogacy work. Each surrogate attends group therapy weekly. Bringing the surrogates together with the couples allows a bond to form among the triad which replaces the mother - infant bond.¹¹

7. Keane, The Surrogate Mother, p. 247.

8. Rochelle Sharp, "Fertility Clinic Criticized," Cincinnati Enquirer, 24 August 1986, Col. 1, p. A-6.

9. Sharp, p. A-6.

10. Ellen Cantarow, "The Babymakers," Mademoiselle, November (1984), p. 246.

11. Cantarow, p. 246.

Since the first surrogate birth, the process has been employed in a variety of ways. In 1983, in Long Beach, California, "a woman was artificially inseminated with the sperm of a man whose wife could not produce eggs of her own."¹² This was not different from the previous inseminations involving surrogates. However, this time, "Five days later, the tiny embryo - or more accurately, pre-embryo, or conceptus - was washed out of the woman's body and implanted in the womb of the man's wife. In early 1984, the wife gave birth to a boy."¹³ This was the first time a woman incapable of conceiving was able to give birth.

In 1984, IVF was performed with the egg of a woman who did not have a uterus. "So the eight-cell embryo was implanted in the womb of a Detroit woman."¹⁴ The fertilization clinic at Mount Sinai Medical Center in Cleveland, Ohio, announced that the Michigan woman made history: she was the first American surrogate to carry an embryo for another couple.¹⁵

The women described above are unique. Not many women opt to become surrogate mothers. According to Michigan psychiatrist Philip Parker,

12. Dale Mezzacappa, "Motherhood Isn't What It Used To Be," Buffalo News, 12 August 1986, p. C-1.

13. Mezzacappa, p. C-1.

14. Mezzacappa, p. C-1.

15. Schneider, p. 36.

who works with Noel Keane and who has interviewed over three hundred potential surrogates, there are several common motives:

Most women willing to be surrogates have already had children, and many are married. They choose the surrogate role primarily because the fee provides a better economic opportunity than alternative occupations, but also because they enjoy being pregnant and the respect and attention that it draws. The surrogate experience may also be a way to master, through re-living, guilt they feel from past pregnancies that ended in abortion or adoption. Some surrogates may also feel pleased, as organ donors do, that they have given "the gift of life" to another couple.¹⁶

3.3 Catholic View

In its stand on surrogate motherhood, the Catholic Church does not consider the motive of the surrogate. The Catholic view can be derived from two sources. In an allocution delivered by Pope Pius XII in 1949, AID is forbidden to all Catholics.

Artificial insemination in marriage, with the use of an active element from a third person, is immoral and as such is to be rejected summarily. Only marriage partners have mutual rights over their bodies for the procreation of new life, and these rights are exclusive, nontransferable and inalienable."¹⁷

The second source is an allocution delivered to the Second World Congress on Fertility and Sterility by Pius XII, on May 19, 1956. The

16. John A. Robertson, "Surrogate Mothers: Not So Novel After All," The HCR, No. 5 October (1983), p. 29.

17. Smith, p. 65.

Pope expressed the Church's official position regarding in vitro fertilization and based its view upon the marital relationship.

On the subject of the experiments in artificial human fecundation 'in vitro,' let it suffice for us to observe that they must be rejected as immoral and absolutely illicit.

Artificial fecundation exceeds the limits of the right which spouses have acquired by the matrimonial contract, namely, that of fully exercising their natural sexual capacity in the accomplishment of the marital act. The contract in question does not confer on them a right to artificial fecundation, for such a right is not in any way expressed in the right to the natural conjugal act and cannot be deduced from it.¹⁸

Richard McCormick, a noted Catholic moral theologian, writes,

By this 'active element from a third person,' Pope Pius meant donor insemination. And his argument would apply equally to donor eggs. Furthermore, he viewed such third-party involvement as opposed to the good of the child, because, between the child and at least one rearing parent, there would be 'no bond of origin, no moral and juridical bond of procreation.'¹⁹

McCormick himself feels third-party involvement transgresses "conjugal exclusivity," whether the involvement comes in the form of a donor's sperm or egg or uterus. In his eyes, gamete donation or surrogate gestation betrays the promise of exclusivity exchanged in the marital vows. McCormick believes that separating the elements of parenthood

18. The Pope John Education Center, "Test Tube Fertilization," July-August (1978), p. 3.

19. McCormick, p. 401.

(such as genetic, gestational and rearing) "diminishes a certain aspect of the human person."²⁰

All the Church's concerns regarding IVF apply to the surrogate process, as well. The problems inherent in the procedure are: uninformed consent to experimentation, the surplus of unwanted embryos (when more than one egg is extracted for fertilization the odds of success increase), the possible damage to the embryo, and the violation of the marital relationship (separation of the unitive from the procreative element in marriage). Added to these issues is the problem of an "outsider" brought into the parenting process. Father Donald McCarthy asks, "Do we have a right to use scientific planning to deny the child's right to its own married parents? Put in another way, should our society cooperate, through its scientific community, in further undermining the family?"²¹

