

ARTIFICIAL INSEMINATION, EGG DONATION AND ADOPTION

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שאלה

An infertile Jewish couple has asked the following questions: Which, if any, of the new developments in reproductive technology does Jewish law *require* us to try? Which *may* we try? Which, if any, does Jewish law *forbid* us to try? If we are not able to conceive, how does Jewish law view adoption?

תשובה

These questions can best be treated by dividing those issues that apply to the couple from those that apply to potential donors of sperm or eggs, and by separately delineating the status in Jewish law of the various techniques currently available.

For the Couple

May an infertile Jewish couple use any or all of the following methods to procreate: (1) artificial insemination with the husband's sperm; (2) artificial insemination with a donor's sperm; or, (3) egg donation? *Must* they use one of these methods if they cannot procreate through their own sexual intercourse? (4) Is adoption permissible? (5) Which of these methods for becoming parents, if any, fulfill the commandment to procreate?

For the Donor

May Jews donate their sperm or eggs so that other people who are infertile can have children? If so, are there any restrictions?

(The Subcommittee on Bioethics has agreed to divide the many issues on the beginning of life, and so those connected with in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), and surrogate motherhood, while described here, will be treated in a separate responsum.)

Within Jewish sources, children are seen as one of God's chief blessings. Sarah, Rebecca, Rachel, and Hannah have trouble conceiving and bearing them, but that only adds to the preciousness of the children they ultimately have. God's blessings of the Patriarchs promise children as numerous as the stars, and later Deuteronomy and the Psalmist include children prominently in their descriptions of life's chief goods.¹

Moreover, Jewish law understands propagation not only as a blessing, but a commandment. It is, indeed, the first of the biblical commandments, and its occurrence in the creation story in the opening chapter of the Torah indicates the centrality of children in the Bible's understanding of human life. While both husband and wife are obviously necessary to procreate, for exegetical and, probably, economic and/or physical reasons, the Mishnah later asserts that it is only the man who is subject to the commandment – the reason why Jewish law is more permissive in the use of female contraceptives than male ones – and that to fulfill this biblical demand one must have two children.² Here, though,

¹ Sarah, Rebecca, Rachel and Hannah have trouble having children: Gen. 15:2-4; 18:1-15; 25:21; 30:1-8, 22-24; 35:16-20; 1 Sam. 1:1-20. God's blessings of the Patriarchs promise numerous children: Gen. 15:5; 17:3-6, 15-21; 18:18; 28:14; 32:13. Children figure prominently in the descriptions of life's chief goods in Deuteronomy (e.g., 7:13-14; 28:4, 11) and in Psalms (e.g., 128:6).

² The biblical command to "be fruitful and multiply": Gen. 1:28. The Mishnah's determination that it is only the man who is subject to the commandment: M. Yevamot 6:6 (61b), where the ruling is recorded as the majority opinion (that is, without ascription) but without textual support and where Rabbi Yohanan ben Beroka immediately objects: "With regard to both of them [i.e., the male and female God first created] the Torah says, 'And God blessed them and said to them. . . . "Be fruitful and multiply."'" The Talmud (B. Yevamot 65b-66a) brings conflicting evidence as to whether or not a woman is legally responsible for procreation and ultimately does not decide the matter. That is left for the later codes; cf. M.T. Laws of Marriage 15:2; S.A. Even HaEzer 1:1, 13. The Talmud there also brings conflicting exegetical grounds for the Mishnah's ruling restricting the command to men, basing it alternatively on "Replenish the earth and subdue it" (Gen. 1:28) or on Gen. 35:11, "I am God Almighty, be fruitful and multiply." There are problems in using both texts, however. The traditional pronunciation of the Hebrew verb in the first verse (Gen. 1:28) is in the plural, making propagation a commandment for both the man and the woman; it is only the written form of the text that is in the masculine singular (and even that can apply, according to the rules of Hebrew grammar, to either men alone or to both men and women). The second verse (Gen. 35:11) is indeed in the masculine singular, but that may be only because God is there talking to Jacob; the fact that Jacob is subject to the commandment proves nothing in regard to whether his wives were.

These problems make it likely that the real reason for limiting the commandment of procreation to men is not exegetical at all, and we have to look elsewhere for what motivated the Rabbis to limit it in that way. I would suggest that that reason is to be found in the economic sphere – specifically, that since men were going to be responsible for supporting their children (although there is some question as to whether they were legally obligated to support their daughters), it was against the man's best economic interests to have children, and so it was precisely the men that had to be commanded. Alternatively, since the man has to offer to have conjugal relations with his wife for procreation to take place, it may be that physical factor that prompted the Rabbis to impose the commandment on men.

The Mishnah's determination that that command is fulfilled with a minimum of two children is also found in M. Yevamot 6:6 (61b). In that Mishnah, the School of Shammai say that one has to have two boys and the School of Hillel say that one must have a boy and a girl. The Talmud understands the School of Shammai's position to be based on the fact that Moses had two sons, Gershom and Eliezer (1 Chron. 23:15); while the Mishnah already states that the School of Hillel's ruling is based on Gen. 1:27, according to which God created the human being, "male and female God created them."

There are several variations on this ruling in the sources. A Tosefta (T. Yevamot 8:3), included in the Talmud (B. Yevamot 62a), asserts that the School of Shammai actually requires two males and two females, while the School of Hillel requires a male and a female. Yet another talmudic tradition (*ibid.*), in the name of Rabbi Nathan, states that the School of Shammai requires a male and a female, while the School of Hillel requires

as usual, the Mishnah is only specifying the minimum needed to fulfill one's obligation under the law. Jewish practice at that time and throughout the centuries since then, and indeed later Jewish law itself, together make it clear that one was supposed to have as many children as one could, for, as Maimonides says, "whoever adds even one Jewish soul is considered as having created an [entire] world."³

As the biblical stories indicate, though, couples cannot always have the children that both they and the Jewish tradition would like. Like the biblical characters, modern couples often experience their inability to have children as frustrating and degrading. Somehow, they think, we should be able to do what our bodies were designed to do and what most other people's bodies enable them to do. Especially when all one's married friends are having children, an infertile couple often feels not only unlucky and deprived, but embarrassed and defensive as they continually feel the need to explain why they do not have children too. Infertility even challenges many people's feeling of adequacy as a man or as a woman – and as a mate. Some marriages fall apart due to the tension engendered by continued, unsuccessful attempts to have children.

The Jewish emphasis on children can actually be an additional source of consternation for infertile couples. Couples who cannot have children are no longer obligated to fulfill the commandment to propagate, for commandments make logical and legal sense only when the one commanded has the ability to obey. Still, Jewish couples who seek to abide by Jewish law – and even those who do not – often *feel* that they are letting down not only each other, but their parents, the Jewish people, and God.

In addition to these legal concerns, there are emotional and theological components of the tradition that add to infertile couples' misery. The tradition, as we have noted, glories in children. So, for example, when the Psalmist wants truly to bless his listener or reader, he says:

Happy are all who fear the Lord, who follow His ways. . . . Your wife shall be like a fruitful vine within your house; your sons, like olive saplings around your table. So shall the man who fears the Lord be blessed. May the Lord bless you from Zion; may you. . . live to see your children's children. May all be well with Israel!⁴

either a male or a female. The Jerusalem Talmud (J. Yevamot 6:6 [7c]) records the position of Rabbi Bun (Abun) who takes note of the context of the School of Hillel's ruling right after that of the School of Shammai's ruling requiring two boys. Rabbi Bun therefore reads the School of Hillel as agreeing that two boys would suffice to fulfill the obligation, but "even a boy and a girl" would, and thus the School of Hillel is offering a leniency over the School of Shammai's requirement of two boys, in line with the School of Hillel's general reputation. Rabbi Bun also notes that if that were not the case – that is, if the School of Hillel were saying that *only* a boy and a girl would fulfill the obligation – then this ruling should appear in the various lists of the stringencies of the School of Hillel in Chapters 4 and 5 of M. Eduyot, but it does not. Despite these variants, the codes rule that the obligation to propagate is fulfilled only when one has a boy and a girl: M.T. Laws of Marriage 15:4; S.A. Even HaEzer 1:5.

Based on Exod. 21:10, the Rabbis deduced the obligation for a man to offer to have sex with his wife independent of the possibility of propagation. See M. Ketubbot 5:6.

³ The Talmud (B. Yevamot 62b) encourages couples to have as many children as possible on the basis of Isa. 45:18 ("Not for void did He create the world, but for habitation [לשבת] did He form it") and Eccles. 11:6 ("In the morning, sow your seed, and in the evening [לערב] do not withhold your hand") When codifying this law, Maimonides adds the explanation quoted; see M.T. Laws of Marriage [אשת] 15:16. Maimonides' theme of a whole world being created with the birth of a child is echoed in M. Sanhedrin 4:5, "If anyone keeps a person (according to some manuscripts, "within the people Israel") alive, it is as if he has sustained an entire world," and the converse appears in B. Yevamot 63b: "If someone refrains from propagation, it is as if he commits murder (literally, 'spills blood') and diminishes the image of God."

⁴ Ps. 128:1, 3, 4, 5.

As that passage indicates, such positive feelings about children are, at least in part, due to the tradition's conviction that children are an expression of God's blessing of those who abide by the conditions of God's Covenant with Israel. As the Torah says explicitly:

If you obey these rules and observe them faithfully, the Eternal, your God, will maintain for you the gracious covenant that God made on oath with your forbears. God will love you and bless you and multiply you. . . . There shall be no sterile male or female among you.⁵

While this sounds warm and loving to those who have children, it has a very different ring to those who do not. As one infertile Jewish woman has written,

Fertility, it seems, is an integral component of the covenant. Is barrenness, then, next to godlessness? If you who are fertile have received a sacred blessing, have we who are not received a divine curse?⁶

Of course, the people involved in the biblical stories of infertility include no less than our Patriarchs and Matriarchs, who are depicted as being in very good graces with God. Indeed, in later sections of the Torah, the merits of those people and the oath God swore to them are the grounds for forgiving the seriously erring Israelites after the molten calf incident and for God's choosing the people Israel in love.⁷ The Torah, therefore, is ambivalent about piety producing fertility and about fertility being the mark of piety, and that should hopefully be of some comfort to infertile Jewish couples.

If the biblical stories of infertility raise internal, theological problems within the Torah, their prevalence should not surprise us at all. In our own times one in seven couples in the United States is infertile, where "infertile" denotes a couple who is actively trying to have a child over the period of a year and cannot conceive. Since Jews go to college and graduate school in percentages far exceeding the national norm, they generally do not even try to have children until their late twenties or thirties. That compounds the problem yet further for the Jewish people, for infertility increases with age: 13.9 percent of couples where the wife is between thirty and thirty-four are infertile, 24.6 percent where the wife is between thirty-five and thirty-nine, and 27.2 percent where the wife is between forty and forty-four. As many as 1.2 million patients are treated annually in the United States for infertility problems, with approximately one billion dollars spent each year in their care. Even so, for as many as one in five infertile couples, a cause is never found, and as many as half the infertile couples seeking treatment are ultimately unsuccessful, despite trying various avenues of treatment.⁸

⁵ Deut. 7:12-14.

⁶ Julie Stockler, "The Longing for Children," *Moment* 18:5 (Oct. 1993): 94.

⁷ Exod. 32:13; Deut. 7:6-8.

⁸ U.S. Congress, Office of Technology Assessment, *Infertility: Medical and Social Choices*, OTA-BA-358 (Washington, D.C.: U.S. Government Printing Office, May 1988), pp. 1, 3, 4, and 6. According to that report, in 1982, an estimated 8.5 percent of married couples with wives aged fifteen to forty-four were infertile, 38.9 percent were surgically sterile, and 52.6 percent were fertile. As the report notes, however, surgical sterilization masks some couples who were infertile anyway, and so if they are excluded from the population base, the 2.4 million infertile couples account for 13.9 percent of the remaining 17.3 million couples, or roughly one in seven. See also Lori B. Andrews, *New Conceptions* (New York: St. Martin's Press, 1984), p. 160; Paul Lauritzen, "Pursuing Parenthood: Reflections on Donor Insemination," *Second Opinion* (July 1991): 57-58.

In contrast to biblical times, though, scientific methods now exist to enable the other half of these couples to bear children. This provides new hope to such couples, and we certainly rejoice with them when they succeed in having the children they want. Whenever we *can* do something new, though, we must ask the moral and legal question of whether we *should* or do so, and the new methods of achieving conception come with some clear moral, financial, communal, and personal costs that must be acknowledged and balanced against the great good of having children.

Traditional Sources on Non-Sexual Insemination

Artificial insemination is one method used when a couple cannot conceive through sexual intercourse because of sexual dysfunction, insufficient or abnormal sperm, or less than the required mobility of the sperm. There are four sources within the tradition that contemplate insemination of a woman without sexual intercourse, and so even though they do not reflect methods of insemination parallel to modern means, they are commonly invoked in contemporary Jewish discussions of artificial insemination.

The first occurs in the Talmud:

Ben Zoma was asked: “May a high priest [who, according to Lev. 21:13, must marry a virgin] marry a maiden who has become pregnant [yet who claims she is still a virgin]? Do we take into consideration Samuel’s statement, for Samuel said: ‘I can have repeated sexual connections without [causing] bleeding [i.e., without the woman losing her virginity],’ or is the case of Samuel rare?” He replied: “The case of Samuel is rare, but we do consider [the possibility] that she may have conceived in a bath [into which a male has discharged semen, and therefore she may marry a high priest].”⁹

However implausible conception by these means may seem to moderns, this talmudic source clearly contemplates the possibility of conception without sexual intercourse, and its simple meaning is that artificial insemination neither invokes the prohibitions nor leads to the illegitimacy of adultery or incest through sexual relations. Even some medieval and early modern rabbis, though, had trouble imagining such a situation, let alone using it as a basis for legal decision, and so they interpret the passage metaphorically.¹⁰ Others, however, accept the possibility of such conception and interpret the passage on its face, leading Rabbi Moshe Feinstein, for example, to permit donor insemination.¹¹

The second source generally cited is a medieval Midrash regarding Ben Sira, second-century B.C.E. author of a book of the Apocrypha often cited in the Talmud. This legend, first mentioned by Rabbi Jacob Moellin Segal (1365-1427) in his work *Likutei Maharil*, claims that Ben Sira was conceived without sexual intercourse by the prophet Jeremiah’s

⁹ B. Haggigah 14b.

¹⁰ Judah Rozanes, *Mishneh Le-Melekh* on M. Laws of Women (הלכות אשות) 15:4; Moses Schick (Maharam Schick), *Taryag Mitzvot*, ch. 1; Solomon Schick, *Responsa Rashbam*, Even HaEzer, ch. 8.

¹¹ E.g., Rabbis Hayyim Joseph David Azulai, quoted in Immanuel Jakobovits, “Artificial Insemination, Birth Control, and Abortion,” *Ha-Rofeh Ha-Ivri* (1953) 2:169-183 (English) and 114-129 (Hebrew); Rabbi Jonathan Eybeschutz, *Benei Ahuvah* on M. Laws of Women (הלכות אשות) 15:6; and Rabbi Jacob Ettlinger, *Arukh La-Ner* on B. Yevamot 12b. The sources in this and the previous note are cited in Rosner, “Artificial Insemination,” in Fred Rosner and J. David Bleich, *Jewish Bioethics* (New York: Sanhedrin Press, 1979), p. 116, notes 4-7. Rabbi Moshe Feinstein also bases his permission to use donor insemination on this source, noting that it specifically classifies the child as legitimate; see *Iggrot Moshe*, 4 Even HaEzer 1:10, 2:11, 3:11.

daughter in a bath, the father having been Jeremiah himself who, coerced by a group of wicked men, had emitted semen into the water. The Midrash is undoubtedly based on the fact that the Hebrew spellings of “Jeremiah” and “Sira” have the same numerical equivalent (271). The legend subsequently appears in many medieval texts as well as most, if not all, of the rabbinic responsa dealing with artificial insemination.¹² The story is denied, however, by Rabbi David Gans, who notes its absence in the Talmud and the classical collections of Midrash, and who quotes Rabbi Solomon ibn Verga to the effect that Ben Sira was the son of the daughter of Joshua ben Jehozadak, a High Priest mentioned in the Book of Ezra.¹³ Be that as it may, this story supports three contentions: that conception without sexual intercourse is possible; that, unlike sexual intercourse, it does not impart the status of illegitimacy (*זמזומ*) as it normally would on a child conceived by a father and daughter; and, since the legend asserts that Ben Sira was the child of Jeremiah, the sperm donor is apparently to be considered the legal, as well as the biological, father of the offspring.

The third source commonly quoted is the comment of Rabbi Perez ben Elijah of Corbeil in his work *Haggahot Semak*, who states:

A woman may lie on her husband’s sheets but should be careful not to lie on sheets upon which another man slept lest she become impregnated from his sperm. Why are we not afraid that she become pregnant from her husband’s sperm and the child will be conceived of a menstruating woman [niddah]? The answer is that [we are not concerned about the child being the progeny of a menstruating woman] since there is not forbidden intercourse, [and so] the child is completely legitimate [kasher] even from the sperm of another, just as Ben Sira was legitimate. However, we are concerned about the sperm of another man because the child may eventually marry his sister.¹⁴

Whether or not a woman can, in fact, be impregnated by sperm on a sheet (presumably shortly after the man left the bed), Rabbi Perez clearly assumes that she can, and thus we have another source within the tradition that contemplates insemination without sexual intercourse. Like the legend cited above, Rabbi Perez assumes that the child so conceived is legitimate, even if the sexual union of the biological parents would have been prohibited – here, because the woman was (or might have been) menstruating. He also mentions a concern that will arise in cases of artificial insemination by a donor (and also in cases of adoption), namely, the worry that the child will later have intercourse with his half-sister or her half-brother, an act that Lev. 18:9 classifies as incest. The people involved would presumably be acting unknowingly, of course, and one then must ask whether the prohibition would apply; but even if it does not, contemporary Jewish law must be concerned with the danger of genetic defects in the children of such a biologically consanguineous relationship.

