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Orthodox & Non-Orthodox Legal Writings on Reproductive Technologies

C. Michelle Greenberg

This purpose of this thesis is to compare the Responsa of Orthodox and non-Orthodox movements concerning reproductive technologies. Through this comparison it is possible to see not only how Judaism in general stands on these issues, we also find that the different denominations tend to agree on these issues. It also becomes clear that our tradition, though lacking in clear precedents, informs and guides appropriate ethical responses to innovative medical technologies.

The thesis is divided into four chapters. The first chapter gives general background on Jewish medical ethics and the principles discussed throughout the Responsa on reproductive medicine. The second chapter analyzes the Orthodox *Teshuvot* on artificial insemination by husband and donor, in vitro fertilization and surrogacy. The third chapter focuses on these same issues from the progressive Jewish perspective. Finally the fourth chapter concludes the argument showing that the opinions of the decisors are not dependent on their movements, rather overriding Jewish principles guide the *Teshuvot* of the rabbis.

Texts used for this thesis included modern *Teshuvot*, modern articles and lectures on secular and Jewish bio-ethics and some rabbinic texts including Talmud and *Shulkhan Arukh*.

ORTHODOX & NON-ORTHODOX LEGAL WRITINGS ON REPRODUCTIVE TECHNOLOGIES

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Thesis Submitted in Partial Fulfillment of
Requirements for Ordination

Hebrew Union College-Jewish Institute of Religion
Graduate Rabbinic Program
New York, New York

March 6, 2000
Advisors: Dr. David Ellenson, Dr. Leonard Kravitz

For my parents

Bonnie Greenberg

&

Jerry and Shari Greenberg

My teachers, my models, my friends.

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CHAPTER 1

GIVE ME CHILDREN, ELSE I SHALL DIE

GIVE ME CHILDREN, ELSE I SHALL DIE[1]

Over and over our tradition retells the story of barren parents desperate to have children. The very first Jew, Abraham, couldn't believe that even in his advanced years he would become a father. Sarah struggled with inadequacy as she watched Hagar rear the child that should have been hers. Rebecca had trouble conceiving, as did Rachel. We feel the pain of spousal insensitivity in Jacob's response to Rachel sadness and need.. We learn about the deleterious affects of communal condemnation as Hannah prays desperately for a son. Throughout our tradition, the story of barrenness and infertility is told. Throughout our tradition we are promised many children if we fulfill the covenant. God promised children as numerous as the sands of the sea and the stars in the sky.

"Getting pregnant and maintaining a pregnancy is a very complicated process."[2] Eggs and sperm must mature in a healthful way, then meet under very specific circumstances, the fertilized egg must then implant properly into the uterine lining and finally, it must grow over nine months. Throughout this process, hormones must be released in appropriate amounts, the mother's health must be safeguarded. "Primary infertility refers to failure of conception after one year of trying

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[1] Exodus 30:1.

for couples who have never before been pregnant."[3] At least half of all infertile couples can be aided through medicine, and, approximately 85% of those can become pregnant with artificial insemination.. Yet, reproductive technologies still fail with approximately half of all people who use them.[4]

Our ability to successfully develop ever more complex medical technology has brought us to a point at which we can create. We have reached a place where it is possible to do what theologians, philosophers and even scientists have always thought was the exclusive dominion of God. Our science has made it possible that Sarah, Rachel and Hannah would not have struggled with the grief of barrenness. Our story as a people would have been very different had these women been able to see a specialist that would make their wombs fertile. The sadness of the many in our history that could never give birth is alleviated with the medical advances of the modern age.

And as Elliot Dorff argues, this is particularly relevant to Jews today. As a people we wait longer and longer to marry and have children. As the body ages, it is less able to produce sperm or ova and hormones in the appropriate manner to cause a pregnancy. Because Jews as a

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[2] Gardner, Allen, "Infertility and the Bio-technical Revolution," UAHC Infertility and Assisted Reproduction Study Guide, August 1999.
[3] Andrew, Lori B., New Conceptions, New York, 1984; p2.
[4] Dorff, Elliot, lecture at "Bio-Ethics and Sacred Decisions: Medical Technology, Liberal Judaism and Our Lives" conference, San Francisco: October 1999.

group tend to put off pregnancy until after careers have been established, the health problems leading to infertility are all the more exacerbated. Now that we have these technologies, we are faced with a solution to the ever-increasing number of Jews who long for children and are unable to conceive. "When one *cannot* do something, there is not moral question of whether one *should*. When one *can* do something, however, then whether one *should* do it is often not only an apt question but a critical one."[5]

Today, technology is able to aid in every step of the reproductive process. The advantage of these reproductive technologies is that they allow otherwise infertile parents to have children. In cases other than surrogacy, barren women are able to carry children to term. The process of the child's growth within the womb and within the context of a family can only serve for good. These people who fifty years ago would have only had adoption as an option are now often able to parent a child that is genetically and physically their own. In many cases, these artificial reproductive technologies actually emulate natural procreation to such an extent that they are tantamount to "normal" procreation.

However, fundamental theological and ethical questions could not be asked until we had stretched far enough in our medical technology to be able to develop questions. We cannot confront and study the possible

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[5] Dorff, Elliot N., Matters of Life and Death: A Jewish Approach to Modern Medical Ethics, Philadelphia: JPS, 1998; 6.

effects of innovative technologies until after these technologies have been established, tested and become viable.

Infertility is certainly a medical disorder, but it also affects the mental and emotional health. Infertility causes anxiety, hurt, frustration and feelings of inadequacy and guilt. Whatever we do with this technology, it will affect us in more than technological manners. It will affect us ethically. Our task is to find the place where religion and morality meet..

The majority of Jewish decisors emphasize *rachmanut*, compassion, in making their decisions concerning these reproductive technologies. There are certainly limits placed on what can be done, however, most rabbis—Orthodox and non-Orthodox—push the boundaries as much as they are able while maintaining the integrity of the tradition.

RESPONSA

Responsa is the body of literature dealing with law in the post-Talmudic period. It records decisions of *halakhic* authorities since then. These conclusions are reached through analysis of previous *halakhic* decisions. Yet the questions are based in real life situations, so the decisors must understand and adapt historical decisions to what is often a different reality in contemporary times. "If in their opinion, the existing legal rules did not satisfy the needs of the time, they sought and found a

solution by means of one or more of the legal sources of Jewish law—interpretation, legislation, custom, *ma'aseh*, and legal reasoning."[6]

Teshuvot are "where past and present intersect."[7] Through these writings, rabbis are able to bring the ideas of tradition into the present to deal with the problems facing us today. Through *Teshuvot*, the ongoing historical conversation in able to confront and respond to the modern problems which the rabbis could never have imagined.

Much of Responsa literature deals with medical ethics. Generally, when medicine is in experimental stages, the technologies are treated very differently than those established over a period of time.

SECULAR AND JEWISH BIO-ETHICS

"Americans tend to embrace all medical advance as medical miracle."[8] Our society naturally assumes that any new technology is beneficial and should whole-heartedly be embraced. This is not so. Only with careful thought and analysis can we decide what technologies extend our ability to heal and what technologies bypass our humanity.