The Director of Research at the Pope John Education Center believes there is the additional stigma of immorality to surrogate motherhood, because of overtones of infidelity on the part of the participants. "Human dignity must be maintained," writes The Reverend Monsignor Orville Griesse. Using a donor means "there is a genetic asymmetry in

20. McCormick, pp. 401-402.

21. "Test Tube Fertilization," p. 3.

the relationship of husband and wife to the child with possibly damaging psychological effects.²²

Treatment of the embryo is a major concern of the Church in pregnancy by means of IVF and SET. Though the Catholic Church has not taught that the fertilized eggs are persons with rational and immortal souls, the Church does assert that it is unjustifiable to act on the assumption that these ova are not persons.²³

Before a subcommittee of the House Science and Technology Committee, Father Donald McCarthy testified that the United States needed "a kind of civil rights platform for the minority rights of the tiniest human beings."²⁴ He offers six suggestions for legislation:²⁵

1. First of all, legislation could prohibit any form of experimentation on a human embryo which is likely to damage that embryo or delay its natural development by delaying the time of its transfer and implantation. Only procedures intended to benefit the embryo itself should be allowed.

2. Second, any form whatever of freezing human embryos could be excluded. The long-term risks of such freezing are still unknown. But even without risk, to subject the embryo to freezing without consent violates the dignity of the embryo unless freezing represented a proven kind of therapeutic

22. Orville Griesse, "Is the Church Insensitive to the Plight of Childless Marriages?" The Pope John Education Center, October (1984), p. 3.

23. "Test Tube Fertilization," p. 3.

24. McCarthy, p. 174.

25. McCarthy, p. 176.

procedure necessitated by the embryo's condition of health. We would not think of freezing perfectly healthy babies after birth; there is no genuine and ethically persuasive reason for freezing perfectly healthy embryos.

3. Third, any deliberate taking of the life of an extra-corporeal embryo could be prohibited as well as any neglect of reasonable efforts to implant such an embryo in its mother's body. The legislation of aborting fetuses and embryos does not entail the legalization of destroying them extra-corporeally or failing to implant them.

4. Fourth, removal of an inviable fetus or embryo from its mother's body for transfer to another woman could be prohibited by statutory definition as a form of experimental manipulation, unless necessary to save the life of the fetus or the embryo.

5. Fifth, it would seem that statutes could insist that in vitro fertilization procedures unite only the sperm and ova of married couples out of respect for the embryo's right to natural parents. The deliberate surrogate arrangement in which a woman brings to full term an infant she conceives from the sperm of a married man for him and his wife, violates the rights of that child to natural parents, as do all forms of artificial insemination with donor gametes, and all forms of extra-marital parenting. If the law tolerates such actions, that does not remove the inherent injustice involved, any more than legal toleration of other forms of discrimination.

6. Sixth, out of respect for the embryo's rights the law could readily prohibit any parthenogenic or uniparental procreation by cloning or human animal hybridization. No group of adults would seem to have the right to generate a human being by such procedures, which include, among other objectional features, the deprivation of natural parents for that human being (if indeed it were a human being).

The Catholic Bishops of Great Britain, report that IVF would devalue adoption, a procedure which respects the dignity of the child and contributes to society. Severing procreation from the marriage bond could negatively affect the way marriage partners and parents and their children relate to each other. Sexual intercourse could become

trivialized. Children could be selected on eugenic grounds. Procreation, a divine gift could become commercialized.²⁶

Rev. Edward J. Bayer, Director of Continuing Education at the Pope John Education Center, expresses his concern that, not only will the child be seen as a commodity, but the "parents" will be seen as a commodity, as well.

It could be noted also that our sexual organs, already relegated by an ever more dominant mentality to the category of 'toys for fun and games,' are being further trivialized by artificial methods for technologically forcing new life into existence. For our reproductive facilities are thus seen more and more as so much gadgetry, useful for getting what we want, but, if they fail us, replaceable by gadgetry of our own design. Thus, it is not only the child who is being turned into a commodity, but also our own sexuality- which is to say our own selves.²⁷

Catholic concern extends to the maturing child. Adopted children often seek their roots. There is a need to understand whence they came. Even children who have not been adopted sometimes require assurance that they are not adoptees, that they have always "belonged." What will happen in the cases of donor eggs, sperm, embryos, or uteruses?

26. Catholic Church, p. 27.

27. Edward J. Bayer, "Surrogate Parenting," The Pope John Education Center, May (1985), p. 3.

From Pope Pius XII to Pope John Paul II, Catholic doctrine teaches "life is sacred and so are the means of producing that life."²⁸ The words of Pope John XXIII underline the Catholic view of the incompatibility of surrogate motherhood with what God has wrought.

We must solemnly proclaim that human life is transmitted by means of the family, and the family is based upon a marriage which is one and indissoluble and, with respect to Christians, raised to the dignity of a sacrament. The transmission of human life is the result of a personal and conscious act, and, as such, is subject to the all-holy, inviolable and immutable laws of God, which no man may ignore or disobey. Man is not therefore permitted to use certain ways and means which are allowable in the propagation of plant and animal life.