Finally, Rabbi Moses ben Nahman (Nahmanides), in explaining the verse, “One may not have intercourse with one’s neighbor’s wife for seed [or sperm]” (Lev. 18:20),

¹² J.D. Eisenstein, “Alfa Beta de-Ben Sira,” *Otzar Midrashim* (New York: Hebrew Publishing Company, 1928), p. 43; cf. J. Preuss, *Biblical and Talmudic Medicine*, trans. Fred Rosner (New York: Sanhedrin Press, 1978), pp. 463-464; H. Friedenwald, *The Jews and Medicine* (Baltimore: Johns Hopkins Press, 1944), vol. 1, p. 386; Immanuel Jakobovits, *Jewish Medical Ethics* (New York: Bloch, 1959, 1972), pp. 244-250.

¹³ David Gans, *Zemah David* (Offenbach, 1968). 1:1:441. p. 14b. S. Verga, *Shevet Yehudah* (Lemberg, 1846).

¹⁴ Quoted by Rabbi Joel Sirkes. *Bayit Hadash* (“Bah”) on the Tur, Yoreh De’ah 195. Also quoted by Rabbi David ben Samuel Ha-Levi, *Turei Zahav* (“Taz”), on S.A. Yoreh De’ah 195:7.

points out that the last two Hebrew words of that verse seem unnecessary. He then raises the possibility that they were included in the text to emphasize one reason for the prohibition of adultery, namely, that society will not know from whom the child is descended. On this basis, Rabbi Yoel Teitelbaum rules that donor insemination is biblically prohibited, for it is like adultery in that the identity of the donor is usually unknown and because D.I. establishes a genetic relationship between the biological father and the child which, had there been intercourse, would have been categorized as an act of adultery. Rabbi Eliezer Waldenberg goes even further: he uses Nahmanides' interpretation as forbidding the very act of injecting a donor's semen into a married woman's womb as an act of adultery, regardless of the absence of sexual contact involved.¹⁵

Note that the first three sources are all ruling after the fact (בריעבך) of insemination. Using them for rulings of artificial insemination, then, whether such rulings be stringent or lenient, will require us to ignore this disanalogy.

There is another problem in using them. As a matter of general policy, I maintain that we should use the precedents within our tradition to guide us in our own rulings as much as possible, even when they are scant in number and considerably different in context from the questions we are asking, as long as we keep these disanalogies in mind in assessing the weight we give the precedents and the conclusions we draw from them.¹⁶ Rabbi Teitelbaum, however, already anticipates a problem in using the commentary of Nahmanides, for it is not obvious that biblical commentaries were ever intended to be sources of law.¹⁷ Moreover, the first three sources discussed in this section, the ones that explicitly contemplate the possibility of artificial insemination, are so unlike the contemporary conditions in which the question of the permissibility of artificial insemination arises that one wonders whether they can seriously serve as a legal resource for our questions.

The Range and Costs of Available Infertility Treatments

The methods of insemination described in the sources above, even if physically possible, are happenstance at best. Modern infertility treatments differ from the first three of the above sources in two significant ways. First, when contemporary techniques are used, all parties involved intend for conception to take place; and, second, the probability of that happening is considerably greater than it is in the situations described by the first three sources.

Specifically, in our time, about fifty percent of infertile couples are ultimately treated successfully, and about eighty percent of those are aided in producing children through con-

¹⁵ Rabbi Moses ben Nahman, *Commentary to the Torah*, on Lev. 18:20. Rabbi Yoel Teitelbaum, *Divrei Yoel* 110, 140. Rabbi Eliezer Waldenberg, 9 *Tzitz Eleizer* 51:4; see also 3 *Tzitz Eleizer* 27:1, where Rabbi Waldenberg vigorously opposes the ruling of Rabbi Peretz, quoting a number of early decisors who disagree with him on the unqualified legitimacy of a child born without sexual union.

¹⁶ See Elliot N. Dorff, "Toward A Methodology for Jewish Medical Ethics," *Jewish Law Association Studies* 6, B.S. Jackson and S.M. Passamanek, eds. (Atlanta: Scholars Press, 1992), pp. 35-57; and, more briefly, in "A Jewish Approach to End-Stage Medical Care," *PCJLS* 86-90, pp. 66-77. For other positions that challenge the appropriateness of the legal methodology that I think we should use in making Jewish normative decisions, see Daniel H. Gordis, "Wanted – The Ethical in Jewish Bio-Ethics," *Judaism* 38:1 (winter 1989): 28-40; David Ellenson, "How to Draw Guidance from a Heritage: Jewish Approaches to Mortal Choices," in Barry S. Kogan, ed., *A Time to Be Born and a Time to Die* (New York: de Gruyter, 1990), pp. 219-232; and Louis Newman, "Woodchoppers and Respirators: The Problem of Interpretation in Contemporary Jewish Ethics," *Modern Judaism* 10 (Feb. 1990): 17-42.

¹⁷ Yoel Teitelbaum, 2 *Divrei Yoel*, 110, 140. He claims that biblical commentaries may nevertheless be considered a source of law if they engender a stringency rather than a leniency. For Rabbi Moshe Feinstein's reply, see *Dibrot Moshe*, Ketubbot 238-239.

ventional medical and surgical therapy. Medical treatment ranges from relatively simple techniques like teaching the couple to pinpoint the time of ovulation for maximum potential for conception to more sophisticated treatments like artificial insemination or drug therapy to stimulate the ovaries to ovulate. Surgical treatments also span a wide spectrum of complexity, ranging from ligation of testicular veins for eliminating varicocele to delicate microsurgical repair of reproductive tract structures in both men and women.

Ovulation induction, surgery, and artificial insemination are the most widespread and the most successful approaches to overcoming infertility. Drug therapy with Clomid for stimulating ovulation and artificial insemination are successful in slightly less than fifty percent of the cases in which they are tried, and they generally cost \$300 or \$400. (If Pergonal is used instead of Clomid, the cost is considerably greater, amounting to \$2,000 to \$3,000 per cycle.) Corrective surgery, of course, is also expensive, but where it is appropriate, it holds out the hope for a permanent solution to the couple's infertility problems.

Three more complicated and more expensive reproductive technologies – in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), and zygote intrafallopian transfer (ZIFT) – account for the other twenty percent of those couples who are successfully treated.¹⁸ In addition, the couple may enlist the help of another woman through “traditional surrogacy” or gestational surrogacy. Since these procedures are not the subject of this responsum, I will not describe them in detail here. Suffice it to say, though, that these procedures are much more costly (\$8,000-\$10,000 for each try), have a much lower rate of success in producing a baby (approximately ten percent for each attempt), and raise gnarly legal, moral, and psychological problems.¹⁹

Even the less costly and morally less complicated methods of correcting infertility, though, have financial, legal, moral and psychological costs, and couples thinking about using them must recognize these burdens and plan support mechanisms to deal with them before deciding to employ such aids. Sex on schedule does indeed take much of the joy out of making love. It also makes you think of your body as a machine somehow detached from “you.” Since that machine is not working as well as you would like, at least in this one area, you may lose a measure of self-confidence and self-respect. Many feel sad and alone; some cannot talk about this even with their spouse. Indeed, some fear losing their spouse altogether due to the trials of reproductive technology; infertility is already a strain on most marriages, but using reproductive technology focuses attention on children and the couple's inability to have them. If repeated attempts are necessary, repeated failures are

¹⁸ The 85-90% and 10-15% breakdown between conventional treatments and the more technologically sophisticated approaches of IVF, GIFT, and ZIFT is found in the report of the Office of Technology Assessment of the U.S. Congress, *Infertility*, p. 7.

¹⁹ Doctor Brenda Fabe, a gynecologist/obstetrician at Kaiser Permanente Hospital in West Los Angeles, supplied these approximate costs for me. See also Elizabeth Royte, “The Stork Market,” *Lear's* (Dec. 1992): 52-55, who reports similar prices.

Royte also notes that success rates “were widely overreported in the early 1980s, with clinics reporting take-home baby rates of thirty to thirty-five percent. After an Office of Technology Assessment investigation in 1987, numbers became more realistic, but because the fertility industry isn't yet regulated by law, there are still no reporting standards.” As a result, instead of live births, clinics may count pregnancies, and “they may not disclose the number of babies born with congenital diseases or that die within a month of birth.” Moreover, “a woman who has triplets may add three births to the clinic's log, though only one mother takes babies home.” (All citations from p. 54.)

The American Fertility Society asserts that IVF has a 15.2 percent success rate, and then only counting couples who produce quality eggs, sperm, and embryos (p. 54). That does not count the couples who drop out because they cannot produce such genetic materials. Still, ten years ago, IVF's success rate stood at less than five percent; by 1987 it had doubled (p. 55), and by now it has effectively tripled.

possible, and the couple will need to deal with ever-renewed hopes and oft-recurring disappointments. After all, only half of the couples with infertility problems are ultimately successful in having children of their own through the techniques now available.²⁰

None of this is sufficient reason to ban the use of these techniques by Jews, but the psychological costs of seeking to treat infertility in these technological ways, as well as the economic, legal, and moral ones, must be balanced against the emotional costs of not having children or of having them through adoption. Infertile couples are under no Jewish obligation to use modern technology to have children. If they nevertheless choose to do so, they must recognize and take into account all of the factors involved in order to make a reasonable and Jewishly responsible decision.

Let us return to the beginning. Couples having trouble getting pregnant are normally first advised to time their intercourse to coincide with the woman's most fertile time. Rabbis do not object to this since it usually comes at the beginning of the time when the couple is permitted by the laws of family purity (טהרת המשפחה – or, as Rabbi Susan Grossman has suggested, קדושת המשפחה) to have conjugal relations after waiting for the woman's menstrual period to be over.²¹

If timing does not work, physicians commonly do a thorough analysis of both the husband and wife. If corrective surgery can help either or both of them to become fertile, Jewish law would permit taking the risks of surgery for such a purpose, although it would not require it. The life or health of neither of them is threatened by their inability to have a baby, and so the surgery would not be required on those grounds. Furthermore, even though the man has a duty to procreate under Jewish law, he is under no obligation to undertake the risks of surgery to fulfill that duty – although, again, both he and his wife may do so.

Sometimes drug therapy is required to stimulate the woman's ovaries. Even though there is evidence that such drugs increase to some extent the risk of ovarian cancer, high blood pressure, and strokes, the demonstrated risk is not so great that such therapy must be prohibited because of the overriding Jewish concern of Jewish law to preserve the woman's life and health.²² On the other hand, because the woman's own health is not threatened by her infertility, and because, in any case, she is not subject to the command to procreate, she is not at all required by Jewish law to use such drugs. That is an option she has, an option she can choose to act on or refuse with the full endorsement of Jewish law for either choice.

²⁰ U.S. Government, *Infertility*, p. 9.

²¹ Susan Grossman, "Feminism, Midrash, and Mikveh," *Conservative Judaism* 44 (winter 1992): 14. Rabbi Grossman has pointed out to me that sometimes one of the manifestations of a woman's infertility problem, particularly in older women, is that she spots during the middle of her cycle, and that could mean, according to the laws of family purity, that she must refrain from conjugal relations with her husband for three days during her time of ovulation to insure that her menstrual period is indeed over. To make it possible for such women to have conjugal relations during ovulation despite such spotting, traditional women, sometimes with the collusion of Orthodox rabbis, have invented creative ways to circumvent such possibilities, such as wearing dark underwear during that time so that the spots are not noticeable. For those infertile couples in the Conservative community who observe the laws of family purity, we would heartily endorse such creative solutions to this problem of staining, especially since the time about which we are talking is, at worst, during the women's "clean days," which are only rabbinically enacted, while the commandment to have children incumbent upon her husband is biblical.

²² The general imperative to take steps to maintain our health is, according to Maimonides and Isserles, based on Deut. 4:9 and 4:15, "and you shall guard yourselves." The verses in context speak about guarding ourselves against following other gods, but Maimonides and Isserles applied them to guarding our bodies against illness as well. See M.T. Laws of Ethics (דעות), chs. 3-5; Laws of Murder 11:4-5; S.A. Yoreh De'ah 116:5 (gloss). Because they are reading the verses out of context, there is a debate in later sources as to whether by quoting these verses they mean to make the requirement biblical or whether the verses are merely a supporting text (*asmakhta*) and the command is therefore rabbinic: see the Tumim (27:1), affirming its biblical nature, and the

The next most common method of reproductive therapy is artificial insemination, including artificial insemination by the husband (A.I.H.) or by a donor (A.I.D., or so as not to confuse that with the AIDS virus, the more common abbreviation is now D.I. for donor insemination or, in some discussions, S.D.I. for surrogate donor insemination). This responsum will focus on both these forms of artificial insemination, along with the converse of D.I., egg donation, and the alternative to all such reproductive technologies, adoption. In so doing, hopefully this responsum will lay the groundwork for another, later responsum that will deal with the yet more complicated issues raised by IVF, GIFT, ZIFT, and surrogacy.

Artificial Insemination Using the Husband's Sperm

A. Circumstances in which Artificial Insemination is Used

The practice of artificial insemination has been used and documented in animals since the late eighteenth century, and the first successful case in humans was reported by the Scottish surgeon, Dr. John Hunter, in 1790.²³ This, however, may be long after such success with artificial insemination actually occurred, for whereas IVF, GIFT, and ZIFT require surgery and therefore doctors, hospitals, and anesthesia, and whereas artificial insemination is now usually done in a doctor's office or as an out-patient in a clinic or hospital, women may have performed artificial insemination on their own for some time before this using the "turkey baster method."

In any case, while artificial insemination is only one method used to treat infertility, the process has a much higher national success rate (fifty-seven percent) than other available procedures (estimated as seventeen percent at best), and it is less invasive and less dangerous than some of the alternatives. Moreover, although many people assume that infertility is almost always rooted in a problem in the female, actually close to half of the time the problem resides in the male.²⁴ Average sperm counts over the past fifty years have declined by fifty percent for reasons that researchers are now investigating.²⁵ Whatever the cause, the consequent need for artificial insemination has increased dramatically in the last several decades. Thus when it becomes clear that a couple is infertile and cannot be made fertile through timing their intercourse for the woman's most fertile period, through pills to aid ovulation, or through surgery to remove blockages in the testes or fallopian tubes, artificial insemination is usually the first technique attempted. Estimates for the number of children born each year in the United States through donor insemination range from 10,000 to more than 30,000, and many more are born through A.I.H. Dr. Fred Rosner estimated in 1970 that by then some 250,000 Americans were the product of

Lehem Mishnah to M.T. De'ot 3:5 and the Meiri, who both consider it to be rabbinic. In any case, saving a life (פקוח נפש) the extreme case of maintaining our health and the issue here, is a well-attested principle in Jewish law, one that the Rabbis deduce from Lev. 18:5, understanding "and you shall live by them [i.e., My commandments]" to mean that you shall not die by them; see B. Shabbat 32b, 129a, 132a, 151b; Yoma 82a-85b; M.T. Hilkhot Yisodei Torah 5:1. The Rabbis also asserted the converse, that we may not unduly put ourselves at risk; see n. 85 below.

²³ Fader, *Sperm Banking: A Reproductive Resource* (Los Angeles: California Cryobank, Inc., 1994), p. 3.

Immanuel Jakobovits, *Jewish Medical Ethics*, p. 244, claims that the first successful human insemination was in 1866.

²⁴ Fader, *ibid.*, pp. 8, 11.

²⁵ "Health Report," *Time*, 7 June 1993, p. 20. Two researchers claimed recently that the decline is due to men's increased exposure to estrogen in milk from hormone-dosed cows and water supplies contaminated by chemical spills.

artificial insemination, and the U.S. Government's 1987 survey suggested that some 65,000 children are born each year through artificial insemination, almost half through D.I. and the remainder through A.I.H.²⁶

About half of all artificial inseminations are done to overcome fertility problems in the husband, and the other half serve to circumvent problems in the wife (or in both partners). If the number of sperm in the husband's semen is too small to generate children, or if it is insufficiently motile (that is, if it is not shaped correctly or energized enough to swim up the vaginal cavity), then if it can be made effective if several ejaculates are combined, the husband's semen, thus enhanced, is used for inseminating his wife.²⁷ This is Artificial Insemination by the Husband (A.I.H.).

If the husband's sperm is not sufficiently numerous or motile, and if attempts to enhance its number or mobility fail, the couple can ask for donor insemination (D.I.). While it is possible that the sperm of a fertile, male family member can be used, the more common practice is to use the sperm of a donor to a sperm bank whose medical history and often whose occupation and personal characteristics are known to the couple but whose identity is usually not revealed to them.

Semen has proteins that, if injected directly into the woman's uterus, could produce anaphylactic shock in the woman, collapse, and perhaps even death. As a result, in most artificial inseminations, whether using the husband's semen or a donor's, the semen is put at the opening of the cervix so that the mucous membranes in the cervical canal can remove the antigens in the semen, leaving only sperm that reaches the uterus. This, of course, is exactly what happens in normal intercourse, and this form of artificial insemination is the cheapest and most effective way of assisting generation.

Under some conditions, however, this relatively easy method cannot be used, and so more developed and more expensive means of reproductive technology must be invoked – assuming that the couple chooses to do so. Specifically, if concentrating several ejaculates does not work to increase the sperm's mobility or number, the semen may be "washed" or "spun down" with various tissue culture media to separate viable sperm from the other components of the semen. Since this process removes the semen's accompanying antigens, the sperm thus isolated can be injected directly into the uterus,

²⁶ The numbers in this paragraph are from Andrews, *New Conceptions*, p. 160; Lauritzen, "Pursuing Parenthood," pp. 57-58; Fred Rosner, "Artificial Insemination in Jewish Law," *Judaism* (fall 1970) (reprinted in Rosner and Bleich, *Jewish Bioethics*, p. 105); and Fader, *Sperm Banking*, pp. 12-13. The 1987 U.S. Government report was based on a survey conducted by the Office of Technology Assessment, entitled, *Artificial Insemination: Practice in the United States: Summary of a 1987 Survey-Background Paper*, OTA-bp-ba-48 (Washington, D.C.: U.S. Government Printing Office, Aug. 1988). That survey reported only a thirty-seven percent success rate for artificial insemination (instead of fifty-seven percent), and thus 65,000 babies from the 172,000 women inseminated each year. Even so, that is still more than double the highest success rate claimed by those using the more complicated methods – and almost four times as high as the actual ten percent success rate of those procedures.

