

EH 1:3:2020

## **Choosing Parenthood: ART, Adoption and the Single Parent**

by Rabbi Susan Grossman

*Approved on May 13, 2020, by a vote of 24-0-1. Voting in favor: Rabbis Aaron Alexander, Jaymee Alpert, Pamela Barmash, David Booth, Suzanne Brody, Nate Crane, Elliot Dorff, David Fine, Susan Grossman, Judith Hauptman, Joshua Heller, David Hoffman, Jeremy Kalmanofsky, Steven Kane, Amy Levin, Daniel Nevins, Micah Peltz, Avram Reisner, Robert Scheinberg, David Schuck, Deborah Silver, Ariel Stofenmacher, Iscah Waldman, and Ellen Wolintz-Fields. Voting Against: none. Abstaining: Rabbi Jan Kaufman.*

**Sheilah:** May a single, unmarried, individual who wants to choose to become a parent through adoption and/or the use of artificial reproductive technologies (ART) do so under Jewish law?

**Teshuvah:**

**Introduction:**

About fifteen years ago, a congregant approached me to perform a baby naming for her newborn daughter. I knew the woman. She had grown up in the congregation. She was single, had despaired of ever getting married, and had chosen to utilize ART to have a child of her own and raise that child on her own. She wanted to welcome her child into the covenant within her congregational home. The next Sabbath, with the proud grandparents in attendance, the woman carried her daughter up to the bimah for her aliyah, following which I blessed her and her child and announced the child's name. After services, I was approached by several older members who were distressed that the congregation had "legitimized" a child born "out of wedlock." It was irrelevant to them that they knew the woman since she had been a child and were otherwise sympathetic to her. It was also irrelevant to them that the child had been the product of medical intervention rather than what they might have considered promiscuity.

Their response, articulated in the early 21<sup>st</sup> century, reflected centuries of halakhic and social assumptions about marriage as a prerequisite to sexual activity and childbearing that stigmatized single mothers and the children born to them, as discussed in the below section, "Sex and Singles." The implications of these assumptions are discussed in the below section, "The Obligations to Marry and Have Children," exploring whether the obligations (i.e., commandments, *mitzvot*) to marry and procreate are necessarily interdependent commandments, the fulfillment of one is necessarily dependent on fulfilling the other, or whether they are separate commandments, either of which can be fulfilled under certain conditions even if the other commandment cannot be fulfilled in a timely or reasonable manner.

*The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.*

The desire for children is an ancient and time honored one in Judaism. Biblical and rabbinic sources acknowledge the pain both childless men and women experience and set precedents to facilitate their having children, as discussed in the below section “The Desire for Children.” But until the advent of modern medical treatments for infertility, there were few alternatives for having children outside of natural birth besides adoption or surrogacy.<sup>1</sup> Except regarding a levirate widow,<sup>2</sup> even the idea of someone wanting to birth and raise a child outside of marriage was probably inconceivable to the ancients.

Over the last few decades, however, both social convention and medical technology have changed, perhaps more so than in all of previous history.

Socially, the profile of the average family in Western and liberal democratic societies is changing with single parenthood becoming more common and accepted, as will be discussed in the below section, “What About the Kids?” Concurrently, an individual can now not only survive but thrive without the economic support the family unit traditionally provided, as discussed in the below section, “Demographics, Biology, and Other Factors.” With such changes has come greater choice and greater difficulty in finding a compatible spouse. Consequently, growing numbers of Jewish women and men remain single even as they confront the ticking biological clock that adds urgency to their deep desire to build a Jewish home with children of their own.

Medically, doctors can now bring to fruition healthy babies for those who previously could not have biological children of their own on their own. The Jewish community generally has embraced adoption and assisted reproductive technologies (ART) aimed at improving fertility and bringing to fruition healthy babies. Adoption and such medical reproduction interventions as artificial insemination by the husband (AIH), artificial insemination by donor (AID), in vitro fertilization (IVF) and other assisted reproductive technologies, defined as fertility treatments in which the eggs and embryos are handled (including IVF), and the use of gestational carriers (surrogacy) have been widely accepted in North America and Israel, with some caveats, for use by heterosexual couples who have not been able to have children naturally. These technologies

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<sup>1</sup> E.g., Gen. 30:79-13. That Leah is to be considered these children’s legal mother is indicated by Leah naming the children birthed by her handmaid Zilpah, who Leah had given as a concubine to Jacob. Such expectations of concubinage and what we today might refer to as surrogacy are reflected in ancient Mesopotamian law. See, e.g., the Code of Hammurabi, CH § 144 and §145, in which a priestess provides her husband with a slave to impregnate. Cf. Pamela Barmash, *The Laws of Hammurabi: At the Confluence of Royal and Scribal Traditions* (Oxford University Press, forthcoming 2020). Any children are considered her legal offspring and must be claimed as legitimate heirs by the husband. While contemporary readers understandably may be uncomfortable with the use -- or, from our perspective, abuse -- of the handmaidens within the patriarchal family structure of the Genesis narratives, efforts to equate the handmaids with Leah and Rachel as mothers of Israel are not reflective of the practices of concubinage or what we might call surrogacy in the Ancient Near East (ANE) nor of more modern treatments of surrogacy that often still reflect significant differences in class status between the carrier and adoptive mother. See n. 3 below for the relevant CJLS *teshuvot* on the subject.

<sup>2</sup> The biblical stories of Tamar (Gen. 38) and Ruth (Ruth 3:1-13, 4:13) are unconcerned with either woman's possible desire for motherhood beyond efforts to secure their place in society with a child of their deceased husband's line. For a fuller discussion of the biblical and rabbinic levirate laws, see Dvora Weisberg, *Levirate Marriage and the Family in Ancient Judaism* (Lebanon, NH: Brandeis University Press, 2009).

have been responsible for helping countless couples realize the blessings of parenthood. (However, singles and gay couples may or may not have equal access to these technologies, depending upon local law, as discussed briefly below.)

The purpose of this *teshuvah* is not to review previous *teshuvot* permitting adoption and the use of fertility treatments nor repeat their findings on the various related halakhic and ethical issues with which this author largely agrees, including that the mother's Jewish status determines the Jewish status of any child birthed by her, and ancillary issues of the chance of biological siblings inadvertently marrying, the status of adopted children vis a vis their biological and adoptive parents, inheritance, etc.<sup>3</sup>

The question this *teshuvah* addresses is whether singles may *intentionally* seek to become parents through adoption or by availing themselves of artificial reproductive technologies under Jewish law. (The civil law issues related to singles availing themselves of adoption and the use of reproductive technologies to have a child are outside the scope of this *teshuvah*. Relevant law

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<sup>3</sup> Based on the Fertility Clinic Success Rate and Certification Act of 1992, the Centers for Disease Control and Prevention (CDC) define ART as all fertility treatments in which the egg and embryo are handled. The halakhic issues surrounding ART, adoption, and surrogacy have been dealt with by the Committee on Jewish Law and Standards of the Conservative Movement (CJLS) in the following *teshuvot* permitting adoption, surrogacy, the use of ART and their related issues: David Lincoln, "Surrogate Motherhood," EH 1:3. 1984; Rabbi Avram Reisner, "On the Conversion of Adopted and Patrilineal Children," YD 268:7.1988; Rabbi Elliot Dorff, "Artificial Insemination, Egg Donation and Adoption," EH 1:3.1994; Rabbi Aaron Mackler, "In Vitro Fertilization," EH 1:3.1995; Rabbi Mackler, "Maternal Identity and the Religious Status of Children Born to a Surrogate Mother," YD 268:6.1997; Rabbis Mackler and Elie Spitz, "On the Use of Birth Surrogates," EH 1:3.1997a; Rabbi Spitz, "On the Use of Birth Surrogates," EH 1:3.1997b; Rabbi Mackler, "Surrogate Parenting," EH 1:3.1997c; Rabbi Spitz, "Mamzerut," EH 4.2000a; Rabbi Daniel S. Nevins, "A Concurring Opinion Regarding Mamzerut," EH 4.2000b; Rabbis Kassel Abelson and Dorff, "Mitzvah Children," Even HaEzer 1:5.2007; Rabbi Barry Leff, "May a Convert Use a Name Other than 'Ploni ben/bat Avraham Avinu?'" YD 269:1.2010a, with Concurring and Dissenting Opinions by Rabbis Dorff, Miriam Berkowitz and Gail Labovitz, YD 269:1.2010b-d; and Rabbi Morris Shapiro, "Artificial Insemination in Jewish Law" (CJLS: August, 1978), cited by Rabbi Dorff, *Matters of Life and Death: A Jewish Approach to Modern Medical Ethics* (Phila., PA: JPS, 1998), 52, 344n50, cf., R. Dorff's overall discussion of ART on 37-111. See also Rabbi Mackler, "An Expanded Partnership? In vitro Fertilization and Jewish Ethics," *Journal of Religious Ethics* 25:2 (Fall, 1997): 277-304. In addition, see Rabbi Michael Gold, *And Hannah Wept: Infertility Adoption and the Jewish Couple* (Philadelphia: JPS, 1988, reprinted 1994): esp. 120-127. R. David Golinkin specifically permits adoption by a single parent in his *teshuvah* prohibiting singles from utilizing ART to become parents (a decision with which this *teshuvah* disagrees). See his "Teshuvah binyan hazaraah mlachotit," EH 1 Birkey Yosef, subparag. 14, Vaad Halakhah, Israel Rabbinical Assembly (English summary: "Artificial Insemination for a Single Woman," [http://www.responsafortoday.com/engsums/3\\_7.htm](http://www.responsafortoday.com/engsums/3_7.htm). (Accessed May 8, 2017). All the above cited CJLS *teshuvot* are available at <https://www.rabbinicalassembly.org/jewish-law/committee-jewish-law-and-standards>. For a review of Orthodox positions on IVF, see David Bleich, "Survey of Recent Halakhic Periodical Literature: In Vitro Fertilization: Questions of Maternal Identity and Conversion," *Tradition* 25:4 (Summer, 1991): 82-102, esp. 96n8 on paternal status. For a more recent review of the halakhic permissibility of various methods of ART and halakhic status of genetic, biological (gestational) and social parents from the perspective of such current Orthodox thinkers as Rabbis David Bleich, Michael Brodye, and Moshe Tendler (all of whom define the sperm donor as the halakhic father), see Benjamin J. Samuels, *How Advances in Science Change Jewish Law and Ethics: Assisted Reproductive Technologies and the Redefinition of Parenthood* (PhD DSS, Yeshiva University, 2017), esp. 162-320, 400-407.

varies by state and country. Individuals contemplating the possibility of becoming a single parent should consult legal counsel specializing in adoption and/or fertility law, as appropriate.)<sup>4</sup>

For the purpose of this teshuvah, the term “single” refers to any unmarried individual regardless of sexual orientation or gender identity. The Conservative Movement supports, recognizes and provides ceremonies to sanctify same sex marriages. Individuals in such relationships will not be categorized as singles for the purposes of this *teshuvah*. However, some issues that will be dealt with below may be applicable for same sex couples, e.g., naming a child in regard to Hebrew patronymic (father's name), matronymic (mother's name) and tribal identity (when the child inherits the status of *cohen* or *levi*).<sup>5</sup>

Biblical and rabbinic literature is heteronormative and androcentric.<sup>6</sup> In other words, the very material from which we draw our guidance and inspiration reflects the heterosexual and patriarchal assumptions about gender identity, roles, and norms current in the societal context in which such material was produced and transmitted. Understanding the societal context for such perspectives helps us understand how best to comprehend the applicability of these sources to modern halakhic questions, especially when such ancient perspectives do not reflect our current thinking or social context. Thankfully, Western and liberal democracies have generally advanced to the point that an individual's status, generally, is no longer dependent upon fecundity or marital status, even if society has remained largely heteronormative. As Jews, we recognize that our worth, and that of every human being, is dependent not upon the conditions of our lives but upon being created in God's image (*b'tzelem Elohim*). Such worth is independent of our physical capability, social achievement, marital status, or racial, religious, ethnic, or gender identity or sexual orientation. We do not have to be married or have children to be beloved of God or worthy in God's eyes and, therefore, in the eyes of the modern Jewish community or wider society.<sup>7</sup> Jewish tradition long has recognized that parenthood is not right or possible for

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<sup>4</sup> For a recent and comprehensive survey of state and international law on ART, including surrogacy, see Alex Finkelstein, Sarah Mac Dougall, Angela Kintominas, Anya Olsen, *Surrogacy Law and Policy in the U.S.* (Columbia Law School Sexuality & Gender Law Clinic: 2016).

[http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia\\_sexuality\\_and\\_gender\\_law\\_clinic\\_-\\_surrogacy\\_law\\_and\\_policy\\_report\\_-\\_june\\_2016.pdf](http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf).

(Accessed on July 31, 2017.) Since July, 2018, Israeli law grants single women access to surrogacy but denies surrogacy rights to single men and same sex couples. See Jeremy Sharon, Jonathan Weber Rosen, “Gay Couples Denied Right to Surrogacy in New Law,” *Jerusalem Post* July 18, 2018. <https://www.jpost.com/Israel-News/Surrogacy-bill-passes-Netanyahu-flip-flops-on-homosexual-surrogacy-562810>. (Accessed April 22, 2019.) Regarding the complicated ethical concerns regarding the status and well-being of surrogates, particularly from developing countries, see Patricia Fronek, “Current perspectives on the ethics of selling international surrogacy support services,” *Medicolegal and Bioethics*, 2018:8: 11–20 (accessed Jan. 2020); and Claire Fenton-Glynn, “Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements,” *Medical Law Review (Oxford)*, 24:1 (Winter 2016): 59–75, <https://doi.org/10.1093/medlaw/fwv044> (accessed Jan. 2020).

<sup>5</sup> On Conservative Movement policies permitting same sex marriage, see Rabbis Dorff, Nevins and Reisner, “Homosexuality, Human Dignity, and Halakhah: A Combined Responsum,” EH.24. 2006b and “Rituals and Documents of Marriage and Divorce for Same Sex Couples,” EH 24.2012a.

<sup>6</sup> See, e.g., Michael Satlow, *Tasting the Dish: Rabbinic Rhetorics of Sexuality* (Atlanta, GA: Scholars Press, 1995), esp. 12-13.

<sup>7</sup> See, e.g., Elliot Dorff, “Artificial Insemination, Egg Donation and Adoption,” 17.

everyone and has even suggested alternatives to parenting for fulfilling our obligation of *pru urvu*, procreation, or repopulating the world, specifically by teaching Torah to children and by raising and providing financial support, and a Jewish education, to children.<sup>8</sup> Therefore, nothing in this *teshuvah* should be misinterpreted to imply any opprobrium on singles who choose *not* to pursue parenthood. There is absolutely no halakhic obligation for a single to choose parenthood regardless of whether or not the individual would have preferred to have children.<sup>9</sup>

Nevertheless, the desire to have children is deeply rooted in Jewish values and in the hearts of many. This is no less true for those who have not yet found an acceptable partner to marry.<sup>10</sup>

For ease of discussion within the body of this *teshuvah*, all fertility treatments will be referred to collectively as ART and all permutations of utilizing a gestational carrier will be referred to collectively as surrogacy except where specific distinctions are halakhically necessary for either category of treatment.

### **The Obligations to Marry and Have Children:**

Modern families come in all permutations: heterosexual, homosexual, blended, single parent, multi-generational, etc. In the rabbinic mind, the ideal family unit was much more circumscribed: a marriage between a man and a woman resulting in children.<sup>11</sup> Both biblical narratives and Talmudic case law deal with blended families and with women who would be described today as single parents. Where such single mothers appear in our ancient texts, they are often identified as, or assumed to be, widows or divorcees who have had their children within

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<sup>8</sup> Quoting Prov. 11:30, *The fruit of the righteous [the Torah] is a tree of life...*,” Tanhuma Noah 2:1 equates learning Torah and good works with fulfilling the commandment to be fruitful. Other sources equate teaching Torah (i.e., Jewishly educating or providing for the Jewish education of children) or caring for a child’s needs with having children of one’s own, e.g., b. San. 19b. See Rabbi Uri Cohen, of Nishmat, the Jeanie Shottenstein Center for Advanced Torah Study for Women, “Childless or Childfree,” for a thoughtful presentation of modern Orthodox commentators who write about viewing childlessness in a positive light as an opportunity to focus on other *mitzvot* like tzedakah, supporting Jewish education, or *keruv* (Jewish outreach). <https://www.nishmat.net/torah/view.asp?id=42>. (Accessed July 12, 2017.)

<sup>9</sup> For an eloquent exploration of the pain of experiencing childlessness from men’s point of view, and the choice to remain childless despite such pain, see Elliot Jager, *The Pater: My Father, My Judaism, My Childlessness* (London, England: Toby Press 2015).

<sup>10</sup> See, e.g., Rabbi Lisa Gelber, “A Singular Path to Parenthood,” *The Times of Israel* (March 21, 2014) <http://blogs.timesofisrael.com/a-singular-journey-to-parenthood/>. (Accessed July 20, 2017.)