Human life is sacred- all men must recognize that fact. From its very inception it reveals the creating hand of God. Those who violate His laws, not only offend the divine majesty and degrade themselves and humanity, they also sap the vitality of the political community of which they are members.²⁹

3.4 Feminist View

In Test Tube Women, Genoveffa Corea provides an ethical critique of the new medical technologies from a feminist perspective. Corea writes that instead of giving back women control of their bodies, the new reproductive technologies are taking away the little bit of control which remains to women. The Catholic concern that men and women will mimic God, designing sons and daughters in their own image, is further

28. Albert S. Moraczewski, "Twelve Ways to Make a Baby," Ethics and Medics, 9, No. 11 November (1984), p. 2.

29. Bayer, p. 4.

amplified by Corea to include the fear that men alone will do the designing.³⁰

In Corea's book, physicians are described as vultures awaiting the needed ovaries for in vitro fertilization research. She documents a doctor's request: should it be necessary for the surgeon to remove the woman's ovaries he would like to have them, but only if it is necessary. The nurse, writes Corea, would see the male look of camaraderie and a woman would be without her ovaries.³¹ "In one year in Los Angeles, 546 women had perfectly healthy ovaries removed."³² In 1979, doctors routinely removed healthy ovaries in hysterectomy patients over 45."³³ If Corea is correct in her evaluation of the use of surrogate motherhood, laws to protect women are certainly needed.

3.5 Secular Legal View

Around the world, judicial and legislative bodies are beginning to consider the legal ramifications of the new reproductive technologies. In 1984, the Infertility (Medical Procedures) Act passed both houses of

30. Rita Arditti et al, Test Tube Women, (Boston: Pandora Press, 1984), p. 45.

31. Arditti, p. 39.

32. Arditti, p. 38.

33. Arditti, p. 39.

the Victorian Parliament³⁴. In England, the Warnock Commission issued its report on "human assisted reproduction"³⁵ and the Netherlands developed guidelines for in vitro fertilization.³⁶ The guidelines for IVF in the Netherlands specify:

1. Only academic hospitals perform IVF.
2. IVF may only be used with women with tubal disorders.
3. Written informed consent be obtained.
4. Donor sperm or eggs are permitted.
5. The use of surrogate uteruses is forbidden.³⁷

The Warnock Commission recommended that the British government:

1. Impose a permanent ban on agencies which exist to recruit women for surrogate pregnancies.
2. Make it a criminal offense to experiment on embryos after the fourteen day stage (when embryos begin to differentiate and form vestiges of a nervous system).
3. Place a temporary moratorium on some methods of embryo transfer.
4. Regard the woman giving birth as the lawful mother of the child with the egg donor having no rights or obligations with respect to the child.³⁸

34. Peter Singer, "Making Laws on Making Babies," The HCR, 15, No. 4 August (1985), p. 5.

35. Annas, p. 50.

36. Helen Bequaert Holmes, "And In The Netherlands," The HCR, 15, No. 4 August (1985), p. 6.

37. Holmes, p. 6.

38. Singer, p. 6.

In Australia, The Infertility Act requires that:

1. The Minister of Health must approve the hospital where IVF and related procedures occur.
2. New patients may only be married couples. Those unmarried persons already being treated may continue.
3. Before a couple can be accepted into the program they must be under treatment for infertility for twelve months.
4. Donated eggs, sperm, or embryos may only be used as a last resort.
5. There be no marketing of human reproductive material.
6. There be no payment for sperm, eggs or embryo except for the prescribed amount for travel or medical expenses incurred by the donor.³⁹

A case heard in New Jersey in August 1986 may well determine the legal future of surrogate motherhood in the United States. After the birth of the child, the surrogate refused the escrow money due to her and opted to keep the baby. The couple who contracted for her services went to court to request permanent custody of the child. The couple was granted temporary custody while the court decided to whom to give the baby. The issue became more complicated when the surrogate claimed her husband may have been the biologic father.⁴⁰ After determining that the husband of the surrogate was not the child's father, custody was temporarily awarded to the couple, with minimal visitation rights

39. Singer, p. 5.

40. Kolbert, p. 25.

to the surrogate and her husband. To date, the case remains in litigation.

The above case is the second known instance of a surrogate mother attempting to keep the child. In the first case, the surrogate discovered she was having the baby for a trans- sexual female and refused to give up the child. The couple, not wishing the publicity, chose to allow her to keep the baby.⁴¹

Only once has a couple reported to have rejected a baby born to its surrogate. The infant was born with microcephaly, a condition related to mental retardation. A paternity test proved the father to be the surrogate's husband. The surrogate kept the baby and lost the fee for her service.⁴²

The first bill in the United States to consider surrogate mother arrangements was introduced in the Alaska House of Representatives in 1981.⁴³ "Since then, at least six other states: California, Maryland, Michigan, Ohio, South Carolina and New York have considered or are planning to debate legislation on this issue."⁴⁴