²⁷ According to Meredith F. Small ("Sperm Wars," *Discover*, July 1991, p. 50), "Doctors look for a sperm count of at least 20 million per milliliter of semen, but they are more interested in sperm mobility – the speed and swimming direction of individual sperm – because a few fast swimmers are more likely to succeed than millions of sluggards. Reproductive physiologists believe that at least forty percent of the sperm viewed under the microscope must be vigorous, well-aimed swimmers for a couple to have a good chance at conception." Of the 300 million sperm in a typical human ejaculation, within ten minutes of landing at the cervix only thousands speed toward the fallopian tubes at the far end of the uterus, where the egg lies in wait after drifting down from the ovaries, and only two hundred sperm typically make it to the egg. Once one sperm has managed to bore into the egg, the shell of the egg releases enzymes that detach the other sperm. *Ibid.*, pp. 51-52. This article also presents the results of recent research to the effect that sperm counts for ejaculations during intercourse decreased the more time couples spent together and, conversely, increased when the male assumed female infidelity. That is *not* a justification for an infertile couple to try promiscuity as a therapy!

thus ameliorating problems of mobility. Moreover, because washing away the other elements of the semen concentrates the sperm, problems of low sperm count can also be overcome through this method.

Artificial insemination is also used to overcome reproductive problems in the female. If, for example, the woman's cervix is damaged, the man's sperm cannot reach the uterus and must be washed and artificially implanted there. Similarly, if the woman's cervix does not make good mucus naturally, or if the drugs she is taking to stimulate her ovaries spoils the effectiveness of her cervical mucus, the sperm must be washed and implanted into her uterus to avoid shock. In such cases, the husband's sperm is used when it can be, and these constitute other situations when A.I.H. is used. If the husband's sperm cannot be used and if the woman suffers from any of these problems, a donor's sperm may be implanted in her uterus, and this, then, is another set of circumstances in which D.I. is used, in this case to resolve problems in both the male and the female.

B. Rabbinic Responses to A.I.H.

When the semen of a man is united artificially with his wife's ovum, most rabbis who have written on the subject have not objected.²⁸ Because of Judaism's appreciation of medicine as an aid to God, there is no abhorrence of such means merely because they are artificial.

The only issue is the means by which the husband's sperm is obtained. To insure that there is no "destruction of the seed in vain," some rabbis advocate collecting it from the vaginal cavity after intercourse, but an obstetrician I consulted, one who has many observant Orthodox and Conservative patients – told me that collecting sperm in that way is simply "unrealistic." Moreover, the vaginal pH kills the sperm since it is more acidic than cervical mucus. Consequently, rabbis have permitted using a condom to collect the semen for A.I.H. (clearly one without spermicide). Some of these rabbis insist, though, that the condom have a small hole in it so that there is still some chance of conception through the couple's intercourse. While I have no particular objection to such stringencies, it does seem to me that they are unnecessary, for producing semen for the specific purpose of procreating cannot plausibly be called wasting it – and, indeed, some Orthodox rabbis follow the same line of reasoning and permit a man to masturbate to produce semen for artificial insemination of his wife.²⁹ We should adopt this latter approach.

In the same spirit, Rabbi Morris Shapiro has argued that where the husband is the donor, he should be credited with fulfilling the mitzvah of procreation, for the mitzvah is to produce two viable children for which both intercourse and artificial insemination are merely preparations.³⁰ This severs the command to procreate from the method of conception, interpreting the command instead as a matter of the couple's intent to produce children and their success in doing so. Despite this separation of procreation from sexual intercourse and the emotional bonding that commonly accompanies it, I would agree with Rabbi Shapiro for three reasons. (1) The sperm involved is the husband's in

²⁸ See, for example, Immanuel Jakobovits, *Jewish Medical Ethics*, p. 264; J. David Bleich, *Judaism and Healing: Halakhic Perspectives*, (New York: Ktav, 1981), pp. 83-84. Dr. Rosner lists, in addition, Rabbis Feinstein, Schwadron, Walkin, and Zevi Pesah Frank as permitting A.I.H., while Rabbis Tanenbaum and Waldenberg "frown upon it, stating it is permissible only in extreme situations" – but, of course, that is, by hypothesis, always the case. See Rosner, "Artificial Insemination," in Rosner and Bleich, *Jewish Bioethics*, p. 112.

²⁹ Cf. Bleich, *ibid.* p. 84, n. 3 for a list of sources on this issue.

³⁰ Rabbi Morris Shapiro, "Artificial Insemination in Jewish Law," prepared in Aug. 1978 for the Committee on Jewish Law and Standards, p. 3.

any case, and the child is therefore the husband's according to all understandings of Jewish law.³¹ (2) The husband, by hypothesis, cannot fulfill the commandment in any other way. By virtue of going through the expense and trouble of artificial insemination, though, he has demonstrated clearly that he wants to obey the commandment, and the Talmud says that God attributes the merit of fulfilling a commandment if one tries to do so but cannot.³² Finally, (3) the husband generally goes through considerable humiliation, pain, and perhaps depression in coming to terms with his inability to impregnate his wife through sexual intercourse, and therefore we should do all we can to augment his satisfaction with the whole procedure so that he does not forever associate his new child with his own frustration in the process of conceiving him or her – a result that is as important for the child as it is for the man.

Artificial Insemination with a Donor's Sperm: Legal Concerns

When the husband cannot provide sperm capable of impregnating his wife, the matter becomes more complicated. After such infertility is diagnosed, the obligation to procreate ceases to apply to the man, for one cannot be legally obligated to do that which one cannot do. A Jewish couple faced with this situation, then, should pause, seek counseling, and think carefully about whether they want to use donor sperm or engage in costly and often frustrating attempts to have a child through some of the new reproductive technologies.

There is no Jewish obligation to do any of these things. The Jewish tradition would have all people, fertile or infertile, understand that our ability to procreate is not the source of our ultimate, divine worth; that comes from being created in God's image, which is true of each of us from the moment of birth to the moment of death, whether or not we manage to have children in between. (Note that, in contrast to many religions of the ancient past, God in the Bible and in the Talmud and Midrash specifically does *not* engage in sexual union to create us or anything else, and so imitating God does not require procreation through sexual union.) As Jews, we gain additional divine worth through our Covenant with God, which foresees a reward of children "as numerous as the stars above" but which is made with the current generation of Jews just as much as with any past or future one. Moreover, the religious commandment to generate children, which, in any case, traditionally is only incumbent on the male, ceases to apply to those men who cannot have them, and there is no guilt or shame involved in that. That is just the way God created some of our bodies.

On the other hand, as I shall argue below, the couple *may* choose to use at least some of the new procedures. Such a choice, though, should be made only when the couple has understood all the factors involved. In addition to the psychological problems described above that affect the vast majority of couples who have infertility problems, using someone else's sperm (or eggs) engenders some specific problems of its own that

³¹ Dr. Rosner cites all of the following who claim that the donor is considered the father in Jewish law: Rabbis Moses of Brisk, Samuel ben Uri, Judah Rozanes of Constantinople [a commentator on Maimonides' *Mishneh Torah*], Jacob ben Samuel, Israel Ze'ev Mintzberg, Simeon Zemah Duran, and Jacob Ettlinger. Rabbis Jacob Emden and Moses Schick rule that the child is the son of the donor, but the donor has not fulfilled the commandment of procreation because there has been no sexual act involved. Only Rabbis Hadaya and Moses Aryeh Leib Shapiro on Dr. Rosner's list do not consider the child as that of the donor. See Rosner, "Artificial Insemination," in Rosner and Bleich, *Jewish Bioethics*, p. 111, with the specific sources in notes 30-37 on p. 117.

³² B. Berakhot 6a; B. Kiddushin 40a; J. Peah 1. But according to B Kiddushin 39b, there is one exception to the converse of this rule. Specifically, in weighing the culpability of a person, God does not ordinarily connect an evil thought to its act (even if not fulfilled), but God does so when one thinks of idolatry.

will be described below. The couple must understand the strains that all these factors are likely to impose on their marriage if they go through with these procedures, and they must make plans to get help in dealing with them. Finally, they should investigate alternatives like adoption before trying such reproductive technology.

If the couple does choose to forge ahead and use donor sperm, may they do so in accordance with Jewish law? Rabbis addressing that question to date have raised several legal and moral objections:

A. Adultery and Illegitimacy

Some rabbis object to donor insemination on grounds of adultery. If artificial insemination is construed as adultery, then its product would be an illegitimate child (ממזור) who himself or herself and whose descendants may not marry a Jew for ten generations according to the Torah.³³ Rabbi Eliezer Waldenberg, for example, takes strong exception to donor insemination on these grounds:

The very essence of this matter – namely, the placing in the womb of a married woman the seed of another man – is a great abomination of the tent of Jacob, and there is no greater profanation of the family than this in the dwelling places of Israel. This destroys all the sublime concepts of purity and holiness of Jewish family life, for which our people has been so noted since it became a nation.³⁴

For me, however, this misstates our concern with preventing adultery. The Torah, of course, prohibits adultery with no special explanation aside from the general rationales it gives for all of its laws regarding prohibited sexual relations, namely, that we should observe those commandments to make us holy and pure as a people. From the context of the Torah, holiness clearly denotes making us different in moral character and action from the ancient Egyptians and Canaanites, and purity entails avoiding pollution of the land of Israel through licentious sexual practices;³⁵ but these terms can well include other factors as well, factors intrinsic to what we understand holiness and purity in spousal relations to mean. The question, then, is whether artificial insemination violates our understanding of holiness and purity in a marital relationship.

The crucial part of those concepts involved in the prohibition of adultery, it seems to me, is maintaining the trust between husband and wife; it is that trust that is violated when either spouse has an extramarital affair. In standard cases of artificial insemination by a donor, however, the husband not only knows about the insemination, but deeply wants it so that he and his wife can have children.³⁶ This, of course, is not in and of itself sufficient to make donor insemination acceptable, for even if both partners agreed to each other's adultery, that would not make it permissible. The vast majority of cases of adultery, how-

³³ Deut. 23:3.

³⁴ *Tzitz Eliezer* vol. 9, 51, ch. 5, sec. 1, p. 251.

³⁵ For the prohibition of adultery see Lev. 18:16 and 20:10. For the rationale that observing this will make us holy and pure, see Lev. 18:24 and 20:8, 26. For separation from the practices of the Egyptians and Canaanites as an explicit component of the meaning of those terms, see Lev. 18:3, 27, 30; 20:23, 24, 26. For avoiding pollution of the land of Israel as another component of the meaning of these terms: Lev. 18:25-29; 20:22.

³⁶ Rabbi Paul Plotkin has suggested that, biblically at least, the ban of adultery is based not on the breach of trust involved, but on the violation of the husband's acquisition of his wife (קניין). In D.I., though, the husband agrees to the procedure, and so presumably his rights of possession are not violated.

ever, involve a breach of trust, and it is that which explains much of our abhorrence of adultery, for such untrustworthiness undermines the honesty and holiness that we want in marriage. While trust is the critical feature that is lacking in most cases of adultery, it is fully present in most, if not all, cases of donor insemination. Contrary to Rabbi Waldenberg, then, I think that artificial insemination by a donor is not an “abomination” or “profanation” that destroys all Jewish concepts of holiness and purity, but rather is a desperate attempt to have children – an undisputed good in marital relationships for the Jewish tradition – in a context of mutual openness and trust.

On a more technical level, the Talmud, Maimonides, Rabbi David Halevi (the “Taz”), and the majority of recent authorities have already maintained that adultery takes place only when the penis of the man enters the vaginal cavity of the woman.³⁷ That is clearly not the case when insemination takes place artificially. The lack of contact of the genital organs in donor insemination, then, means that it does not legally constitute adultery, and the child conceived by D.I. is legitimate and does not suffer from the liabilities of an illegitimate child (ממזר).

Not only is the physical contact missing; the intent to have an illicit relationship is also absent. While lack of intent to commit adultery does not excuse an act of sexual intercourse from the requirement to bring a sin offering, it does excuse the couple from the more serious penalties of extirpation (כרת), death at the hands of the court, or lashes.³⁸ Thus the intent of the couple is an important legal consideration, and it is even a more important moral consideration. In the case of D.I., the couple’s intent is the exact opposite of adultery, for they are going through expensive and emotionally taxing procedures in an effort to express their love *for each other* through having and raising a child. Thus D.I. should not be construed as adultery either theologically, legally, or morally.

³⁷ B. Shavuot 18a; cf. M. Yevamot 6:1 (53b), B. Yevamot 54a, and B. Horayot 4a. M.T. Laws of Forbidden Intercourse 1:10-11. This is also the opinion of Rabbi David Halevi (the “Taz”) of the seventeenth century, who bases it on the responsa of Rabbi Peretz, an eleventh-century scholar; see *Turai Zahav* in S.A. Even HaEzer 1:8. Rabbi Peretz is quoted there as asserting that “in the absence of sexual intercourse, the child resulting from the mixing of sperm and egg is always legitimate.” Rabbi Bleich, who vigorously opposes A.I.D., nevertheless notes the following modern authorities (Aharonim) who require sexual contact for a sexual act to be termed adulterous: Rabbi Shalom Mordecai Schwadron, *Teshuvot Maharsham* (Brezany, 1910), vol. 3, no. 268; Rabbi Aaron Walkin, *Teshuvot Zekan Aharon* (New York, 1951), vol. 2, no. 97; Rabbi Ben Zion Meir Hai Uziel, *Mishpetai Uziel* (Tel Aviv, 1935), Even HaEzer, vol. 1, no. 19; Rabbi Moshe Feinstein, *Iggrot Moshe* (New York, 1961), Even HaEzer, vol. 1, no. 10; and Rabbi Eliyahu Meir Bloch, *Ha-Pardes*, Sivan 5713. On the other hand, he cites the following who do not require sexual contact for the prohibition of adultery to take effect: Rabbi Yehudah Leib Zierler, *Teshuvot Ma'arekhei Lev*, no. 73 and Rabbi Ovadiah Hadaya, *No'am*, vol. 1 (5718), pp. 130-137, with reference also to Rabbi Eliezer Waldenberg, *Tzitz Eliezer*, vol. 9, no. 51, sec. 4. These latter authorities stress that Lev. 18:20 reads literally, “and to the wife of your fellow you shall not give your intercourse for seed to defile her,” which, in their view, would include providing semen even without sexual intercourse. See J. David Bleich, *Judaism and Healing*, p. 84, notes 1 and 2.

In the discussion of this responsum by the Committee on Jewish Law and Standards, Rabbi Paul Plotkin noted that for those who insist on contact of the genital organs to establish adultery, there is a parallel in the Talmud’s insistence that the Torah’s prohibition against eating blood is violated only when the blood is ingested in the normal way, through the throat. Therefore, contrary to the Jehovah’s Witnesses, who interpret the biblical command more broadly, we Jews permit blood transfusions, even when they are precautionary and not clearly essential for the saving of a life. See B. Sanhedrin 63a, and another responsum of mine (Elliot N. Dorff, “A Jewish Approach to End-Stage Medical Care,” *PCJLS 86-90*, pp. 101-102), in which I use this precedent along similar lines to permit the withdrawal of artificial nutrition and hydration. While I would agree that this case is parallel to the one at hand – and I want to thank him for calling my attention to that – and while that strengthens the point being made here, we do not need to depend upon it to establish that adultery occurs only where there is genital contact because the Talmud and later authorities already make that point.

³⁸ See M.T. Laws of Forbidden Intercourse 1:1, 9, 12 (and see the commentary of the Maggid Mishneh there).

B. Unintentional Incest in the Next Generation

If the donor is anonymous, there is also the possibility of unintentional incest in the next generation, for the product of the artificial insemination might happen to marry one of the children whom the donor has with his wife. In that case, the child born through donor insemination would be marrying his or her biological half-brother or half-sister. This issue is resolved in Jewish law if the donor is known and the children avoid his offspring as mates. It is also resolved if it is known that the donor is not Jewish, for Jewish law does not recognize family relationships among non-Jews through the father's line.³⁹ On that basis, Rabbi Moshe Feinstein permitted D.I. if the donor were not Jewish – although he was later pressured to withdraw his responsum.⁴⁰ The pressure notwithstanding, Rabbi Feinstein stood on sound Jewish legal grounds in permitting D.I. from a non-Jewish donor.

Some Orthodox rabbis object to using the sperm of a non-Jewish donor, however, for fear that this will pollute the purity of the Jewish genetic line and will transfer non-Jewish qualities of character (whatever that means) to Jewish offspring. Curiously, physicians report that traditional Jews prefer non-Jewish donors for fear of incest in the next generation, but liberal Jews want Jewish donors. The motivations for that may be many, but undoubtedly for some people insemination by a non-Jew smacks of intermarriage, and others probably hold an ethnic notion of Jewish identity and want a Jewish donor for reasons not unlike the Orthodox arguments against polluting the Jewish biological line. This line of reasoning is clearly rooted in exclusivist views of Jews and non-Jews, views to which we should not be party. In the case of the Orthodox respondents who hold this view, it is also, as Daniel J. Lasker has shown, the product of kabbalistic affirmations of original sin, a doctrine roundly rejected by the non-mystic sources of Jewish thought – and rightly so.⁴¹

There is another factor, though, that should prompt us strongly to urge that the identity of the donor, or at least substantial parts of his medical history, be known. In addition to Jewish law's prohibition of sexual intercourse between Jews and non-Jews, there is an independent commandment in Jewish law to maintain health. We therefore must be concerned to prevent progeny with serious genetic defects or diseases due to the consanguinity of the couple. This is clearly a concern if we know that the donor is Jewish, but in our own day, with rampant intermarriage, it is even a worry if the donor is not Jewish, for a child born through D.I. may some day marry a non-Jew who is his or her natural half-brother or half-sister – or have intercourse with such a person outside of marriage. This concern is all the more worrisome because sperm banks are largely unregulated and many use the same donors for numerous inseminations.⁴² All these factors would argue all the more strongly in the present circumstances of rampant intermarriage that a child born through D.I. should

³⁹ B. Yevamot 98a; cf. Tosafot, B. Yevamot 22a, s.v. ערוה. M.T. Laws of Forbidden Intercourse, 14:13; S.A. Yoreh De'ah 269:3.