<sup>11</sup> For a summary of the Jewish laws of marriage and divorce, see, e.g., Moses Mielziner, *Jewish Law of Marriage and Divorce in Ancient and Modern Times and Its Relation to the Law of the State* (Cincinnati: Bloch, 1984) and Michael Satlow *Jewish Marriage in Antiquity* (Princeton, NJ: Princeton University, 2001). For a modern feminist critique of marriage as acquisition, see Rabbi Judith Hauptman, *Rereading the Rabbis* (Berkeley, CA: Westview Press, 1998) and, especially, Rabbi Gail Labovitz, *Marriage and Metaphor: Constructions of Gender in Rabbinic Literature* (Lanham, MA: Lexington Books, 2009). Regarding Jewish law and same sex marriage, see Rabbis Dorff, Reisner, and Nevins, cited above, n. 5.

wedlock.<sup>12</sup> The rabbis considered marriage as the only legitimate context within which to engage in sexual intimacy. (See the discussion in the below section “Sex and Singles” about single mothers who bear children out of wedlock.)

To the rabbis, two of the most important purposes of marriage are to enable a man to fulfill the commandments to reproduce (*pru urvu, be fruitful and multiply*)<sup>13</sup> and to find companionship,<sup>14</sup> both of which assume sexual intimacy between husband and wife. However, the rabbis placed different emphases on these two aspects of marriage.

Although legally constructed as the acquisition by a man of a woman,<sup>15</sup> marriage is defined by the rabbis as *kiddushin*, a word derived from the Hebrew root *k-d-sh*, holy, thus evoking the idea that sanctity is vested within the matrimonial bond. As R. Simlai is quoted as saying in *Bereishit Rabbah*,

לא איש בלא אשה ולא אשה בלא איש ולא שניהם בלא שכינה

“No man without a wife, neither a woman without a husband, nor both of them without God’s Presence.”<sup>16</sup>

In other words, marriage is a holy relationship, a partnership in which God's very presence dwells.

At the heart of that relationship lies the sacred potential to create new life. As the Talmud phrases it:

<sup>12</sup> E.g., 2 Kings 4:1-7 (Elisha helps a widow avoid selling her children into slavery), b. BB11a (a mother of seven seeks charity).

<sup>13</sup> Although God first commands humanity to be fruitful and multiply in Gen. 1:28, the source of the actual command is Gen. 9:7, according to Rashi in his comments on Gen. 9:7, b. Ket. 51. See the discussion in David Feldman, *Birth Control in Jewish Law*, 46ff and 46n2.

<sup>14</sup> Gen 2:18-24 states that it is not good that man should be alone. The rabbis understood Ex. 21:10, requiring a husband to fulfill the sexual needs of his wife (*ona'ah*) even when he takes a second wife, to teach that sexual intimacy in a marriage is a separate commandment from procreation. Jewish law thus permits sexual relations during pregnancy, after menopause or during other times when a woman cannot otherwise conceive. E.g., see Tos. and Mordecai ch. 1 Yevamot on Shulhan Arukh Even HaEzer 23:5. For a contemporary discussion of how Jewish values can inform intimacy within relationships, see Rabbi Dorff, *This is My Beloved, This is My Friend: A Rabbinic Letter on Intimate Relationships* (NY: Rabbinical Assembly, 1996), esp. pp. 13ff. Available at <https://www.rabbinicalassembly.org/sites/default/files/assets/public/publications/this-is-my-beloved.pdf>. (Accessed Aug. 3, 2017.)

<sup>15</sup> For a discussion of the complexities of the rabbinic perspectives of marriage as *kiddushin*, see Rabbi Gail Labovitz, *Marriage and Metaphor*, esp. 29-62. Rabbinic material was composed, transmitted and largely addressed to men and thus reflects their perspective. The patriarchal perspective of marriage is evident in such biblical verses as Eccl. 9:9, "Enjoy happiness with the woman you love..." and such rabbinic statements as that found on b. Yev 63a, "R. Eleazar said, 'Any man who has no wife is not a man for it is written, *male and female God created them and when they were created, God blessed them and called them Adam.*' (Gen 5:2)."

<sup>16</sup> Bereishit Rabbah 8:9.

תנו רבנן: שלשה שותפין יש באדם, הקב"ה ואביו ואמו. אביו מזריע הלובן, שממנו עצמות וגידים וצפרניים, ומוח שבראשו, ולובן שבעין. אמו מזרעת אודם, שממנו עור ובשר ושערות, ושחור שבעין. והקב"ה נותן בו רוח ונשמה. וקלסתר פנים, וראיית העין, ושמיעת האוזן, ודבור פה, והלוחך רגלים, ובינה והשכל.

Our Rabbis taught: "There are three partners in a human, the Holy One, his father and his mother. His father supplies the semen of the white substance out of which are formed the child's bones, sinews, nails, the brain in his head and the white in his eye; his mother supplies the semen of the red substance out of which is formed his skin, flesh, hair, blood and the black of his eye; and the Holy One, gives him the spirit and the breath, beauty of features, eyesight, the power of hearing and the ability to speak and to walk, understanding and discernment."<sup>17</sup>

That God is an intimate partner in the creation of life with both the man and the woman emphasizes the intense sacred mystery and responsibility of procreation.

To the rabbinic mind, fulfilling the command to procreate represents the very purpose of all creation. Marriage is such an important prerequisite to procreation that the rabbis compel a master to free a male half slave so as to permit him to marry in order to procreate.<sup>18</sup>

The rabbis allowed some exceptions to the requirement to marry. Maimonides (Rambam), for example, permits a man to remain unmarried in order to focus all his energy on Torah study, as did Ben Azzai in the Talmud, but only on the condition that the individual would be able to avoid all immodest thoughts and sexual temptations.<sup>19</sup>

R. Yosef Karo codifies the obligation of marriage for the purpose of procreation in the Shulhan Arukh,

חַיֵּב כָּל אָדָם לְשֵׂא אִשָּׁה כְּדֵי לְפָרוֹת וּלְרַבּוֹת. וְכָל מִי שֶׁאֵינוֹ עוֹסֵק בְּפָרְיָהּ וּרְבִיָּהּ כְּאֵלֵּי שׁוֹפֵךְ דָּמִים, וּמְמַעֵט אֶת הַדְּמוּת, וְגוֹרֵם לְשִׁכְנוּתָהּ שֶׁתִּסְתַּלַּק מִיִּשְׂרָאֵל. הִגָּה: וְכָל מִי שֶׁאֵין לוֹ אִשָּׁה שְׂרוּי בְּלֵא בְּרַכָּה בְּלֵא תוֹרָה כו', וְלֹא נִקְרָא אָדָם. וְכֵיּוֹן שֶׁנֶּשְׂאָה אִשָּׁה עֲבוּדָתוֹ מִפְּקָדָיִם, שֶׁנֶּאֱמַר: אִשָּׁה מְצָא טוֹב וְנִפְקַד רְצוֹן מֵה"

Every man is obligated to marry a woman in order to be fruitful, and to multiply and anyone who doesn't engage in being fruitful and multiplying is as if he spills blood, and lessens the appearance, and causes the Divine Presence to depart from Israel. *Rema*: He who does not marry is not allowed to make a blessing or to engage in Torah, etc. and he is not called a man, and when he marries a woman, his sins are cast into doubt, as it is

<sup>17</sup> b. Nid. 31a. On the limitations of the rabbinic understanding of biological processes and its applicability today, see Julius Preuss, transl. by Fred Rosner, *Biblical and Talmudic Medicine* (Lanham, MD: Rowman and Littlefield, 1993; reprinted by Jason Aronson: 2004).

<sup>18</sup> b. Pes. 88b. (A slave could only marry another slave; a free person another free person. A half slave was prohibited from marrying either a slave or a free person and thus unable to marry anyone.) See also b. Git 41b.

<sup>19</sup> Rambam, *Hilkhot Ishut* 15:3. See b. Kid. 29a, recording a disagreement between Babylonian and Palestinian sages over whether one must study first or marry first. Cf., the comments of Rashi and Tosafot, ad. loc.

said: *One who has found a wife has found goodness and obtains favor in the eyes of God (Proverbs 18:22).*<sup>20</sup>

The obligation of *pru urvu*, procreation, and the role of marriage as the only legitimate avenue to fulfill that obligation, is so important that a man can be forced to take a wife upon reaching the age of 20 if he does not have a good excuse to wait, such as pursuing Torah learning.<sup>21</sup> The above source in the Shulhan Arukh effectively summarizes a trend found throughout rabbinic literature that prioritizes procreation as the purpose of marriage.<sup>22</sup> Although the woman, herself, has no obligation to procreate according to the rabbis,<sup>23</sup> she is obligated to facilitate her

<sup>20</sup> Shulhan Arukh Even HaEzer 1:1, almost citing verbatim b. Yev. 63b. While women were considered exempt from the obligation to reproduce (see below), the rabbis also assumed women so desired to be married that they would be satisfied with any type of husband, e.g., see b. Ket. 75a, cf. b. Ket. 86a. Given the financial vulnerability faced by widows and divorcees in a pre-modern society of fairly rigid gender roles, such an assumption may not have been entirely misplaced. E.g., b. Git. 35a, b. Ket. 98a.

<sup>21</sup> Shulhan Arukh Even HaEzer 1:3. Although a sperm donor can be halakhically considered the father of the child born from that donation, most poskim do not consider children born with the assistance of ART as fulfilling the donor's obligation to *pru urvu*. Thus any obligation an acknowledged father has to support his child born out of wedlock derives not from the obligations of *pru urvu* but from the mitzvah of *tzedakah*. However, there are poskim who argue that when the husband donates sperm specifically to impregnate his wife, he does fulfill *pru urvu*. For a review of the literature see Dorff, "Artificial Insemination," and citations therein, esp. 473n31; other CJLS teshuvot cited in n 3 above, infra; and Baruch Finkelstein, Michal Finkelstein *The Third Key: The Jewish Couple's Guide to Fertility* (Nanuet, NY: Feldheim, 2000), esp. 43-4, and n26-29. Cf., Rabbanit Dr. Michal Tikochinsky, "May A Single Man Fulfill The Mitzvah Of Pru U'rvu (procreation)?" *The Lindenbaum Center for Halakhic Studies at Yeshivat Chovevei Torah*. <https://library.yctorah.org/lindenbaum/may-a-single-man-fulfill-the-mitzvah-of-pru-urvu-english/>. (Accessed Feb.12, 2020.)

<sup>22</sup> E.g., b. Yev. 62b-63b. See also notes. 18-20 above.

<sup>23</sup> See M. Yev. 6:6 and b. Yev. 65b-66a. In Gen. 1:28, God commands both the male and the female to be fruitful and multiply. Although M. Yev. 6:6 includes the opinion of R. Yohanan b. Beroka that the commandment is incumbent upon both men and women, the sugyah rejects that opinion and determinatively applies the commandment only to men. The sugyah offers several textual proofs to explain women's exemption, ultimately relying on examples of rabbinic case law and logic to prove that the command does not apply to women. Perhaps the most pertinent explanation for women's exemption is that the Torah does not obligate anyone to endanger oneself and since pregnancy and birth are life threatening experiences for women, women cannot be obligated to a commandment that would endanger them. R. Meir Simha of Drinsk (19- 20 C) represents this approach: "The Torah did not burden a Jew with an obligation that he (sic) is physically unable to handle...Therefore regarding women, who are endangered during pregnancy and childbirth, the Torah did not obligate them to procreate." *Meshekh Hohmah* on Gen. 9:7, transl. by Danya Ruttenberg, "Jewish Sexual Ethics," in Rabbi Dorff and Jonathan Crance, ed., *The Oxford Handbook of Jewish Ethics and Morality* (NY, NY: Oxford University Press, 2013): 392. On the rabbinic position that life supersedes almost all other commandments, see, e.g., b. Yoma 85a-b, b. San. 74a-b. Pregnancy and birth continue to present a danger (*sakanah*) for women. According to the CDC's most recent figures, the percentage of women who die from pregnancy or delivery complications has actually risen from 7.2 deaths per 100,000 in 1989 to 15.9 death in 2012, the last year for which national statistics are available. <http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html>. (Accessed on July 12, 2016.) The exemption of women from the obligation of procreation, therefore, continues to remain pertinent and in force under *halakhah*. Although statistics are not yet available to track the impact of recent legislation that restricts women's access to gynecological and neonatal care, such legislative changes may likely result in increased maternal mortality due to increased incidents of serious complications. CJLS approved, in 2014, the *teshuvah* by Rabbi Pamela Barmash ("Women and Mitzvot" YD 246:6.2014) that determined that "women and men are equally obligated to observe the *mitzvot*, with the exception of those *mitzvot* that are determined by sexual anatomy," i.e., including *pru urvu* for women, which would require undergoing the physical dangers of pregnancy. This *teshuvah* does not in any way seek to change or limit women's exemption from the obligation of procreation nor its application in decisions



husband's fulfillment of that obligation. Women who refused to cohabit with their husbands could be labeled rebellious and be divorced without the benefit of receiving their ketubah.<sup>24</sup> In general, men were prohibited from marrying a woman who could not bear children if they had not already fulfilled their obligation to have children.<sup>25</sup> A woman who had already been unable to bear with two previous husbands could not marry a third unless the man had already fulfilled the commandment of having children.<sup>26</sup>

While the rabbis recognized that the husband's fertility could be at fault when facing childlessness and believed the wife when reporting on the husband's lack of potency,<sup>27</sup> the focus on reproduction from a male-centric perspective is perhaps most starkly represented in the rabbinic requirement that a man must divorce his wife if she remains childless for 10 years. So serious is this commandment that the man who refused to divorce a childless wife could be compelled to do so.<sup>28</sup>

Thankfully, the obligation to divorce a childless woman was already rejected by the time of the Rema.<sup>29</sup> In recent times, divorce is seldom turned to as the solution to infertility, even in Orthodox communities, due to a combination of medical advances in the field of fertility treatment, wider access to and acceptance of adoption, and a paradigm shift from seeing infertility as a social stigma against a woman to a burden of tremendous emotional pain for both

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permitting birth control and abortion under Jewish law. See, David Feldman, *Birth Control in Jewish Law* (NY: NYU Press, 1968 and Northvale, NJ: Jason Aaronson, 1998), 53-56.

<sup>24</sup> M. Ket. 5:7, b. Ket. 63a-b. Men were expected to fulfill the conjugal needs of their wives as well as provide for their physical needs (in terms of food, clothing and health care) and could be brought up on charges for failing to fulfill their obligations to their wives, e.g., M. Ket. 5:7. While the Talmud includes several exhortations that a man not force himself sexually upon his wife (Eruvin 100b), at least one rabbinic court case indicates that the application of rabbinic law effectively allowed a husband to do whatever he sexually liked to do with his wife, even over her objections, e.g., b. Ned. 20b.

<sup>25</sup> E.g., b. Yev. 61b.

<sup>26</sup> E.g., b. Yev. 65a.

<sup>27</sup> E.g., b. Yev. 65b.

<sup>28</sup> According to the Talmud, unless a man had children by another marriage, he was obligated to divorce a woman, even against her will, if she failed to produce children for him within 10 years of marriage, ostensibly because, even in a polygamous society, she undermined the man's ability to fulfill the biblical obligation of reproduction (*pru urvu*). E.g., b. Ket. 100b, 101b. The childless woman would be divorced without her ketubah or rights to maintenance unless the husband knew she was childless before marrying her. Cf. b. BM 67a. On compelling a man to divorce his barren wife, see, e.g., b. Ket. 77a, on which R. Tahlifa ben Abimi is cited as arguing that a man be compelled to divorce his wife after 10 years of childlessness. See the Ran ad. loc. (*d.h. ein*). Karo requires that the man be beaten with a stick, if necessary, to force him to comply (Shulhan Arukh Even HaEzer 154:10). Talmudic commentators and codists debate whether a man must be forced to divorce a wife who has not produced offspring within 10 years of their marriage. On b. Yev. 65a, Rava permits a man to keep a childless wife and take a second with whom to fulfill the *mitzvah* as long as he can afford to support both women. Referring to this sugyah in his comments on b. Yev. 21a, the Rif quotes Rabbeinu Gershon that a man can take a second wife and does not send away the first wife for the sake of the *mitzvah* of procreation. Cf. b. Yev. 65a, where R. Ammi rules that if a man chooses to test his potency with another woman, he must divorce his first wife and grant her her ketubah. Cf., Peskita de Rab Kahana 22:2 and variant Song of Songs 1:4§2, that includes a subversive morality tale critical of the obligation to put away a childless woman, highlighting the values of love and companionship over fecundity in a marriage.

<sup>29</sup> Rema Shulhan Arukh Even HaEzer 1:3. He also rejects the position that a man must be forced to marry.

husband and wife who equally deserve society's compassion.<sup>30</sup> This tendency away from relying on divorce as a response to infertility also may be due, in part, to the broadening of women's role and status in society and concurrently a greater appreciation for the mitzvah of companionship as a main function of marriage and a greater reliance on the rabbinic concept that one who cannot fulfill a commandment is exempt from it. Infertile couples, as well as same sex couples and singles, are therefore *not* obligated to try to fulfill the mitzvah of procreation (*pru urvu*) although, as this *teshuvah* will argue, they may do so if they so choose.