41. Keane, The Surrogate Mother, p. 209.

42. Keane, The Surrogate Mother, p. 231.

43. Krimmel, p. 38.

44. Krimmel, p. 38.

Two states, Michigan and Kentucky, have case law that resolves some preliminary issues, such as payment of the surrogate and the legality of the agreement between the surrogate and the couple. As yet, no state court has addressed the thornier issue of the enforceability of the contract.⁴⁵

The South Carolina proposal, modeled on the Michigan bill, would regulate the process by specifying the Probate Court's "order of filiation" establishing paternity, the surrogate's consent to relinquish parental rights, and the adoption of the child by the wife of the biologic father. Included in the bill is a list of criteria for the evaluation of the suitability of the couple for "surrogate adoption." The California bill would remedy the inability of infertile couples to become parents through the services of a surrogate.⁴⁶

The Michigan Supreme Court, "held that the Paternity Act does allow a father to seek and receive a determination of his biologic paternity, even if the drafters of the Act had not specifically envisioned the surrogate mother situation."⁴⁷

45. Keane, "Draft," p. 3.

46. Krimmel, p. 38.

47. Kempers, p. 12 S.

In Kentucky, the court ruled that "the mere affidavit as to artificial insemination, without other positive proof of non-access and blood grouping, is not sufficient for this court to assume and adjudge the donor to be the natural and biologic father of the child."⁴⁸

In the first case of a child born in Michigan of a surrogate gestational mother, a court granted the genetic parents "the right to have their names put on the birth certificate and to be recognized as the legal parents (Chargot, 1986)."⁴⁹

There are no laws in the United States prohibiting payment to gamete donors. Virginia and California prohibit payment for eggs while Maryland prohibits the sale of sperm.⁵⁰ Many states include in their fetal research legislation the prohibition of the transfer or sale of embryos. Ten states (Maine, Massachusetts, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, Rhode Island, Utah and Wyoming) employ language which could prohibit payment to a woman who undergoes in vitro fertilization followed by pre-embryo transfer.⁵¹

48. Kempers, p. 12 S.

49. Kempers, p. 12 S.

50. Kempers, p. 12 S.

51. Kempers, p. 12 S.

In Kentucky, a statute was adopted stating that the laws prohibiting baby selling "shall not be construed to prohibit IVF utilizing the wife's egg with the husband's sperm."⁵² In 1986, the Kentucky Supreme Court held that payment by a biologic father to a surrogate who had been inseminated with his sperm did not violate the baby-selling laws. The biologic father was seen by the court as having a legal relationship with the child due to his genetic link. Further, since the contract was made before conception, the surrogate arrangement was seen as a means to assist those unable to conceive in the customary manner to have a biologically related offspring, not as an arrangement to avoid an unwanted pregnancy. The court found no difference between a child produced through a surrogate for an infertile woman and her husband and a child produced through artificial insemination for an infertile man and his wife.⁵³

3.6 Halachic View

Jewish law has ruled on the question of the permissibility of surrogacy, also using AI as its base. Jewish law considers surrogacy, when used for convenience, to be morally offensive. However, when medical reasons require that a married couple follow this procedure to enable them to have children, some rabbis are more lenient. It is to be assumed that those decisors who were opposed to AID as unsuitable to

52. Kempers, p. 13 S.

53. Kempers, p. 13 S.

the modesty of a daughter of Israel, will also prohibit the use of a Jewish surrogate on similar grounds.

3.7 Rabbi Eliezer Waldenberg

The question of maternity arises in surrogate motherhood, just as the question of paternity arose in AID. From his responsum on in vitro fertilization, Rabbi Eliezer Waldenberg's attitude towards surrogate motherhood can be derived. Since the surrogate mother would become pregnant through either AID or IVF, and since Rabbi Waldenberg opposes both for the reasons given above, it may be stated with certainty that Waldenberg would not be in favor of surrogate motherhood under any circumstance.

3.8 Rabbi J. David Bleich

Rabbi J. David Bleich is *Rosh Yeshiva* at Yeshiva University and visiting Professor of Law at the Benjamin Cardoza School of Law. His articles on halachic topics appear regularly in a great variety of journals. He offers a different way of looking at the halachic problems with surrogate motherhood.⁵⁴

54. J. David Bleich and Fred J. Rosner, Jewish Bioethics (New York: Sanhedrin Press, 1979), cover.

Rabbi Bleich writes that a related question was investigated in the 1971 edition of Noam by Rabbi Isaac Liebes.⁵⁵ The question referred to organ transplants. In this article, Liebes quotes many sources, and includes the statement of Rabbi Y'kutiel Aryeh Kamelhar regarding an infertile woman who received an ovarian transplant. His conclusions are germane to this investigation. Kamelhar examines two questions. The first is: which of the two women is halachically the mother? The second is: is the husband who has sexual intercourse with a wife carrying a transplanted reproductive organ of another married woman guilty of adultery? Kamelhar asserts that the source of transplanted organs has no bearing upon the halachic definition of adultery.⁵⁶

Transplanting an ovary and transferring an embryo are not that different in the eyes of the *halacha*. Since adultery, apparently, is not an issue in an ovarian transplant, Bleich claims that adultery would not be relevant in the case of embryo transplant, either.