⁴⁰ Moshe Feinstein, *Iggrot Moshe*, Even HaEzer (New York, 1961), vol. 1, nos. 10 and 71, pp. 12-14, 169-171; Hoshen Mishpat, vol. 2 (New York, 1963), no. 11, pp. 322-324. On the pressure that ultimately caused him to withdraw these responsa, see Zvi Hirsch Friedman, *Sefer Sedeh Hemed* (Brooklyn, 1965/6), p. 34.

⁴¹ Daniel J. Lasker, "Kabbalah, Halakhah, and Modern Medicine," *Modern Judaism* 8:1 (Feb. 1988): 1-14, esp. pp. 7-11.

⁴² Currie-Cohen, Lullrel, and Shapiro, "Current Practice of Artificial Insemination by Donor in the United States," 300 *New England Journal of Medicine* 585 (1979). Thirty-one percent of the inseminating doctors surveyed in that study indicated that they use the sperm of several donors within one menstrual cycle, while 51.1 percent reported that they use a single donor, but change donors with each new cycle, and one donor had been used to produce fifty pregnancies; see p. 587. If the subject is a donor for a minority ethnic group in the

know the identity of his or her natural father, whether Jewish or not – or at least enough of his medical history to avoid people with similar medical histories as mates. The same, incidentally, would be true for an adopted child.

In light of much larger numbers of non-Jews than Jews in North America, this concern would not be as great if it were known that the natural father (or, in the case of adoption, the natural parents) were not Jewish, for then the chances of such an unwitting, consanguineous union occurring are much, much smaller. The day is probably not too far off when such unions can be prevented through DNA analysis of the child and his or her potential mate without revealing anything about the identity of the donor.

The strong recommendation of the American Association of Tissue Banks-Reproductive Council, however, and the preference of most donors and sperm recipients are that the parties involved remain unknown to each other. However, in the future a health condition may arise in the child whose proper treatment requires more information from the donor than he provided on the initial questionnaire, or, conversely, a genetic condition might appear in the child that could have health implications for the donor's children or family. Therefore, responsible sperm banks keep donor and patient files and continue to track the whereabouts of donors and patients.

Moreover, while children born through donor insemination currently do not have at age eighteen the same legal rights as adopted children do to trace their biological parents, D.I. children may well gain such rights in the future, especially since the medical and psychological needs that propelled the change in legislation for adopted children are similar in D.I. children. That, then, is another reason for couples using D.I. to make sure that the sperm bank they are using keeps careful and current records of their donors and recipients.⁴³

Disclosure of the identities of donors and recipients, then, is still preferable for the physical reasons described above and the psychological reasons delineated below, but the common practice of confidential donor insemination is permissible *if* the sperm bank keeps thorough records on all its donors and recipients and conscientiously updates them as necessary. Furthermore, as much as possible of the donor's medical history must be revealed to the child in order to prevent possible genetic diseases in that child's own offspring.

area, the chances of intermarriage by the children become even greater; see p. 589, n. 9. Medical students are the most tapped resource; cf. George Annas, "Fathers Anonymous: Beyond the Best Interests of the Sperm Donor," 14 *Family Law Quarterly* 7 (1980). Apparently one such case actually took place in Tel Aviv, and in another case in the United States incest was avoided only by the intervention of a doctor who knew of the couple's common paternal roots: see Hoffer, "The Legal Limbo of Artificial Insemination by Donor," *Modern Medicine*, 1 Nov. 1979, p. 27.

I was not able to find any definitive study of the practice of sperm banks on this issue after the Cohen study of 1979. On the other hand, while that may have changed, none of the sources I consulted – including a 1993 summary of law regarding artificial insemination published by the American Bar Association – reported any new legislation prohibiting such multiple uses of one donor's sperm. See Julia J. Tate, *Artificial Insemination and Legal Reality* (No city indicated: American Bar Association, Section of Family Law, 1992), 27 pages.

On the contrary, in the booklet published by California Cryobank, Inc. (Fader, *Sperm Banking*, at n. 23 above), the practice is that sperm donors must agree to donate sperm twice a week for a minimum of a year, and preferably two. They have that policy because they freeze the man's sperm for six months while they continue to test him for AIDS and venereal diseases to make sure that his sperm is not infected, and "without the year minimum commitment from donors, this safety measure could not be carried out" (p. 21). They report that "the number of live births from one donor usually ranges between two and ten" (p. 21), and they retire a donor after his sperm has produced ten live births. Nevertheless, they maintain that the chance of offspring from a single donor inadvertently marrying and having children, "although not impossible, . . . is extremely remote," especially because they distribute frozen sperm internationally (pp. 21-22).

⁴³ See Fader, *Sperm Banking*, pp. 26-27.

C. Identity of the Father

While adoption was applauded in Jewish law, it did not gain the legal power to replace the child's natural parentage. So, for example, if an orphan is the child of a כהן but his adoptive father is a ישראל, the child retains his natural father's status at birth. The same would presumably be true for the child born through D.I. But what if the biological father's status is not known? And what if the donor is a non-Jew – or, at least, is not known to be a Jew?

In addition to these questions of personal status, there are related questions of inheritance. Would the child of D.I. inherit from the sperm donor, the husband (the “social father”), neither, or both?

And then there is the question of the commandment to “be fruitful and multiply.” Does a man fulfill that obligation if he consents to have his wife impregnated with the semen of another man? Does he fulfill it if his own semen is artificially implanted in his wife's uterus? What if he himself is a semen donor?

By and large, rabbis have ruled that the provider of the semen is the father. Nevertheless, some rule that a semen donor does not fulfill the obligation to procreate because there is no sexual act involved, and some do not see either the donor or the social father as the father for purposes of Jewish law.⁴⁴ These varying positions, of course, would directly affect the answers to the questions raised above regarding personal status (כהן, לוי, or ישראל) and inheritance within Jewish law in addition to the question of the commandment to procreate.

Let us take them one by one. With regard to personal status, if the donor's status as a כהן, לוי, or ישראל is known, the child inherits that. If the donor's status is not known, the child is usually treated as a ישראל as a default status. If it is not certain that the donor of the semen is a Jew, that does not matter with regard to the Jewish identity of the child, for Jewish law determines a person's Jewish identity according to the bearing mother. Her religion can usually be determined, and then, if necessary, the child can be converted to Judaism as an infant. The more complicated questions of personal status regarding the possibility of incest in the next generation have been treated above.

As for inheritance, thirty-one American states have passed laws making the child of a married couple who use D.I. the legal child of the couple. Unlike adoption, no court order or other official action is required for this to be the case, but some states restrict this parentage to cases in which a physician did the procedure, and most (twenty-six) require that the husband's consent to the donor insemination be in writing. Eighteen of these thirty-one states have adopted some form of the Uniform Parentage Act, which defines the donor as *not* being the father with regard to either rights or responsibilities, as long as a physician was involved in the insemination.⁴⁵ Donors who want to protect their property, though, may want to remain anonymous in states that have not passed the act, where a physician was not

⁴⁴ See n. 30 above.

⁴⁵ John Yeh and Molly Uline Yeh, *Legal Aspects of Infertility* (Boston: Blackwell Scientific Publications, 1991), pp. 41-48. The Uniform Parentage Act, 9A U.L.A. 592 (1979), drafted in 1973 by the National Conference of Commissioners on Uniform State Laws and approved by the House Delegates of the American Bar Association in 1974, has since been passed in whole or in part by the following states: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. Section 5(A) deals with donor insemination.

This acceptance of donor insemination in American law took some time. In 1964, Georgia became the first state to pass a statute legitimizing children conceived by donor insemination, on condition that both the husband and wife consented in writing, and the first American appellate court ruling affirming that stance was in

involved, or where the husband did not provide written consent to the procedure (or the donor has no way of knowing whether the husband did). In any case, since Jewish law does not govern inheritance in the United States or Canada, the implications of D.I. for inheritance within Jewish law need not concern us; it is, after all is said and done, a moot issue for Jewish law, determined by the law of the state.

What Jewish law does determine, though, is whether a Jewish man fulfills the commandment to be fruitful and multiply through agreeing to have his wife impregnated by a donor, and the answer to that has generally been “No.”⁴⁶ Rabbi Joseph Soloveitchik, however, has said that raising adopted children does fulfill the commandment,⁴⁷ and the same reasoning would seem to apply to a child conceived through D.I.

The first point that must be mentioned here is that donor insemination stretches our understanding of fatherhood. We normally assume that the same man who sired a child will be the one who raises him or her. When that does not happen, the legal category of fatherhood and the concept underlying it must be applied to new circumstances, and then we should not be surprised if the attribution of fatherhood does not fit exactly right, no matter which way we rule.

In our case, some factors would lead us to call the semen donor the father for purposes of the commandment of propagation. Unless there has been a formal, legal act of adoption, in American law we call the man who brings up a child but who did not sire it “the foster father” or “the step-father,” depending upon the circumstances. That usage, which exists in Rabbinic law as well (*apotropos*), would argue for seeing only the biological father as the one official “father.” Moreover, as I shall describe in more detail in the section on adoption below, while the Jewish tradition applauded adoption as a way of providing parental support and education for orphaned children, it never ascribed legal parentage to the adoptive parents but rather saw them as the agents of the child’s natural parents. That precedent would seem to apply to the biological and social fathers of a child born through D.I. as well, making the social father the agent of the biological father and not his legal substitute. Underlying both the linguistic usage and the law on adoption is the genetic fact that it is the natural father’s DNA that the child inherits, not the social father’s. Modern research has made us increasingly aware of the impact of our genes on who we are as people, not only biologically, but in a number of

1968 in the California Supreme Court case, *People v. Sorenson*. The court there upheld Mr. Sorenson’s criminal conviction for not supporting a D.I. child conceived with his consent during his marriage. The court held that the sperm donor had no more responsibility for the use of his sperm than a blood donor had for the use of his/her blood. This was in sharp contrast to the 1954 ruling of the Supreme Court of Cook County, which held that regardless of the husband’s consent, D.I. was “contrary to public policy and good morals, and constituted adultery on the mother’s part,” so that the child so conceived was the mother’s exclusively and “the father has no rights or interest in said child.” See Fader, *Sperm Banking*, pp. 4-5. Thus the 1973 recommendation of the Commissioners on Uniform State Laws that children born through D.I. be considered legitimate was, for most jurisdictions, breaking new ground. It has, however, been widely followed: see *S. v. S.*, 440 A.2d 64 (N.J. 1981); *In re Adoption of Anonymous*, 345 N.Y.S.2d 430 (1973); *Noggle v. Arnold*, 338 S.E.2d 763 (Ga. 1985); *R.S. v. R.S.*, 670 P.2d 923 (Kan. 1983); *Mace v. Webb*, 614 P.2d 647 (Utah 1980); *In re Custody of D.M.M.*, 404 N.W.2d 530 (Wis. 1987); *L.M.S. v. S.L.S.*, 312 N.W.2d 853 (Wis. 1981); *In re Baby Doe*, 353 S.E.2d 877 (S.C. 1987). Thus, the man who consents to the artificial insemination of his wife is now legally obligated to support the resulting children, either on the theory of equitable estoppel (since he, after all, consented to the insemination), or on the theory of adoption, according to which the husband, by his consent, has formally or informally adopted the children.

⁴⁶ For example, Bleich, *Judaism and Healing*, p. 30.

⁴⁷ Melech Schachter, “Various Aspects of Adoption,” *Journal of Halakhah and Contemporary Society* 4 (fall 1982): 107.

character traits as well. That genetic contribution of the semen donor, while shaped by the child's upbringing, is ultimately indelible. It influences the medical history of the child, and it determines the identity of the people whom it is genetically dangerous to marry, lest the children born of that marriage suffer from the diseases rooted in their consanguineous union.

On the other hand, there are other factors that would lead us to classify the social father as the one who fulfills the command to propagate. According to the biblical law of levirate marriage, when a man dies childless, it is the duty of his brother to have conjugal relations with the deceased man's widow so that a child might be born bearing the parentage of the deceased brother. That precedent would argue that the semen donor is not the father.⁴⁸ Moreover, one classical Rabbinic source ascribes fatherhood to the man who raises a child, not to the one whose semen gave him birth. It is a homiletical (midrashic) source, and therefore not one that intends to announce law, but it does invoke a parable that places its ruling in a legal context, the writing of a marriage contract, and, contrary to other sources, it specifically proclaims the guardian the father. Based on Isa. 64:7, "But now, O Lord, You are our Father," the Midrash says:

The Holy One, blessed be He, said: "You have abandoned your ancestors, Abraham, Isaac, and Jacob, and you are calling Me father." They said to Him: "We are recognizing You as [our] father. Parable: An orphaned girl grew up with a guardian [*apotropos*], and he was a good and faithful man who raised her and watched over her as is fitting. He wanted to marry her off, and the scribe came to write her marriage contract. He said to her: "What is your name?" She said: "So-and-so." He said to her: "And what is the name of your father?" She began to be silent. Her guardian said to her: "Why are you silent?" She said to him: "Because I know no father except you," for the one who raises [a child] is called father and not the one who begets. Similarly, these orphans, Israel, for it says, "We were orphans without a father" (Lam. 5:3), their good and faithful Guardian is the Holy One, blessed be He, [and] Israel began to call Him "our Father," as it says, "But now, O Lord, You are our Father" (Isa. 64:7). The Holy One, blessed be He, said: "You have abandoned your ancestors and you call Me 'Our Father?'" as it says, "Look back to Abraham, your father, [and to Sarah who brought you forth]" (Isa. 51:2). They said to Him: "Master of the world, the one who raises [a child] is the father and not the one who begets [him/her]," for it says, "For You are our father, for we have not known Abraham" (Isa. 63:16).⁴⁹

⁴⁸ Deut. 25:5-10. This law may only refer to inheritance rights, but the language of Deuteronomy seems to indicate a stronger relationship, for the levir is to have a child with his sister-in-law, whom he takes "as his wife," but "The first son that she bears shall be accounted to the dead brother, that his name may not be blotted out in Israel" (Deut. 25:6).

⁴⁹ Exodus Rabbah 46:5. In contrast, another, deservedly famous source (B. Sanhedrin 19b) proclaims that "Whoever brings up an orphan in his home, Scripture ascribes it to him *as if* he had begotten him." This source in Exodus Rabbah, however, removes the "as if."

Furthermore, the fact that the semen donor never intended to raise the child makes him somewhat like the gentile who renounces the idolatrous status of a given idol and thereby converts it into a mere statue;⁵⁰ similarly – although obviously with no implications whatsoever that a child is an idol! – the donor’s explicit intention to have someone else raise the child might, it could be argued, amount to a renunciation of his status of fatherhood and a transfer of it to the social father. Yet another precedent that argues in this direction is that of Jacob, who adopts Ephraim and Menasheh, even though he did not beget them, and their descendants thus become two of the twelve tribes of Israel, along with the descendants of the rest of Jacob’s sons.⁵¹

Aside from these arguments based on facets of Jewish law, a number of contemporary realities would argue in this direction. American law, as we have seen, construes the man who raises the child to be his or her father for all legal purposes. With the exception of the physician who asks for a medical history of the child’s family, all of the people who come into the child’s life see the social father as the father too. That is right and proper, for the social father, after all, invests a lifetime of energy, love, and substance in the child, while in most cases the donor never even meets the child. Jewish law generally awards privileges only to those who bear concomitant responsibilities, and that would certainly suggest in this case that the man who raises the child, rather than the man who merely ejaculates, should merit the status of fulfilling the commandment of propagation. Such a ruling would accord with both the intentions and the actions of both men involved.

Whichever way we rule, then, some aspects of the ruling will seem counterintuitive, for in some ways the semen donor really is the father, and in some ways the social father is. Seeing exclusively one or the other as the father hides important aspects of the child’s being. We need, then, to craft a ruling that recognizes the fatherhood of both men involved in the distinctive ways in which they are the child’s father.

For purposes of the commandment of propagation, we must see the semen donor as the father of the child. In part, this is because of the precedents cited at the start of this responsum – although, as I indicated there, those stories are not really on point as analogies for the modern practice of D.I. More substantively, then, it is the ultimate fact that the child’s genetic heritage is that of the semen donor that motivates this ruling. That fact is important legally in two ways. First, Jewish law abhors incest, counting it among only three prohibitions which one may never violate, even at the cost of one’s life.⁵² Aside from this legal and moral factor, we also have a medical concern, for we now know the genetic basis of family diseases imparted through consanguineous unions. For both these reasons, then, we must consider the semen donor to be the father for purposes of the commandment of propagation. As we shall note below, this imposes upon him some duties from which American law makes him exempt, and that must be part of his understanding and undertaking when agreeing to be a semen donor.

⁵⁰ M. Avodah Zarah 4:4-7; T. Avodah Zarah 6:2; B. Avodah Zarah 43a, 52a-55a; M.T. Laws of Idolatry 8:9-12; S.A. Yoreh De’ah 146:1-12.

⁵¹ Gen. 48:5-6. As Rabbi Reuven Kimmelman has pointed out to me, however, Jacob, while not the biological father of Ephraim and Menasheh, was their biological grandfather, unlike the social father of a D.I. child. Furthermore, biblical terminology often does not discriminate between children and grandchildren, and since Joseph was Jacob’s first-born son by Rachel, Ephraim and Menasheh may represent Joseph’s double portion through primogeniture – although we do not hear of a similar provision for Reuven, Leah’s first-born son. In any case, these factors would argue against using this last example to support the social fathers claim to fulfilling the command to procreate, while the specific language of the verses in Genesis, by which Ephraim and Menasheh are legally taken as Jacob’s sons even though they are not biologically his sons, would seem to support his claim.