To our modern ears, the law requiring a man divorce his childless wife sounds heartless and degrading, reducing a women's role in marriage to that of a vessel whose primary purpose is to carry her husband's progeny. However, these rules also emphasize the extent to which the rabbis were willing to go to enable the birth of the next generation and sustain the Jewish people. While marriage filled a variety of social, socio-economic, and emotional roles from the rabbinic perspective, the law requiring a man divorce a barren wife indicates that marriage as a vehicle for procreation was more important in terms of operative rabbinic law was than any particular individual marriage.

While generally concerned about the man's ability to fulfill his minimum obligation to procreate,<sup>31</sup> the rabbis were not completely insensitive to the need that women had for children, even if that need was not born of a ritual obligation. This recognition is reflected in cases granting a divorce (*get*) to women who have been unable to have children with their current husband and want to try to have children with another husband.

One source, in particular, is worth citing here.

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<sup>30</sup> Orthodox Rabbi Baruch Finkelstein and Michael Finkelstein (RN, CNM) take this approach in their comprehensive volume on infertility, *The Third Key: The Jewish Couple's Guide to Infertility* (NY: Feldheim, 2005). For a Conservative Movement approach, see Rabbi Gold, *And Hannah Wept*, cited above in n.3. Some modern Orthodox *poskim* who allow artificial insemination with a husband's sperm (AIH) rule that the father does not thereby fulfill his obligation to *pru urvu* (to procreate). See, e.g., R. Auerbach, "Artificial Insemination and Surrogate Motherhood: A Halakhic Perspective," *Noam* 1:13-19 (1991, v. 2):145-166. However, other significant Orthodox *poskim* rule that the husband does indeed fulfill his obligation to *pru urvu* through AIH with his own sperm (Igeret Moshe EH 2:18) and even with IVF (Professor Avraham Sofer, *Nishmas Avraham* EH 1 citing Ovadia Yosef).

<sup>31</sup> b. Yev. 61b, M. Yev. 6:6, ad. loc., presents the classic source defining the minimum requirement to fulfill the commandment of procreation: וּבֵית הַלֵּל. וּבְנֵי זָכָרִים. שְׁנֵי זָכָרִים. אוֹמְרִים, אֵלֶּיךָ ה' אֱלֹהֵינוּ, אִם כֵּן יֵשׁ לֹא בְּנִים. בֵּית שְׂמַאי אוֹמְרִים, שְׁנֵי זָכָרִים. וּבֵית הַלֵּל. אוֹמְרִים, זָכָר וְנִקְבָּה, שְׁנֵי זָכָרִים, הַזָּכָר וְהַנִּקְבָּה כְּרֵאָה לֹא יִבְטֹל אֲדָם מִפְּרֻיָּהּ וּרְבִיָּהּ, אֵלֶּיךָ ה' אֱלֹהֵינוּ. אִם כֵּן יֵשׁ לֹא בְּנִים. בֵּית שְׂמַאי אוֹמְרִים, שְׁנֵי זָכָרִים. וּבֵית הַלֵּל. אוֹמְרִים, זָכָר וְנִקְבָּה, שְׁנֵי זָכָרִים, הַזָּכָר וְהַנִּקְבָּה כְּרֵאָה לֹא יִבְטֹל אֲדָם מִפְּרֻיָּהּ וּרְבִיָּהּ, אֵלֶּיךָ ה' אֱלֹהֵינוּ. “One must not abstain from *be fruitful and increase* unless one has children. The School of Shammai says two males. The School of Hillel says a male and a female, as it is written *male and female He created them* (Gen. 1:27).” While having two children was generally accepted as the minimum necessary for a man to fulfill his obligation to procreate, the codists rule that this was only true if both children could and did reproduce before they passed away. See Rambam, *Mishneh Torah Hilkhos Ishut* 15:4 (who requires that a male and female be born to fulfill the commandment of procreation) and Shulhan Arukh Even HaEzer 1:5, 6. Despite these minimums, men were encouraged to have as many children as possible, as long as they have the strength to do so (e.g., b. Yev. 62b, *Mishneh Torah Hilkhos Ishut (Laws of Marriage)* 15:16, based upon such verses as Isaiah 45:18 and Ecclesiastes 11:6).

ת"ש, דאמר ר' אחא בר חנינא אמר ר' אבהו אמר ר' אסי: עובדא הוה קמיה דרבי יוחנן בכנישתא דקיסרי, ואמר: יוציא ויתן כתובה ואי ס"ד לא מפקדה, כתובה מאי עבידתה? דלמא בבאה מחמת טענה כי ההיא דאתאי לקמיה דר' אמי, אמרה ליה: הב לי כתובה, אמר לה: זיל, לא מיפקדת, אמרה ליה: מסיבו דילה מאי תיהוי עלה דהך אתתא? אמר: כי הא ודאי כפינן. ההיא דאתאי לקמיה דרב נחמן, אמר לה: לא מיפקדת, אמרה ליה: לא בעיא הך אתתא חוטרא לידה ומרה לקבורה? אמר: כי הא ודאי כפינן.

Come and hear what R. Aha b. Hanina stated in the name of R. Abbahu in the name of R. Assi: Such a case once came before R. Johanan at the Synagogue of Caesarea, and he decided that the husband must divorce her and also pay her the amount of her kethubah. Now, if it be suggested that a woman is not subject to the commandment (of *pru urvu*), how could she have any claim to a kethubah? It is possible that this was a case where she submitted a special plea; as was the case with a certain woman who once came to R. Ammi and asked him to order the payment of her kethubah. When he replied, "Go away, the commandment does not apply to you," she exclaimed, "What shall become of a woman like myself in her old age!" "In such a case," the Master said, "certainly compel [the husband]." A woman once came [with a similar plea] before R. Nahman. When he told her, "The commandment does not apply to you," she replied, "Does not a woman like myself require a staff in her hand and a hoe for digging her grave!" (I.e., a child on which to lean for support in old age and bury her after death.) "In such a case," the Master said, "we certainly compel [the husband]."<sup>32</sup>

Although initially ignored by the rabbinic judges, these unnamed women make poignant and cogent arguments that they have a compelling need to have children. They need children to care for them in old age, even if they are exempt from the command to procreate. The rabbis agree, to the extent of taking the extraordinary action of granting these women their *get* with full *ketubah* (payment of the marriage contract).<sup>33</sup> These cases are brought as examples of the rabbinic rule that a *get* with *ketubah* can be granted at the request of a woman who has a specific request that reasonably justifies a divorce. For our purposes here, these cases indicate that the rabbis treated a woman's desire for children as reasonable and actionable, to the extent that they would bend a significant aspect of Jewish law (that only a man can initiate a divorce) in order to assist a woman's effort to have children. According to rabbinic law, the specific plea can theoretically be any reasonably compelling need. We may not consider the desire to have children to care for us as we age a good motivation for someone to have children today, although the important role

<sup>32</sup> b. Yev 65b.

<sup>33</sup> Conceivably, the court compelled the husbands in question to grant the divorce and pay these women's *ketubah* (the marriage document that provided a settlement to the woman in certain cases of the dissolution of the marriage). See the discussion in Rabbi Susan Grossman, *Between Authority and Autonomy: Women in the Rabbinic Courts, A Study of Rabbinic Attitudes and Perceptions* (Diss. : Jewish Theological Seminary, 2009), 116-122. On the status and challenges of women who are denied religious divorces by Orthodox rabbinic courts and thus remain *agunot* (chained women), see Susan Aranoff and Rivka Haut, *The Wed-Locked Agunot: Orthodox Jewish Women Chained to Dead Marriages* (Jefferson, NC: McFarland, 2015).

children can fulfill as direct and indirect caregivers for aging parents is no less applicable today than in ancient times, despite the proliferation of assisted living and other facilities that supplement, but do not substitute for, the caring attention of family.<sup>34</sup>

While the rabbis were responding to women who wanted to have children within the context of a marriage, their rabbinic decisions set two important precedents that hold implications for our discussion about those seeking to become single parents by choice: The rabbis assume that (1) women have a right to bear biological children of their own, independent of any particular marriage commitment and that (2) such a right supersedes other traditionally compelling halakhic considerations, in these cases the husband's prerogative to initiate divorce. (The rabbis already assumed that men had the obligation to, and thus the desire to, have children, as discussed above.)

## Sex and Singles

Much of the opprobrium reserved for unwed mothers throughout Jewish history was driven by the assumption that sexual intimacy outside marriage, even between unmarried individuals, is prohibited.<sup>35</sup> R Eliezer criticizes an unmarried man who has intercourse with an unmarried woman not for the sake of marriage, saying that he engages in *beilat zenut* (sexual harlotry).<sup>36</sup> Societal opprobrium was much more severe for women than for men who engaged in sexual activity outside of marriage.<sup>37</sup> Where evidence of a bride's virginity was lacking on the wedding night for a previously unmarried woman, the woman could be divorced without her *ketubah*, ostensibly because the husband did not receive the "goods" he had paid for in the marriage agreement.<sup>38</sup> A woman's virginity was given a set value, specifically twice that of a woman

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<sup>34</sup>See *2015 Report: Caregiving in America* (National Alliance for Caregiving (NAC) and AARP Public Policy Institute: 2015). <http://www.aarp.org/content/dam/aarp/ppi/2015/caregiving-in-the-united-states-2015-report-revised.pdf>. For a personal perspective, see, e.g., Jane Gross, *A Bittersweet Season: Caring for Our Aging Parents--and Ourselves* (NY: Vintage, 2012).

<sup>35</sup> E.g., b. San. 73b assumes sex between unmarried youth is prohibited but not punishable. b. Yev. 47b, includes among the prerequisites for conversion the prohibition on meeting privately with someone of the opposite sex (thus ruling out the opportunity for non-marital intimacy). The rabbis learn this requirement from Ruth 1:16, *where you lodge, I will lodge*. On Ruth and the rabbinic usage of her story to shape the process of conversion, see Shaye Cohen, *The Beginnings of Jewishness*, esp. 299 and notes 80, 81 for parallels and manuscript variants.

<sup>36</sup> Sifra Emor 1:7, Kedoshim 7:6; y. Yev. 6:5 (7c), 7:5 (8b), 13:1 (13b) and b. Yev. 60a (that the man causes the woman to become a harlot). Cf., b. Yev. 59b, 60a, 61b, 76a; b. San. 51a and b. Tem. 29b, 30a. See Michael Satlow, "Texts of Terror: Rabbinic Texts, Speech, Acts, and the Control of Mores," *AJS Review* 21:2 (1996): 273-397, esp. 281 and notes, and his *Tasting the Dish*, 122-3.

<sup>37</sup> Rabbinic literature generally categories as whores (*zonot*) women who have sex not within or for the explicit purpose of marriage, e.g., Sifra Qod. 7 (90d), based on Lev. 19:29, *Do not degrade your daughter and make her a whore (zonah)*. For a full discussion on the rabbinic rhetoric of sexuality which was critical of sexually active women, see Satlow, *Tasting the Dish*, esp. 121-126.

<sup>38</sup> M. Ket. 1:6. The Shulhan Arukh identifies two signs of virginity: blood flow after the first intercourse and pressure required for penetration. (Shulhan Arukh Even HaEzer 68:3). The rabbis identified a number of situations in which an otherwise virginal woman could lack the signs of virginity due to an earlier injury (M. Ket. 1:7, cf. b. Ket. 13a), after repeated physical exertions like climbing steep stairs (y. Ket. 1:1, 25a) or even where the act does

lacking her virginity (such as widows and divorcees).<sup>39</sup> This distinction is still reflected today in most *ketubot*, even in the Conservative Movement.

### *Unwed Mothers and Their Children*

Until recent times, an unwed mother in the Jewish community was often considered a *zonah* (a harlot) even though the acknowledged father received little or no social opprobrium.<sup>40</sup> Children born out of wedlock were called *shetukim*, silent ones.<sup>41</sup> Jewish law, unlike English law, does not identify a “bastard” as any child born out of wedlock. The rabbinic term for bastard, “*mamzer*,” technically refers to a child born of an adulterous or incestuous relationship.<sup>42</sup> *Mamzerim* were barred from marrying most other Jews except those who were *mamzerim* or converts.<sup>43</sup> Even

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not cause bleeding (b. Hag. 14b-15a). If a groom was alone with his fiancée at his future father in law’s house before the wedding, he could not charge the bride with failing to show the signs of virginity (M. Ket. 1:5; Shulhan Arrukh Even HaEzer 68:1). On the importance of a woman’s virginity and the status of women who engage in premarital sex in biblical and rabbinic society, see Tikva Frymer-Kensky, “Virginity in the Bible,” in *Gender and Law in the Hebrew Bible and the Ancient Near East*, edited by Victor Matthews, Bernard Levinson and Tikva Frymer-Kensky (Sheffield, England: 1998): 79-96; and Rabbi Hauptman, “Rape and Seduction,” in *Rereading the Rabbis: The Woman’s Voice* (Boulder, Colorado: 1998): 77-101. For a critique on the male control of women’s sexual and procreative capacity in rabbinic thought, see Rabbi Labovitz, *Marriage as Metaphor* (Lanham, Maryland: 2005). See also the discussion and sources on unwed mothers in the section “Unwed Mothers and Their Children” immediately below, *infra*.

<sup>39</sup> M. Ket. 1:2.

<sup>40</sup> E.g., b. Yev. 61b shifts the power of the opprobrium from the sexually active single man to the single woman by rephrasing the Sifra’s reportage of a statement by R. Eleazer that a sexually active single man engages in *beilat zenut* (sexual harlotry) to, “An unmarried man who had intercourse with an unmarried woman, with no matrimonial intent, renders her thereby a *zonah* (a whore).” See, n. 35 above. For examples from the early modern period, see Elisheva Carlebach, “Fallen Women and Fatherless Children: Jewish Domestic Servants in 18 Century Altona,” *Jewish History* 24 (2010): 295-308, citing the *pinskens* (community records) of that German Jewish community. On changing social attitudes towards premarital intimacy in traditional communities in Israel today, largely because of the impact of army service on the social mores of young women, see Lisa Gilad, “Contrasting Notions of Proper Conduct: Yemini Jewish Mothers and Daughters in an Israeli Town,” *Jewish Social Studies* 45:1 (Winter 1983): 73-86. On the availability of the Sifra to the redactors of the Babylonian Talmud, see, e.g., Yaakov Elman, “Orality and the Redaction of the Babylonian Talmud,” *Oral Tradition* 14/1 (1999): 72 and n. 49. Article available at [http://journal.oraltradition.org/files/articles/14i/6\\_elman.pdf](http://journal.oraltradition.org/files/articles/14i/6_elman.pdf). (Accessed July 21, 2017.) Poskim generally rule that out of wedlock children do not fulfill for the acknowledged father his obligation to procreate (*pru urvu*), perhaps to avoid imposing parental obligations upon the father, e.g., providing support. See references in n. 21 above, *infra*.

<sup>41</sup> M. Kid. 4:2, b. Ket. 13a. Though *shetukim* are generally assumed to be of unknown paternity, b. Kid. 75a explains the term *shetuki* as “silenced from the father’s estate.”

<sup>42</sup> M. Yev. 4:3; b. Yev. 45b. Cf. b. Yev. 49 a-b, which excludes a child born of a widow awaiting a *levir*.

<sup>43</sup> Deut. 23:3: *A mamzer shall not enter the congregation of the Lord*. See, e.g., b. Yev. 45a, b. Yev. 49a, b. Kid. 72b-73a. For a survey of rabbinic literature on *mamzerut* and the status of *mamzerim* in the Conservative Movement, see Rabbi Spitz, “Mamzerut,” EH 4.2000a.

though children born to unwed mothers are not technically *mamzerim* under Jewish law, they were often identified as *mamzerim*<sup>44</sup> and suffered similar social ostracism.<sup>45</sup>

While sexual relations outside of marriage (and any resulting offspring) entailed severe rabbinic opprobrium, the situation is different for an unwed mother whose pregnancy is assumed to have taken place without coitus. The rabbis entertain the possibility that a woman could become pregnant without engaging in sexual relations, specifically by becoming pregnant in the bath. Several cases in the Talmud rule that if the pregnant woman was never married, she retains her status as a virgin. No legal penalty, social stigma or castigation is applied to her because sexual relations presumably did not take place at all. Regardless of whether or not the rabbis actually believed a woman could become pregnant via immersion in water containing semen (presumably from an involuntary ejaculation), their acceptance of such a possibility became the basis for a number of lenient rulings regarding unmarried women found to be pregnant and the progeny born to them.<sup>46</sup>

Admittedly, the situation of becoming pregnant in a bath was assumed to be accidental and unintentional by the rabbis, effectively *bediavad* (after the fact) rather than *lhathillah* (before the fact). In contrast, utilizing ART to become pregnant is an intentional effort that would certainly be considered *lhathillah*. However, in the rabbinic mind, the significant distinction between becoming pregnant in the bath and becoming pregnant as a result of coitus is not intention but whether there was commission of the sexual act itself. The rabbis ultimately categorize non-coital pregnancy, and the resulting children, as wholly permitted without halakhic or social disability. Such sources have been relied upon as part of the halakhic argument generally approving of the use of ART to treat infertility.<sup>47</sup> While such permission assumed a marital context, the argumentation, from a halakhic bioethics point of view, would be the same regardless of marital status. The only significant obstacle to permitting ART (and adoption) for

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<sup>44</sup> *Shetukim* are listed along with *mamzerim* since their questionable lineage results in similar restrictions on whom they can marry. See M. Kid. 4:1, 3; b. Kid. 74a. Cf. b. Ket. 13a (that children born out of wedlock are treated as *mamzerim* unless the mother can bring proof of paternity) and b. Kid. 73a (that the presumption is that *shetukim* are fit to marry other Jews without fear of marrying a sibling). Cf., Boaz Cohen, "Some Remarks on the Law of Persons in Jewish and Roman Jurisprudence," *PAAJR* 16 (1946-7): 1-37. See also Satlow, *Tasting the Dish*, 56ff.