There are few ties between secular and religious bio-ethics. The majority of bio-ethicists are secular. There is little connection between

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[6] Elon, Menachem Principles of Jewish Law, New York: Lambda Publishers, 1990; 1461.
[7] Ellenson, David, keynote address at "Bio-Ethics and Sacred Decisions: Medical Technology, Liberal Judaism and Our Lives" conference, San Francisco: October 1999.
[8] Post, Stephen G., "Medical Miracles make Moral Muddles."

the pragmatic issues of problem solving and the theory behind these decisions. Secular bio-ethics must apply to a number of cultures, religions and backgrounds. For this reason, secular bio-ethicists do not often call upon the religious community for decisions. The religious medical ethics community focuses on the needs of community over the individual. In general, secularists place autonomy in higher regard. According to Caplan, ultimately faith overwhelms autonomy.[9] For people to understand and relate to the decisions made by medical ethicists, it is necessary for them to have a common faith or understanding. In times of medical choices, usually people are in crisis of some sort and need to rely on the ministrations of clergy. Secular bio-ethics is so rationally oriented that it can become insensitive. The addition of faith based medical ethics tempers this.

The most recent furor in the secular and religious ethics of reproductive medical technologies occurred in the late 1970's with in vitro fertilization. Concerns were raised that these technologies would damage the relationship between parents and children; that the understanding of procreation, reproduction and family would be forever altered by the introduction of other elements into the procreative process. The debate died down over time but the concerns are still valid. What are the limits to be placed on reproduction? Do artificial

technologies reduce the natural relationships of families? Who should benefit from these technologies? What role does social imbalance play? Will the roles of family members change?

Many questions are raised in secular ethics concerning innovative reproductive technologies that are not as apparent in the Jewish ethics. Certainly the varied religious influences in different cultures affects the questions raised. For example, in the United States, a primarily Christian nation with strong Puritan ethics, the anti-abortion mores influences ethics in reproductive technology against zygote reduction. The strong feminist movement often raises concerns of women as "fetal containers."[10] Regardless, the secular influence must be remembered and respected in analysis of progressive Jewish medical ethics in particular and even in *Halakhic* Judaism's medical ethics to some extent.

Medical technology has moved into the forum of great religious questions. Moral issues confronted by individuals are likewise confronted by moral traditions. It is necessary for us to become involved as religious institutions. The issue today is that these technologies raise

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[9] Caplan, Arthur, lecture at "Bio-Ethics and Sacred Decisions: Medical Technology, Liberal Judaism and Our Lives" Conference, San Francisco: October 1999.

[10] Reich, Warren Thomas, ed., Encyclopedia of Bioethics, v4, New York: Macmillan, 1995; 2234.

fundamental questions about the nature of human relationships and what limits, if any, should be placed on human procreation.[11]

> While these laws claim our unquestioned loyalty on the strength of their religious value, as the means to the fulfillment of Gd's [sic] will, they are primarily the expression of the moral discipline of Judaism. They are founded on the supreme sanctity of human life, on the dignity of man as a creation in the image of G-d [sic], on the religious precept to mitigate suffering and sickness, on the claims of the sick to spiritual aids in their recovery from illness, and on the rights of the patients and physicians to respect for their religious susceptibilities.[12]

PRINCIPLES OF JEWISH MEDICAL ETHICS

Elliot Dorff frames questions of Jewish medical ethics within major tenets of Judaism. The following ideals are aspects of Jewish ethics found throughout the Responsa and in particular in those that confront questions of medical ethics.[13]

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[11] Grazi and Wolowelsky, "Use of Cryopreserved Sperm and Pre-Embryos in Contemporary Jewish Law and Ethics," offprint from "Assisted Reproductive Technology Anthology," 8:53-61, 1995.
[12] Commission on Synagogue Relations, A Hospital Compendium, New York: Federation of Jewish Philanthropies, 1969; p16.
[13] Dorff, Elliot N., Matters of Life and Death: A Jewish Approach to Modern Medical Ethics, Philadelphia: JPS, 1998; 14-33.

CONEH HASHAMAYIN

Adonai koneh hashamayim v'aretz. God owns all that is in the heavens and earth. This implies that our bodies are the property of God. We cannot do with them as we wish. Since our bodies are the property of God we cannot destroy or damage them. We must care appropriately for our bodies. But how is this best done? How do we differentiate between care for the soul's needs and the body's needs? Is there a difference between the sickness of yearning and the sickness of barrenness or sterility? Throughout Responsa on medical ethics, this ideal appears again and again.

BTZELEM ELOHIM

Because all people are created in the image of God, each person's worth is equivalent to that of every other person. Mishnah Sanhedrin teaches that God creates all people from the same stamp, each person is like all others. Yet, we are different. Our differences and similarities are based in our connection to God. Having been created in the image of God, all life is valuable. Each human is valued equally. The life of a healthy newborn is no more important than an ailing old man or a sick Torah scholar. Each person is valued equally preventing decisions from being made based on subjective criteria.

THE BODY AND SOUL ARE INEXTRICABLY LINKED

People are whole and complete. The mind, soul and body cannot be separated. For this reason, an illness of one aspect effects the other aspects as well.

The Body is Morally Neutral

The body is capable of either good or evil. It is not in and of itself either of these. Because the body is morally neutral, any acts that it participates in should be for the sake of God and good. The choice being available, it is important to encourage that the body to do what is right. Likewise, the pleasures of the body are God-given as well. "The body, in other words, can and should give us pleasure to the extent that such pleasure enables us to live a life of holiness."[14] Holiness is reached in Judaism through the appropriate use of our bodies, minds and souls.

Mandate to Heal

"We have a universal duty to heal others because we are all under the divine imperative to help God preserve and protect what is God's."[15] The healer is obligated to not only help the patient to heal physically but morally and spiritually as well. Of utmost importance is the Physicians oath administered by Asaph ben Berachayu is the ethic of healing. A physician is obligated to heal above all other things. "Take heed that ye

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[14] ibid. 24.
[15] ibid. 26.

do not cause a malady to any man."[16] All people deserve equal and ethical treatment, "you shall not harden your hearts against the poor and the needy but heal them."[17]

COMMUNITY VS. INDIVIDUAL NEEDS

While we are required to care for the individuals, it is also incumbent on the community to maintain the welfare of all its members. This often plays itself out through questions of resource allocation. It is necessary that the basic needs of all members be met. In some instances, the line between needs and wants becomes unclear.

KIDDUSH HASHEM AND PIKUACH NEFESH

Jews must sanctify God's name through their actions and choices. While life is among the greatest of things to be had, there are certain situations during which a Jew is obligated to sacrifice his or her life in order to honor God. Only in situations of forced idolatry, incest or murder may a Jew martyr him or herself. In all other situations, a Jew must do what is necessary to save life. Judaism teaches that the value of every Jewish life is infinite. Nearly any religious law is suspended when danger threatens.

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[16] Commission on Synagogue Relations, A Hospital Compendium, New York: Federation of Jewish Philanthropies, 1969.

JEWISH BIO-ETHICS OF ARTIFICIAL REPRODUCTIVE TECHNOLOGIES

There are a number of different types of technologies used in order to procreate with the assistance of medicine. Some are more straightforward than others such as artificial insemination. Some are more complex like test tube fertilization of eggs. The questions that arise are more and more difficult based on the complexity of the medical procedure itself. This is due to the increased variables and the distance between these technologies and natural procreation. The rabbis are concerned with a number of questions. More than the matters of technology, issues of relationship and responsibility occupy the minds of the *posekim*.