Kamelhar cites two sources supporting the opinion that a transplanted organ becomes an integral part of the body of the recipient. He derives this view from the regulations which govern the classification of animals and plants. Leviticus 19:23-25 states that one may not eat the fruit of a tree during the first three years after its planting.

55. J. David Bleich, Contemporary Halachic Problems (New York: Yeshiva University Press, 1977), pp. 106-109.

56. Bleich, Contemporary, p. 107.

In *Sotah* 43b, a seedling which is grafted to a mature tree is said to lose its independent identity. Hence, the fruit of this tree is not forbidden as are the fruits of a seedling during the first three years after its planting. From this, Kamelhar derives the principle that the transplanted organ acquires the identity of the organism.

Kamelhar cites *Chulin* 79a to support the permissibility of gynecological transplant. When an offspring is born of interbreeding between two different species, Rabbi Y'hudah indicates that the identity of the male parent is to be disregarded when determining the species of the offspring. Since the mother does the nurturing, the mother alone determines the species. Rabbi Chananiah, however, states that the seed of the father must be considered, because the father has a role in the birth of the offspring. The *halacha* is according to Rabbi Y'hudah.

Bleich states that this conclusion may be applied to determine the maternity of a child born of a fertilized *ovum* implanted in a surrogate mother. The surrogate nurtures the embryo; the role of the natural mother may be compared to the seed of the father (as in the Talmudic discussion above).

Bleich is among those who believe that the embryo has life from the moment of conception, and states that only the donor mother is the

child's mother. Thus, the embryo has already acquired identity as well as parentage before it is born. The fetus would be deemed a nascent human being, regardless of its stage of gestation. Bleich concludes by stating that the ramifications of this medical technology must be further considered.

The current trial in New Jersey has elicited statements from various respected Jewish voices. Although no definitive *halacha* has been established, Rabbi Moshe Tendler may represent a significant trend in viewing surrogacy as an exploitative economic relationship. Tendler, chairman of Yeshiva University's biology department and professor of medical ethics, abhors the concept of surrogacy. "He characterizes this as a form of enslavement, and calls businesses that match couples with women for the purpose of surrogate motherhood as 'slave markets.'"⁵⁷

3.9 Rabbi Walter Jacob

The responsa of Rabbi Walter Jacob provide further material for this examination of the *halacha*.⁵⁸ Jacob regards surrogate motherhood as a new way of relieving the childlessness of a couple. He opines that the commandment to procreate can be fulfilled in this manner and sees no

57. Ellen Rittberg, "Rabbis Debate Implications of Surrogate Motherhood," Northern California Jewish Bulletin, 23 January 1987, 136, No. 4.

58. Jacob, pp. XV-XVIII.

halachic difference between adoption and surrogate motherhood. There would be no question of illegitimacy as long as the surrogate is unmarried. If the surrogate is not Jewish, the child can be converted, as in adoption. Since adultery has been ruled out in AID, even if the surrogate were married, the baby would be considered legitimate.⁵⁹

59. Jacob, pp. 505-507.

Chapter 4

THE IMPLICATIONS FOR REFORM JEWS

Catholics consider modern reproductive technology in the framework of the marital relationship. Conservative Protestants use the same criterion. Liberal Protestants, however, focus on the ethics of each individual circumstance. The *halacha* investigates the legal ramifications of a specific before responding with a prohibition or permission. These ramifications are, in the main, specific to the halachic system, although as we saw with Waldenberg's treatment of IVF, broader ethical and social concerns are present. Unlike Catholics and conservative Protestants, *halacha* does not emphasize the theology of the marital relationship with respect to the method of fertilization. And unlike liberal Protestants, halachists do not tend to adopt a situation-ethics approach. Each halachist claims that there is a "correct" answer in all cases involving similar circumstances.

There are three approaches to the *halacha*. A person may be bound by it, ignore it, or use it as a source of guidance. This study is directed to the "third" Jew, the one who cares about the *halacha* and yet cannot be committed to following it without an examination. This investigation ends with the question with which it began. Does the *halacha* find modern technological advances an acceptable means for

offering childless couples a hope of parenting? In order to answer this question, each reproductive technology is considered individually.

4.1 Artificial Insemination

Among the halachic decisors who allow AIH, the acceptable circumstances vary, as do the sanctioned methods for procuring the semen. If AIH is clearly the only possible means for effectuate conception, and if the couple has been infertile for a required length of time, then many decisors say AIH may be utilized.

Although the matter becomes more complicated when the semen donor is not the husband, individual halachists offer various opinions. Most halachists do not consider AID to be adultery and, therefore, do not forbid it on the grounds of adultery. For these decisors, adultery is defined as extra-marital penile penetration, which does not occur in AI.