<sup>45</sup> Children identified as *mamzerim* often experienced higher mortality rates, e.g., p. Kid. 4:1, 43b ("R. Huna said, 'A *mamzer* does not live 30 days"). On the high mortality rates of *mamzerim* and other out of wedlock children in the early modern period, see Carlebach, "Fallen Women," and ChaeRan Y Freeze, "Lilith's Midwives: Jewish Newborn Child Murder in Nineteenth Century Vilna," *Jewish Social Studies* 16:2 (Winter 2010), 1-27.

<sup>46</sup> b. Hagigah 14b-15a. Lacking the sexual act, there is no prohibition. See Ronit Irshai, *Fertility and Jewish Law: Feminist Perspectives in Orthodox Responsa Literature* (Waltham MA: Brandeis University, 2012), esp. Chap. 6 and p. 233 ff. See also Preuss, trans. Rosner, *Biblical and Talmudic Medicine* (1993): 464. Theoretically, no social disability should accrue to the resulting child, as reflected in the rabbinic tradition that Ben Sira was conceived when his mother was impregnated in the bath by the prophet Jeremiah. The tradition is found in *Aleph Bet de Ben Sira* (*Sefaria, Otzar Midrashim, The Aleph Bet of Ben Sira, Alternative Version: 2*, available at [https://www.sefaria.org/Otzar\\_Midrashim%2C\\_The\\_Aleph\\_Bet\\_of\\_ben\\_Sira%2C\\_The\\_Alphabet\\_of\\_ben\\_Sira%2C\\_\(alternative\\_version\)?lang=bi](https://www.sefaria.org/Otzar_Midrashim%2C_The_Aleph_Bet_of_ben_Sira%2C_The_Alphabet_of_ben_Sira%2C_(alternative_version)?lang=bi), accessed on March 4, 2019) and is referred back to in a number of later commentators, e.g. Responsa *Tashbetz* 3:263.

<sup>47</sup> See n. 3 above.

singles lies in our attitudes about whether or not marriage is a halakhic prerequisite for having children and starting a family.

Sexual mores have changed, particularly over the last half century. It is more than likely that individuals of all genders engage in sexual relations before marriage, particularly as a precursor to marriage.<sup>48</sup> We no longer automatically condemn pre-marital sex nor devalue women who engage in it, even if we, in the Conservative Movement, still caution individuals to treat pre-marital sex as a level of intimacy that should not be entered into casually.<sup>49</sup> Concurrently, children of single parents no longer carry the social stigma within larger Western and liberal democratic society that they once did. The social ostracization experienced by *shetukim* (children born from out of wedlock sexual relations) in pre-modern Jewish society is largely lacking today. Such a shift in societal perceptions, perhaps due to the increased number of divorces, makes all forms of single parenthood more socially acceptable within the Jewish community as well as within larger society.<sup>50</sup>

### The Desire for Children

Hebrew Scripture provides many examples of men and women who experience deep pain over their unfulfilled desire to have biological children of their own.<sup>51</sup> All the matriarchs suffer from infertility.<sup>52</sup> Abraham, already advanced in years, shares with God his concern he will die

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<sup>48</sup> On changing social attitudes towards premarital intimacy in traditional communities in Israel today, see Gilad, "Contrasting Notions of Proper Conduct," cited above, n. 40.

<sup>49</sup> Rabbi Dorff, "This is My Beloved," 30-36.

<sup>50</sup> Several Orthodox self-help organizations have emerged to support Jewish single parents, notably Kayama in Israel for Orthodox single mothers (kayamamoms.org) and Jewishsinglemoms.org in the US, sponsored by Chabad. Several Jewish Federated communities offer support for single Jewish parents through their local version of Jewish Family Services. See for example, the San Diego Jewish Family Services, whose website includes a page, "Supporting Single Jewish Parents,"

[http://www.jfssd.org/site/PageServer?pagename=programs\\_connect\\_single\\_parents](http://www.jfssd.org/site/PageServer?pagename=programs_connect_single_parents). (Accessed March 4, 2019.)

<sup>51</sup> Biblical literature highlights the stories of women who concurrently were heartbroken because they could not conceive even as they were subjected to derision and efforts to lower their status within the family because of their infertility. See, e.g., Gen. 16:4 (in which childless Sarah is lowered in Hagar's eyes when Hagar conceives), Gen. 30:22-23 (in which God takes away Rachel's "disgrace" when she gives birth); and 1 Samuel 4-11 (in which childless Hannah is taunted by her co-wife and cries to the Lord). In rabbinic literature see, e.g., Genesis Rabbah (GR) 71:1 (on Genesis 29:31) that childless women are "prisoners in their own homes"; GR 73:3, that *God remembered Rachel* (Gen.30:22) means God responded to her groans (see also b. Tan. 2a-b); and GR 73:5 (on Gen. 30:23), "R. Levi b. Zechariah said, 'Before a woman has given birth, any misdeed is attributed to her.'" For a fuller discussion of rabbinic views on childlessness, see Judith Baskin, "Rabbinic Reflections on the Barren Wife," in *Harvard Theological Review* 82 (1989):1-14. See the below discussion about the desire for a child, *infra*, regarding biblical and rabbinic treatment of the patriarchs' desire for children.

<sup>52</sup> Even Leah, who birthed children, suffered secondary infertility, as evidenced by her resorting to the use of a surrogate, her handmaid Zilpah, to have two more children after she could no longer bear (Gen. 30:9-13.) On childlessness as a patriarchal construction, see, e.g., Dora Rudo Mbuwayesango, "Sex and Sexuality in Biblical Narrative," in Dana Nolan Fewell (ed.), *The Oxford Handbook of Biblical Narrative* (Oxford: Oxford University Press, 2016): 456-464, esp. 457-9.

childless.<sup>53</sup> Isaac prays for his childless wife Rebecca.<sup>54</sup> The rabbis understand his prayer not as a plea for his wife but for himself in response to his own infertility. This understanding reflects a rabbinic recognition (discussed below) that men could be the source of infertility in a couple and that men could be distressed by their childlessness.<sup>55</sup>

The rabbinic acknowledgement that the husband could be the source of a couple's infertility had legal implications. For example, in two cases from Yevamot, discussed above, the rabbis grant divorces to childless women in response to their desire for children.<sup>56</sup>

Biblical narratives also reflect how difficult it is for even an empathetic husband to understand the pain felt by a woman yearning for children of her own. Hannah remains inconsolable in response to Elkanah's effort to comfort her with the words, *Am I not better than ten sons?*<sup>57</sup> Not all husbands in the biblical narratives are presented as empathetic. When Rachel compares childlessness to death, as she emotionally demands children from her husband Jacob, the text specifies that Jacob becomes angry with Rachel. Jacob exhibits neither empathy nor compassion for Rachel's pain and refuses to intercede. In his eyes, her childlessness comes from God and is thus outside his purview.<sup>58</sup> The rabbis take note of this in the midrash, criticizing Jacob for not following the behavior of his father, Isaac, who prayed on behalf of his childless wife Rebecca.<sup>59</sup> Perhaps having sired other children with Leah, Jacob has no personal stake in Rachel's fecundity. The Talmud also compassionately affirms Rachel's feelings of grief over her infertility when they cite her cry, "*Give me children, or else I am dead,*" as the proof-text for including the childless among the four considered dead:

The source is worth citing here:

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<sup>53</sup> Gen. 15:2.

<sup>54</sup> Gen. 25:21.

<sup>55</sup> See b. Yev. 64a that suggests Isaac was also infertile, based on the use of the additional term "*on behalf of (Inokhah)*" rather than just "*for his wife (lisho)*." This interpretation resolves a dilemma for the rabbis who assume the patriarchs kept all the commandments as the rabbis understood them. According to the text, Isaac was 40 when he married (Gen. 25:20) and 60 when Rebecca gave birth to the twins (Gen.25: 26), even though he should have divorced her after 10 years of childlessness according to rabbinic law. However, also according to rabbinic law, he would not have had to divorce her if *his* infertility was the cause of their childlessness. (See discussion below, *infra*.) While reflecting an androcentric pro-natal perspective, this midrash and the law it relies upon reflect the rabbinic recognition that women were not always the cause of a couple's childlessness. Cf., n. 56 immediately below. See Jager, *Pater*, cited above, n. 9.

<sup>56</sup> b. Yev. 65b, quoted above, *infra*. These cases imply a general rabbinic rule that women could be granted a divorce when there is reasonable cause. See the discussion below and in Rabbi Grossman, *Women in the Rabbinic Courts*. Avraham Steinberg, citing J. Green, reports that a Tel Aviv rabbinical court granted a woman a divorce on the grounds that she wanted to get pregnant naturally which was impossible with her then current husband. Avraham Steinberg, transl. by Fred Rosner, *Encyclopedia of Jewish Medical Ethics* (NY: Feldheim, 2003): 62, 70 n35, citing J. Green, *Assia*, Vol. 5, 5744 (1984): 125ff.

<sup>57</sup> 1 Sam 1:8 (*Ha lo anochi tov lach meiasarah banim?*)

<sup>58</sup> Gen. 30:1-2.

<sup>59</sup> Genesis Rabbah 71:7. According to the midrash, Jacob's just punishment will be meted out when Leah's sons stand before Rachel's son Joseph in Egypt and hear him say the same words Jacob says to Rachel, "*Am I a substitute for God?*" (Gen. 50:19).



אריב"ל: כל אדם שאין לו בנים חשוב כמת, שנאמר: הבה לי בנים ואם אין מתה אנכי ותניא, ארבעה חשובין כמת: עני ומצורע, וסומא, ומי שאין לו בנים, עני - דכתיב: כי מתו כל האנשים, מצורע - דכתיב: אל נא תהי כמת, וסומא - דכתיב: במחשכים הושיבני כמתי עולם, ומי שאין לו בנים - דכתיב: הבה לי בנים ואם אין מתה אנכי.

R. Joshua b. Levi said: One (*adam*) who is childless is accounted as dead, for it is written, *Give me children or else I am dead*. (Gen. 30:1) And it was taught: Four are accounted as dead: A poor man, a leper, a blind person, and one who is childless. A poor man, as it is written, *for all the men are dead [which sought thy life]* (Exod. 4:19). A leper, as it is written, [*And Aaron looked upon Miriam, and behold, she was leprous. And Aaron said unto Moses ...] let her not be as one dead* (Num. 12:10-12). The blind, as it is written, *He hath set me in dark places, as they that be dead of old* (Lam. 3:6). And one who (*mi*) is childless, as it is written, *Give me children or else I am dead* (Ex. 4:19).<sup>60</sup>

R. Joshua b. Levi and the *baraita* in which his statement is embedded both begin the midrash with gender neutral terms, respectively *adam* (a person), rather than *ish* (a man), and *mi* (one who), rather than *ha-ish* (the man who), even though both sources go on to use the masculine possessive *lo* (has), perhaps simply reflecting the masculine gender bias in Hebrew. The use of gender neutral pronouns could simply reflect the original context of the biblical proof text as Rachel's words or reflect the not uncommon usage of the generic term *adam* for person. However, the rabbis seldom are hesitant to deconstruct and reapply biblical texts out of context, as evident within the midrash itself in its use of a verse about Moses to prove that the poor are the dead. In addition, rabbinic literature's general tendency is to speak from the male perspective and transfer to male characters statements and actions originally attributed to women.<sup>61</sup> The use of gender neutral opening words here may specifically reflect a rabbinic sensitivity to women struggling with infertility.

Taken together, such rabbinic sources reflect a rabbinic perspective of active compassion for those struggling with infertility, a compassion prompting active assistance and a critique of those who, like father Jacob, do not offer sufficient assistance.<sup>62</sup> In the ancient world, such assistance would have been limited to prayer on the woman's behalf by friends and family<sup>63</sup> or may have

<sup>60</sup> b. Ned. 64b.

<sup>61</sup> On the tendency of the rabbis to suppress the names of female characters and push female protagonists to the sidelines, see, e.g., Tal Ilan, "Stolen Water is Sweet": Women and their Stories between Bavli and Yerushalmi," in Peter Schäfer, ed., *The Talmud Yerushalmi and Graeco-Roman Culture III* (Tübingen: Mohr-Siebeck, 2002): 185-224, reprinted in Tal Ilan, *Silencing the Queen: The Literary Histories of Shelamzion and Other Jewish Women* (Tübingen: Mohr-Siebeck, 2006): 160-213. Variants have a greater tendency to suppress female protagonists as sources move farther from the original, regardless of whether later variants are Palestinian or Babylonian. See the discussion on b. Hullin 47b and b. Shab. 134a in Rabbi Grossman, *Women in the Rabbinic Courts*, esp. 332-341.

<sup>62</sup> The Talmud contains a number of internal critiques of rabbis who judge harshly or erroneously, e.g., b. Taanit 21a (about Nahman ben Gamzu), b. Ber. 5b (about Rav Huna who denied a tenant his due of produce) and b. BB 153a (about Rabba trying to fool a woman plaintiff who appeared before him, discussed in Rabbi Grossman, *Women in the Rabbinic Courts*, 71-76). See also Jacob Neusner, *The Talmud: What It Is and What It Says* (Lanham, MD: Rowman and Littlefield, 2006), 129.

<sup>63</sup> E.g., b. Nid. 66a.

resided with the authority of a rabbinic judge to grant a childless woman a divorce from her husband in order to find a man with whom she could possibly have children.<sup>64</sup> In the modern world, this rabbinic perspective of active compassion can serve as a reminder not only to express compassion but also to offer whatever assistance is possible and reasonable under our understanding of *halakhah* to those combatting infertility. Such a sensitivity has informed the dominant discourse across the Jewish community from the Reform through the modern main stream Orthodoxy, including the Conservative Movement, to permit the use of a wide range of medicinal interventions to resolve infertility problems in order to have children.<sup>65</sup> Although our ancient rabbis would not have foreseen a situation in which men or women would want to conceive children outside marriage (beyond the needs of leviratical inheritance, as noted above), the desire for children is not limited to those who are married, nor is the pain associated with childlessness. In addition to confronting the pain of childlessness, a single who chooses to pursue parenthood as a single has also confronted the difficult and painful calculus that marriage will not likely occur in time to bear and raise children of one's own.

### **Demographics, Biology and Other Factors**

While marriage and family remain the foundation of Jewish communal life and continuity, the Jewish community is not immune to the changes of larger contemporary industrialized societies. Jewish divorce rates as well as the percentage of our population remaining single are now similar to that of wider American society.<sup>66</sup>

Societal advances allow men and women to be economically self-sufficient, thereby largely eliminating the pressure to settle for a spouse in order to simply survive. Thankfully gone are the days so humorously portrayed in *Fiddler on the Roof's* "Matchmaker, Matchmaker" when a girl had to settle for her father's match or when a father was willing to accept for his daughter a loveless match with a much older man to ensure she would not starve. In pre-modern times there was also tremendous pressure to see a daughter settled so she would no longer be a drain on her father's household. As for men, unless wealthy enough to be able to afford servants, marriage was essential to ensuring that the traditional distaff roles of cooking, cleaning, and mending were done. If left with young children following the untimely death of a wife (particularly common due to complications related to childbirth), most men had to quickly remarry to ensure that there was someone to care for the children.

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<sup>64</sup> b. Yev. 65b. See the discussion above, *infra*, on these cases and the lengths the rabbis go to facilitate procreation.

<sup>65</sup> See n. 3 above.

<sup>66</sup> According to the 2013 PEW population study of American Jewry, (the most recent complete study available at the time of writing this teshuvah), 9% of American Jews are divorced compared to 11% of all Americans and 25% of American Jews are single and have never married, compared to 28% of all Americans, statistically insignificant differences. *A Portrait of Jewish Americans Findings from a Pew Research Center Survey of U.S. Jews* (Oct. 1, 2013): 189. <file:///C:/Users/rabbi/Downloads/jewish-american-full-report-for-web.pdf>. (Accessed May 8, 2017.)