PRU ORVU

The first commandment is to be fruitful and multiply. It is traditionally understood to be within the context of marriage. Judaism teaches that the world was created in order to be inhabited. People are obligated to continue the work of Creation begun by God. Marriages are partially for the purpose of having children. Those who do not fulfill this commandment, "diminish the divine image."[18] It is religiously and culturally incumbent upon Jews to bring children into the world and this

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[17] ibid.
[18] *Shulkhan Arukh, Even Ha'Ezer* 1:1

should be done within the context of marriage (Genesis 1:28, Exodus 21:10).

NATURAL VS. TECHNOLOGICAL

Any interference in natural birth is considered questionable unless necessitated by medical reasons. This can apply to both birth technologies that cause pregnancy and those that end it. While God has imbued people with the ability to create technologies, there is a fine line between what is allowed and what is forbidden Much of the *posek's* work is defining that line.

ZERA L'VATALAH

Among the problems of artificial insemination is the manner in which sperm is collected. Wasteful emission of sperm (*hoza'at zera l'vatalah*) is prohibited by Jewish law. Maimonides and Jacob ben Asher both state that it is forbidden to emit sperm rashly. Joseph Karo (*Shulkhan Arukh Even Ha'Ezer* 23:1) adds that it is the "gravest of all the transgressions in the Torah." What is wasteful? Masturbation is prohibited as Onanism. Some decisors believe that sperm collected for the purpose of testing and than discarded is *hoza'at zera l'vatalah*. But others disagree. Among the questions the *posekim* face is whether if the end purpose of the sperm collection is procreation, is it still forbidden?

ADULTERY AND MAMZERUT

Among the problems of donor insemination is the concern of adultery. In general the rabbis have argued that without sexual contact there is no adultery. But some find other wise. Is a woman who carries the seed of another man allowed to continue living with her husband? Has a woman who has been impregnated by the sperm of a man other than her husband been adulterous according to Halakha? Will the child thus be a mamzer? Is adultery an act that can only occur with the actual physical contact of the genitals?

The child of an adulterous relationship is a mamzer, but if no adultery is involved, is the child ritually fit? If a donor's identity is kept anonymous, could the child potentially be a *mamzer* or marry its own half-sibling?

INCEST

Should the concern for incest in later generations prevent the use of artificial insemination by donor now? Is it appropriate to develop processes by which donors will be recorded in order to prevent this eventuality? How is the confidentiality of the donor then protected? If

the donor is unknown, it is conceivable that the child will grow up and possibly marry its own half-sibling?[19]

TRADITIONAL PRECEDENTS

Halakhists were searching for precedents in dealing with reproductive technologies and were unable to find any solid examples. They used the Biblical stories of Hagar, Bilhah and Zilpah as models for surrogacy. Leah and Rachel's transfer of fetuses (Joseph and Dinah) for embryo transfer. And the issue of a pregnant virgin marrying a high priest as a parallel for artificial insemination. Our tradition doesn't have the tools, the precedents, for dealing with innovative medical technologies.

Because there is no precedent of reproductive science in tradition, there is no Halakhic source able to respond to these problems, when dealing with reproductive technologies, we look to the tradition for guiding principles. It is our task as modern *posekim* to define the appropriate way to use the new technologies based on the guidelines of our tradition.[20]

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[19] Freehof, Solomon, American Reform Responsa, New York: CCAR, 1952; "157. Artificial Insemination," 123-125" and "158. Artificial Insemination," 125-128.

[20] Ellenson David, "Artificial Fertilization (*hafrāyyah melakhotit*) and Procreative Autonomy," in The Fetus and Fertility in Jewish Law, Moshe

HAGIGAH 14B

According to Leviticus 21:13-14, a high priest must marry a virgin. Hagigah 14b discusses the permissibility of the high priest marrying a pregnant virgin.

> Ben Zoma was asked: "may a high priest marry a maiden who has become pregnant? Do we take into consideration Samuel's statement, for Samuel said: 'I can have repeated sexual connections without bleeding,' or is the case of Samuel rare?" He replied: "The case of Samuel is rare, but we do consider that she may have conceived in a bath, and therefore she may marry a high priest.

This text asserts that it may be possible to become impregnated without the act of physical intercourse. Many halakhists infer that this text shows that there was no adulterous relationship, thus the child is not *mamzer*. A small number of rabbis interpret this passage metaphorically, choosing to ignore it as precedent in situations of artificial insemination.

ALPHA BETA D'VEN SIRA

The following legend first appeared in *Likutei Maharil* by Rabbi Jacob Moellin Segal (1365-1427). The daughter of Jeremiah the prophet

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Zemer and Walter Jacob, eds., Pittsburgh: Freehof Institute of Progressive Halacha, 1995.

became pregnant but was still a virgin. It was discovered that she had bathed in the same waters in which her father had been forced to emit semen.[21] The story appears in almost every responsa on artificial insemination since then. It demonstrates that this manner of conception even though the ova and sperm are from father and daughter does not make the child *mamzer*. Further, Ben Sira is called the child of Jeremiah demonstrating that the offspring is the legal and biological child of the sperm donor.

RECORDED IN NAME OF RABBI PEREZ BEN ELIJAH OF CORBEIL

In *Haggahot Semak* by Rabbi Perez ben Elijah of Corbeil, he writes that a woman is prohibited from sleeping on the sheets that a man not her husband has slept on. This is so she will not unwittingly be impregnated thus causing a child to incestuously marry its paternal half sibling.[22]

CONCLUSION

A number of ethical and *halakhic* issues influence the discussion reproductive technologies. This is a particularly interesting topic in that there are no solid textual precedents for handling these questions from a Jewish perspective. Of the three texts available, only one is Talmudic

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[21] Dorff, Elliot N., Matters of Life and Death: A Jewish Approach to Modern Medical Ethics, Philadelphia: JPS, 1998; 48-9.

and all three are *aggadic*. At best, this is a difficult issue to confront. This paper will show that the *posekim* of all the movements are for the most part in agreement. These reproductive technologies hold great promise when used responsibly. The rabbis show that it is vital to maintain responsibility between the different parties involved, keep the notion of *refuah*, healing, at the forefront and decide everything with appropriate *rachmanut*.

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[22] ibid. 49.

CHAPTER 2

ORTHODOX RESPONSA ON REPRODUCTIVE TECHNOLOGIES

Chapter 2
MISSING

CHAPTER 3

NON-ORTHODOX RESPONSA ON REPRODUCTIVE TECHNOLOGIES

INTRODUCTION

Progressive Judaism is strongly influenced by post-enlightenment thought. The notion of autonomy is paramount in decision-making questions of ethics throughout Reform and Conservative Judaism. They reflect secular ethicists' concerns. How much personal choice should be allowed the childless people so desperate to have children? Does everyone have a right to reproduce by means of these technologies? As stated in the Encyclopedia of Bio-Ethics, ". . . the philosophers. . .maintain that individuals have great leeway in their choice of whether to procreate, with whom, and by what means."[1] Progressive Judaism walks the fine line between autonomous post-enlightenment decision making and the necessary constraints of a community based faith.

Judaism is an evolving organism that has developed through years of study, literature and living. While the tradition is given a great deal of weight, it is not a static thing that prevents innovation. Rather, Judaism must be living and changing according to the influences and needs of its surroundings. Conservative Judaism must walk a line between exacting ideology that is unmovable and a statement that is so all-inclusive that integrity of uniqueness is lost. The Rabbinical Assembly must write Responsa within these parameters.