The *halacha* on AI is based upon the analogy to the woman becoming pregnant from semen in the bath water. Although no analogy is perfect, this comparison lacks the most important element: intention. The woman who went to bathe had no intention of becoming pregnant. Those who avail themselves of AI not only intend to become pregnant, it is their fervent wish to do so. Therefore, the very basis of the halachic

reasoning must be questioned. In considering AI as a reproductive option, this study is not concerned with how it happens, but rather with the status of the child conceived by means of AI. The question then becomes: to what extent do Reform Jews share the concerns of the *halacha*? In examining the *halacha* regarding this question, we find that Reform Jews do share some of the halachic concerns. To determine if there is guidance to be derived from the *halacha*, each concern will be looked at individually below.

Although the laws of levirate marriage are not part of the liberal Jew's world, the halachic concern with incest is shared by liberal Jews. For liberal Jews, the motivation may be the medical health of the child, more than the Toraitic prohibition. The solution can be found in carefully kept medical records. Physicians, by recording the medical history of the donor, should be able to assure those who turn to AID that there is no genetic contamination.

Regarding the question of whether AI implies "wasted semen," there is an halachic trend suggesting that there is no inhibition when the intent is procreation. But the question whether AI fulfills the commandment to procreate evokes mixed responses from the decisors. Reform Jews regard the *mitzvah* of family to be equally as important for women as for men. If we add to that the rule of some halachists that AI effectuates the commandment to procreate, then we can accept the lenient view found in the rulings of some of the decisors.

There still may be major social value in assuring that incest does not occur. Should we be concerned that the child of AI could enter into a consanguinous marriage, Feinstein offers a remedy. This halachist adds a unique contribution in his responsum. His "*Rov*" principle means that since Jews are a small part of the population in the diaspora, we can assume the donor is a non-Jew. It is important to note, however, that Waldenberg, an Israeli, cannot make use of *Rov* in this issue. Using the sperm of a Gentile donor for a Jewish couple allays any fear of incest. *Halacha* is only applicable to Jews. Therefore, halachically, there is no need to be concerned about either the incest or levirate marriage laws for the AID offspring.

4.2 In Vitro Fertilization

IVF has no precedent either in the Bible or in the Talmud. Jewish legalists determine the *halacha* regarding IVF from the incident in the bath mentioned above. Setting aside the issue of intent, the single major halachic responsum prohibits IVF because of two deterrents. First, Waldenberg states that the "child" cannot be considered human, having been conceived outside of the uterus. Second, he adds, permitting the IVF procedure could result in a world of "Frankensteins." Each of these concerns will be responded to individually below.

Waldenberg makes an halachic point - that there is no *yichus*, familial relationship, with a child conceived in a Gentile womb. This statement is accepted by halachic sources. However, Waldenberg then compares the Gentile womb with the fertilized *ovum* by means of *Moreh N'vuchim*, and appears to be reading the Talmud through the filter of medieval philosophy. Waldenberg uses *Moreh N'vuchim* as a bridge to the *halacha*. He goes outside the normal halachic legal system and bases his halachic ruling on non-halachic grounds.

Therefore, a purely halachic analysis of the first objection requires us to challenge Waldenberg's responsum. In order to prove there is no relationship between parent and child, Waldenberg quotes Rambam's *Moreh N'vuchim*, assuming a Maimonidean scientific world view. Because we are no longer committed to Maimonidean science, his source is unconvincing. The idea that a separated organ is no longer human is medieval because, among other things, it does not consider the genetic identity of the organ. The comparison of IVF to a Gentile womb is invalid in that we know the woman is Jewish. Further, the fact that the egg is mixed with sperm in a petrie dish does not belie the fact that the egg comes from a human being, and, when joined with the sperm, produces a human being.

The second deterrent cannot be dismissed as easily. We must be concerned with the social consequences of IVF. There is a general feeling among Catholic theologians that if we remove procreation from

its natural context and transfer it to the laboratory, we will be creating a Huxlean world. Jeremy Rifkin sees this world as one of gadgetry, without feeling. Waldenberg has a similar fear of the consequences of these modern reproductive advances. Reform Jews are apt to share these concerns about the costs of "progress."

It is Waldenberg's fear of such scientific "progress," each step more abhorrent than the previous, that is our challenge. Already, there exist institutions for selective breeding. The Repository for Germinal Choice, opened in Escondido, California, by announcing their plan to use the sperm of Nobel Prize winners.¹

Opponents of the Beverly Hills Medical Center say that the techniques of the first full-service high-tech conception center in the United States can easily be applied to the production of a perfect baby.² Genoveffa Corea notes that because these technologies are costly³, their use is limited to the wealthy and upper middle class. Corea takes the matter of technology at its worst one step further, when she states the corollary in the case of IVF with a surrogate. Just as only the wealthy will be able to avail themselves of AI and IVF, the

1. Wallis, p. 56.

2. Schneider, p. 35.

3. IVF: For each IVF attempt, the cost is \$5,000. At least four or five attempts are usually needed. Surrogate: The surrogate usually receives approximately \$10,000 upon the baby's birth. The attorney receives about \$10,000, including approximately \$500 in miscellaneous fees. This brings the total cost to approximately \$25,000.

surrogate will most likely be a person in financial need. Corea asks the cogent question: "When babies are turned into consumer products, who oversees quality control?"⁴ It is our responsibility to guarantee that the new technologies do not become a business. Strict government regulations and legislated supervision can eliminate this concern.