Today, individuals can fend for themselves. Economic independence and modern conveniences that make the tasks of daily life less time consuming allow hearts and minds to hold sway. Concurrently, despite dating sites and efforts in the Jewish community to bring singles together, social mobility and the diffusion of cohesive Jewish communities in both the Orthodox and the non-Orthodox world make it difficult for young people to find their *bershert*, their intended. Consequently, many people fear their prime childrearing year will pass before they can marry and have children with a compatible spouse.

For heterosexual women in the United States, there is another significant factor that makes finding one's *bershert* difficult: demographics. In 1940, the ratio of single men to single women in the United States was 101 men for every 100 women. By 1970, the ratio was 81 single men for every 100 single women. By 1989, there were only about 60 single men for every 100 single women. A 2015 study by *Time Magazine*, delineated by age and geographic location, found that there were significantly more college educated single women than college educated single men in almost every area of the country. Not surprisingly, the highest percentage of communities representing the highest female to male ratio (1.8-1) appeared in the age 65+ category due to male morbidity rates. However, even in the 18 to 30 year old category, the youngest category identified in this survey, the ratio generally ranged throughout the nation from 1.2-1.8 single college educated women to every single college educated man. Most significantly, in the 31 to 45 year old age category, the ratio of college educated single women to college educated single men precipitously increased for women nationally (e.g., jumping from 1.2 or lower to 1.6 or higher) when compared to the 18 to 30 year old age category.<sup>67</sup>

It is worth noting that women still usually marry up in income, if no longer up in educational level, which further limits the availability of eligible men.<sup>68</sup> This is particularly challenging in ethnic populations, like the Jewish community, in which the majority of women attend college and often go on to professional school.<sup>69</sup> One can argue that it is not that heterosexual women do not want to get married but, given the demographic inequity between available male and female

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<sup>67</sup> Naomi Miller, *Single Parents by Choice: A Growing Trend in Family Life* (NY and London: Insight Books Plenum Press, 1992): 17; Chris Wilson and Bronson Stamp, "The Ratio of Single Men to Women Where You Live," *Time Labs* (August 24, 2015) <http://labs.time.com/story/see-the-ratio-of-single-men-to-women-where-you-live/>. (Accessed Feb. 13, 2020.)

<sup>68</sup> Yue Qian, "Gender Asymmetry in Educational and Income Assortative Marriage," *Journal of Marriage and Family* 79:2 (April 2017): 318–336. In comparing data from 1980 and 2008-12, Qian found a reverse in the tendency of women to marry up in education but a continuing tendency for women to marry up in income. The tendency for women to marry up in income was highest among women whose educational levels surpassed that of their husbands.

<sup>69</sup> For example, according to the 2000-2001 National Population Survey, more than half of all Jewish adults, including both men and women, earned a college degree (55%) and fully one quarter (25%) earned a graduate or advanced degree. (Comparable figures for the total U.S. population are 29% and 6%, respectively.) *National Jewish Population Survey 2000-1: Strength, Challenge and Diversity in the American Jewish Population* (NY: United Jewish Communities, 2003; Updated Jan. 2004): 4, 6. Available at <http://www.jewishdatabank.org/studies/downloadFile.cfm?FileID=1490>. (Accessed July 21, 2017.)

singles, there will simply be many women who cannot find a suitable husband despite their best intentions.

As for heterosexual men who are single, while the general demographics of available single women are in their favor, the reality is that finding one's Jewish *besharit* (one's intended) is difficult even with the help of dating sites like Jdate and Match.com, particularly as men and women's biological clocks tick down, as discussed immediately below. For those LGBTQ members of the Jewish community, the chance of finding a suitable Jewish spouse is even more difficult. While demographics alone do not explain the significant increase in the number of singles in the American Jewish community, such statistics point to factors beyond personal volition that contribute to an individual remaining single.

### *Biological Time*

The desire for children becomes particularly pressing for those whose biological clocks are ticking while no suitable marriage partner is available. Studies show that fertility rates begin to drop significantly in women when they reach age 30 and more rapidly when they reach 35. Fertility in women deteriorates from a peak of 25% to 30% fertility rate per cycle in women in their 20s to less than 5% by age 40. Concurrently, as a woman ages, the chance for serious complications during pregnancy increase. With age, the risk of spontaneous abortion (what we commonly refer to as a miscarriage) and aneuploidy (chromosomal abnormalities in the fetus that cause birth defects) increases as do dangers to maternal health, including hypertension disorders, operative delivery and maternal mortality due to a variety of complications including placenta previa (when the placenta partially or completely covers the cervix, causing severe bleeding during labor and birth).<sup>70</sup>

Men also undergo reduced fertility with age. Studies that have adjusted for the age of the wife show, for example, that conception with men over 40 years of age was 30% less likely than with men of 30 years of age.<sup>71</sup>

That married couples may delay having children for any number of personal, professional, or familial reasons, and thus find themselves facing reproductive challenges, does not affect the reality that the above biological facts present a harsh reality check for singles who desire biological children of their own, yet face the increasing unlikelihood of marrying in time to have biological children of their own. With a woman's optimum reproductive span being between ages 25-29 and a man's optimum reproductive age peaking at 30, it is not surprising that more and

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<sup>70</sup> According to a number of studies by the ACOG and individual researchers, the citations for which are gathered in Sara Deatsman, Terrie Vasilopoulos, and Alice Rhoton-Vlasak, "Age and Fertility: A Study of Patient Awareness," [www.ncbi.nlm.nih.gov](http://www.ncbi.nlm.nih.gov). (Accessed January 24, 2019.)

<sup>71</sup> A review of these studies can be found in Isiah D. Harris, Carolyn Fronczak...and Randall B Meachem MDs, "Fertility and the Aging Male," *Reviews in Urology* 2011: 13(4): e184-e190. Abstract available at [http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3253726/#\\_\\_ffn\\_sectitle](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3253726/#__ffn_sectitle). (Accessed on July 11, 2016.)

more singles choose to pursue single parenthood rather than wait and perhaps give up the chance for a biological child of their own as their biological clocks tick down.

### *Other Demographic Concerns*

The decimation of European Jewry in the Holocaust, rising assimilation and lower fertility rates that traditionally correspond to higher educational and economic attainment all contribute to a Jewish demographic challenge for world Jewry and particularly for the North American Jewish community.

In North America, a recent Pew study found that the Jewish population is expected to decline in North America over the next forty years (between 2010 and 2050) from 6 million to 5.9 million, reflecting a two percent decline (-2%) in Jewish population within the overall population of the region. These numbers will be even lower if we only count Jews of matrilineal descent and converts who had *mikvah* (and, for men, *milah* or *hatafat dam*). In the United States, the Jewish birth rate is currently at 1.9, below the replacement level of 2.1.<sup>72</sup> The numbers become even more complicated when we factor in Pew's 2013 study of Orthodox Jewry who represent only 10% of the North American Jewish population yet had fertility rates more than twice as high as that of other Jews (4.1 compared to 1.7 children per couple). Of Orthodox parents, 98% say they are raising their children as Jews compared to only 78% of other Jews. Of this Orthodox 10%, 62% are Haredi (Ultra-Orthodox). While the Jewish population is expected to grow in Israel, where the average fertility rate (TFR) from 2010-13 was 2.3, fertility is similarly greater among the Haredi communities.<sup>73</sup>

Jewish demographics as a percentage of the world's population is even more dire.

A note must be added here in response to the perspective that everyone should refrain from childbearing as a way to respond to the world's population growth crises. World population increases present significant ecological, economic, and political challenges that are beyond the scope of this *teshuvah*. However population growth extrapolations predict that the Jewish percentage of the world population will drop significantly over the next few decades. For example, according the Pew study, the overall population in the Middle East and North Africa

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<sup>72</sup> "The Future of World Religions: Population Growth Projections 2010-2050." (Pew Research Center, April 2, 2015): 133-141. file:///C:/Users/rabbi/Downloads/PF\_15.04.02\_ProjectionsFullReport.pdf. (Accessed July 11, 2016.) For the purposes of its demographic studies, Pew Research Center identifies Jews as those who self-identified when asked about their religion on a national census and large scale survey. Pew acknowledges that "the worldwide figure would be smaller if a tighter definition (such as an unbroken line of matrilineal Jewish descent) were imposed." "Religion and Public Life, Demographic Study, The Global Religious Landscape: Jews." (Pew Research Center, De. 18, 2012) [www.pewforum.org](http://www.pewforum.org). (Accessed July 6, 2018).

<sup>73</sup> "A Portrait of American Orthodox Jews: A Further Analysis of the 2013 Survey of U.S. Jews," (Pew Research Center, Aug. 26, 2015): 4, 11ff. file:///C:/Users/rabbi/Downloads/Orthodox-Jews-08-24-PDF-for-web.pdf. (Accessed July 11, 2016.)

from 2010 to 2050 is expected to increase by 73%. In comparison, for the same time period in the Middle East and North Africa (mainly in Israel), Jewish population growth is expected to be only 46%. While the expected Jewish population increase may sound high, it is just a fraction of the growth of the non-Jewish population if the current population disparity and consequential geometric increase of overall population for the region is taken into account.

Even when accounting for the fact that Israel is expected to have the largest Jewish population in the world by 2050, the total number of Jews as a percentage of world population will continue to decline.<sup>74</sup> Today Jews represent less than 0.2% of the world's population. Jewish world population is expected to grow by only .65%, well below average and about half the growth rate of the rest of world's population. That means a decline of the Jewish percentage of the world population.<sup>75</sup> As Hillel taught, "If I am not for myself, who will be; if I am only for myself what am I."<sup>76</sup> As good citizens of the world, and cognizant of our obligation to *tikkun olam* (repairing the world), we can support Jewish and other international efforts to alleviate the economic and environmental challenges presented by world population growth even as we seek to increase the number of Jewish children being raised as Jews by having children of our own and supporting those who would like to raise Jewish families, regardless of their marital status.

The disturbing data on Jewish demographics requires multi-valanced responses. Various initiatives in the Jewish community designed to encourage Jewish singles to meet and marry are one aspect of such a response. Another, somewhat controversial approach, was authored several years ago by Rabbis Abelson and Dorff in response to dropping Jewish birth rates on the heels of the Holocaust and rising assimilation. Their *teshuvah*, passed by the CJLS, encourages couples to have what they term a "mitzvah child," i.e., one or more additional children, even if it meant availing themselves of ART and adoption to do so.<sup>77</sup> Rabbis Abelson and Dorff stress that those who are unable to have children, or more children, are not obligated to try to do so. While Rabbis Abelson and Dorff were addressing married couples, their desire to see more Jewish children born can also be well served by permitting Jewish singles who desire to build a Jewish family of their own to do so through adoption and/or ART. Their *teshuvah* serves as another example of rabbinic pro-natalism, i.e., the rabbinic support of encouraging parenthood.

Another response to these significant concerns can be for our communities to give our fullest support to anyone, particularly within our Movement, who wants to have Jewish children and build and raise a Jewish family. While many examples of greater support for Jews raising Jewish families fall outside the scope of this *teshuvah* (e.g., reducing the cost burden for day and

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<sup>74</sup> "The Future of World Religions," 8-9. Cf. Alon Tal, "Life in Israel Has Become Very, Very Crowded," *Mosaic* (May 24, 2018). <https://mosaicmagazine.com/response/israel-zionism/2018/05/life-in-israel-has-become-very-very-crowded/> (Accessed Jan. 2020.)

<sup>75</sup> Aaron Kalman, "Global Jewish Population Grows by 88,000 Over Past Year," citing a study by Professor Sergio Della Pergola of the Hebrew University. *The Times of Israel* (September 9, 2012).

<http://www.timesofisrael.com/jewish-population-grows-by-88000-over-past-year/>. (Accessed July 13, 2016).

<sup>76</sup> Pirke Avot 1:14.

<sup>77</sup> Rabbis Abelson and Dorff, "Mitzvah Children."

afternoon schools and Jewish camping), this *teshuvah* certainly advocates improving the support our schools, synagogues, camps, and youth programs offer single parents of all permutations, including single parents by choice. This includes welcoming single head of household families into our congregations by providing social and, where necessary, financial support (for example, in the form of school tuition scholarships). It also includes such policies, as recommended here, of permitting singles to avail themselves of adoption and ART to have Jewish children and build Jewish families, and of helping single parents by choice to celebrate the birth and other life cycles of their children within our congregations in the same way we celebrate such events for children born within marriage.

### **Additional Concerns Relating to Single Parenthood by Choice**

#### *Wounding and Healing*

There are risks associated with any medical treatment, including ART. Jewish law balances the obligation not to endanger or wound (*havalah*)<sup>78</sup> with the obligation to heal.<sup>79</sup> For ART, risk agents include the retrieval of eggs and transfer of embryos; side effects, and possible long term effects,<sup>80</sup> from the drugs required for treatment; and of course, as with any birth, giving birth itself.<sup>81</sup> All this is as true for a single woman as a married woman utilizing ART. In countries with advanced medical facilities like the United States, Canada and Israel, such risks are

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<sup>78</sup> E.g., b. Hullin 10a explains *hamira sakkanta me'issura*, that which is dangerous is to be avoided even more stringently than that which is ritually forbidden, based on Deut. 5:15 *you shall take care of yourself diligently*. See the discussion in Rabbi Dorff, "Artificial Insemination, Egg Donation, and Adoption," *Conservative Judaism* 49:1 (Fall, 1996): 3-60, esp. p. 43.

<sup>79</sup> E.g., Exod. 21:19; b. Ber. 60a; b. BK 46b, 85a-b. The Rabbis learned the obligation to heal from the command not to stand by the blood of another (Lev. 19:16) and to restore what is lost (Deut. 22:2). See David M. Feldman, *Health and Medicine in the Jewish Tradition* (NY: Crossroads, 1986); David Bleich, "The Obligation to Heal in the Judaic Tradition: A Comparative Analysis," in Fred Rosner and David Bleich, *Jewish Bioethics* (NY: Sanhedrin Press, 1979): 1-44; and Daniel Sinclair, "The Obligation to Heal and Patient Autonomy in Jewish Law," *Journal of Law and Religion* 13:2 (1998 - 1999): 351-377. Stable URL: <http://www.jstor.org/stable/1051470>.

<sup>80</sup> While earlier studies correlated increased cancer risk with the use of fertility drugs, see e.g., L. Brinton, "Long Term Effects of Ovulation Stimulating Drugs on Cancer Risk" *Reproductive Biomedicine Online* (July 15, 2007) (1):38-44. Stable URL: <http://www.ncbi.nlm.nih.gov> (accessed Jan. 25, 2019), more recent studies indicate that while infertile women may be at an increased risk of invasive ovarian, endometrial, and breast cancer, the use of fertility drugs does not appear to increase this risk, although some studies show an increased relative risk in borderline ovarian cancer. See "Fertility drugs and cancer: a guideline," Samantha Pfeifer, et al. *Fertility and Sterility*, Volume 106, Issue 7: 1617-1626, <https://doi.org/10.1016/J.FERTNSTERT.2016.08.035> (accessed Jan. 2020) and "Use of fertility medications and cancer risk: A review and update," Lindsay Kroener, et al., *Current Opinion in Obstetrics and Gynecology* (Curr Opin Obstet Gynecol), (29(4) (Aug. 2017): 195–201, doi:10.1097/GCO.0000000000000370 (accessed Jan. 2020).

<sup>81</sup> According to the Centers for Disease Control and Prevention, maternal morbidity increased from 49.5 deaths per 10,000 births in 1993 to 144 deaths per 10,000 births in 2014 with blood transfusions significantly increasing maternal risk. See, "Reproductive Health: Severe Maternal Morbidity in the United States," *CBC* (Nov. 27, 2017). <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/severematernalmorbidity.html>. (Accessed Jan. 25, 2019.)



minimal, although the medical conditions and concerns of every woman must be handled on a case by case basis between the woman and her doctor(s). In general, for decades now, Jewish bioethicists have acknowledged that the medical risks of ART are not in general prohibitive.<sup>82</sup>

While Rabbi Mackler did not entertain a discussion about the permissibility of a single woman utilizing ART, halakhic concerns over wounding or putting oneself in danger should not be any more compelling for a single woman seeking to become pregnant than for a married woman. The treatments would retain the same level of risk, or lack thereof. If it were to be argued that ART for a single is an elective procedure, not undertaken in order to heal her own infertility but to solve her inability to conceive without a male partner, one could answer that Jewish law generally includes elective procedures under the category of healing (e.g., lasik surgery to eliminate the need for contacts or glasses), particularly when the psychological or social benefits are significant (e.g. braces or cosmetic surgery when a deformity subjects the individual to potential ridicule).<sup>83</sup> Permitting the use of ART for singles falls into this same category since providing childless singles the ability to have biological children of their own results in significant psychological, emotional, and practical benefits (including the rabbinically sanctioned compelling need to have children to care for these individuals as they age, as discussed above). ART, whose purpose is to help bring new life into the world, is part of our partnership with God to complete the work of creation and improve the world (*tikkun olam*).<sup>84</sup> This is no less true when helping a single realize the joys of parenthood than when assisting a married couple to do so.