⁵² B. Sanhedrin 74a; M.T. Laws of the Foundations of the Torah 5:1-3; S.A. Yoreh De’ah 157:1.

This is not to deny the critical input of the social father in the raising of the child. The second important point to make here, then, is that the command to procreate, like all other commandments, does not apply to those who cannot fulfill it. “In cases of compulsion (אונס), the All-Merciful One exempts him,” the Rabbis say.⁵³ Thus men who cannot impregnate their wives should not see themselves as thereby failing to obey Jewish law; their inability to procreate frees them of the responsibility to do so. In that way, they are legally in a better status than those men who have had many children, but all of the same gender, for such men presumably could still fulfill the commandment of begetting a boy and a girl but technically have not done so.⁵⁴ Even there we would probably be inclined to say that the man is exempt from having any more children after having two, regardless of their gender, because no man can consciously control the gender of his children; how much the more is that man exempt who cannot have any children at all.

Moreover, the social father should be aware that there are more than enough other commandments he can and must fulfill, including many dealing with the children the man has with his wife through D.I. In fact, in some ways, the fact that the social father is not legally the father in Jewish law gives the man who assumes all the obligations of raising the children conceived through D.I. a special status. As the Talmud says,

“Happy are they who act justly, who do right at all times“ (Ps. 106:3). Is it possible to do right at all times?...Rabbi Samuel bar Nahmani said: This refers to a person who brings up an orphan boy or girl in his house and enables them to marry.⁵⁵

Thus while the social father – that is, the one who rears the child – is not the father in the technical sense of being the biological parent and therefore does not fulfill through D.I. the specific commandment to procreate, he is the “real” father in most significant ways for the child and “does right at all times.”

I would suggest that we go yet further. According to traditional sources, one who raises another person’s biological child does not assume the biblical prohibitions associated with one’s own child. Thus intercourse between an adoptive parent and the adopted child is not a violation of the biblical laws of incest,⁵⁶ and adopted children raised in the same home may, according to the Talmud, marry each other.⁵⁷

⁵³ The principle is announced in B. Nedarim 27a, B. Bava Kamma 28b, and B. Avodah Zarah 54a. There is some discussion among medieval commentators as to whether in cases of compulsion the obligation continues but the person is not culpable for failing to fulfill it (that is, the exemption applies only to culpability for failure to perform the commanded act), or whether the obligation ceases to apply altogether (that is, the exemption is from the obligation itself). The answer depends on whether the person, although unable to fulfill the obligation now, could fulfill it later, in which case the obligation continues and the principle excludes only culpability at this time; or whether the compulsion will continue indefinitely, in which case the obligation itself ceases. In any case, Tosafot (B. Gittin 41a, s.v. לישא) apply the principle directly to the obligation to be fruitful and multiply, claiming that in such an instance the obligation itself ceases. In general on this topic, see *Encyclopedia Talmudit* (Hebrew), “אונס” vol. 1, pp. 346-360, esp. pp. 347 and 360.

⁵⁴ See note 2 above.

⁵⁵ B. Ketubbot 50a.

⁵⁶ S.A. Even HaEzer 15:11.

⁵⁷ B. Sotah 43b. One medieval authority, Rabbi Judah ben Samuel, decreed that such marriages may not be performed; cf. Judah ben Samuel of Regensburg (He’Hasid), *Sefer Hasidim*, sec. 829. This decree, however, has not been generally accepted; see Rabbi M. Sofer, *Responsa*, 2 Yoreh De’ah 125. As Michael Brody notes, however, although legally permitted, few such marriages are performed; see Michael Brody, “Marital Fraud,” *Loyola of Los Angeles International and Comparative Law Journal* 16:1 (Nov. 1993): 98, n. 15. The rabbinic prohibition I am proposing below takes that reluctance one step further by giving it legal form.

Even though there is no biological relationship between the social father and the child adopted or born through D.I., and despite the permissive rulings on adoption cited above, I think that the emotional and educational relationships are sufficiently strong for us to apply the category of secondary relations (שניירת) to D.I. children – and also to adopted children. That is, in most cases of D.I., the wife's eggs are used for all of the couple's children, and then sexual relations between two of the children, who are biologically half-brothers and half-sisters, are prohibited according to the Torah itself. But even if a couple has a girl and a boy who were both born using another woman's eggs and another man's sperm, we would see it as incest of the second degree for them to have sexual relations, and consequently we would not marry them. The same would be true for two adopted children, even if their biological parents are four separate people, all different from the social parents. Moreover, we would see intercourse between adoptive parents and their adopted children, or between the social father and the donor-inseminated child he is raising, as prohibited incest of the second degree. That is a stringency over the traditional sources, but one that the close relationship created in raising a child warrants.

In sum, because the child's genetic heritage is not the social father's and because traditional sources define an adoptive parent as the agent of the natural parent, we cannot consider the social father as fulfilling the commandment of propagation when either D.I. or adoption is used. Our marital law, though, must recognize the strong bonds that social parents create between themselves and all the children they raise and among all the children themselves, whether they became the social parents' children through artificial insemination, egg donation, or adoption. Consequently, sexual relations between the parents and children or between the children themselves are prohibited in the second degree.⁵⁸ Furthermore, the social father's name may be invoked when the child is being identified by his or her Hebrew name, as, for example, when called to the Torah.⁵⁹ Similarly, children of donor insemination should consider themselves obligated to fulfill the Torah's commands to honor one's parents (Exod. 20:12; Deut. 5:16) and to respect them (Lev. 19:3) as applied to the social parents, and conversely, the social parents should consider themselves responsible to fulfill the duties that the Torah and the Jewish tradition impose upon parents *vis-a-vis* their children.⁶⁰

⁵⁸ I would like to thank Rabbi Gordon Tucker for suggesting this approach in the meeting of the Committee on Jewish Law and Standards on 8 Dec. 1993. The Torah's definition of sex between half-siblings as incest: Lev. 18:9; 20:17. The Rabbinic category of incest in the second degree: B. Yevamot 21a; M.T. Laws of Marriage 1:6; S.A. Even HaEzer 15:1ff. In line with this treatment of adoptive and D.I. relationships on a rabbinic, rather than a biblical level, we would maintain the rabbinic rulings that award the possessions, earnings, and findings of a minor child to the custodial, rather than the natural, parents (B. Bava Metzia 12b; S.A. Hoshen Mishpat 370:2). and, despite the laws prohibiting unmarried and unrelated people from living together (ייחוד), we would permit, for example, an adopted son whose adoptive father has died to continue living alone with his adoptive mother. See Broyde, "Marital Fraud," pp. 98-99.

⁵⁹ This has been the ruling of the Committee on Jewish Law and Standards, which validated a responsum in 1988 by Rabbi Avram Reisner to the effect that an adopted child may use the patronymic and matronymic of his/her adoptive parents, and a convert need not use אביו אביו. The same would apply to children born through D.I. See *PCJLS 86-90*, pp. 168-169.

⁶⁰ For a brief description of the obligations of children to parents as defined by Jewish tradition, see my article, "Honoring Aged Mothers and Fathers," *Reconstructionist* 53:2 (Oct.-Nov., 1987): 14-20. For a more extended description, see Gerald Blidstein, *Honor Thy Father and Mother* (New York: Ktav, 1975). For a description of the duties of parents toward their children, see Ben-Zion Schereschewsky, "Parent and Child," *Encyclopaedia Judaica* 13:95-100. Vol. 10 of *The Jewish Law Annual* (Boston: Boston University Institute of Jewish Law, and Philadelphia: Harwood Academic Publishers, 1992) was devoted in its entirety to legal aspects of the relationships between parents and children. While the Talmud and later Jewish law codes do not speak of D.I. children specifically, they do require that children honor and

These rulings, then, openly recognize both the ways in which the semen donor (i.e., the biological father) has a relationship to the child and the ways in which the social father does. Donor insemination has real import for both men involved and for the child, and both men must be seen as the “real” father of the child in the critical, but different, ways in which they both are.

Artificial Insemination with a Donor’s Sperm: Moral Concerns

A. Licentiousness

Since these strictly legal concerns can be met, most rabbis who have objected to donor insemination have done so on moral grounds. In my own view, positive law and morality are one undifferentiated web, where each can and should influence the other. That is especially true in a religious legal system like the Jewish one, where a fundamental assumption is that the law must express the will of a moral – indeed, a benevolent – God. Thus the moral concerns that donor insemination raises are not, for me, “merely” moral, but fully legal.⁶¹

It is especially interesting, though, to see rabbis who usually shun moral arguments in their legal decisions resort to them when they cannot find legal grounds to deny the legitimacy of donor insemination. Thus, Rabbi J. David Bleich, for example, claims that since, according to Jewish law, the provider of the semen is the father, the adoptive father does not fulfill the mitzvah of procreation by consenting to have his wife impregnated by another man’s seed, even if he subsequently assumes all of the responsibilities of parenthood. In Rabbi Bleich’s view, this reduces artificial insemination by a donor to a matter of personal desire that must be weighed against the potential legal problems of adultery, wasting of seed, and incest in the next generation. Despite this, he hesitantly permits it under certain circumstances.⁶²

Others have similarly voiced concern about the morality of using someone else’s body or semen in this way, and others worry that artificial insemination will increase the prospects of widespread licentiousness. Rabbi Jakobovits voices these moral concerns in strong language:

If Jewish law nevertheless opposes A.I.D. [artificial insemination by a donor] without reservation as utterly evil, it is mainly for moral reasons, not because of the intrinsic illegality of the act itself. The principal motives for the revulsion against the practice is the fear of the abuses to which its legalization would lead, however great the benefits may be in individual cases. By reducing human generation to stud-farming methods, A.I.D. severs the link between the procreation of children and marriage, indispensable to the maintenance of the family as the most basic and sacred unit of human

respect their stepfather and stepmother (B. Ketubbot 103a; S.A. Yoreh De’ah 240:21), and the same would clearly apply to the social parents of D.I. children.

⁶¹ I have written about this in several contexts: “The Interaction of Jewish Law with Morality,” *Judaism* 26:4 (fall 1977), pp. 455-466; “Judaism as a Religious Legal System,” *Hastings Law Journal* 29:6 (July, 1978): 1331-1360, esp. pp. 1347-1360; and *A Living Tree: The Roots and Growth of Jewish Law* (with Arthur Rosett) (Albany, NY: State University of New York Press, 1988), pp. 249-257.

⁶² Bleich, *Judaism and Healing*, p. 80.

society. It would enable women to satisfy their craving for children without the necessity to have homes or husbands. It would pave the way to a disastrous increase of promiscuity, as a wife, guilty of adultery, could always claim that a pregnancy which her husband did not, or was unable to, cause was brought about by A.I.D., when in fact she had adulterous relations with another man. Altogether, the generation of children would become arbitrary and mechanical, robbed of those mystic and intimately human qualities which make man a partner with God in the creative propagation of the race.⁶³

We, however, should take a much more positive attitude toward artificial insemination, even when the wife of an infertile man is being inseminated with a donor's semen. After all, people who want to be licentious will find many ways to do so without artificial insemination. Indeed, artificial insemination is so onerous a mode of illicit sex – if it be that at all – that it is downright implausible that people would go to the trouble and expense of using it for such purposes. Furthermore, the couple is, by hypothesis, using D.I. when they have no other way to achieve a precious goal in Jewish law and thought, the bearing of children. As will be discussed below in greater detail, we should applaud their efforts, both because the Jewish tradition has always valued children, and also because having and raising Jewish children is a demographic imperative for the Jewish community in our time.

b. The Impact on the Marriage and on the Parent-Child Relationship

Rabbi Jakobovits' point about severing the tie between generation and parenting is more complicated. We clearly do not want to transform generation to stud farming, we certainly do want to acknowledge the importance of fathers in the rearing of children, and we do want to preserve the tie between children and loving families.

These concerns should not, however, lead us to prohibit artificial donor insemination. At the very most, they would lead us to restrict our approval of it to married couples who cannot have children in any other way, and it may not even do that. This responsum specifically will not treat the issue of artificial insemination of single women because that would require a much more extensive analysis of our developing understanding of "family" and of the evidence available regarding the well-being of children raised by single, but loving, parents. We shall not undertake that here. The question that led to this responsum, though, asks about artificial insemination in the context of infertile, married couples, and so to weigh the morality of donor insemination in that situation, we must analyze what it does to the relationship between husband and wife and between parents and child.

In a philosophically penetrating article probing the nature of parenthood, Paul Lauritzen, a man whose own wife was artificially inseminated, notes that one need not deny the significance of genetic relationships to affirm that the more important parental relationship to a child is that of caring for it:

⁶³ Jakobovits, *Jewish Medical Ethics*, pp. 248-249. Cf. pp. 244-250 and 272-273 generally. Cf. also Bleich, *ibid.*, pp. 81-84; Alex J. Goldman, *Judaism Confronts Contemporary Issues* (New York: Shengold, 1978), pp. 74-86. This was also the opinion of Rabbi Jacob Breish, who engaged in a vigorous debate with Rabbi Moshe Feinstein, agreeing with him that donor insemination was technically legal, but asserting that it would result in a general decline of moral values, that "from the point of view of our religion these ugly and disgusting things should not be done, for they are similar to the deeds of the land of Canaan and its abominations." 3 *Helkat Ya'akov* 45-51. For the debate with Rabbi Feinstein: *Dibbrot Moshe*, Ketubbot, pp. 232-248.

Caring for, nurturing, and nourishing a child in the context of an ongoing social, emotional, and loving relationship is more important than physically begetting a child, however ineradicable and significant the physical/biological connection that is created thereby. . . . While genetic connection may foster relational bonds, it is the bonds that are crucial, not the genetic ties.⁶⁴

Lisa Sowle Cahill has argued against artificial insemination (and adoption) on the ground that biological relation offers children greater moral protection from abandonment than the parental bonds to which individuals freely consent, but, as Lauritzen says, that is not necessarily so:

While it may be true that biological relation will often, in Cahill's words, "undergird and enhance" the interpersonal relation between parent and child, this biological relation is not necessary to the development of an intense, ongoing social relationship; nor does the existence of biological relation ensure a social commitment to care. . . . Parental responsibilities are, in a sense, inalienable, but it is not genetic connection that makes them so; rather it is the intense, person-specific nature of the interpersonal bonds constituting the parental relation that makes parental responsibility largely nontransferable.⁶⁵

The real moral problems in donor insemination for Lauritzen, then, are those that threaten the purpose of parenthood and the relationship between husband and wife. Chief among those are secrecy and the genetic asymmetry donor insemination creates in the relationship between each of the parents and the child. In addition, as Jews we must also ask how our moral evaluation of donor insemination should be affected, if at all, by the demographic realities of the low Jewish birthrate and high rates of Jewish intermarriage and assimilation in which this question is being asked in the first place.

1. *Secrecy*

The secrecy that often surrounds artificial insemination is sometimes justified as a protection for the child, sometimes as protection for the husband, and sometimes as protection for the donor. We shall consider each in turn.

Children, the argument goes, may feel perplexed and odd if they know they were conceived in an unusual way, especially as they approach puberty. Moreover, when they have their inevitable quarrels with their parents, children born through donor insemination, like adopted children, may feel and say that they would not be having such problems if their *real* fathers were there. Secrecy presumably shields children from such feelings and helps them accept their social parents, even in time of tension.

Secrecy about how a child was conceived, though, undermines the trust that must be at the very core of a child's relationship with his or her parents – especially on a subject as critical to a child's identity and self-image as his or her origins. Since secrecy almost definitely will require one or both social parents to lie to the child on a number of occasions, the potential damage is even worse. As Sissela Bok notes in her book, *Lying*, lies are

⁶⁴ Paul Lauritzen, "Pursuing Parenthood: Reflections on Donor Insemination," *Second Opinion* (July, 1991): 63. I want to thank Rabbi Aaron Mackler for calling my attention to this article and those listed on this topic in n. 68 below.

⁶⁵ *Ibid.*, pp. 65-66.

particularly corrosive and contagious within families. “The need to shore up lies, [to] keep them in good repair,” she writes, “the anxieties relating to possible discovery, the entanglements and threats to integrity – are greatest in a close relationship where it is rare that one lie will suffice.”⁶⁶ Indeed, as Lauritzen points out, this is possibly the most egregious case of “living a lie,” for when the truth about a child’s origins through artificial insemination is kept from the child, everything about the parent-child relationship is based on a presumed or explicit lie. That surely is “incompatible with the commitments that responsible parenthood entails,”⁶⁷ not only theoretically, but practically, for it engenders shame and guilt, fear and suspicion.

Secrecy does not protect the husband’s ego either. It is perfectly normal for men who cannot impregnate their wives to feel angry, inadequate, ashamed, and even guilty. The only hope of coping with such feelings over the long run is not through denial, but rather through expressing them (literally, pushing them out of himself) through open communication with those who are likely to sympathize and support him.

If he can talk about this with his wife, she can reassure him that she still considers him a manly mate, whatever his sperm count or mobility may be. Furthermore, he will soon discover, if he does not already know, that marriage is not exclusively based on the ability to procreate, that it includes, more importantly, sharing life together. Given the possibilities of artificial insemination and adoption, one can surely include the raising of children, which, after all, takes much more of one’s time, energy, and commitment and offers a much more sustained basis for sharing than procreation alone does. If the man is sufficiently self-assured to talk with his male friends about this too, he may well find that he is not alone, that some of his friends may be experiencing the same problems or know of others who are, and that, in any case, they will not abandon him as a friend and will not think less of him as a man.