The Responsa Committee states beautifully the primary issues at the heart of modern Responsa,

> Rabbinic Scholars ought to acknowledge that traditional techniques of Halakhic analysis, in particular the case method of reasoning by analogy are of limited usefulness in an area dominated by technological novelty.

Because our tradition has no precedents, no example of these sort of medical innovations, it is necessary to find new ways of studying and confronting the difficulties inherent in analyzing appropriate Jewish responses to particular modern events. The Reform and Conservative Responsa in this chapter developed in such a way that they do just that. While early Teshuvot on artificial insemination demonstrate tenuous decision making ability—almost as if the respondents do not want to articulate what should be done. The most modern examples do, however, represent particularly modern interpretations. These decisors often agree with past *posekim* and traditional models, yet the tone of the writing demonstrates a new comfort with the role of legal decisor and the difficulties of facing new technologies.

ARTIFICIAL INSEMINATION

The earliest CCAR Responsa on artificial insemination was written in 1952. The *Shealah* is very direct, "is artificial insemination permitted

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[1] Reich, Warren Thomas, ed., Encyclopedia of Bioethics, v4, New York:

by Jewish Law?" The original *posek* outlines the primary issues of artificial insemination: *periya ureviya, zera l'vatala*, adultery, *mamzerut* and the possibility of an incestuous marriage for the child. Most later decisors articulate that there is limited, if any, precedent in the traditional texts for responding to this question. Solomon B. Freehof however remarks,

> Even though the technique of artificial insemination is new, nevertheless, most of the questions mentioned above are not new in the Law, since the legal literature has already discussed them with regard to certain special circumstances which are analogous to artificial insemination, namely, if, for example a woman is impregnated in a bath from seed that had been emitted there.

Freehof cites numerous *halakhic* texts that allow aspects of artificial insemination. He asserts that the traditional texts are inclined to permit the husband's sperm while forbidding that of a donor. Freehof believes that the "possibility of the child marrying one of his own close blood kin is far-fetched."[2] The Responsa concludes that the wife commits no sin and since the child is *kasher*, then artificial insemination should be permitted.

Alexander Guttman responds to the same question, "Is artificial insemination permitted by Jewish Law?" Using the same sources, his

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Macmillan, 1995; 2234.

[2] Freehof, Solomon, American Reform Responsa, New York: CCAR, 1952; "157. Artificial Insemination."

conclusion is different from that of Solomon Freehof. "Whereas I do not see sufficient evidence for recommending the issuance of a prohibition against artificial insemination, I should like to caution against a hasty *Heter* (Permit) for which I found no backing worth the name in our Jewish teachings."[3] Guttman relies on Haim F. Epstein who allows artificial insemination with the husband's sperm if the physician finds that this is the only possible way for begetting a child. Epstein argues the necessity of limiting the concept of *hotsa-at zera l'vatal* (wasting of seed), which would allow this conclusion.

In essence, Guttman is trying to allow artificial insemination because he feels it is right to allow this for the sake of people suffering infertility. However, the limited texts available cause him to turn to a modern Orthodox *Teshuvah* as proof that artificial insemination with the husband's sperm is justifiable. This is problematic for the Reform movement. It finds its historical credibility in the modern interpretation of another movement.

Guttman concludes that the Talmudic discussion of insemination in the bath is theoretical and therefore of no relevance to the discussion. He even calls it mere *aggadah*, discarding any *Halakhic* import to that case. Guttman finishes,

> Whereas I do not see sufficient evidence for recommending the issuance of a prohibition against artificial insemination, I should

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[3] ibid, "158. Artificial Insemination."

> like to caution against a hasty *Heter* (permit) for which I found no backing worth the name in our Jewish teachings.

He makes no definitive statement for or against artificial insemination. By neither permitting nor prohibiting, Guttman begs the issue.

Solomon Freehof takes a more solid stance than does Guttman. While he does not decree that artificial insemination be permitted, he does come out in support of allowing the procedure,

> My opinion would be that the possibility of the child marrying one of his own close blood kin is far-fetched, but that since, according to Jewish law, the wife has committed no sin and the child is *kasher*, then the process of artificial insemination should be permitted.

By the 1980s the nature of the Reform Responsa was changing. Freehof again responds to a question of artificial insemination.[4] This time, however, the question already assumes that artificial insemination is available, permitted and in use by Jews. Freehof's answer demonstrates this as well.

In his discussion Freehof utilizes many more textual sources than he had thirty years previous. Additionally, he adds discussion by non-Reform *posekim* as well. The Responsa looks at a variety of sources modern and ancient that confront the question of adultery and *mamzerut* that could be at issue should a child be born of a donor that is not his or

her father. Freehof tells us that the Orthodox *posek* Moshe Feinstein absolutely forbids the possibility of a mixed donation. Though the mixture will strengthen the seed of the primary donor with that of other donors, it remains unclear who the parent would be. Feinstein objects on the basis of deception. A woman may believe it is her husband impregnating her, but in fact it is another man. Freehof concludes that all mixed seed donations are prohibited by Halakhic authorities. Because the original *Shealah* asked specifically what Jewish law had to say, no additional decision is made as to the permissibility of mixed seed donations. The tradition demands knowledge of paternity in order to prevent later incestuous relationships.

> Another Reform Responsa deals with a complex set of questions: Should a parent whose child has been born through artificial insemination tell the child that the child has been conceived in this fashion? If the semen used in the process of artificial insemination is a mixture of the father and of a volunteer, is the husband to be considered the actual father of the child? Is it permissible to use a donor in the case of artificial insemination?[5]

Most Responsa strongly condemn donor insemination. It distorts the line of paternity, and a mixture of husband and donor sperm is particularly problematic in that the child of such a procedure could

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[4] Freehof, Solomon, New Reform Responsa, New York: HUC Press, 1980; "46. Insemination with Mixed Seed," 202-204.

possibly marry its genetic sibling. The *posek* here argues differently. Citing Hullin 11b, Sotah 27a and Even Haezer 4:13, he asserts that if "a mixture has been used, there would also be no question about the father. In accordance with Jewish law, the husband is presumed to be the father unless there is proof that this is not so."[6] The concern for consanguinity does arise later in the *Teshuvah*, however. While the *posek* give tacit approval for insemination with an anonymous Gentile donor, he only warns of possible incestuous marriage with a Jewish donor. Arguing that the Jewish community is vast and widely dispersed, "this likelihood is minimal and for that reason both Jewish and non-Jewish donors may be used."[7] This is contrary to most *posekim* who argue that among the primary reasons for prohibiting AID is the possibility of incestuous marriages. Finally, the *posek* asserts that conception is a private matter between parents. The child, conceived in a traditional sexual matter or through artificial insemination or even surrogacy, is not party to the act of conception nor should he or she be.