Regarding a single man (whether heterosexual or homosexual) who contracts with a woman to serve as a surrogate to bear his child, CJLS *teshuvot* permitting surrogacy already assume that a single woman may undertake normal risks to bear children for others.<sup>85</sup> The single status of the prospective father does not affect the permissibility of or ancillary rules relating to surrogacy (e.g., that any child born of a Jewish father and non-Jewish surrogate requires conversion). (Regarding a woman bearing her own child, it should therefore be equally, if not even more acceptable, to bear those same risks for one's own benefit, to have a child for oneself, rather than just for another.)

### *What About the Kids?*

Single parenthood presents significantly different challenges than does raising a child in a two parent household. Those considering single parenthood should seriously and honestly weigh their

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<sup>82</sup> E.g., Rabbi Mackler, "In vitro Fertilization," EH 1:3, 1995 (originally printed in *Responsa of the CJLS 1991-2000*), 515.

<sup>83</sup> E.g., Rabbi Moshe Feinstein permits cosmetic surgery to help women improve their eligibility for a spouse. M. Feinstein, *Responsa Igerot Moshe Chosen Mishpat* (Bnai Brak:1985) 2: 66.

<sup>84</sup> Gen 2:15. Cf. b. Shab. 10a (those who judge fairly partner with the Creator), b. Shab. 119b. (those who pray the Sabbath eve prayers are partners in creation). For a discussion on the concept and application of *tikkun olam*, see Rabbi Dorff, *The Way Into Tikkun Olam (Repairing the World)* (Woodstock, VT: Jewish Lights, 2005).

<sup>85</sup> See CJLS responsa on surrogacy cited above in n.3. Regarding access to surrogacy in Israel for gay couples, see n.4 above.



ability to face these challenges on their own. The decision to raise a child on one's own should not be entered into lightly or without sufficient emotional capacity and financial capability to support a family.

Single parent families can result from divorce, unintended pregnancy, death of a spouse, birth to co-habiting but unmarried couples, etc. Several studies conclude that while children in two parent homes tend to do best in most indicators (such as school grades and drug use), that is only true when there is low conflict in the home. Children raised in poor quality marriages in which there is a lot of conflict fare worse than children in single parent households.<sup>86</sup> According to a longitudinal study conducted by Ohio State University, the most important variable affecting a child's wellbeing is family stability, regardless of the number of parents. Children born and raised by a single parent did as well as children raised in a two parent home that was not disrupted by divorce or the early death of one parent.<sup>87</sup>

However, the costs associated with both adoption and ART (particularly in the US, Canada and other countries in which there is only limited coverage for the medical expenses associated with ART) make it likely that such prospective parents are in an economic position to provide sufficiently for the resulting children.<sup>88</sup> Several studies cited *infra* above also note the positive influence of the regular presence of a grandparent on children, whether in dual or single parent homes. (Such a positive influence can also be provided by extended family and Big Brothers and Big Sisters.) In addition, Jewish congregations and the Jewish community, as a whole, can do more to provide social and emotional support for the single head of household families among us.

In conclusion, there is no evidence to suggest anything but a happy outcome for children raised from birth by a loving and attentive single parent with sufficient resources to provide for the child.

### **When Marriage Is Not Possible**

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<sup>86</sup> Kelly Musick and Ann Meier, "Are Both Parents Always Better Than One? Parental Conflict and Young Adult Well-Being," *Rural New York Minute*, Cornell University's Community & Rural Development Institute, Issue Number 28 (April 2009) and reprinted in *New York Communities 2009: A Year of CARDI Publications* Issue 11 (Feb. 2010): 4, available at [www.cardi.cornell.edu](http://www.cardi.cornell.edu). (Accessed July 14, 2016.)

<sup>87</sup> Claire M. Kamp Dush, "An Examination of Child Well-Being in Stable Single-Parent and Married Families," in Elizabeth Peters, Clair M. Kamp Dush, eds., *Marriage and Family: Perspectives and Complexities* (NY, Columbia University: 2009): 143-176. See also Bella DePaulo, "Children of Single Mothers: How Do They Really Fare?" *Psychology Today* (Jan. 16, 2009), <https://www.psychologytoday.com/blog/living-single/200901/children-single-mothers-how-do-they-really-fare>. (Accessed July 13, 2016.)

<sup>88</sup> Several studies examining children raised by poor single parents show the negative impact of being raised in poverty. Many studies focus on the problems of raising single children in poverty, e.g., Aurora P. Jackson, Kathleen S. J. Preston, and Todd M. Franke, "Single Parenting and Child Behavior Problems in Kindergarten," *Race and Social Problems* 2:1 (March 2010):50–58 (first published online March 19 2010. doi: 10.1007/s12552-010-9026-y), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3193152/> (accessed June 13, 2016) and "Unemployment Among Single Mother Families," Fact Sheet, Institute for Women's Policy Research (September 2009), [www.iwpr.org/pdf/singlemotherUE\\_c369.pdf](http://www.iwpr.org/pdf/singlemotherUE_c369.pdf) (accessed June 13, 2016).

The decision to pursue single parenthood by choice is often the result of a painful and personal recognition that the chance of finding a suitable marriage partner with whom to have children has become unlikely during one's optimal childbearing years. Marriage to a suitable mate has so far proven impossible. The chance for children of their own, not yet so.

The rabbis understood that Divine Law exempts those who are unavoidably prevented from fulfilling a religious obligation: היכא דאפשר - אפשר, היכא דלא אפשר - לא אפשר (*Heicha d'efshar, efshar; heicha dlo efshar, lo efshar*), "Only where it is possible to be carried out is it possible to be carried out, but where it is not possible, it is not possible."<sup>89</sup> This rabbinic rule exempts an individual from a positive obligation (*mitzvat taaseh*) and/or from a negative obligation or prohibition (*mitzvat lo taaseh* or *issur*).<sup>90</sup> Rabbis Abelson and Dorff echo this rabbinic understanding when they write that "commandments make logical and legal sense only when the one commanded has the ability to obey."<sup>91</sup> The rule of *heicha dlo efshar, lo efshar* (what is not possible is not possible and thus no longer obligatory nor prohibited) is applicable here. One is not obligated to get married if one cannot. Where the prerequisite obligation to marry before parenthood and conception is not possible, there is no prohibition (*issur*) on parenthood and conception outside marriage. (This is particularly the case where conception can be accomplished without sexual intimacy through ART, thus avoiding the halakhic question of sexual relations outside of marriage.)

Singles whose biological clocks are ticking down have been unable to find a suitable spouse to marry. Therefore, while they are not obligated to pursue adoption or ART to have children, they are also not obligated to continue to wait for marriage before choosing to utilize adoption or ART to have children. They become exempt from the prerequisite of marriage before parenthood because marriage for them has proven to be impossible in time to have biological children of their own.

This is further supported by the rabbinic decisions that permit an exemption from religious obligation when a competing obligation exists.<sup>92</sup> For example, the *Tur* and the *Derishah* both decide that those engaged in the *mitzvah* of caring for the needs of the community are exempt from the obligation to pray.<sup>93</sup> Such a balancing of responsibility and exemption is applicable here

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<sup>89</sup> b. Bava Kama 84a, b. Hullin 11b-12a and b. Niddah 67b.

<sup>90</sup> A contemporary application of this rabbinic rule is the basis of the teshuva by Rabbis Dorff, Reisner, and Nevins, "Homosexuality, Human Dignity & Halakhah" (cited in n. 5 above *infra*), esp. 9 and notes.

<sup>91</sup> Rabbis Abelson and Dorff, "Mitzvah Children," 2.

<sup>92</sup> The classic example is setting aside a commandment for the sake of the command to protect life and health (*pekuakh nefesh*), which the rabbis learn from Lev. 18:5 (*v'hai bahem, you shall live by them*). Cf. Ezek. 20:11; b. Yoma 83a, 84b. Only three cardinal sins are exempt from such overrides: idolatry, sexual violations, and murder. See b. San. 74a.

<sup>93</sup> Magen David on Shulhan Arukh Orach Hayyim 108:1 s.v. (*'o na' nas*) citing the *Tur* (Section 33) and *Sefer Derishah* (R. Yehoshua Falk). For a concise summary of the debate, see R. David Markel, "On Exemption in Unavoidable Situations: An Adaptation of an Essay by Rabbi Yosef Engel." <http://www.neirot.com/jewish-perspective-values/on-exemption-in-unavoidable-situations-an-adaptation-of-an-essay-by-rabbi-yosef-engel>. (Accessed July 11, 2016.) Cf. t. Yev. 8:5 (8:4 in Zuckerman, ed.) which cites Ben Azzai explaining that he is

when we consider the obligations of parenting separate from the obligation of marriage. The central daily prayer of the Jewish people, the *Shema*, is one of many places in which the Torah obligates us to teach our children.<sup>94</sup>

These models of rabbinic exemptions, freeing individuals of obligations that either cannot be fulfilled or are in conflict with other commandments, provide halakhic justification to exempt singles of the prerequisite of marriage before utilizing adoption or ART for the purpose of having and raising children of their own, specifically so that men can fulfill the commandment of procreation and so that both men and women can fulfill the commandment to teach their children the ways of God and of our People.

Singles are not required to avail themselves of adoption or ART, for their inability to wed frees them of the obligation to try to have children. Adoption and ART are *options* available to those of every gender orientation who want to pursue the opportunity to become parents, build a Jewish home, and educate their children in the ways of God and our people.

While single men who do not find a suitable mate are not technically obligated to *pru urvu* (procreating), by reason of the rabbinic exemptions discussed above, ART does provide a way for them to fulfill this commandment even when unable to find a suitable mate to marry. While adoption does not technically fulfill the commandment of *pru urvu*, adoption does equally fulfill the desire for parenthood as well as the opportunity to teach one's children.

Women are not halakhically obligated to procreate, as discussed above. Yet they are equally obligated in all other commandments not dependent upon anatomy.<sup>95</sup> Though not obligated to avail themselves of adoption or ART, single woman can utilize adoption or ART to have their own children, thereby making possible the fulfillment of the obligations incumbent upon Jewish parents in raising and educating children in Torah and the ways of the Jewish People.

### *Permitting What is Not Prohibited*

There may be many reasons why something that is not technically prohibited is nevertheless not desired or recommended, whether out of concern for a slippery slope or ethical or pietistic concerns consistent with larger Jewish values. This is the reason Rabbi David Golinkin gives, in a *teshuvah* passed by the Israeli Vaad HaHalakhah for Israel's Masorti (Conservative) Movement, to justify prohibiting singles from utilizing ART, even though he acknowledges there is no halakhic prohibition against their doing so. He argues that allowing singles to utilize ART would free men and women of their need for each other to birth children and thus, "we are in

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exempt from the command to have children because of his overwhelming compulsion to spend all his time studying Torah.

<sup>94</sup> Deut. 11:19. See b. Kid. 29a. Though traditional *poskim* debated whether women were exempt from the requirement of studying or teaching Torah to their children, today the Conservative Movement considers women obligated to all commandments equally with men aside from those commandments based on sexual anatomy. See Rabbi Barmash, "Women and Mitzvot."

<sup>95</sup> Rabbi Barmash, "Women and Mitzvot."

effect saying: there is no need for the Jewish family. As a man does not need a wife, a woman does not need a husband, and children do not need two parents!" (R. Golinkin permits single parenthood for adoption because of the overriding value of *hesed* in raising an orphan.)<sup>96</sup>

Unfortunately, Rabbi Golinkin fails to consider the fact that not everyone is able to find a suitable partner to marry, particularly in time to have biological children of one's own. Permitting singles to utilize ART to have children need not be seen as undermining the importance and sanctity of marriage within Jewish life. Rather, it provides a way for those who have been unable to marry to still have children and build a Jewish family. Therefore there is no legitimate reason to prohibit that which is specifically not prohibited under Jewish law.

Rabbinic law often permits something that is not prohibited even if the action in question carries potentially serious halakhic ramifications, particularly where a compelling need exists. Such were the case in the above examples decreeing brides be treated as virgins when a reasonable explanation could account for the lack of symbols of their virginity or, if found to be pregnant, that they had been impregnated "in the bath." In these cases, the compelling need was to protect a woman from the emotional pain of castigation and possibly the very real danger of severe poverty if she were no longer considered a desirable wife in the rabbinic world.<sup>97</sup>

While societal shifts are only one of many data points we consider when making decisions of Jewish law, in this case, such shifts argue for permitting what is not halakhically prohibited (non-coital conception), particularly because here there is also a compelling need. The compelling need today is both individual and communal. On the individual level, the ability to have children today is no less compelling than for the women our sages permitted to be divorced in order to have children to care for them in their old age. That today's singles seeking parenthood do not necessarily articulate their desire for parenthood from this perspective, which may seem too far in their personal futures to contemplate, does not make it any less real. They will also need children to care for them as they age. While one cannot know in advance whether one's children will fulfill a caregiver role in some capacity consistent with the commandments of honoring one's parents, *kibbud av v'em*,<sup>98</sup> such a concern did not prevent the rabbis from relying on this compelling need to provide active compassion, i.e., concrete assistance, to the childless women who came before them. The larger Jewish community also has a compelling need: the

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<sup>96</sup> Rabbi Golinkin, "Artificial Insemination for a Single Woman," 9.

<sup>97</sup> On the dangers single mothers and their offspring faced, see n. 40-45, above. The assumption that what is not prohibited is permitted underlies many of the halakhic decisions regarding fertility questions, particularly when a stringency leads to shame or danger or where there are differences of opinion among *poskim*. See sources cited in n. 3 above and Steinberg, transl. Rosner, *Encyclopedia of Jewish Medical Ethics*: Vol. 1, esp. 80, 88-89 and n. 91, and cf. 587-9.

<sup>98</sup> For a discussion on the obligation of children to care for parents, see Rabbi Nevins, "Between Parents and Children," in Martin S. Cohen and Michael Katz, *The Observant Life* (NY: The Rabbinical Assembly, 2012): 673-692.

demographic need to sustain the Jewish people, a need Scripture and our sages recognized as fundamental.

If the individual's pain of childlessness and the desire to fulfill the commandments to raise and educate Jewish children are not sufficient to permit singles to avail themselves of adoption and ART to choose parenthood, either of the above rabbinically sanctioned compelling needs (to have children to care for aging parents and to sustain the population of the Jewish people) should be sufficient to argue for permitting singles to become parents through adoption and ART. Taken together, these individual and communal needs certainly provide sufficient reason for us to permit what, in Jewish law, is not prohibited. Thus, if singles want to become parents through adoption and ART, they are to be permitted to do so.

In other words, despairing of the ability to have a biological child of one's own within wedlock is a category with halakhic consequences: for the purposes of this teshuvah, that consequence is the halakhic permissibility to choose single parenthood through the use of ART.

Such a halakhic categorization does not take away from the lived experience of those choosing single parenthood as a positive, free-will decision of empowerment. Choosing single parenthood can be a positive and personal choice, not just a decision born of despair, as important as that component is in this halakhic discussion. However, even if the decision to choose single parenthood is not personally experienced by the individual as a response to despair, the halakhic assumption remains that the individual has no expectation of imminent marriage (i.e., has despaired of the possibility of marriage) and thus can pursue single parenthood through ART.

### *How Long is Long Enough?*

Jewish tradition has long acknowledged that we cannot truly know or judge another's pain, as Proverbs 14:10 states, "The heart alone knows its bitterness (*marat nafsho*) and no outsider can share in its joy."

How long someone looks for a mate before despairing of finding an appropriate spouse and the extent of efforts made during that time will, by necessity, vary greatly among individuals depending upon where they live and their personality, health, work life and other conditions and obligations. There is such a variety of variables that it would be inappropriate to suggest or require a minimum age or length of search time as a yardstick to define when a single becomes exempt from the obligation to marry before pursuing single parenthood by choice through adoption or ART.

As with other rabbinically defined situations, such as a sick person asking to eat on Yom Kippur, we rely on an individual's own self-assessment to determine whether competing needs exempt an

individual from a commandment.<sup>99</sup> Ideally, singles considering adoption and/or ART, will consult with their rabbis in addition to their medical practitioners. However, even if they do not seek prior, personal, rabbinic permission (*lhathillah*), we can assume that their very decision to undertake the deliberative, costly, and multi-stepped process of either adoption or ART is determinative that these singles have despaired of marrying in time to achieve biological parenthood and thus are exempt from the prerequisite obligation of marriage.