On the other hand, if the man cannot muster enough self-confidence to have such discussions with his wife and friends, he ironically cuts himself off from the very strengthening he so desperately needs. Secrecy about his wife’s donor insemination thus will not help him, but will rather compound the problems in making the necessary adjustments in one’s thought, feelings, and plans. As Lauritzen says,

Unfortunately, to mask a problem is not to resolve it, and the secrecy only serves to delay an acknowledgement of the emotional and psychological effects of sterility. Infertile individuals need to mourn and grieve the children they will not produce; they need to resolve any feelings of inadequacies that sterility may engender, and secrecy is an obstacle to meeting both needs.⁶⁸

Moreover, the secret of a woman’s donor insemination can be revealed at any time in an angry moment, and that cannot help but add stress to a marriage. Furthermore, relatives and friends who do not know about the donor insemination will quite inno-

⁶⁶ Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Vantage Books, 1978), p. 224; cited in Lauritzen, “Pursuing Parenthood,” p. 69.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, p. 69. Cf. Rona Achilles, “Anonymity and Secrecy in Donor Insemination: In Whose Best Interests?” *Sortir la maternité du laboratoire*, Conseil du Statut de la Femme (Montreal: Government of Quebec, 1988), pp. 156-163 (notes on pp. 407-408); and Patricia P. Mahlsted and Dorothy A. Greenfeld, “Assisted Reproductive Technology with Donor Gametes: The Need for Patient Preparation,” *Fertility and Sterility* 52:6 (Dec. 1989): 908-914.

cently add to the man's pain when they talk about whom the child resembles. All of these factors mean that the husband's manliness is much better protected if he does not keep the donor insemination of his wife a secret.

Jewish law also would encourage the husband to avoid secrecy. "Be fruitful and multiply" is certainly a commandment, one that North American Jews, who statistically have a 1.6 or 1.7 reproductive rate, nowadays all too often ignore. As we have noted above, however, if one *cannot* fulfill this commandment, one ceases to be obligated by it. Therefore, an infertile man should not feel any shame or guilt for failing to fulfill this commandment since it does not apply to him. Moreover, procreation is not the only duty we have regarding children. Those who cannot procreate may not be able to fulfill that commandment, but they surely can raise children through artificial insemination or adoption. In so doing, they fulfill many commandments and act with real, ongoing *חסד* (lovingkindness, fidelity) to the children who are, in most significant ways, their sons or daughters. For both of these reasons, then, an infertile Jewish man whose wife is artificially inseminated or whose children are adopted has nothing to hide – and nothing to gain by secrecy.

That leaves the donor. Secrecy surrounding artificial insemination is most often justified to protect the potential pool of donors, for if the donor's identity were known, it is feared, he might be held financially, morally, and perhaps legally responsible for the care of the child or the mother. This might include not only child support and a claim on the biological father's estate when he dies, but also monetary compensation for any disease or disability that passed through the semen from the donor to the child, especially given the general lack of regulations governing sperm banks.⁶⁹ Moreover, according to Yeh and Yeh, "many potential donors would be reluctant to give specimens if they knew that their names would be given out publicly."⁷⁰ Conversely, the social parents may want to keep the identity of the donor secret to prevent unwanted intrusions by that man in their lives and in the life of their child on the grounds of his biological connection to the child.

Some of these are real concerns, and some are not. As noted above, since the 1970s, most American states have enacted the Uniform Parentage Act or other legislation that makes the husband, and not the donor, the legal father of the child, with most of these states requiring that the husband agree to the procedure in writing and that there be a physician involved in the insemination. The only legal concerns of donors with regard to inheritance or child support, then, involve donations in those states that did not pass the Uniform Parentage Act or its equivalent and donations where the requirements were not met in the laws of those states that did pass such legislation. The latter situation occurred in a recent case where lesbians used a friend as a sperm donor, and he subsequently won the right in court to be involved in the child's upbringing.⁷¹

Potential liability for diseases contracted through the insemination is a more serious possibility that might lead potential donors to remain anonymous. Indeed, three recent law review articles argued that legal notions of warranty should be invoked or legislation should

⁶⁹ Richard Doren has stressed this point in arguing for greater control of sperm donations while yet preserving donor confidentiality; see Richard Doren, "The Need for Regulation of Artificial Insemination by Donor," *San Diego Law Review* 22:1193-1218 (1965).

⁷⁰ Yeh and Yeh, *Legal Aspects of Infertility*, p. 48.

⁷¹ *Jhordan C. v. Mary K. and Victoria T.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986).

be passed to prosecute such claims, at least if the donor knowingly hid important genetic information or lied about it.⁷² This is especially important in light of the fact that donors are usually paid, and even though the sums are modest (typically, \$25 for each donation), the money may encourage donors to be careless or evasive in their answers to questions about their physical histories or perhaps even to lie. Only three states – California, Florida, and Indiana – have enacted legislation going beyond the required testing of sperm donors for the HIV virus, and no state has statutorily imposed regulations sufficient to meet the recommended guidelines of the American Fertility Society.⁷³ This is undoubtedly because in-depth testing of donors and their sperm could cost recipients an additional \$800 to \$900.⁷⁴ That would make donor insemination much more expensive than the \$200 to \$500 that it commonly costs now, but, of course, it is nothing in comparison to the costs of caring for a genetically defective or diseased child. No legal action has yet been brought against a donor on these grounds, but one could understand why a donor might want to avoid any chance of that through anonymity.

The social parents may also want to preserve the donor's anonymity in order to keep him out of their lives and the life of the child. Of course, those states that have passed the Uniform Parentage Act or its equivalent have thereby established protection against that since the sperm donor, according to such statutes, is legally not the father in any way; but that applies only when all of the details of the law are carried out, such as written permission of the husband and supervision by a physician, where these are mandated by law. Courts have given donors paternal rights where these aspects of the law have not been fulfilled and where the donor has evidenced through his actions that he wanted to serve as the child's father.⁷⁵ Thus, even in those states that have laws governing this, and all the more so in those that do not, the social parents may want to guarantee their freedom from the donor through keeping his identity secret.

It is interesting that Australia, which pioneered open adoptions, has also enacted laws that mandate that donors, donors' spouses (if married), and infertile couples be counseled *not* to preserve anonymity before participating in donor programs. A registry in which donors are identified is open to children at age eighteen, equivalent to the law on adoption.⁷⁶

⁷² Doren, "The Need for Regulation of Artificial Insemination by Donor," at n. 69 above; L. Thomas Styron, "Artificial Insemination: A New Frontier for Medical Malpractice and Medical Products Liability," *Loyola Law Review* 32:411-446 (1986); Anita M. Hodgson, "The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination Procedures," *Indiana Law Review* 26:357-386 (1993). Styron, at p. 443, n. 190, records the donor agreement recommended by the American Fertility Society to preserve the donor's anonymity yet making him responsible to notify a designated party "should I contract any contagious or venereal disease."

⁷³ Hodgson, *ibid.*, p. 359 and n. 10 there. See 1991 Cal. Adv. Legis. Serv. 801 (Deering); FLA, STAT. ch. 381.6105 (1990); IND. CODE, par. 16-8-7.5-6 (1988).

⁷⁴ Hodgson, *ibid.*, p. 360 and n. 12 there.

⁷⁵ *C.M. v. C.C.*, 377 A.2d 82, 152 N.J.Super 160 (Juvenile and Domestic Relations court, Cumberland County, N.J.), 1977; *Jordan C. v. Mary K. and Victoria T.*, 224 Cal Rptr 530, 179 Cal. App.3d 386 (1986); *In the Interest of R.C.* 775 P.2d 27, 34 (Colo. 1989). The condition that the donor show interest in serving as the father through his consistent actions is critical, for the U.S. Supreme Court, in ruling that a biological father who had no relationship with the child was not entitled to notice of the child's adoption proceedings, held in *Lehr v. Robertson* 463 U.S. 248, 103 S.Ct 2985, 77 L.Ed.2d 614 (1983) that "the mere existence of a biological link does not merit equivalent constitutional protection" to one who did maintain a relationship with the child.

⁷⁶ S. Alias and C.J. Annas, "Social Policy Considerations in Noncoital Reproduction," *Journal of the American Medical Association* 255 (1986): 62, cited in Mahlstedt and Greenfeld (at n. 68), p. 911. These laws also prohibit payment for specimens and mixing of donor and husband sperm.

American states, however, have uniformly protected the identity of the donor, and even those who keep records of the donation only allow them to be opened for “cause” or “good cause,” some requiring a court order to do so, and this was the position incorporated into the Uniform Parentage Act as well.⁷⁷ Thus American states apparently do not want to go as far as Australia has done in revealing donors, social parents, and children to each other.

Even so, one can protect the *confidentiality* of the donor without keeping the fact of the donation a secret. One can even divulge to the child many facts about the donor without compromising his privacy – an important point given that children often want to know and, one might even say, have the right to know, many genetic characteristics of their biological fathers.

At present, only three states (California, Illinois, and Ohio) require the physician to keep records of the attributes of the donor, and fifteen others require that some state agency have such records.⁷⁸ We should encourage registration at least of the donor’s medical history and, if possible, of other personal characteristics that the donor would like his progeny to know about him. As Mahlstedt and Greenfeld say, “Considering donors real people with specific interests, skills, and family histories enables the donor children to identify positively with their genetic heritage.”⁷⁹ Moreover, as we noted above, it enables the children to avoid having incestuous sex, either within or without marriage. That is not only important legally and morally, but also physically, for one wants to avoid the genetic problems that can arise in the progeny of an incestuous relationship. For both psychological and physical reasons, then, if the donor insists on confidentiality, his sperm may be used for insemination within the bounds of Jewish law as we interpret it only if information about his medical history, and preferably tidbits about his character and interests, be made available to both the social parents and to the child.

The above approach to matters of secrecy is based on the best advice available in the psychological literature which, in turn, is based on the experience of many, many people – couples, donors, and children – involved in donor insemination. Still, even with all of this input, some couples may choose to keep the donor insemination a secret from their children, family, and friends – just as they do not reveal other things to anyone else, like, for example, the times they have intercourse – in order to make themselves and their child feel as close to them and as “normal” as possible. We should understand and permit that decision, but only after sharing with parents the advice that has emerged from those who have dealt with donor insemination extensively and the reasons for that advice, as described above.

2. *Asymmetry*

The fact that a child born through donor insemination is the biological descendant of the mother but not that of her husband makes for an asymmetry in their relationship to their child. That can cause problems in their spousal relationship if the husband never works out his feelings of anger, impotence, shame, and perhaps even guilt at not being able to father a child. Every time he sees the child, he may be reminded of his own infertility and, in contrast, his wife’s ability to procreate. He may once again resent his predicament and, through psychological transference, his wife. The asymmetry

⁷⁷ Yeh and Yeh, *Legal Aspects of Infertility* (at n. 45), pp. 45-46.

⁷⁸ The Health Department is mandated to keep such records in Alabama, Colorado, Minnesota, Montana, Nevada, New Jersey, and Wisconsin; a local court or the Registrar of Vital Statistics keeps such records in Connecticut, Idaho, Kansas, New Mexico, Oklahoma, Oregon, Washington, and Wyoming. See Yeh and Yeh, *Legal Aspects of Infertility*, pp. 45-46.

⁷⁹ Mahlstedt and Greenfeld, “Patient Preparation” (at n. 68), p. 911.

involved in donor insemination also may cause problems in the father-child relationship. In Lauritzen's words:

When the child is young, there will be the inevitable speculation about whom the child resembles. For the father this is likely to be painful and to frustrate rather than further the parent-child bond. If the child develops in ways or with interests different from the father's, or if the child is particularly close to his mother, the father may well feel left out, an outsider in the family. If the child is told about the conception, he is likely at some point to wield this information to inflict pain. He may shout in anger that he hates his mother, but only to his father will he say that he, the father, is not his real parent. So the absence of genetic relation is likely to be painful and isolating, and in this pain the mother cannot fully share.⁸⁰

Adoption engenders some of the same feelings, and adjusting to them is in some ways easier and in some ways harder than adjusting to donor insemination. On the one hand, neither of the parents can see an adopted child as their biological progeny, and so the problems for the husband-wife relationship caused by the asymmetry of donor insemination would not affect adoption.

On the other hand, though, the parent-child relationship may be more difficult, for in donor insemination the child knows that at least one of the social parents (the mother) is also his or her biological parent, while in adoption both biological parents are unknown. Thus the child's genetic uncertainty and the lure to blame the parents' lack of biological connectedness in moments of tension are doubled. Moreover, many adopted children feel that they have been fundamentally rejected by their genetic parents, leading some to seek the identity of, and a meeting with, their genetic parents as adults. That often produces less than desirable results for all parties concerned: the child may be deeply disappointed in the reality, as against the dream, of the kind of human beings the genetic parents are; the genetic parents may find being discovered by the child after all these years to be most unwelcome, making the child feel rejected yet again; and the social parents feel that somehow they were inadequate as parents, that they never succeeded in overcoming the lack of biological relationship between them and the child despite years of love and effort, if the child now seeks to know and be connected with his or her biological parents.⁸¹

While these dangers in both donor insemination and adoption should not be minimized, they should not be exaggerated either. We do, after all, have many "blended" families today in which children are raised by a biological parent and by a nonbiological parent. That may not be ideal for the same reasons of asymmetry that artificial insemination is not ideal, and yet we know that committed spousal and parent-child relationships based on honesty, trust, and respect most often overcome the difficulties. One must remember, too, that in marriages in which fertility is not a problem, the families that result from them are not always ideal; each marriage and family has its difficulties that the people involved must overcome, and the asymmetry of artificial insemination is just a pitfall of a specific sort. The couple and child *will* need to talk out the issues fully, perhaps with professional help, but it is certainly not

⁸⁰ Lauritzen, "Pursuing Parenthood" (at n. 8), p. 71.

⁸¹ For a recent, poignant article about this, see Susan Chira, "Years After Adoption, Adults Find Past, and New Hurdles," *New York Times*, 30 Aug. 1993, pp. A1, C11. I would like to thank Professor Vicki Michel and Rabbi Elie Spitz for calling this to my attention.

impossible for a marriage and family to survive the asymmetry of artificial insemination and even to emerge stronger as those involved join in dealing with its challenges.

The same point applies to grandparents. As Mahlstedt and Greenfeld point out, if grandparents remain distant from grandchildren conceived through artificial insemination, it is generally not in reaction to the means of conception, but it is rather a continuation of the poor relationships that the social parents had with them from the start on other grounds entirely. It is *those* personal problems that must be addressed before the special issues deriving from donor insemination can be successfully confronted.

This is very important for the social parents to recognize, for family support is critical to meeting the challenges that the asymmetry inherent in donor insemination poses. As Mahlstedt and Greenfeld say:

The social attitudes which concern infertile couples most are *not* those of the church or the law, but those of their families. . . . It is their support that most effectively enables confidence, conviction, and courage to emerge in the couple's experience with donor conception. Couples who receive family love and support reflect less ambivalence about their choice, more comfort in sharing their means of conception with others, and more confidence in their abilities to cope with negative social attitudes.⁸²

Thus with grandparents, with other family members, and with friends, as with the social parents themselves, good relations apart from this issue will help everyone deal with it, and bad relations will make that task harder. Within a reasonably strong network of relationships, however, including especially their own, the asymmetry inherent in donor insemination need not become an insurmountable obstacle to a strong marriage and to good parenting, and it therefore should not be prohibited on that moral ground.

3. *Demographic Concerns*

In addition to these moral issues that presumably affect couples of all faiths involved in donor insemination, there are specific Jewish issues in judging its morality. Rabbi Jakobovits mentioned adultery and diminution of the role of the father as reasons to oppose donor insemination, despite his inability to find legal grounds to do so. For reasons discussed above, I have rejected those contentions of his. There is one important moral factor, though, that, on the contrary, argues for permitting donor insemination. That factor is the demographic context in which this question is being asked.

Jewish families in the past had numerous children. This was in part, no doubt, because so many children died in childbirth or of childhood diseases, and so one might have only a few children survive to adulthood even if one had significantly more than that in the first place. Thus while birth control was known and used when medically necessary for either the mother or the infant she was nursing, it was not even contemplated, as far as we can tell from the sources, for purposes of family planning.⁸³

Contemporary Jews generally do not share this ethic. Survival rates to adulthood are much better now, and so Jewish couples need no longer conceive many more children than they ultimately want to have. Moreover, they commonly want to provide substantial educational and material benefits to the children they do have, and that argues for smaller

⁸² Mahlstedt and Greenfeld, "Patient Preparation," p. 913.

⁸³ On this topic and on many others relevant to this responsum, see David M. Feldman, *Birth Control in Jewish Law* (New York: New York University Press, 1968), esp. chs. 9-13.

families so that they can afford to do that. Economic necessity and the women's movement have made the dual-career marriage commonplace, and so couples are reluctant to have many children when they know that they will have limited time to care for them. These factors, plus the loss of a third of world Jewry in the Holocaust, plus assimilation and intermarriage, have together produced the serious demographic problems that our contemporary Jewish community has.

This must enter into our moral evaluation of donor insemination because a Jewish examination of any moral issue cannot be adequate to Jewish concerns if it only narrowly considers the specific legal issues involved. Any tradition based on law must grapple with its sources if it is to be true to itself and if it is to reap the many benefits inherent in a legal system,⁸⁴ and I have done that in some detail above. The law, though, must be interpreted with full cognizance of the specific context to which it is to be applied, for otherwise it risks two opposite dangers: it could either be ignored and thus dishonored, or else – perhaps the greater danger – it could be obeyed despite the personal, social, and moral havoc it wreaks on the situation it was meant to guide with sensitivity and wisdom. Certainly, Jewish law, which tries to delineate the will of God as we understand it, must now, as it has in the past, pay attention to the welfare of the Jewish community and of the specific people involved as any good God would. Moreover, the Conservative movement, with its commitment to historical analysis, must surely not only recognize the influences of historical circumstances on the legal judgments of the past, but must also take the responsibility to meet the needs of Judaism and the Jewish community in its *responsa* of the present.

In our case, then, when the demographic statistics are as threatening as they are for the continuity of the Jewish tradition and the Jewish community, any room in the law to enable Jews who are otherwise infertile to have children must be used. The moral scales, in other words, are decisively balanced by these communal scales in favor of donor insemination when the couple cannot have children in any other way.

4. *Compassion*

These communal considerations stand quite apart from, and in addition to, the compassion one must surely have for couples who have tried to have children and cannot. In such situations, both members of the couple suffer immensely. In addition to the frustration of being unable to have children when they deeply want to do so, they often have feelings of inadequacy as either men or women. Infertility certainly requires couples to alter their understandings of what it means to be a man, a woman, and a couple, for one important part of all of those concepts is no longer true. Thankfully, the greater publicity about infertility in our time, including its frequency, and the availability of support groups and helpful publications, have enabled many couples to overcome the emotional hurdles involved; but more than a few couples have broken apart because of their inability to have children. In addition to our communal concerns mentioned above, then, our attention to the needs of Jews who are trying to fulfill Jewish law and actualize Jewish ideals, and our interest in preventing divorce to the extent that we can, should also prompt us to prefer the permissive lines of reasoning in the sources described above.