Two questions are asked in another *shealah*, can a wife use the sperm of a deceased man for insemination. If the sperm of the husband is inserted into another woman for surrogacy, when the child is born, to whom does it belong? Freehof finds both these questions to be related to ownership by the wife of her husband's genetic material. Since the Torah

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[5] Jacob, Walter, Contemporary American Reform Responsa, New York: CCAR Press, 1988; "197. Child Born Through Artificial Insemination."
[6] ibid.

asserts that a woman is due food, clothing and a sexual relationship (Exodus 21:10), then the materials of these obligations are also hers. In other words, the sperm of her husband belongs to her and she has the right to use it as she wishes, including artificial insemination after her husband's death. Freehof's reading on surrogacy is much simpler. "As for the surrogate mother, the wife certainly has some claim on the possession of the child, since it is her husband's sperm which is put into the body of the surrogate mother, and all the more right if it is the mixture of the husband's sperm and her seed that was put into the body of the surrogate mother. And, thirdly, if the surrogate mother agreed at the outset that she was merely the instrument of maturing the child's body."[8]

A further question is the permissibility for a Jewish man to anonymously donate his sperm. He directs that the sperm only be used for Gentile women so that there is no opportunity for discomfort or gossip in his Jewish community. So the possible objection lies in whether a Jew should aid in the conception of non-Jewish children.

> The Mishnah (Avodah Zarah 2.1) says that a Jewish midwife should not aid at the birth of a child of an idolatrous woman, lest she thereby increase the number of idolaters in the world . . .[but] the law is codified in the *Shulhan Arukh (Yoreh Deah* 154:2) that a

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[7] ibid.
[8] Freehof, Solomon, Today's Reform Responsa, New York: HUC Press, 1990; 102-103.

> Jewish woman may not aid at the birth of an idolater unless it is her paid profession to do so.[9]

The sperm donor is paid for the donation, in that case, is he a professional? It would seem that precedent allays his concerns in that a paid individual is considered a professional. Further, Freehof points out that there is a positive obligation incumbent upon Jews to aid all people with *tzedakah*, healing the sick, burying the dead etc., for the sake of *derekh eretz*, "paths of peace." Finally, Freehof points to the scholar and physician Nachmanides who aided a Christian woman in giving birth to a child.

There are numerous precedents that would seem to allow, or even encourage, a Jewish sperm donor to direct his donation to Gentiles. Interestingly, the *posek* does not evaluate the permissibility of donor insemination itself. This is due to the procedure in this case not involving Jewish parents. Also, we may infer that by the time of this question (the late 1980s) Progressive Judaism had widely accepted artificial insemination as an acceptable mode of conception for the secular world.

In 1993, the Israeli Chief Rabbinate issued warning notices in a number of prominent newspapers forbidding Jewish men from donating sperm to hospital sperm banks and Jewish women from accepting any medical treatment that included artificial insemination by donor. The

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[9] ibid. 126.

question is asked of the Conservative *posek*, Moshe Zemer, "Does the Halakhah permit a man to give sperm for the artificial impregnation of his wife?"[10]

Zemer responds that the Chief Rabbinate's ban does not deal at all with artificial insemination by husband. Additionally, the notice appearing in newspapers was entirely void of halakhic sources to support its assertions. It is noted in this Conservative Responsa that some halakhic sources do prohibit artificial insemination by husband on the ground of *zera l'vatalah*, but overall most Halakhic authorities accept this by the early 1990's. There is some disagreement over what point in a marriage a couple should turn to artificial reproductive technology in order to bear children. A number of Orthodox *Teshuvot* are cited, but ultimately, the Conservative *Teshuva* is given, "Although there is some controversy on the issue of artificial insemination from a husband in keeping with the pluralistic nature of the *halakhah*, the vast majority of respondents not only permit, but encourage artificial insemination with the husband's sperm in fulfillment of the *mitzvah* 'be fruitful and multiply.'"[11]

The Conservative *posek*, Professor Louis Ginzberg was asked about a situation where artificial insemination by donor would be the only way for a married couple to have children. The husband had suffered a

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[10] Zemer, Moshe, Halakhah Shefuyah, Tel Aviv, 1993; "A Rabbinic Ban on Sperm Donation," 283-285.
[11] ibid.

disease that had destroyed his reproductive organs preventing him from creating sperm. If the donor sperm were to be injected directly into the wife's uterus preventing any sort of physical contact with the donor, would it be possible for her to become impregnated in this way, providing a child for this couple?

The Teshuvah begins with questions of *mamzerut*. Ginzberg suggests that the sperm and egg of a man and woman forbidden one another causes *mamzerut*. This would imply that it is conception and not sexual contact that causes *mamzerut*. This is contrary to most Orthodox *posekim* who assert it is the forbidden contact itself, which causes adultery and thus *mamzerut*. He argues that because the Mishnah offers no proof that *mamzerut* is from forbidden intercourse, then it must mean the process of conception itself.

The *posek* proceeds to cite the primary sources used as precedent for artificial insemination cases. In particular, he points to *Alpha Beta d'ven Sira*, the text asserting that Jeremiah is the father of his daughter's son due to his emission of seed in bath water in which she bathed. Ginzberg argues that this text is not an acceptable source as it deals with matters "strange and surprising . . . which do not 'find favor in the eyes of the sages.'" While *periya ureviya* is a *mitzvah*, the progeny would be *mamzer*, thus forbidding the union of the wife and an anonymous donor.

> On the contrary, even though there is no proof to forbid, there is support for one who says that, according to the opinion of the

> *rishonim*, a child who is born from sperm absorbed by his married mother without intercourse is a *mamzer*. . . . [I]t is superfluous to add how ugly this practice is from the point of view of ethics and purity to inject the sperm of another man into the uterus of a married woman. And it has already been said: 'And you shall be . . . a holy people to the Lord your God' [Deuteronomy 26:19]."[12]

Ginzberg clearly condemns donor insemination.

Edward Feld asserts that there is no problem with artificial insemination by husband. This procedure should not only be permitted but encouraged because it allows otherwise childless couples to become pregnant and carry their own genetic children to term. The difficulties arise with artificial insemination by donor. In response to the assertion that donor insemination is adultery and the resulting child is *mamzer*, Feld responds, "Such a view violates our common-sense notion of what constitutes adultery." He allies himself with those decisors who decree that only physical contact actually is adultery. Hagiga 14b supports this. The impregnated virgin has clearly come into contact with sperm but she never had physical sexual contact with a man, since she is still *kasher* to marry the High Priest then we must understand that physical contact is required for a sexual act. In other words, since the donor never actually comes in contact with the woman, this is not an adulterous relationship.

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[12] Golinkin, David, ed., The Responsa of Professor Louis Ginzberg, New

An interesting twist in the discussion of adultery is that brought by Noam Zohar in an article cited by Feld here. Zohar contends that the tradition teaches that the husband owns the wife's womb meaning that any trespass there violates his *kinyan*, ownership. The sperm of a donor would violate the "monopolistic relationship" that the husband has with his wife's body. Zohar spins artificial insemination making it a matter of women's ownership of their own bodies. If women are the sole owners of their wombs then they would make the decisions as to artificial insemination on a personal basis. Granted, this sense of autonomy is not in joint with the overriding traditions of Judaism and it blatantly ignores the fact that childrearing is socially, traditionally and Jewishly an act of partnership, yet this is still a fascinating way to approach the problem of artificial insemination by with donor sperm.

The primary concern that Feld raises with donor insemination is that the child has a right to know his heritage. Because most donor insemination uses a mixture of sperm from multiple donors, it would be a difficult process for the child to identify his biological father. "By purposely bringing into being people who cannot trace their story, who have no history, we are fundamentally altering an important sense of what it means to be human." Artificial insemination redefines what human-ness is. This is a dangerous road to walk he argues. Children will be unable to identify who they are in a larger story, parental

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York: JTS, 1996; 211-213.

responsibility is ignored and does this not "encourage disassociation of sexuality and responsibility among males?"