While a discussion about the full implications of and conditions for banking one's gametes is beyond the scope of this teshuvah, it is worth discussing what, if any, impact the decision to bank one's gametes (by freezing one's eggs or sperm) has on the exemption from the prerequisite obligation of marriage before pursuing parenthood.<sup>100</sup> It is medically possible for women in their mid to late 30s to undergo part of the IVF treatment process in order to have their eggs frozen to improve their chances of later having biological children, either within marriage or as single parents by choice. Similarly, men can freeze their sperm. However, even were a woman to freeze her eggs, her age at the time of pregnancy matters because there is an increase in pregnancy complications as a woman ages. Most clinics will implant an embryo in an otherwise healthy woman only until her 51<sup>st</sup> birthday out of concern for the health of the woman and pregnancy, according to Dr. Joseph Osheroff of Shady Grove Fertility Center. Even if a woman freezes her eggs, the earlier a woman is pregnant, the more likely she will be to have a healthy pregnancy. Risks increase as a woman ages. High blood pressure and diabetes are just two possible complications, according to Dr. Osheroff.

Elective procedures are generally permitted, as discussed above. Therefore, single women in their 30s who choose to freeze their eggs and single males who choose to freeze their sperm are permitted to do so. However, elective procedures cannot be halakhically required due to the even minimal danger presented by wounding. That is why modern *poskim* have determined that married women can utilize IVF, or any form of ART, but do not need to do so.<sup>101</sup> *Kol v'homer*, all the more so, single women cannot be required to undergo the elective procedure of a partial IVF to extract and freeze their eggs in order to create a longer window within which to find an appropriate spouse. Similarly, single men in their 30s may freeze their sperm but are not required to do so (since they are otherwise exempt as singles from the obligation to procreate on the basis of *heicha lo efshar lo efshar*, i.e. that one is exempt from what is impossible to fulfill).

Therefore the guidelines set out above about how long an individual must wait before being considered free of the prerequisite of marriage before parenthood are not affected by the ability or decision to freeze one's eggs or sperm. For all single individuals, even those who have frozen

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<sup>99</sup> For example, Shulhan Arukh Orach Hayyim 618:1 permits individuals to eat on a fast day solely on their own statement of what they require in order to feel well. On eating during fast days, see Rabbi Labovitz, "The Non-Fasting Shaliah Tzibbur on Yom Kippur," CJLS: OH 618:1.2012.

<sup>100</sup> On the halakhic issues relating to banking and/or donating gametes, particularly semen, see CJLS teshuvot on artificial insemination listed in n. 3 above, *infra*.

<sup>101</sup> See n. 3 above.

their eggs or sperm, we rely on their own self-assessment as determinative that they have despaired of marrying in time to achieve biological parenthood and thus are exempt from the prerequisite obligation of marriage before pursuing parenthood through adoption or ART.

### *Unintended Pregnancies*

Jewish law treats every pregnancy as a potential life that can be terminated only to protect the life and physical and mental well-being of the mother and/or the children she already has. The mother's well-being is primary. She is the only actual living being in the relationship between mother and fetus. In Judaism, though the fetus is potential life, it is legally and theologically considered part of the mother's body, like her leg or arm, until the fetus exerts its independent identity when its head or majority of its body exits its mother's body to the open air. Therefore, if a pregnancy, unintended or otherwise, causes the woman significant embarrassment, emotional distress, presents a danger to her physical or mental health, and/or endangers her ability to care for existing children in any way, Jewish law permits her to have an abortion. Ideally, the abortion should take place as early as is feasible.<sup>102</sup>

That said, any single woman who decides she has the medical, emotional, and financial capability to bring an unintended pregnancy<sup>103</sup> to term and either offer the child up for adoption or raise her child on her own as a single parent by choice deserves the full support of the Jewish community.

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<sup>102</sup> Although rabbinic law permits an abortion to protect the mother from embarrassment up until the moment of birth, some later poskim require increasingly serious maternal danger as the fetus ages. See Rabbis Ben Zion Bokser and Abelson, "A Statement on the Permissibility of Abortion," *Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1980-1985* (NY: RA, 1988), Rabbi David Feldman, "Abortion: The Jewish View," available at [https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19861990/feldman\\_abortion.pdf](https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19861990/feldman_abortion.pdf) and Rabbi Susan Grossman, "Partial Birth Abortion and the Question of When Life Begins," esp. 18 n86,88. [https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/grossman\\_partial\\_birth.pdf](https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/grossman_partial_birth.pdf). (Accessed Feb. 12, 2019.)

<sup>103</sup> The CDC defines unintended pregnancy as "a pregnancy that is reported to have been either unwanted (that is, the pregnancy occurred when no children, or no more children, were desired) or mistimed (that is, the pregnancy occurred earlier than desired). Unintended pregnancy is a core concept that is used to better understand the fertility of populations and the unmet need for contraception (birth control) and family planning. Unintended pregnancy mainly results from not using contraception, or inconsistent or incorrect use of effective contraceptive methods. Unintended pregnancy is associated with an increased risk of problems for the mother and fetus. If a pregnancy is not planned before conception, a woman may not be in optimal health for childbearing." "Unintended Pregnancy Prevention," Centers for Disease Control and Prevention. Available at <https://www.cdc.gov/reproductivehealth/contraception/unintendedpregnancy/index.htm>. (Accessed Feb. 12, 2019.) According to a 2016 study, nearly half (45%, or 2.8 million) of the 6.1 million pregnancies in the United States were unintended, based on 2011 statistics. Specifically, 27% of all pregnancies were "wanted later" and 18% of pregnancies were "unwanted." LB Finer and MR Zolna, "Declines in Unintended Pregnancy in the United States, 2008–2011," *New England Journal of Medicine*, 2016, 374(9):843–852, doi:10.1056/NEJMsa1506575. Cited by <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> and CDC <https://www.cdc.gov/reproductivehealth/contraception/unintendedpregnancy/index.htm> as the most current statistics available. (Accessed Feb. 12, 2019.) Jewish law permits abortion to protect the physical and mental health of the woman and the well being of current children. See n 102 above.

A growing number of single women who feel their biological clocks ticking may choose to bring an unintended pregnancy to term and raise the baby as a single parent by choice. An unintended pregnancy ideally can inspire a couple to make the decision to marry in order to provide for the child and build a home together. This is preferable when the couple has an honest, healthy, and supportive relationship. Although it is becoming more common for partners living together to raise children without formal marriage, this is not the Jewishly preferred choice. Marriage is. However, even when the father is known, marriage may not be forthcoming when the individuals are not yet ready to marry or if they know that they would not be able to sustain a healthy marriage and home life together. Marriage could be ill advised for any number of reasons, not only the gravest, where the woman realizes a relationship with the father is, or could reasonably become, physically or emotionally abusive and/or otherwise unhealthy or dangerous. Such a situation raises questions about the role the father will be allowed or expected to play in raising the child. The woman must determine whether she can safely confide in the father his paternity.<sup>104</sup> Where there is reason to believe that the father will provide a positive influence on the child, studies show that the involvement of fathers in their children's lives lead to positive outcomes in their children's health and well-being.<sup>105</sup> Ideally, mother and father would together determine what if any relationship the biological father will have with the child if they determine that marriage is not an appropriate or healthy option for them as a couple. However, such a discussion, let alone a mutually acceptable agreement, may not be reasonable and the woman can decide to raise the child on her own without informing the unintended father. There are women who successfully navigate these challenges and bring into the world beautiful children who grow up to be productive and healthy individuals.

If a single woman intentionally is trying to get pregnant, the potential father should be informed and be a willing partner in the effort to conceive a child. Intentionally becoming pregnant even with a willing unmarried partner is nevertheless strongly discouraged due to the long term legal, social, and psychological complications for the man, the woman and any children that may result. Choosing to pursue adoption or ART to have a child is preferable to intentionally trying to become pregnant with a single man because it eliminates the rabbinic problem of non-marital coitus and protects the woman and her child from paternity challenges and other complications. While this *teshuvah* does not recommend intentionally becoming pregnant with an unmarried partner in order to have a child, if any children result, the children and their parent deserve the same support and acceptance the Jewish community extends to all families.

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<sup>104</sup> The rights of unmarried fathers vary by state. For a brief national review, see "The Rights of Unmarried Fathers, State Statutes through 2017," <https://www.childwelfare.gov/pubPDFs/putative.pdf>. (Accessed Feb. 12, 2020.)

<sup>105</sup> Laura Duberstein Lindberg, Kathryn Kost, Isaac Maddow-Zimet, "The Role of Men's Childbearing Intentions in Father Involvement," *Journal of Marriage and Family*, 79:1 (Feb. 2017): 44-59. <https://doi.org/10.1111/jomf.12377>. (Accessed Feb. 12, 2020.) The studies they review also found that fathers of unintended pregnancies outside marriage were generally less likely to be involved in their children's lives than fathers of intended pregnancies, even when they could follow the development of the pregnancy and be involved as an involved father, e.g., visiting and sharing in the care of the children. Where birth parents are not married, the custodial parent should consult with legal counsel in their state to protect their rights and the best interests of their child.



### Names, Tribes Other Identifiers:

Halakhic treatments of adoption and ART provide precedents for how to navigate the issues related to the naming and tribal identity of children raised by only one, or none, of their biological parents:

\* Where the birth mother is Jewish, the child is born Jewish. Where the birth mother is not Jewish, the child requires conversion, with mikveh and, for a boy, *brit milah lshem gerut*, (ritual circumcision for the sake of conversion) before the child can be considered Jewish.<sup>106</sup>

\* Conservative law already permits an adopted child to have the patronymic and matronymic of the adopting parents instead of *ben/bat Avraham Avinu v'Sarah Imeinu*.<sup>107</sup>

\*Where the tribal identity (Cohen/Levi/Israelite) of the biological father (i.e., the sperm donor) can be determined, the resulting child can inherit that tribal identity. Where the tribal identity, or Jewish identity, of the biological father is unknown, the child is considered an Israelite.<sup>108</sup>

These rulings offer us guidance as we consider the special complications of identifying children born of single parents by choice.<sup>109</sup>

*Identifiers when the father is the single parent by choice:* The child takes on the father's Hebrew name as patronymic. Where the father is also the biological father, the child inherits the father's tribal identity, included in the child's patronymic, only if the child is born of a Jewish mother. Where the birth mother is Jewish and her name is known to the father, the mother's Hebrew name is added as a matronymic. Where the birth mother is Jewish and her name is unknown to the father, the matronymic need not be added. However, to avoid embarrassment<sup>110</sup> in egalitarian communities in which men and women are treated equally in ritual matters and individuals are called to the Torah by both parents' names, the matronymic *Sarah* may be added where the birth mother is Jewish, since all Jews are considered, according to tradition, as a descendant of the matriarch Sarah (and patriarch Abraham). Although this is the reasoning for granting converts the names *ben/bat Avraham Avinu v Sarah Imeinu*, the appellations *Avinu* and *Imeinu* should only

<sup>106</sup> Rabbi Dorff, "Artificial Insemination": 496-7.

<sup>107</sup> Rabbi Reisner, "On the Conversion of Adopted Children," cited in n. 3 above.

<sup>108</sup> Rabbi Mackler, "In Vitro," cited in n. 3 above. Cf. m. Ket. 1:9-10 debating whether the mother is believed if she states that the father is a Cohen, Levi, or Israelite. See also Rabbi Dorff, "Artificial Insemination," 478, 483. Rabbi Moshe Feinstein ruled that outside of Israel, one must assume all sperm donations are from non-Jewish donors even when the doctor reports the sperm is from a Jewish donor, because the doctor may be so reporting just to make the recipient(s) feel better, and thus all children born from sperm of unknown donors are to be considered Israelites. Igeret Moshe EH 1:10. For a fuller discussion on the halakhic issues of paternity, believing the mother's identity of the father, and application in Israel and the rabbinic courts, see, Steinberg, *Encyclopedia of Jewish Medical Ethics*, Vol 3: 777-782.

<sup>109</sup> While the below discussion holds implications for the naming of children in two parent same sex marriages, a discussion of the applicability of these implications is beyond the scope of this *teshuvah*.

<sup>110</sup> Cf. Rabbis Dorff, Reisner, and Nevins, "Homosexuality, Human Dignity," esp. 9.

be added where the child is born of a non-Jewish mother so that a child born of a Jewish mother is not mistakenly considered or identified as a convert. Where the birth mother is not Jewish, the child may still use the biological father's patronymic, however without any tribal identity. In addition, the child requires conversion and the matronymic would be *Sarah Imeinu*, consistent with the rules of naming following conversion. Rabbis are encouraged to brief their staff and gabbaim so that individuals, particularly students, who only have a patronymic are not asked for their mother's name on being called to the Torah.

*Identifiers when the mother is the single parent by choice:* The mother's Hebrew name becomes the child's matronymic. Where the biological father (e.g. the sperm donor) is known to be Jewish and that man's Hebrew name and tribal identity is known, these can be used for the child's patronymic.<sup>111</sup> Where the biological father is assumed or known to be not Jewish and/or the Hebrew name of the Jewish biological father is unknown, the child generally carries only the matronymic. Rabbis are encouraged to brief their staff and gabbaim so that individuals, particularly students, who only offer a matronymic are not asked for their father's name on being called to the Torah. Where individuals are distressed by their lack of a patronymic, and/or to protect against embarrassment in public, they can be given or take on the patronymic *Avraham* since all Jews are the children of Abraham and Sarah. Although this is the reasoning for granting converts the names *ben/bat Avraham Avinu v Sarah Imeinu*, *Avinu* and *Imeinu* should never be added to the matronymic or patryonic of a child born of a Jewish mother so as to avoid mistaking a child born of a Jewish single mother as a convert. *Avraham Avinu* should be added if the child was born of a non-Jewish mother, e.g., a surrogate, and thus conversion is required. In the event of an adoption, the matronymic can be the Jewish name of the adopting mother.

Matters are somewhat more complicated when the tribe of the biological father is known but his name is unknown. In such a situation, the parent can decide to allow the tribe of the child to default to Israelite. Although today in the Conservative Movement we do not require a cohen to renounce his tribal identity upon marrying a divorcee or convert,<sup>112</sup> in the past such a cohen would functionally renounce his tribal status upon such a marriage. This renunciation serves as a precedent for the ability of an individual, or those acting on his or her behalf, to renounce one's tribal identity. Alternatively, if there is a desire to retain the tribal identity where known, even if the father's name is unknown, and/or if the mother and/or child are distressed with the lack of a patronymic, the child can be called by the patronymic *Avraham hacohen/halevi*, which is preferable to the more Talmudic generic of *Ploni hacohen/levi*, in order to protect the individual from embarrassment.

The addition of the generic patronymic *Avraham* or matronymic *Sarah* need not raise questions as to the status of a child as Jewish from birth because the names *Avraham* and *Sarah* are

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<sup>111</sup> Rabbis Moshe Feinstein and Ovadia Yosef consider sperm utilized through donation as fulfilling *pru urvu* (procreation) for the man, and thus by implication, treat him as the father of the resulting offspring. See n. 30 above.

<sup>112</sup> Rabbi Arnold Goodman, "Solemnizing a Marriage Between a Kohen and a Divorcee," CJLS EH 6:1:1996 and "Solemnizing a Marriage Between a Kohen and a Convert," CJLS EH 6.8:1996.

common Hebrew names, even today, and especially when *Avraham* and *Sarah* do not appear as sequential, as they might in congregations that have adopted the local custom of dropping the appellations *Avinu* and *Imeinu* when calling a convert to the Torah.

### **Religious Obligations of a Single Mother:**

Historically, some religious obligations that a parent does for a child, like *brit milah* and *pidyon haben*, specifically were incumbent upon the father. However, even in ancient days, when a father was unavailable or unable, the mother would take on these ritual obligations.<sup>113</sup> Today in the Conservative Movement, when men and women are equally obligated to all *mitzvot* not dependent upon anatomy,<sup>114</sup> mothers are equally obligated for fulfilling all religious obligations incumbent upon a parent for a child.

### **Adoption, ART and the Hierarchy of Choices**

The choice to utilize adoption or ART is solely at the discretion of the prospective single parent by choice.<sup>115</sup> This *teshuvah* does not give preference to the choice of adoption or ART as a road to parenthood. This *teshuvah* does argue that both adoption and ART are acceptable Jewish choices for singles seeking to become parents. The decision whether to adopt or turn to ART to achieve parenthood is up to the individual, ideally made in consultation with one's rabbi and medical practitioners.

There are many reasons why adoption may be a preferable option, for some the only option, when it comes to becoming a parent. While rabbinic law lacks what we consider adoption today, the rabbis identify those who provide a home for an orphan or unwanted child as that child's parent.<sup>116</sup> Adoption remains a priceless blessing for the majority of families who successfully

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<sup>113</sup> E.g., b. Shab.134. Cf. 1 Mac. 1:63-64; 2 Mac. 6:10 (all of which show women taking responsibility for the *brit milah* of their son). Even though b. Kid. 29a states that women are not obligated for the *brit milah* or *pidyon haben* of their sons and the Shulhan Arukh Yoreh Deah 305:2,15 requires the son to redeem himself if his father does not, Avnei Nezer Yoreh Deah 395 rules that if a mother redeems her son, the *pidyon haben* is valid. (Cited by Rabbi Chaim Tabasky, "Can the Mother Perform a Pidyon HaBen?" 8 Tevet 5766. Available at <https://www.yeshiva.co/ask/?cat=52> . (Accessed Feb. 12, 2019.)