Compassion in these cases, though, goes in two directions. Just as we want to be responsive and affirming to the couples who want to use these new techniques to have children, we also want to recognize that some couples will choose not to engage in these

⁸⁴ I spell out some of the advantages of encasing values in law in my article, "The Interaction of Morality and Jewish Law," *Judaism* 26:4 (fall 1977): 455-466, and in my book, *Knowing God: Jewish Journeys to the Unknowable* (Northvale, NJ: Jason Aronson, 1992), pp. 71-75.

procedures. In some cases, the cost will be a factor. In others, the psychological problems engendered by the asymmetry of donor insemination and egg donation pose too much of a threat to the marriage. For these and other reasons, couples may legitimately refuse to use either donor insemination or egg donation, and we should not make them feel that they have let down the Jewish people, their partner, or potential grandparents. The commandment to procreate does not apply to a couple who cannot have children through their own sexual intercourse, and that recognition will surely be liberating for some couples. There are, after all, many commandments and many opportunities in life to do good deeds, and so, as much as we may individually or collectively support those couples who decide to use D.I. or egg donation, we must also be sensitive to the good reasons that will motivate other couples not to use them.

Using Donated Eggs

A. Balancing the Risks of Egg Donation with the Alternative of Adoption

The parallel phenomenon to donor insemination in the female is egg donation. In cases where a woman cannot produce eggs but can carry a fetus, she may have eggs of a donor woman fertilized in a test tube with either the sperm of her (that is, the infertile woman's) husband or of a donor, and then the zygote is implanted in her uterus for gestation. Moreover, even if a woman over age forty can produce eggs, the success rate of IVF in such women is so dismal that doctors generally recommend the use of a younger woman's eggs instead.

This procedure is much newer than artificial insemination because semen can be obtained through simple ejaculation, while the techniques for harvesting and preserving eggs for donation have been developed only in recent years. Egg donation is also more dangerous to the donor than artificial insemination is. A man who produces sperm for purposes of donation does not thereby entail any physical danger (although there may be psychological or legal risks for him in such donations, as discussed above). The same immunity from physical danger does not apply to the woman who produces eggs for donation. For that procedure to have a better chance of working, and to reduce the number of times the woman must undergo the procedure to harvest the eggs, the woman's ovaries must be stimulated by drugs to produce multiple eggs. As discussed below, there is some evidence that this increases her risk of having ovarian cancer and some other maladies, especially if she does this often. The number of women who are willing to donate eggs is therefore considerably and understandably smaller than the pool of semen donors.

One can understand, though, why the recipients of egg donation want it. Unlike adoption, the woman will go through pregnancy, and many women want to have that experience. Moreover, since Jewish couples find it hard to locate a healthy infant to adopt of their own race, and since some will not adopt any other kind of child, a woman who can bear a child but who cannot produce eggs may seek a woman with characteristics similar to her own to donate eggs so that the offspring will look like her and, assuming that her husband's sperm is used, like her husband as well. The same desires often lead couples who need D.I. to seek a donor similar in characteristics to the husband.

Couples sometimes want children who look like them to maximize their own feelings and those of the child of belonging to each other while simultaneously minimizing the awareness of family, friends, and others that the child became the couple's through any process other than the usual way. This is understandable; after all, for all of us, part of the lure of having children is that they represent one of the ways in which we gain eter-

nity, a piece of us that remains after we die. There is, however, inherent racism involved in refusing to adopt a child of a race different from one's own, and that is both theologically and legally problematic. God, according to our tradition, created all people, with no race inherently more worthy than any other, and membership in a particular race is not a necessary condition for being Jewish – as the plethora of races among Israel's Jews amply attests. Race is not a sufficient condition for being Jewish either, as the many non-Jews of all races demonstrate. Consequently, while such discrimination may be acceptable in the name of enabling the couple and child to overcome some of the problems inherent in egg donation, D.I., or adoption so that the parents and child can bond all the more effectively, rabbis must help couples see that these procedures are both possible and fully valid within Jewish law with donors and children of any race as long as conversion takes place when necessary.

One critical factor that makes egg donation less acceptable than artificial insemination, though, is the extra danger for the donor. Jewish law, after all, does not permit one to endanger oneself unduly: “[The strictures against] endangering oneself are more stringent than [those against violating] a prohibition,” says the Talmud.⁸⁵ One must not “stand idly by the blood of one's neighbor,” according to the Torah, and so some risk is required or at least permitted to save the life of another; but in the case of egg donation we are not talking about saving a life but rather enabling a couple to conceive a new life. Since no physical danger will ensue to the couple if they fail in that project, we cannot justify the danger to the egg donor on that basis. The risks to the donor, though, are not so great as to force us to ban the procedure entirely out of concern for the life or health of the donor. They are significant enough, however, for us to say that egg donation should only be used when the couple has seriously considered all other options for having children, including adoption.

v. Moral and Psychological Issues in Egg Donation

For the infertile couple, most of the moral and psychological issues in egg donation are the same as those we already encountered in artificial insemination. If the sperm used is the husband's, the couple will face the asymmetry mentioned above – although, of course, in the opposite direction, for the husband will be biologically related to the offspring while the wife will not be a provider of the child's gametes. Unlike the case of artificial insemination, though, a woman who carries a child, even if the egg came from another person, has the satisfaction of being the gestational mother, a source of meaning and connection to the child that a man can never experience. If the husband cannot produce sperm with sufficient number or mobility so that the couple must use both donated sperm and eggs, both social parents will not be the biological parents of the child, in which case they must face the problems that adoptive parents encounter. The openness in communication required of all parties involved in artificial insemination must therefore characterize cases of egg donation as well. Finally, the same demographic crisis and the same compassion for the infertile couple that should affect our understanding of artificial insemination should likewise incline us to permit egg donation when the couple cannot have a child in any other way.

Legally, in egg donation as in artificial insemination, contact of the genital organs and intent to have an adulterous relationship are both missing, and so the prohibition against adultery is not relevant. Furthermore, in light of the added expense and the significantly

⁸⁵ B. Hullin 10a. See B. Berakhot 32b; B. Shabbat 32a; B. Bava Kamma 15b, 80a, 91b; M.T. Laws of Murder and the Guarding of Life 11:4-5; S.A. Orah Hayyim 173:2; Yoreh De'ah 116:5 (gloss).

decreased chances of success over artificial insemination, egg donation is even less plausibly construed as a form of licentiousness.

The paucity of egg donors makes it permissible for a fertile sister to donate eggs to an infertile one. Since donor sperm is readily available and inexpensive, it is generally inadvisable for a fertile brother to donate sperm for the impregnation of his infertile brother's wife, for while that is not technically incest, it *feels* very close to it and raises all kinds of boundary problems for the brothers and the child later on ("Is Uncle Barry really only my uncle, or is he my substitute father when I want him to be?").⁸⁶ Since donated eggs are less available and more expensive, though, and since the lack of genital contact means that legally there is no taint of incest, we would allow a fertile sister to donate eggs to her infertile sibling, but only after appropriate counseling and careful consideration of how the sisters are going to handle these boundary questions as the child grows.

c. Identity of the Mother

There is only one source, to my knowledge, that even contemplates anything close to egg donation. Noting that the Torah specifically calls Dinah "the daughter of Leah" (Gen. 30:21) rather than following its more usual practice of identifying the child by her father's name, the Talmud tells a story to explain why the Torah did this. When Jacob already had ten sons, the story goes, Leah became pregnant. She knew that Jacob was to father a total of twelve sons, and she did not want her sister, Rachel, to bear him less than the two sons that each of the maidservants, Bilhah and Zilpah, had already produced. Consequently, Leah prayed that the child she was carrying not be a boy, and ultimately Dinah was born to her. The most common understanding of that story is that in response to Leah's prayers, God changed the gender of the child in utero. (For some reason, the commentators never imagined that Leah could have been carrying a girl in the first place!) The *Targum Jonathan*, however, understands the story to mean that in response to Leah's prayers, God exchanged the female child (Dinah) in Rachel's womb with the male child (Joseph) in Leah's, thus effecting an embryo transfer so that Leah would give birth to a girl and Rachel to her first son. Rabbi Samuel Edels (the "Maharsha," 1555-1631) also claims that this is the correct interpretation of the talmudic story.

The question is whether this interpretation of the story, which is ultimately built on the Torah's identification of Dinah as Leah's daughter, should serve as a precedent for determining the identity of the mother of a child conceived through egg donation. Even if we assume that the story is indeed one of embryo transfer, and even if we ignore the fact that in the story God is the one who effects the embryo transfer rather than human beings, there are real questions as to whether any story should be used for legal rulings, and all the more so one like this that is really only one possible interpretation of what is, in turn, a talmudic tale. Rabbi J. David Bleich, who called attention to the story, himself casts doubt on the use of it for this purpose.⁸⁷

Other grounds, though, support the holding that the bearing mother, rather than the egg donor, should be identified as the mother of the child. Specifically, Jewish law,

⁸⁶ A brother's sperm was, of course, used in levirate marriages (Deut. 25:5-10), but there the husband had died, and so there is no threat of the complications inherent in the blurring of roles between the brothers. Indeed, in that case it would actually be in the child's best interest if the uncle acted as a substitute father.

⁸⁷ The talmudic story: B. Berakhot 60a. The comment of *Targum Yonatan* is on Gen. 30:21. Maharsha's support of that interpretation: B. Niddah 31a. Rabbi J. David Bleich's refusal to use this source to determine the identity of the child's mother on the basis of parturition (along with Rabbi Joshua Feigenbaum) because halakhic principles are not derivable from aggadic sources (quite remarkable, given Rabbi Bleich's usual

in general, defines a child's native religion according to the religion of the birth mother at the time of birth.⁸⁸ Therefore, if a woman converts to Judaism during pregnancy, the child is born a Jew.⁸⁹ Moreover, for purposes of redemption of the firstborn son, Jewish law defines that child as the one who "opens the womb."⁹⁰ All of these precedents, of course, assume that the birth mother provides genetic material as well, but the law clearly focuses not on conception or gestation, but on birth. The only factor, in fact, that would argue against defining the status of the child according to the birth mother is the parallel to fatherhood, for, as we have noted, it is the sperm donor, rather than the social father, who counts as the genetic father in Jewish law. There, however, the social father is never physically involved with the child until after birth, while in the case of egg donation, the birth mother's body nurtures the child throughout gestation. As a result, in accordance with the line of precedents noted above that make the status of the mother at birth the defining factor for determining the religious identity of the child, we hold that a child born to a Jewish woman is Jewish, regardless of the religious status of the ovum donor.⁹¹

d. The Problem of Selective Abortions

Because the rate of success with IVF, GIFT, and ZIFT is currently so low, the standard practice in North America among infertility specialists is to implant four or five sets of gametes (GIFT) or zygotes (IVF or ZIFT) each cycle in the hope of raising the odds of success to twenty-

methodology); J. David Bleich, "Maternal Identity," *Tradition* 19:4 (winter 1981): 359-360. See also Fred Rosner, *Modern Medicine and Jewish Ethics*, 2d ed. (Hoboken, NJ: Ktav, and New York: Yeshiva University, 1991), pp. 115-116. I would like to thank Rabbi Aaron Mackler for calling my attention to these materials.

I think that we not only can use aggadic material as the source of general principles, but commonly do so in halakhic practice. Moreover, I think we should do so, for only then can our beliefs have impact on our actions. We must just be intelligent enough to understand that stories, unlike laws and judicial precedents, are not generally told in a form intended to be examined in legal detail but rather are to be read as articulating general principles, and we must also remember that stories, perhaps even more than legal precedents, may conflict with each other. Furthermore, in the use of stories for legal purposes, we must examine them, as we analyze potential precedents, for the analogies and disanalogies between them and the case at hand. In the case here, though, I would agree with Rabbi Bleich that this story is a very thin reed on which to determine the mother's identity, not so much because it is aggadic, but because it represents only one reading of what is already a fantastic tale designed more to indicate the kindness of Leah and the miracles of God than the way rabbis should rule in cases of egg donation. For the general point about the use of stories within the context of legal reasoning, see my articles, "Methodology in Jewish Medical Ethics," *Jewish Law Association Studies VI: The Jerusalem 1990 Conference Volume*, B.S. Jackson and S.M. Passamaneck, eds. (Atlanta, GA: Scholars Press, 1992), pp. 35-57; and more briefly, "A Jewish Approach to End-Stage Medical Care," *PCJLS 86-90*, pp. 67-70.

⁸⁸ M. Kiddushin 3:12; B. Kiddushin 70a, 75b; B. Yevamot 16b, 23a, 44a, 45b; M.T. Laws of Forbidden Intercourse 15:3.

⁸⁹ S.A. Yoreh De'ah 268:6.

⁹⁰ Exod. 13:2, 12, 15; 34:19; Num. 3:12; 18:15.

⁹¹ When this responsum was approved by the Committee on Jewish Law and Standards, this matter had not yet been determined, and so I maintained then that unless both the ovum donor and the birth donor were Jewish, the child should undergo the rites of conversion. Subsequently, however, the Committee approved the responsum of Rabbi Aaron L. Mackler ("In Vitro Fertilization," below, p. 523), according to which "the woman who gestates [a donated ovum] and gives birth to the child is to be treated as the child's mother for purposes of Jewish law, including the determination of Jewish identity." I have therefore adjusted this printed version of my responsum to reflect that subsequent Committee decision.

This would mean that in the reverse situation, when a Jewish woman's egg is implanted into a non-Jewish surrogate for gestation and birth the child would not be Jewish by birth and would need to undergo conversion.

ty-five percent or so. The use of multiple eggs in any attempt at impregnation, however, produces the need in some cases selectively to abort one or more fetuses. Women can generally safely carry up to three children, but being able to bear more than three healthy babies without undue threat to the mother's health is rare, and so the common practice is to abort all but three fetuses if more than that successfully implant into the uterus. In most cases, the couple is lucky if even one of the implants "take" – indeed, they are then beating three-to-one odds – but in some instances all four or five attach themselves to the uterus and begin to develop.

The Jewish tradition requires abortion when the mother's life or health is at stake, and it sanctions it when there is a risk to her life or health beyond that of normal pregnancy. Abortion, though, is generally prohibited, and the burden of proof is always on the one who wants to abort. We therefore do not want to create situations where we know ahead of time that we may well have to abort one or more fetuses.

Moreover, abortion often engenders psychological issues, even if it is necessary. Those are likely to be all the more severe for a couple with fertility problems in the first place.⁹² Therefore, to avoid the need for selective abortions as much as possible, Jews may only implant two, or at most three, zygotes for IVF or ZIFT and may only use two, or at most three, eggs for GIFT.

E. The Obligation to Procreate

Couples who choose *not* to use egg donation as a means of overcoming their infertility need not feel guilty in doing so. As noted above,⁹³ even though men clearly cannot have children without women, the Rabbis restricted the commandment to procreate to men. Since women do not fall under that legal obligation, then, infertile women are not failing to fulfill any commandments relevant to them by refusing to be impregnated by donated eggs. Given the potential psychological problems engendered by the asymmetry involved in producing a child with the husband's sperm but another woman's egg, one can understand why some women, at any rate, would refuse to undergo the procedure, and that refusal must be respected.

This will mean, though, that the woman's husband will not be able to procreate with his wife (assuming that his sperm is fit to produce children in the first place), and the Mishnah rules that a man who cannot procreate with his wife after trying for ten years must divorce her and marry another in an attempt to fulfill the commandment to procreate.⁹⁴ By the late Middle Ages, though, that rule had largely fallen into disuse, as Rabbi Moses Isserles ultimately codifies:

Today it is not the custom to force somebody on this issue. Similarly, anybody who has not fulfilled the commandment "be fruitful and multiply" and goes to marry a woman who is not capable of having children because of sterility, age, or youth, because

⁹² I want to thank Rabbi Judah Kogen for calling my attention to the psychological aspects of this situation.

⁹³ See n. 2 above.

⁹⁴ M. Yevamot 6:6. In mishnaic times, the man legally could have taken a second wife to fulfill the commandment to procreate, but the Mishnah does not mention that possibility, probably because by mishnaic times polygamy, while legal, was already frowned upon. Thus, not one of the more than 2,000 Sages mentioned in the Talmud has a second wife, and a second wife was called a צררה, trouble. See also the story of Rabbi Judah Ha-Nasi's son, who could not have children with his wife. His father told him to divorce her, but he said, "People will say, 'This poor one waited all these years in vain.'" His father said, "Take a second wife," but he answered, "People will say, 'This is his wife, and this is his concubine.'" He therefore prayed for her, and she was able to conceive (B. Ketubbot 62b). In any case, by the Middle Ages, polygamy was outlawed altogether in Ashkenazic communities through the revision of the law (תקנה) accredited to Rabbi Gershom of Mayence (d. 1028).

he loves her or [even] for her wealth, even though by law we should prevent such a marriage, it has not been the practice for many generations for the court to interfere in the affairs of couples. Similarly, if a man marries a woman and waits ten years [without children], we do not force him to divorce her, although he has not fulfilled the commandment “be fruitful and multiply.” And the same applies to other matters regarding couples.⁹⁵

Infertile couples who choose not to pursue egg donation, then, need not feel that they are thereby violating Jewish law. Again, they *may* use egg donation as a means to have children, but they *are not required* to do so. Those who opt not to use this method should consider adoption, which will satisfy many of the same needs and will open the couple to the possibility of fulfilling many other commandments associated with children.

Donating One’s Sperm or Eggs

Until now, we have considered artificial insemination and egg donation from the point of view of the couple seeking children. What about the donors, though? As we have said above, virtually all halakhic authorities to date have permitted a husband to produce sperm for A.I.H. when he cannot impregnate his wife otherwise. But is it permissible for a Jewish man to donate his sperm for purposes of donor insemination? Conversely, may a Jewish woman donate her eggs for purposes of enabling another woman to become pregnant? If the answers to either or both of these questions is affirmative, are there any restrictions on that permission?