4.3 Surrogate Motherhood

Halacha on surrogate motherhood has ample room for both the restrictive and the permissive opinion. The addition of Bleich's commentary (equating the transplantation of an organ to the transfer of an embryo) allows the embryo to be considered a part of the recipient's body. A plant grafted takes on the identity of the new organism. This would apply to animals and people as well as to plants, for the idea behind the grafting is the same. This *halacha* provides us with an affirmative ruling on surrogacy when the recipient of the embryo is the woman who will raise the child. However, the difficulty remains when the genetic mother, who will raise the child, is not the woman who receives the transplanted embryo and bears the child.

Perhaps, in this instance, *Sanhedrin* 19b may be referred to for assistance. This rabbinic source states that people who raise the child, and not the natural mother and father, are called the parents. Rabbi Morris Shapiro goes one step further, suggesting that when the

4. Schneider, p. 35.

husband is the donor, he should be credited with fulfilling the *mitzvah* of reproduction. This separates the result from the method. The commandment is to produce children. Intercourse and artificial insemination are both merely the means to the end.⁵

Since neither Tendler nor Feinstein consider aesthetics in their rulings on AI or IVF, we must question whether Waldenberg's concern regarding IVF and then deducing surrogate motherhood is a matter of *halacha* or whether it is his own personal preference. In any case, Waldenberg's particular concern for the modesty of a daughter of Israel would not be an issue for today's liberal Jew.

Regardless of the position taken on the *halacha*, there is guidance to be found in Pentateuch. Today's surrogates are not concubines. However, recognizing this limitation and the difference in method of achieving pregnancy, the accounts discussed below appear to be the most apt analogy in Biblical text.

Acknowledging that halachists state that *halacha* cannot be derived from our own interpretation of Biblical material, we would still be remiss if we did not look for guidance from what is the first instance of surrogate motherhood in our heritage: the stories of Abram/Sarai/Hagar

5. Elliot N. Dorff, " 'Choose Life:' A Jewish Perspective On Medical Ethics," University Papers, 4, No. 1 February (1985), pp. 14-15.

and Jacob/Rachel/Bilhah. In Genesis, we read that Sarai, unable to conceive, suggests to her husband Abram that they have a child by their handmaid Hagar. Later, Rachel, also unable to conceive, suggests to her husband Jacob, that they utilize Abram and Sarai's solution: surrogate motherhood. Rachel tells Jacob to take her handmaid, Bilhah to have a child by her. Neither Bilhah nor Jacob's other concubine Zilpah is included in the lists of mothers of the tribal founders of our people, suggesting the inferior status of the Biblical surrogate, even today.

Although the parallel is not exact, since today's methods differ, by investigating traditional commentaries on these Biblical verses we can find guidance, if not solutions, to some of the issues raised by the process of surrogate motherhood. The various commentators mentioned below make relevant observations about the psychology of surrogate motherhood which still obtain today.

The following Biblical verses provide our source for the commentary:

Sarai, Abram's wife, had borne him no children. She had an Egyptian maidservant whose name was Hagar. And Sarai said to Abram, 'Look, the Lord has kept me from bearing. Consort with my maid; perhaps I shall be built up through her.' And Abram heeded Sarai's request. So Sarai, Abram's wife, took her maid, Hagar the Egyptian -- after Abram had dwelt in the land of Canaan ten years -- and gave her to her husband Abram as concubine. He cohabitated with Hagar and she conceived; and when she saw that she had conceived, her mistress was lowered in her esteem.
(Genesis 16:1-4)

When Rachel saw that she had borne Jacob no children, she became envious of her sister; and Rachel said to Jacob, 'Give me children or I am dead.' Jacob was incensed at Rachel and said, 'Can I take the place of God who has denied you fruit of the womb?' She said, 'Here is my maid Bilhah. Consort with her, that she may bear on my knees and that through her I may too have children.' So she gave him her maid Bilhah as concubine, and Jacob cohabitated with her. Bilhah conceived and bore Jacob a son. (Genesis 30:1-5)

The following commentaries on the Biblical verses are discussed below:

16:1 **A handmaid, an Egyptian:** She was Pharaoh's daughter. When he saw the miracles wrought for Sarai he said, 'It is better my daughter be a handmaid in this house than the mistress of another house.' (Rashi)

16:2 **Perhaps I may be built up through her:** This teaches about one who has no children. (Rashi)

16:2 **I shall be built built up through her:** by the merit of bringing my rival into my house. (Rashi)

16:2 **To the voice of Sarai:** to the Holy Spirit in her. (Rashi)

16:2 **To the voice of Sarai:** He was inclined to think her words true, and therefore accepted her advice not to enjoy sex with the woman. (S'forno)