Another problem of artificial insemination by donor is that some of these children will be brought into the world without a male parent. For those single women who choose to raise a child alone, their daughter will never be able to identify a portion of her past. Certainly children raised by a loving father and mother are better able to adjust to life. They are more resilient and generally more successful, so allowing these children to enter the world with only one parent is already an unnecessary difficulty.

> The reader may well note that we have seemingly departed from a strict halakhic analysis. . . .The tradition has something to tell us about how we should think about this latter set of questions but we will miss that knowledge if we look only for halakhic precedent. We must broaden our perspective in order to respond adequately to the new problems we face.[13]

In Vitro Fertilization

In vitro fertilization is a process whereby the eggs are fertilized outside the woman's body, then surgically implanted in her uterus. Many doctors believe that the more eggs implanted, the greater the possibility of a successful pregnancy. After a time the fetuses with the

best chance or survival are left intact while the others are selectively reduced. Is this abortion? Should the possibility of abortion prevent Jews from utilizing in vitro fertilization as a method of reproductive medicine? Additionally we must ask whether the life to which the child is brought is worth the struggles that the child may have to survive to live. What harm could come to a child born through these reproductive technologies about which we are still learning? Is it worth the risk to the child? Many ethicists believe that any life is better than no life. Though "this argument presupposes that these children are waiting in a world of nonexistence to e summoned into existence and that they would be harmed by not being born."[14] This is the antithesis of Jewish thought in that the life of a child does not begin until birth. This is a secular Christian influence that is rarely taken into account in Jewish medical ethics.

Regardless of the various arguments as to the legitimacy of the child's birth, limits must be placed on personal autonomy in order to protect the good of society at large and the possible child in particular. The needs of people wanting to be parents do not supersede the requirements of science, society and faith.

In many of these reproductive technologies third parties are involved. It is possible to have as many as five biological parents for one

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[13] Feld, Edward, "Technology and Halahkah: the Use of Artificial Insemination," *Conservative Judaism* 48:3 (Spring 1996): 49-56.

child: egg donor, sperm donor, and surrogate mother as well as father and mother. What are the rights of these numerous individuals in the development of the child? And to what extent will these various parents affect the child? Is it possible that the child will develop attachments to some or all of these individuals? How will the child identify him or herself as a member of a family and story where genetic parents, birth parents and social parents are possibly different people? The most common argument against these concerns is that the social parents who actually raise the child, attend the recitals, scold the lies, tuck her in at night are the ones to whom the child will bond. The various measures used to bring the child into being are secondary to the parenting received as a child.

In August of 1978 a *shealah* asked about permissibility of test tube babies (in vitro fertilization) in Judaism. The question is framed in such a way as to ask if Jewish parents may use this technology when it is impossible for them to conceive in another manner. Additionally it asks about permissibility of fertilizing several eggs at once, storing some and implanting others. At this time, the success of the first test-tube baby pregnancy was just hitting the news. Not only is precedent lacking in Jewish tradition, secular society had not yet had opportunity to confront, ponder and accustom itself to this possibility. The *posek* reviews the basic issues raised by artificial insemination; Jewish parents should at

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[14] Reich, Warren Thomas, ed., Encyclopedia of Bioethics, v4, New York:

least reproduce themselves by having two children; *zera l'vatalah* does not apply when the ultimate purpose is procreation; and caution should be exercised when using donor sperm. The latter two issues are not a concern because the purpose is reproduction and the sperm used is actually that of the husband. Therefore, this technique, "would enable some childless Jewish couples to have children and should be encouraged when available." As to the question of preserving embryos for later attempts should the first fail or further children be wanted, no significant prohibition can be raised here. However, concerns are raised that the embryos are preserved for a limited time, they should not be used for genetic experimentation and other safeguards should be implemented. These potential lives are due respect though they are not yet living beings. The Responsa is, for the most part, approving of these new technologies, but it does end with a warning that further study is necessary. It is interesting to note that permission is given for this procedure even while the technology is itself in a new and even experimental stage.[15]

Freehof also discusses the process of fertilization that takes place outside the body. This Responsa was written within five years of the first test-tube baby. He begins not with Jewish sources but the discussions by the National Ethics Advisory Board. Their analysis demonstrated a

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Macmillan, 1995; 2234.

[15] Jacob, Walter, Contemporary American Reform Responsa, New York: CCAR Press, 1987; "18. Test Tube Baby," 29-30

great deal of discomfort in both religious and secular circles toward test-tube experimentation. The primarily concerns were due to its "unnaturalness."[16] Judaism certainly advocates the continuation of creation as commanded by God in Genesis, but this is interpreted as natural creation. Meaning that technology is not necessarily accepted as a way of creation. People are so deeply connected to certain notions of human-ness that this went against all that was understood and normal. A similar example is the passionate response to Dolly, the cloned sheep, in early 1998.

Freehof continues with Talmudic cites referring to wasted seed and Onanism. This could be parallel to the situation of test-tube fertilization because there is no sexual relationship occurring whatsoever between the parents. The seed is as if it is spilled upon the ground. Freehof then turns to the Kabbalists—not among the more common sources in a *Teshuvah*—to show that intentionally wasting sperm is even worse than spilling seed. The Kabbalists argue that it is actually used to create evil spirits, *ruchot*. From here we see the depth of relationship between the contemporary fear based response to possible technological mishaps aligned with a medieval reading of Onanism. Freehof brings this argument to the point of absurdity to demonstrate the modern influence on the question. He points out concerns of wholesale "baby-making," but says this argument deserves little weight. The only comparison he

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[16] Freehof, Solomon, New Reform Responsa, New York: HUC Press, 1980;

finds in the traditional texts is Levirite marriage. A child not of the normal sexual relationship becomes the child of a father that is not his biological father. Because the seed of the brother is used one would think that the child actually is his, rather it is that of the elder (and dead) brother. Freehof also points out that though there seem to be a number of arguments against test-tube fertilization, David Goren, Ashkenazic Chief Rabbi of Israel was reported to declare this acceptable in Jewish law for the benefit of a barren couple. This occurred as early as the late 1970's.

Freehof concludes that Jewish law accepts test-tube fertilization. He reluctantly accepts it as a best case scenario for a barren couple. It is not a fantastic option by any means as it remains questionable according to Jewish law, yet there is nothing that specifically prevents its use. An additional issue to be discussed is whether the husband and wife have already fulfilled the mitzvah to be fruitful and multiply. If so, it is not necessary to complete the obligation through this questionable procedure.

Another Responsa in this same collection refers to in vitro fertilization with a cousin's ova. It is a similar issue to that of a sperm donor except that here the donor is another family member. The concern of later incestuous marriage would be alleviated in two ways. First, the donor is not anonymous, the family is quite clearly known. Secondly, the

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"47. The Test-Tube Baby," 205-212.

cousin's family is nearly the same as that of the parents to whom she would be donating her ova. What about questions of adultery though? In earlier times, it was acceptable for a man to marry a woman and her first cousin, but this is no longer acceptable by either Jewish or secular tradition. However, since the conception occurs without the physical connection of the husband and cousin, there is no adultery here. Rather, the ova is fertilized in vitro then placed in the womb of the mother. Any questions of *mamzerut* or adultery are removed. The *posek* turns to the social issues raised here. What sort of psychological effects will this have on the parents, child, cousin and larger family? "In cases of normal family strife, will this situation aggravate matters? Are any pressures for donation being applied to the cousin?" The *posek* concludes that the "potential problems are numerous and should lead to great caution," but "reluctant permission" is given to use in vitro fertilization with the donated ova of the cousin.[17]

By the 1990s the nature of Responsa on in vitro fertilization had changed to focus not on whether it was permissible but what happened now that a living being had been created. This demonstrates that a norm of permissibility had been created in the progressive Jewish community, and as we know from other sources, to a degree in more traditional Jewish circles as well.