<sup>114</sup> As discussed above *infra*, only those *mitzvot* that are defined by one's own biological anatomy, e.g., being circumcised, niddah, and procreation (*pru urvu*), are excluded from the equal obligation upon both men and women. See Rabbi Barmash, "Women and Mitzvot."

<sup>115</sup> Rabbi Dorff urges prospective parents to reconsider adoption before resorting to ART due to the significant physical risk involved in the procedure but he does not require prospective parents to choose adoption before trying an ART treatment. See "Artificial Insemination:" 504.

<sup>116</sup> E.g., rabbinic midrash credits Naomi (Ruth 4:17 *a son is born to Naomi*) and the Daughter of Pharaoh (Ex. 2:10 *she made him her son*) as the parents of the children (Obad and Moses, respectively) they raised but did not birth, b. San. 19b, cf. ER 46:5. See the discussion on adoption in Rabbi Dorff, "Artificial Insemination," 478 ff and in Rabbi Nate Crane, "Adoption," HM 290:1:2018, available at

avail themselves of it. Our understanding of how to deal with adopted children's natural curiosity and concerns about their origin of birth and the choices available to adoptive parents and adult adoptees has broadened considerably over the last few decades, making adoption easier on both parents and children. The very real love and familial connection parents have for their adopted children, who are their children in all ways but biological, and the chance to provide a warm and loving home for children who cannot be raised and/or cared for by their birth parents for whatever reason, argue for our continued support for adoption in the Jewish community.<sup>117</sup>

As fulfilling as adoption can be, however, adoption is not for everyone and not everyone who may want to adopt can successfully do so. The process of adoption is lengthy, expensive, and emotionally complicated. Not everyone qualifies or successfully completes a match.<sup>118</sup> In addition, while adoptions by singles are increasing, singles may still face bias that make it difficult to successfully secure an adoption.<sup>119</sup> Ageism is also a factor limiting successful adoption matches. Even though the majority of applicants for adoptions are over 40, various agencies specifically prefer applicants who are under 40, 45 or 50.<sup>120</sup>

Adoption also does not address the desire to have children “of one's own flesh” so to speak, carrying one's own DNA, or at least some part of it. A study of single women in Israel who choose to avail themselves of ART in their effort to have children found, “Once they (the women) let go of the idea that they were going to have a child within marriage, many of the heterosexual unmarried women I interviewed considered other options. They ultimately chose artificial insemination because they believed it was easier and ‘better’ than having sex with a

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[https://www.rabbinicalassembly.org/sites/default/files/adoption\\_-\\_rabbi\\_nate\\_crane\\_-\\_final.pdf](https://www.rabbinicalassembly.org/sites/default/files/adoption_-_rabbi_nate_crane_-_final.pdf). (Accessed March 4, 2019.)

<sup>117</sup> E.g., see the informative and heartwarming article about Jewish adoption in Connecticut that highlights Cantor Laura Berman's adoption of a young boy from a Russian institution. Cindy Mindell, “Partnering with Heaven - Jewish Adoption in Connecticut” *Jewish Ledger* (Jan. 29, 2014).

<http://www.jewishledger.com/2014/01/partnering-with-heaven-jewish-adoption-in-connecticut/>. (Accessed July 12, 2017.)

<sup>118</sup> For example, three adoption efforts fell through before Rabbi Joel Alter turned to surrogacy to realize a family of his own as a single gay father. See Sarah Ebner, “Meet the Single, Gay Rabbi and His Newborn Twins.” *The Jewish Chronicle* (Feb. 16, 2017) <https://www.thejc.com/lifestyle/features/i-could-never-speak-in-my-own-voice-1,432804>. (Accessed July 12, 2017).

<sup>119</sup> See, e.g., “Adopting as a Single Parent” (Child Welfare Information Gateway available on the US agency Children's Bureau website: <https://www.childwelfare.gov/adoption/>), esp. 2.

<sup>120</sup> The National Council on Disability, a federal agency, notes in their study on discrimination in adoptions that adoption agencies rank candidates for adoptions pursuant to a ranking system: “Heterosexual couples in their late 20s or early 30s with apparently stable marriages are at the top of the ladder. These are the people who can, if they are not infertile, produce children, and who should in the system's view be parents. Single applicants and those in their late 30s and 40s are placed lower on the ladder, along with people with mild disabilities. Gays, lesbians, and those who are significantly older or seriously disabled are generally excluded altogether.” *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, <https://www.ncd.gov/publications/2012/Sep272012/Ch10>. (Accessed July 12, 2017.) See also the unpublished paper by civil rights attorney Sara C. Mills, “Perpetuating Ageism via Adoption Standards and Practices,” esp. 9 n.29. Full article downloadable at [works.bepress.com/sara\\_mills/2/](http://works.bepress.com/sara_mills/2/). (Accessed July 12, 2017).

man in order to get pregnant, it was less costly and less complicated than adoption, and it presented an opportunity to have ‘one’s own’ genetic children.”<sup>121</sup>

For those choosing to utilize ART, the type of ART utilized is usually driven by medical concerns as determined by the woman's medical team. According to fertility specialist Dr. Osheroff, there is a hierarchy of treatments that begins with the least invasive and moves on to the most invasive technologies depending upon the medical conditions of the couple or, in the case of a single, the individual. This process is true regardless of marital status. One advantage of any fertility treatment intervention for single women is that there is no question of informed consent or legal complications about paternity and defining the birth father's role, at least when using anonymous donor sperm.<sup>122</sup> There are significant legal, and possibly halakhic, complications when using known donor sperm. Those considering the use of known donor sperm should consult rabbinic as well as legal counsel. (Dr. Osheroff has also offered egg freezing for single women in their mid to late thirties who want to freeze their eggs in the hope that they may either later marry or be in a situation better suited to single parenthood by choice, as discussed above.) Surrogacy is only recommended if a woman is unable to safely carry to term due to her medical conditions or conditions regarding her uterus or if a same sex male couple or single man desire biological offspring.<sup>123</sup>

### **Conclusion:**

Jewish law and tradition reflects a balance between the ideal and the real. Rabbinic ideation and law viewed marriage and a two parent family, with a mother and a father, as ideal. However, rabbinic literature also reflects the reality of single head of household and blended families. Today, more than in previous generations, a greater variety of configurations are accepted as “legitimate” family units. Children are being raised in single parent households and blended families, and shared between parents in divorced families in greater numbers than in recent memory. “Single parent families are no longer nontraditional families in the United States given the statistics,” according to Westchester Assistant District Attorney and Coordinator of Parent Education and Awareness for the New York State Unified Court System, Susan Pollet, in her

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<sup>121</sup> Susan Martha Kahk, *Reproducing Jews: A Cultural Account of Conception in Israel* (Durham, NC: Duke University Press, 2000): 20.

<sup>122</sup> According to Dr. Osheroff, fertility clinics screen gamete donations for inheritable conditions and diseases. It is worth noting that the availability of genetic testing through such companies as 23 and Me has altered assumptions about the anonymity of gamete donors. See, e.g., Meghana Keshavan, “Consumer DNA Tests Negate Sperm-Bank-Donor Anonymity,” *Scientific American* STAT (September 12, 2019), <https://www.scientificamerican.com/article/consumer-dna-tests-negate-sperm-bank-donor-anonymity/>. (Accessed Feb. 11, 2020.) The implications of these tests and of the future of anonymous donations upon halakhic considerations is beyond the scope of this teshuvah. Cf. CJLS teshuvot cited in n. 3 above infra.

<sup>123</sup> See n. 3 above for sources dealing with the halakhic complication of utilizing various types of ART, including surrogacy and n. 4 above on state and international legal details.

report on single parents for the New York State Court System.<sup>124</sup> These new families are now part of every congregational community. These children are in our schools, camps and youth groups. Our definition of family is changing even as a growing number of Jewish women and men are unable to find a suitable match before their biological clocks make having their own biological children unattainable.

Increased singlehood of young and not so young Jewish adults presents sociological, affiliation, funding and policy challenges for the Jewish community. One response has been to shore up our communal efforts to provide opportunities for Jewish singles to meet in the hope of finding a suitable marriage partner. Another is to broaden the acceptability of and support for single led Jewish families within the organized Jewish community. In Israel, for example, where a pro-natalist perspective drives much of Israeli family law, free ART treatment is provided for up to two children to women regardless of marital status or gender orientation.

This pro-natalist bias reflects two elements. The first is that we have a role in the work of populating the world as part of our partnership with God to complete the work of creation and improve the world (*tikkun olam*).<sup>125</sup> The second is that we have a responsibility to specifically sustain the Jewish people (one significant purpose of the commandment on men to procreate, certainly as Karo understood it). While we reject some of the methods our ancient sages relied on to promote this pro-natalist agenda (such as the obligatory divorce of a childless wife or the permission to divorce an infertile husband, methods already rejected by the Rema and the Talmud, respectively), we can rely on the rabbis' pro-natalist perspective, and the albeit rarer but no less important precedents of active compassion for childless women who sought children to care for them as they aged, to motivate us to help single women and men who desire children. In the context of this *teshuvah* that means permitting singles to adopt and/or to utilize ART so they can realize children of their own even when the blessings of marriage have eluded them.

Parenthood is not for everyone. Even couples desirous of parenthood are not obligated to pursue parenthood outside of natural means within marriage, regardless of the reasons for their decision.<sup>126</sup> This *teshuvah* supports those single individuals who prefer not to have children. Congregations and Jewish institutions can and should do more to welcome and support all singles as well as single parent families. However, for the single individuals who want to turn to adoption or ART to become parents by choice, this *teshuvah* permits them to do so. Their decision to pursue adoption or ART is usually part of a painful and personal recognition that the chance of finding a marriage partner with whom to have children has become unlikely,

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<sup>124</sup> Susan Pollet, "Single Parent Households: Are Children Growing up in Them Really All Right?": 1. [https://www.google.com/url?sa=t&source=web&rct=j&url=http://www.nycourts.gov/ip/parent-ed/pdf/articlesingleparents.pdf&ved=0ahUKEwj96raki\\_HNAhVKPT4KHWTC7wQFggyMAG&usg=AFQjCNHqyXdUWKAnXZx4Cskeh62vZaosAQ&sig2=vh51K4ED82ix\\_JFT0u1iEA](https://www.google.com/url?sa=t&source=web&rct=j&url=http://www.nycourts.gov/ip/parent-ed/pdf/articlesingleparents.pdf&ved=0ahUKEwj96raki_HNAhVKPT4KHWTC7wQFggyMAG&usg=AFQjCNHqyXdUWKAnXZx4Cskeh62vZaosAQ&sig2=vh51K4ED82ix_JFT0u1iEA). (Accessed on July 13, 2016.)

<sup>125</sup> Gen. 2:15; b. Shab. 10a, 119b.

<sup>126</sup> Rabbi Dorff, "Artificial Insemination," 461. R. Moshe Feinstein and other *poskim* understand the obligation "*be fruitful and multiply*" refers only to natural, unassisted, marital relations, Igeret Moshe EH 2:18. See the discussion in Finkelstein, *The Third Key*, 44-46.

particularly as individuals begin to age out of their optimal childbearing years. Rather than considering this desire for parenthood a rejection of marriage, this *teshuvah* embraces the desire for parenthood and the resulting decision to pursue adoption and/or ART as an affirmation of a commitment to raise Jewish children and build a Jewish family.

Nothing in rabbinic law technically prohibits adoption or the use of ART by a single. ART is, by definition, a form of non-coital conception not involving prohibited non-marital intimacy and, thus, has been permitted in halakhic literature. “Not being prohibited” is not, by itself, necessarily sufficient reason to permit, especially where there are contradicting commandments, social concerns, or Jewish values. However, the rabbis permitted that which was not prohibited, particularly when there is a compelling need. That is certainly the case here, where there is both an individual compelling need (the need for a child of one’s own to provide care for the aged parent) and a communal need (to sustain the Jewish people). Where marriage appears to be impossible in time for singles to have biological children of their own, we can rely on the rabbinic concept *היכא דאפשר – אפשר, היכא דלא אפשר – לא אפשר* (*Heicha d’efshar, efshar; heicha lo efshar, lo efshar*), “Only where it is possible to be carried out is it (possible) to be carried out, but where it is impossible, it is impossible”<sup>127</sup> to permit singles to proceed with plans for parenthood without the prerequisite of marriage. While singles are not obligated to pursue parenthood, neither are they prohibited from doing so just because they are not yet married. Where one is unable to fulfill one *mitzvah* (in this case marriage), and is thus exempt from other *mitzvot* generally dependent upon it (in this case procreation and educating children), one may still desire to fulfill one or more of the related *mitzvot*. Even though the *mitzvot* of marriage, procreation, and educating children often have been conflated in rabbinic literature, they are actually discrete *mitzvot*. Thus, those for whom the *mitzvah* of marriage has proven to be impossible may still be able to fulfill the *mitzvot* of having and/or educating children through adoption or ART. While singles are not obligated to fulfill the *mitzvot* of having and/or educating children, they are permitted to do so.

Given all of the above, it is therefore not only permissible but also desirable for singles to have children of their own through adoption and/or ART. By doing so, they not only build their own Jewish family but contribute to building the Jewish people. When welcomed into the Jewish community, such single parents by choice can find the support of a larger family, the congregational family, within which to raise their children steeped in a commitment to Jewish continuity and Jewish family life. Childless couples and singles similarly deserve to be included and warmly welcomed into the Jewish community.

Centuries ago, Rambam wrote, “Whoever adds even one Jewish soul is considered as having created an [entire] world.”<sup>128</sup> Rambam is referring to married men going beyond the minimum requirement of having two children to fulfill *pru urvu*, the *mitzvah* of procreation. While Jewish

<sup>127</sup> b. Bava Kama 84a, b. Hulin 11b-12a and b. Niddah 67b. For a contemporary application of this rabbinic rule, see Rabbis Dorff, Reisner, and Nevins, “Homosexuality, Human Dignity & Halakhah,” esp. 9 and notes.

<sup>128</sup> Mishneh Torah, Laws of Marriage (*Ishut*) 15:16.

singles have no obligation to have children, their desire and efforts to do so can be seen as praiseworthy, consistent with Maimonides' exhortation to increase the Jewish people. May this *teshuvah* offer support and encouragement to those singles who hang their hopes on adoption and/or ART to help them fulfill their dream of adding another Jewish soul to the world as well as motivation to congregations and organizations to more actively welcome and support these singles and the families they seek to raise within the Jewish community.

**Psak:**

- 1) It is permissible for singles to adopt and to utilize any halakhically permissible forms of ART to have children of their own. The use of specific procedures should be determined by the individual in conjunction with his or her medical practitioner(s).
- 2) Adoption is neither more nor less halakhically preferable to utilizing ART.
- 3) Childless individuals are not obligated to try to have a child through ART and/or adoption.
- 4) It is laudable for a single woman to carry an unintended pregnancy to term and keep the child when medically, emotionally, and financially feasible. Intentionally becoming pregnant outside of marriage in order to have a biological child of one's own is significantly less preferable than adopting or utilizing ART due to possible complications with the birth father and particularly when the father is not informed of the woman's intention to try to become pregnant with him.
- 5) Where the mother is the single parent, she takes on all obligations traditionally incumbent upon a father for a child.
- 6) Where the Hebrew names of both parents are known, children conceived through ART carry both the patronymic (and tribal identity) and matronymic of their Jewish biological parents. Conservative Jewish law allows a child to carry the partronymic and/or matronymic of a (Jewish) adoptive parent.
- 7) Where the Hebrew name of only one parent is known, children can be named and called to the Torah by that one parent's name. Where only the (Jewish) mother is known, the child can be called solely by the matronymic. However, if lacking a patronymic causes distress or embarrassment, the patronymic *Avraham* may be added, with the tribal affiliation of the father, if known. Similarly, to avoid distress or embarrassment in communities that call people to the Torah with both the father's and mother's names, and where only the (Jewish) father is known (as in the case of a surrogacy), the matronymic *Sarah* may be added. The terms *Aveinu* and *Imeinu* should only be added to *Avraham* and *Sarah*, respectively, when the child is not born of a Jewish mother and thus is converted.
- 8) Where the tribal identity of the father is unknown, the child is an Israelite. Where the tribal identity of the father is known, it may be used only if the child is born of a Jewish mother. Where the child is born of a Jewish mother and the father's tribal identity is



known, but the name of the father is unknown, the mother can determine whether to use the patronymic *Avraham haCohen/haLevi*, or drop the tribal identifier.

- 9) As an *eitzah tovah* (a form of good advice), and particularly for life cycle events, the Rabbi can instruct the gabbaim and Religious Committee members not to request a second name (either patronym or matronym) when calling an individual up for an Aliyah.
- 10) In the case of reciting the *Mi Sheberach* prayer for the ill, which traditionally cites the individual's Hebrew name ben/bat mother's Hebrew name, where the mother's Hebrew name is unknown, *Sarah* can be substituted.