16:2 **He listened to Sarai's voice:** Scripture does not say he did so, rather he listened to Sarai's voice. This alludes to the fact that even though Abram greatly desired children, he did not do so without Sarai's permission. Even now it was not intended that he be built up from Hagar and that his seed be from her. All Abram intended was to do what Sarai wished and give her satisfaction through her handmaid's children. Or by the merit of this act [surrogate motherhood], Sarai would become worthy of having children, so say our Rabbis. Scripture

continues, Sarai took to inform us that Abram did not hurry the matter until Sarai took Hagar and gave her to him. Scripture mentions Sarai wife of Abram to indicate that Sarai did not despair of Abram and she did not distance herself from him, for she remained his wife and he her husband. (Ramban)

30:1 I am dead: In this matter I am as a withered tree. (S'forno)

The first clause: she was Pharoah's daughter, evokes a comment from Rashi which is relevant to a step in the surrogate motherhood process. Finding the word Egyptian unnecessary, Rashi comments that Hagar had royal lineage. Though royalty may not be important to us today, the first step in surrogate motherhood is to determine what characteristics are important in order to choose a suitable surrogate.

Rashi's next commentary is on the words: perhaps I will be built up. He acknowledges that having children builds one up, thus stressing its importance. His comment that the Holy Spirit was with Sarai when she made her suggestion to Abram indicates an awareness that this was not an easy decision. Rashi uses the word "rival." In Hebrew, this word has a secondary meaning: trouble. By using this word, Rashi intimates the feelings that can arise in an infertile woman.

In S'forno's commentary, we read that Sarai told Abram to have a child with Hagar, but not to enjoy himself in the process. In Sarai's instruction to her husband not to derive pleasure from this conjugal act, we see illustrated the tension inherent in the situation of

surrogate motherhood. Many women going through the surrogate process experience ambivalence. They want the child, but also want the process of conception to remain impersonal. Today there is no necessity for sexual intercourse as the husband and the surrogate have no physical contact. Yet, at times, there remain uncomfortable feelings.

This incident gives credence to our Rabbis' question: is the process of surrogate motherhood considered adultery? Recently, a couple and their surrogate were sitting in a physician's office waiting for their insemination appointment. When the doctor said, "You may both come in now," the wife did not know whether the physician meant her husband and the surrogate, or her husband and herself. The wife felt a feeling of betrayal. The doctor, seeing the look on the wife's face, assured her he meant her husband and herself, not the surrogate. He immediately apologized for his insensitivity. Of course, the wife knew her husband was not committing adultery. It merely felt like adultery.⁶

Ramban reiterates Rashi's view that Sarai will gain merit by having Hagar, her rival, in her home. Yet Ramban introduces a completely different view. One word, which can mean either hear or listen, suggests Abram's sensitivity. Had he initiated the idea of having a child with Hagar, Sarai's possible feelings of inadequacy could have been exacerbated. Feelings of inadequacy are common and understandable in barren women. These feelings can be triggered throughout the process of surrogate motherhood.

6. Conversation reported to the writer on August 18, 1986.

Ramban says that the words wife of Abram are there to show that there was no distance between the two because of the problem of infertility. According to the Ramban, Abram and Sarai could communicate with one another. Unfortunately, infertility and the difficulty of talking about a solution to it have caused many divorces.

Jacob's anger at Rachel's plea, Give me children or I die, is evoked by his own frustration. This confrontation presages the manner in which many couples approach the problem of infertility today. "Give me," one says. "Am I God?" the other responds. Often the infertile person requests and requires additional proof of love. Fragile and fearful of the loss of that love, reassurance is sought in emotional and sometimes hostile behavior.

S'forno comments on the words: I am dead by citing Isaiah 56:3, "I am as a withered tree." S'forno's image of a dying tree suggests more than death. It suggests a slow process whereby vital nutrients are withheld, causing's the tree's life to ebb slowly. In so doing, S'forno touches the core of what many infertile couples experience: the feeling of death, of knowing no seed will come from their bodies.

The stories of our patriarchs and matriarchs do not determine the Jewish legal view of surrogate motherhood. They can, however, illuminate the emotional affects of these modern reproductive techniques. Whereas Jacob's response is to blame his beloved and

indicate that, since he already has children of his own, he does not care, Abram's response to his beloved is one of support and love.

Couples who cannot handle the emotional aspect of the surrogate process probably will not engage the services of a surrogate. But for those couples, who feel equipped to deal with all of the difficulties incurred in surrogate motherhood, counseling for both the surrogate and the couple should be an intrinsic part of the process.

4.4 Conclusion

Reform Judaism is based upon responsible choice. As Reform Jews, we must ask two questions: is the response given by the *halacha* to the issue of modern reproductive techniques a compassionate response and are these new technologies personally conscionable?

In examining the various new reproductive possibilities available to infertile couples today, we find we can derive guidance from our tradition. Indeed, *there is Halacha* on this matter compatible with our values as Reform Jews. Rachel cried, "Give me children or I die." Today's Jew can respond to this agonizing plea knowing modern technologies provide options. Today's Jew can find guidance from principles in the *halacha* to employ these reproductive techniques.

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