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[17] Jacob, Walter, Contemporary American Reform Responsa New York: CCAR Press, 1988; "19. In Vitro Fertilization with Cousin's Ova."

"In Vitro Fertilization and the Status of the Embryo" appeared in 1997 (CCAR Responsa). The question asks, "What is the status of the zygote?" Immediately the posek must be aware that this question has far-reaching moral implications in terms of the abortion debate. The question is centered not on permissibility of the insemination procedure itself but the viability of this zygote as a living human. Does it have a soul? Does it have rights? Are its rights equivalent to an infant? A minor? An adult?

The response discusses these questions in reference *to maya be'alma*, mere water. According to tradition, an embryo that is less than forty days is not considered more than water. Its loss, while certainly affecting the parents, is negligible according to law. The discussion continues with one *Halakhist* declaring that the embryo even in a petri dish is considered a living being. He goes as far as to say that even Shabbat can be broken to save the life of this embryo. Yet, another *Halakhist* argues that the embryo outside the body is not a viable life because it could not in fact survive outside the womb. The embryo is not considered alive outside the womb according to the decision of this Responsa as well.

As to questions of medical experimentation,

> If in the name of "medicine" it is permitted to discard the excess embryos created during in vitro fertilization, then it is certainly

permitted to utilize these embryos for research intended to increase our life-saving scientific knowledge.

The *posek* does however add that the embryo should be treated with respect and honor no matter what happens. It is not a living being, but it is a "potential person."

A *sheelah* is asked whether the zygotes (fertilized ova) not implanted in the womb can be used for medical research, for another couple and what their status of "humanhood" may be. The *posek* begins by questioning the advisability of in vitro fertilization as a procedure in order to determine whether the questions themselves must be answered. In accordance with numerous earlier Reform Responsa, the *posek* sees "no reason to oppose the procedure or to issue any warning concerning it."[18] The rest of his *Teshuvah* deals with concerns for the zygote, what is vital to note here is that the procedure itself is accepted. Now, the decisors must turn to the ethics of how this procedure will be carried out in the most appropriate Jewish way.

Again, the argument is made that the status of an embryo at less then forty days is *maya b'alma*, "mere water." This is not a living, self-aware being. While Jewish law allows certain rights to the fetus as it grows in the womb, during these first days (and the zygote is certainly in this category) most authorities agree that it is not due the protection of all laws concerning living people. Yet, these are potential lives and

deserve a measure of honor because of their potential status. The argument is accepted that artificial reproductive technologies in general and in vitro fertilization in particular are procedures for healing. For this reason, the needs of the infertile parents must be remembered in making any decisions concerning the fertilized eggs. Additionally, since the procedure is one of *refuah*, healing, many actions that would not normally be undertaken can be fulfilled for the sake of healing. In other words, the abortion or destruction of excess zygotes in order to secure the survival of others is acceptable.

> The positive value of IVF as a medical therapy clearly justifies the necessary discarding of excess zygotes. Moreover, since IVF is a means by which Jews can fulfill the *mitzvah* of childbearing, for whose sake a number of important ritual prohibitions can be waived.

The *posek* concludes as well that destruction of excess embryos would certainly allow these embryos to be used for "research intended to increase our life-saving scientific knowledge." Though this is only suggested in the context of treating the embryo with respect and reverence due a potential person.[19]

As for the question of parenthood of a child created through in vitro fertilization, there is a great deal of disagreement. This Reform

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[18] CCAR Responsa Committee, "In Vitro Fertilization and the Status of the Embryo," *CCAR Responsa* 5757.2.
[19] ibid.

Responsa refers to the numerous and differing arguments of Orthodox halakhists, but it accepts none. It seems necessary to point out that the research has been done and attention paid to the Halakhic tradition. However, the posek declares,

> We learn two things from these observations. First, rabbinic scholars ought to acknowledge that traditional techniques of halakhic analysis, in particular the case method of reasoning by analogy are of limited usefulness in an area dominated by technological novelty and innovation. The tortuous logic of the arguments we have just cited demonstrates that there may simply be no precedents or source materials in talmudic literature that offer plausible guidance to us in making decisions about these contemporary scientific and medical issues. Second, given our positive attitude as liberal Jews toward modernity in general, it is surely appropriate to rely upon the finding of modern science, rather than upon tenuous analogies from traditional sources, in order to render what we must consider to be *scientific* judgements. To ask "who are this person's biological parents?" is to ask a scientific question whose answer is determined according to accepted scientific indicators; i.e. genetic testing. Hence, the biological parents of the child are those who donated the sperm and the egg from which he or she was fertilized.[20]

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[20] ibid.

While there is *halakhic* precedent, this Reform *teshuvah* emphasizes the independent decision making necessary for progressive Judaism.

A Reform Responsa asked on behalf of a childless couple discusses not just permissibility of in vitro fertilization, but whether it is obligatory for a Jewish couple to use these technologies in order to have a child. The process itself is physically and emotionally draining as well as quite expensive. While *periya ureviya* is the first of the *mitzvot*, is it truly incumbent upon Jews to use any and all means to fulfill this *mitzvah*?

The *posek* affirms that Reform Judaism does consider this *mitzvah* among "the highest values of Jewish life." In the discussion of this concept points are raised delineating just how vital raising children is in Judaism. According to the texts, "one who is without children is considered as though dead" (Nedarim 64b). A man whose wife is unable to conceive is entitled (even obligated) to divorce her (Yevamot 65a-b). Certainly, the writer articulates that procreation is a *mitzvah* incumbent on all Jews to the point that extreme measures can be taken to insure that children be born of every marriage.

Again, it is acknowledged that artificial reproductive technologies are acceptable methods of creating a child. They are considered therapeutic and understood as medicine. The questions now becomes. if a medical therapy is available to cure infertility, is it necessary that the remedy be used? Infertility is not life-threatening in itself, which would

seem to argue that it is not obligatory, however, life could be created if it were healed. According to tradition, any procedure that can cure should be used on a patient. This would seem to indicate, that the childless couple who raised this *shealah* would be obligated to pursue in vitro fertilization as a cure for their infertility despite the emotional, physical and monetary strains. While in vitro fertilization does meet with some success, it is not overwhelming. Less than one third of the attempts at live births per implementation of eggs is actually successful. This would make the procedure seem less than reliable. In this case, it would not be considered a necessary therapeutic procedure that infertile Jews are compelled to utilize.

The *posek* concludes that in vitro fertilization offers a good alternative for those who are childless, but notes that the tradition does not require individuals to use remedies whose successful outcome is not certain. According to this reasoning, the couple would not be obligated to use in vitro fertilization. "However we ourselves might draw that fateful balance between the possible blessings and the potential risks of in vitro fertilization, the dubious success of this procedure makes it difficult in the extreme for us to assert that a particular woman is somehow 'required' to undertake the procedure." Also raised, is the matter of cost. Since a live birth of a child conceived through in vitro fertilization can cost as much as a quarter million dollars, the expense itself is a significant hardship for many people. Requiring people to

submit to a costly and uncertain procedure is not in the nature of Jewish tradition.

> In cases such as this, we think it better to follow instead the counsel of compassion, of *rachmanut*; let us listen to the voice of those who suffer rather than insist they hearken to ours. . . .if this couple decides against in vitro fertilization, we must pay the highest deference to their freedom, human dignity, and unique experience.[21]

SURROGACY

The Responsa of the transplanted ovum deals with the maternity of a child born from the ova of one woman then carried to term by another. The *posek* questions whether this has been done or if the procedure is merely theoretical at this stage. The *posek* returns to the same traditional source as those used in the debate concerning artificial insemination, Hagigah 14b. Traditional literature does not give a clear precedent as to who is the *halakhic* mother of this child. Instead, the *posek* turns to traditional texts including Mishnah Kiddushin 3:12 to identify parentage though the status of the male parent. This is problematic in contemporary *Halakhic* Judaism due to the current emphasis on maternal transmission of Jewishness. Yet, Reform tradition can certainly adopt this perspective. The *posek* continues, however, that

the body in which the fetus matures does influence the child. For example, in conversion rituals of a pregnant woman, the unborn child is likewise converted along with his mother. This certainly demonstrates the relationship of kinship between the woman carrying the child and the fetus itself. However, the *posek* concludes that the "attitude of the law to normal marriage may serve as an analogy in this special situation."[22] Married parents impress their status upon the child. Therefore, the status of the sperm and ovum donors would be the overriding status of the child, not that of the woman carrying the child to term.

Conclusion

Progressive decisors are concerned for excessive and inappropriate use of these technologies. With the improved access to these technologies could there be a time when children are purchased wholesale from sperm and ovum banks? Freehof likens the possible assembly line process of reproduction to the horror of *ruchot* that the Kabbalists introduced.

The ongoing discoveries in medical science will continue to raise questions for those in the Reform and progressive Jewish movements. These questions must be met with confidence in tradition as well as the willingness to find new ways of answering modern questions. The

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[21] CCAR Responsa Committee "In Vitro Fertilization and the *Mitzvah* of Childbearing," *CCAR Responsa* 5758.3.

studies of half a century ago are not successful in breaking ground and leading progressive Judaism. New innovations will only occur through the utilization of traditional authorities seen through a modern secular lens that is not afraid to enter the conversation with other Jews searching for answers to a modern world.

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[22] Freehof, Solomon, New Reform Responsa, New York: HUC Press, 1980; 218.

CHAPTER 4

CONCLUSION

ORTHODOX AND NON-ORTHODOX JUDAISM: DO WE DISAGREE?

This final responsum sums up the core of modern Jewish thought on reproductive technologies. The *Teshuvah* itself and the numerous responses represent the cross-denominational discussions as well as the absence of movement-particular stands. What it fails to represent, to its credit, is the subtle inter-denominational struggle that is so apparent in many of the comments the *posekim* make in their *teshuvot*.

Rabbi David Golinkin of the Conservative movement was asked whether a single Jewish woman who wants to be a mother is *halakhically* permitted to conceive a child through artificial insemination by donor. Golinkin's response lays out the numerous reasons that Judaism would not allow this procedure for an unmarried woman.[1]

Golinkin argues that *halakhah* forbids donor insemination for a single woman because of *zera l'vatalah*. Because the *mitzvah* to be fruitful and multiply is incumbent upon the man and he has no connection to the child, she would be encouraging this transgression. It is forbidden by Jewish law to allow another to sin. Also, since the *mitzvah* is not incumbent on women, she gains nothing *halakhically* from being artificially inseminated. Additionally, it is important in Judaism to know one's lineage. With donor insemination this would be impossible

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[1] Golinkin, David, Responsa of the *Va'ad Halacha* of the Rabbinical Assembly of Israel, 3, (5748-9): 83-9.

due to confidentiality laws. While some authorities do permit donor insemination if the donor is not Jewish, the risk of incest for the child is too severe in Israel to allow this. And furthermore, why would a Jewish woman in Israel choose to bear the child of a non-Jew?

Golinkin also argues against this on ethical, conceptual and social reasons. Because the Jewish family has been the base of the Jewish people since Abraham, bringing a child into a single parent family would go against the tradition. In these times when many children suffer from broken homes, it seems ludicrous to bring a child into the world in order to raise him or her in a fractured family. Judaism values the needs of community over the needs of the individual. While donor insemination may help this woman now, Judaism will suffer from it in the future. Marriage is not only to fulfill the mitzvah of *pru orvu*; it is also to sanctify sexual relations, family and the community in general. By not marrying, this woman is rejecting primary tenets of Judaism.

Golinkin suggests that the time and money that she would spend on donor insemination be put into dating services. Only after a significant attempt at marrying a man with whom to have a child, may she look at adoption as a possible option. The *posek* finishes his *teshuvah* with a blessing for this woman: "May it be God's will that she marry in the near future and merit the triple blessing of *kiddushin*: holiness, children and love, goodness, peace and companionship."

This responsa was reprinted in *Moment* magazine where it became the source of a debate on the merit of single motherhood and donor insemination. In a letter to the editor titled, "An Orthodox Rabbi Says 'Yes' to Artificial Insemination in Response to a Conservative Rabbi's 'No,'" Rabbi Barry Freundel asks, "While it is true that procreation in marriage is preferable, the matchmaking solution won't help a woman whose biological clock is running out. Is there room for her needs?" This Orthodox rabbi places the value of *rachmanut* before the many textual sources brought by Golinkin. But he does not ignore the questions the tradition does not answer. While *pru oivu* and marriage are not women's obligations, they are still values of the tradition. He asks whether the value of marriage or procreation should supersede the other. For this woman, clearly, procreation is of importance. Rabbi Freundel concludes that her needs and the blessing of modern technologies are in accord and she should be allowed to be artificially inseminated by a donor.[2]

What this Responsa so clearly demonstrates is that the decisions concerning reproductive technologies are not limited by the streams of Judaism to which the decisors belong. Rather, the overriding values of Judaism—healing the sick, compassion for those in pain, *kiddush ha'shem, pru oivu*—all play a part in the decisions of these *posekim*.

Perhaps, it is more telling to look at the individuals who write these *Teshuvot*. Indeed, many of the Orthodox *halakhists* do suggest that men and women wanting to use reproductive technologies consult with their own rabbi—*carte blanche* for allowing these procedures on a case by case basis.

THE ETHICS OF REPRODUCTIVE TECHNOLOGIES

"We place so *much* emphasis in the Jewish world on how to raise children. Sometimes we forget how hard it is to have them in the first place. We forget about the miracle of life...and the devastating pain when life follows not our dreams and hopes and plans, but its own.[3]

In the past decade, innovative reproductive technologies have reached a new threshold. With the development of cloning technology, ectogenesis (maintaining the fetus outside the body) and parthenogenesis (stimulating an unfertilized egg to reproduce through mechanical or chemical means) only a few research years away, the ethical questions are themselves metamorphisizing and becoming all the more pertinent and timely. As our technology expands at an exponential rate, it is

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[2] Golinkin, David, "Artificial Insemination for an Unmarried Woman?," *Moment* 15:6 (December 1990): 18-19 and "Letters to the Editor", *Moment* 15:10 (April 1991): 50-52.

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incumbent upon us to reflect the speedy growth in the ethics of using these procedures for procreation.

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