Donor insemination, it will be remembered, constitutes procreation in Jewish law on the part of the donor. This introduces an appropriate note of seriousness to semen donation. It is not, and should not be construed as, simply another job for a college or medical student to earn some spare change. The (typically) young man involved should recognize that he is making it possible for a couple to have a child, with all the positive implications of that for the couple and, if Jews are the recipients, for the Jewish people. He should approach this whole process, in other words, with a sense of *mitzvah*, duly appreciative of the awesomeness of the human ability to procreate and of his role in helping that happen for an infertile couple.

He should also understand that, like it or not, he will have an important, biological relationship to the offspring. He may want to keep his identity confidential so as not to incur any risk of personal or legal problems with the couple or with the child later on. Since the laws on this are not universal and not totally clear, he may indeed have to retain confidentiality to avoid such consequences, at least as many state laws in the United States are written now.

The donor should recognize, however, that since the child will inherit his genes, he should supply him or her with as much information about his physical and personal characteristics as possible without compromising the confidentiality of his identity. Only then can the child know enough about his or her medical history to take appropriate preventive and curative steps against genetically inherent diseases or susceptibilities to disease, and only then can the child avoid having sex with a genetic relative. Furthermore, as I have said above, the more the donor reveals about his personal characteristics and interests, the more the child can achieve a sense of self-identity, and so the donor should provide at least some of that information to the social parents and, through them, to the child.

⁹⁵ S.A. Even HaEzer 1:3 (gloss).

The donor should also be concerned about his own future children not unwittingly marrying a genetic relative. This too argues for sharing as much information as possible with the child born of artificial insemination so that at least someone is guarding against such an occurrence. All of these problems disappear, of course, if both he and the social parents decide to reveal their identities to each other and to the child, but that raises other problems, and he must consider those too.

None of these difficulties should make semen donation forbidden; the great good of enabling an infertile couple to have a child outweighs them all. This includes any objections to the masturbation through which the semen will be procured, for the intent to produce a child removes any stigma of “wasting of the seed.” The donor, though, must at least understand the complications involved and plan for how he will respond to them.

The same concerns apply to egg donation, but that procedure has the additional concern of the risks involved in harvesting the eggs. Because doctors can now be guided by ultrasound to the ovaries so that they can remove eggs vaginally, surgery is no longer necessary to harvest eggs. To minimize the number of times that a woman must undergo the procedure, though, and to maximize the possibility of pregnancy in the recipient, the woman must be treated with drugs to produce more than one egg. (Eggs cannot yet be frozen.) Recent studies have found, however, that there is some increased risk in egg donors of a number of maladies, including even stroke and heart attack, and that “women who had used fertility drugs had three times the risk of invasive epithelial ovarian cancer compared to women without a history of infertility. . . [and] four times the risk of ovarian tumors of low malignant potential (borderline tumors) seen among women lacking a history of infertility.” On the other hand, as of 1988, 1.9 million women aged fifteen to forty-four years were estimated to have taken fertility drugs, and only a very small percentage of those has contracted ovarian cancer. As a result,

At present, there is no need to change medical practice regarding use of fertility-enhancing drugs. There is enough cause of concern, however, to slightly alter the physician’s approach to counseling patients. We suggest advising patients receiving fertility drugs as to the possible increased risk of ovarian cancer. Especially careful consideration should be given to counseling women who wish to donate eggs, particularly repeat donors, because they derive no reproductive benefit from their fertility drug exposure.⁹⁶

With this state of medical knowledge, then, a Jewish woman *may* take on the risks of egg donation, but not repeatedly, and only if she is assured by physicians after due examination that she personally can do so without much danger to her own life or health, for that clearly takes precedence in Jewish law to the good of enabling an infertile couple to have children, as great a good as that is.

⁹⁶ Robert Spirtas, Steven C. Kaufman, and Nancy J. Alexander, *Fertility and Sterility* [the journal of the American Fertility Society] 59:2 (Feb. 1993): 291-292. I want to thank my friend, Dr. Michael Grodin, for sharing this article with me. The 1988 Congressional report also reported a number of other possible complications caused by commonly used drugs to stimulate the ovaries, including early pregnancy loss, multiple gestations (fetuses), ectopic pregnancies, headache, hair loss, pleuropulmonary fibrosis, increased blood viscosity and hypotension, stroke, and myocardial infarction; see *Infertility* (at n. 8 above), pp. 128-129. Once again, though, the demonstrated risks are not so great as to make stimulation of the ovaries for egg donation prohibited as a violation of the Jewish command to guard our health, but they are sufficient to demand that caution be taken and that the number of times a woman donates eggs be limited.

Egg donors face some of the same issues of confidentiality as do semen donors, but several of the factors are different. Sperm is not in short supply, but eggs are. Furthermore, no state currently has laws unequivocally declaring the social mother, and not the egg donor, to be the legal mother (perhaps because of the newness of the procedure), and so the legal risks of future obligations are substantially greater for egg donors than they are for semen donors. These elements would argue for a greater measure of acceptance of confidentiality in egg donation than we would be prepared to accept in semen donation. On the other hand, the egg donor, no less than the semen donor, contributes substantially to the child's genetic structure, and so she too should reveal as much as possible of her medical history and personal characteristics for the good of the child.

Adoption

When a couple cannot have children, adoption is an available option. Several passages in the Bible suggest that adoption existed during Biblical times,⁹⁷ although the evidence is equivocal and is not specified in any legal source of the Bible. In later Jewish law, adoption is not a defined institution as such, but Rabbinic law provided for the approximate equivalent. The Rabbinic court, "the father of all orphans,"⁹⁸ appoints guardians for orphans and children in need, and the guardians have the same responsibilities as natural parents have. They must care for the child's upbringing, education, and physical accommodations, and they must administer the child's property. If the guardian dies, his or her estate is responsible to continue providing for the child's care. The sense of guardianship in Jewish law is so strong that it was once invoked in a New York case to extend the obligations of the adoptive father beyond the demands of civil law.⁹⁹

Contrary to modern, American adoption, however, in Jewish law the adoptive parents do not become the legal parents, but rather function as the agents of the natural parents.¹⁰⁰ Therefore, natural parents continue to have the usual parental obligations to the child, and the

⁹⁷ For example, Gen. 15:2-3 and 48:5-6 are probably the most plausible cases, but some suggest that all or some of the following passages refer to adoption as well: Gen. 16:2, 30:3, 38:8-9, 50:23; Exod. 2:10; Lev. 18:9; Deut. 25:6; Ps. 77:16; Ruth 4:16-17; Esther 2:7, 15; Ezra 2:61, 10:44; and 1 Chron. 2:35-41, 4:18. The evidence is murky, especially when one tries to differentiate adoption from fosterage and from inheritance rights alone. See Jeffrey Tigay, "Adoption," *Encyclopaedia Judaica* 2:298-301; and Michael Broyde, "Marital Fraud" (at n. 57), p. 97, n. 11.

⁹⁸ B. Bava Kamma 37a; Gittin 37a.

⁹⁹ *Wener v. Wener* 59 Misc. 2d 959, 301 N.Y. Supp. 2d 237 (Sup. Ct. 1969); and cf. appeal 35 App. Div. 2d 50, 312 N.Y. Supp. 2d 815 (2d Dept. 1970), where the judgment was affirmed but not its religious grounds.

¹⁰⁰ Michael Broyde claims (in his article, "Marital Fraud" [at n. 57], p. 97, n. 11.) that there are four instances in the Bible in which adoptive parents are called natural parents, but, as noted in n. 97 above, all of the biblical instances of possible adoption are unclear. In any case, the Talmud assumes those ascriptions of parentage not to be legal pronouncements, but rather descriptions of the close relationships between the children and adoptive parents: see 1 Chron. 4:18; Ruth 4:17; Ps. 77:16; 2 Sam. 21:8; and B. Sanhedrin 9b.

Broyde (*ibid.*, n. 10) calls attention to the disparate approaches taken by Roman and American law, which severed all previous relationships between the biological parents and the adopted children (to the point that, until recent amendments, the parties to the adoption were to remain anonymous to each other), as against English common law, which rejected the institute of adoption altogether, as against the intermediate position taken by Jewish law, which saw the adopted parents as agents of the biological parents. He cites, among other articles, C.M.A. McLauliff, "The First English Adoption Law and Its American Precursors," 16 *Seton Hall Law Review* 656, 659-660 (1986), and Sanford N. Katz, "Re-writing the Adoption Story," 5 *Family Advocate* 9-13 (1982). Because of the theory underlying American law, most states still ascribe to adoption law the ability to recreate maternal and paternal relationships even if the child, under the new legislation passed in many states, knows the biological parents.

guardian fulfills those obligations on behalf of, but not in legal substitution for, the natural parents. Along the same lines, the personal status of the child in matters of Jewish identity, ritual, and marriage depends upon the status of the natural parents.¹⁰¹ Therefore, when it is not known that the gestational mother was Jewish, the child must be formally converted.

At the same time, rabbinic sources express immense appreciation for the adoptive parents; taking a child who is, in essence, an orphan into one's home and raising that child is a **חסד** (an act of faithfulness, of loving kindness) of the first order. Thus the Talmud says that one who does so "is as if he has given birth to him," and, in a source quoted earlier but that bears repeating, notes that the adoptive parents manage to act rightly at all times:

"Happy are they that act justly, who do right at all times" (Ps. 106:3). Is it possible to do right at all times? . . . Rabbi Samuel bar Nahmani said: This refers to a person who brings up an orphan boy or girl in his house and enables them to marry.¹⁰²

This appreciation has legal consequences. As we have noted above, the possessions, earnings, and findings of minor, adopted children go to their custodial, rather than their natural, parents; this is probably a matter of equity, for this provision is in partial compensation for the expenses of raising children.¹⁰³ Similarly, according to Rabbi Moses Sofer, adopted children do not incur the obligations of mourning upon the death of their natural parents, but they do have such obligations when their adoptive parents die.¹⁰⁴ Moreover, in appreciation of the immensely significant role that adoptive parents have in their children's upbringing, and in recognition of the close bonds that adopted siblings create with each other, we consider adopted children, like children born through donor insemination, to have the status of relatives of the second degree (**שניורת**), and therefore sex or marriage between them is prohibited. Furthermore, as with children born through D.I., the social father's name may be invoked when the child is being identified by his or her Hebrew name, as, for example, when called to the Torah.

Many infertile, Jewish couples cannot find Jewish children to adopt because of the high rate of abortion among Jews. That argues for two things: first, Jews should understand that while Jewish law requires abortion when the life or health of the mother is at stake and permits it when there is a risk to the mother's life or health above that of normal pregnancy, by and large the Jewish tradition *prohibits* abortion. Jews all too often wrongly assume that because Jewish law requires or permits abortion in some cases, it does so in all cases, and so all too many of our people are using abortion as a *post-facto* form of birth control. They need to be disabused of this misconception of Jewish law – and made aware

¹⁰¹ Cf. *Encyclopaedia Judaica*, "Adoption," 2:298-303; "Apotropos," 3:218-222; and "Orphan," 12:1478-1480 for a summary of all of the laws in this and the last paragraph. See especially B. Sanhedrin 19b; S.A. Even HaEzer 15:11. Cf. also Michael Brody, "Marital Fraud" (at n. 57), pp. 96-100, who points out that in this way Jewish law is in marked contrast to Roman law as well as American law, but in agreement with English common law.

¹⁰² B. Megillah 13a; B. Ketubbot 50a. See also Exodus Rabbah, ch. 4; S.A. Orah Hayyim 139:3; Abraham Gumbiner, *Magen Avraham*, on S.A. Orah Hayyim 156; Moshe Feinstein, *Iggrot Moshe* on Yoreh De'ah 161.

¹⁰³ B. Sanhedrin 12b awards such possessions to the child's father; S.A. Hoshen Mishpat 370:2 specifies that this means the child's custodial father; and Rabbi J. Falk, *Meirat Einaim*, on S.A. Hoshen Mishpat 370:2, suggests that this is a matter of equity. Thus, a financially independent minor does not transfer his income to his parents because he is supporting himself; cf. S.A. Hoshen Mishpat 370:2.

¹⁰⁴ M. Sofer, *Responso*, 1 Orah Hayyim 164. Sofer assumes that mourning is a rabbinic institution, which itself is a matter of dispute: compare S.A. Yoreh De'ah 398:1 with Moses Isserles, Yoreh De'ah 399:13 (gloss). For other examples of rabbinic institutions not strictly applied in the context of custodial parentage, see, generally, S.A. Orah Hayyim 139:3; Abraham Gumbiner, *Magen Avraham*, on S.A. Orah Hayyim 156; Moshe Feinstein, *Iggrot Moshe*, Yoreh De'ah 161.

of the physical and psychological dangers involved in abortion. They also should come to understand that even if they cannot or will not care for the child, there is an abundance of infertile couples who would do so willingly and lovingly, and that makes non-therapeutic abortions even less justifiable.

In addition, though, Jewish couples contemplating adoption need to widen their search to include non-Jewish children, including ones who are not Caucasian. Conversion will be necessary, but for children that is a relatively easy process. Moreover, as noted above, race is not a factor in Jewish identity – or in the joy (and troubles!) of raising children.¹⁶⁵ Similarly, it is not only infants and able-bodied children that a couple should consider for adoption; older children and those with some disability are also God's children – and are more available for couples seeking to adopt. Indeed, Jews should consider the possibility of adoption of such children even when they have already had two or more children through their own sexual intercourse and have thereby fulfilled the demands of Jewish law to procreate.

At the same time, couples need to be aware of some of the special legal and psychological issues which may arise in adoption. The highly publicized Baby Jessica case, in which a two-and-a-half-year-old child was taken in August, 1993, from the adoptive parents who had raised her from birth and returned to her biological parents, indicates the importance of attending to the legal details of adoption – and of changing the laws in many states that make such a case possible. Apart from physical harm to the child, that is undoubtedly the adoptive parents' worst nightmare, and it probably is not in the child's best interests either. Biological parents do have a right and an obligation to care for their children, but if they give up both the rights and obligations of parenthood in a formal, legal way, adoptive parents and children have the right to be secure in their status as a family.

More commonly, adoptive parents must face psychological issues. Family members may say insensitive things – or bend over backwards in avoiding mention of the adoption. Adopted children will be reminded of their special status each time school forms ask for their medical history. During adolescence, when all children need to differentiate themselves from their parents and often feel misunderstood in the process, adopted children may think that their biological parents *would* understand them if they were present. That may be the occasion for some angry and hurtful remarks as the child attacks the adoptive parents where they are most vulnerable. Moreover, adopted children sometimes seek out their biological parents when they reach adulthood, and the adoptive parents need to understand that that does not usually mean that the child is rejecting them as parents. To cope with issues like these, adoptive parents are well advised to get appropriate counseling even before the child comes into their home and should avail themselves of subsequent counseling as needed.

Along the same lines, Jewish men and women who are not able or willing to adopt should seriously consider becoming Jewish Big Brothers and Jewish Big Sisters to enable children who have lost their father or mother through death or divorce to have a close, adult male or female model to balance the gender of their single parent as they grow up. Both adoption and service as a Jewish Big Brother or Big Sister are significant acts of **חסד** (loyalty and loving-kindness) whose beneficial effects often last throughout the child's life, and thus those who do them should feel religiously as well as personally confirmed and appreciated.

¹⁶⁵Despite the thousands of black children waiting to be adopted, it may not be easy for white people to adopt them, for state and private adoption agencies, often backed by state laws, prohibit such adoption for fear that white parents will undermine the ethnic identity of the child. See Lynn Smith, "Salvation or Last Resort?", *Los Angeles Times*, 3 Nov. 1993, pp. E-1, 3.

In sum, then, adoption is an honored course of action in our tradition. In light of the physical risks of egg donation, and in view of the tradition's overwhelmingly positive attitude toward adoption, we must urge couples to reconsider adoption before engaging in egg donation.

Summary

1. Medical Interventions to Induce Fertility

When couples cannot have children, Jewish law clearly allows that they take advantage of fertility drugs and other techniques that may help them to have children through their own sexual intercourse – as couples undoubtedly prefer as well. Then the emotional values of coitus and reproduction can be preserved, and the medical intervention is solely to aid a natural process.

2. Artificial Insemination

When such interventions do not work, artificial insemination is permissible. Use of the husband's sperm, if possible, is preferable to that of a donor, but even donor insemination is permissible. In the case of A.I.H., the semen may be collected in a condom, but even masturbation to procure the husband's semen is permissible. Since the husband's semen is being used, he fulfills the commandment to procreate through artificial insemination.

In the case of donor insemination, as much about the donor as possible should be revealed to the social parents and, through them, to the child so that the child can have as strong a sense of his or her medical history and personal identity as possible. Secrecy about the artificial insemination should be avoided on all sides and for everyone's benefit – although, for legal reasons and out of respect for a donor's wish for privacy, confidentiality, but not total anonymity, is permissible.

Donor insemination does not constitute licentiousness or adultery, and the child so conceived is fully legitimate. For purposes of priestly status, the child follows the status of the semen donor, if that is known, or else adopts the default status of a **ישראל**.

While the social father does not fulfill the commandment to procreate through D.I., he does fulfill many other commandments connected to the raising of children, making him the child's father in many important senses even if not in the biological one. Children conceived through D.I. are prohibited to each other by the Torah as sexual partners and as candidates for marriage since they share a mother and are thus half-brother and half-sister. If the eggs are also donated and therefore the children have no biological relationship to each other, the children are nevertheless prohibited to each other for purposes of sex and marriage under the rabbinic category of relatives of the second degree because they grew up in the same home as sister and brother. The masturbation required for donor insemination does not constitute "wasting of the seed." Even if the donation will be to a sperm bank such that it may be used for inseminating a non-Jewish woman, masturbation for this purpose is permissible.

While donor insemination is permissible, infertile couples are *not required* to use it to have children, for, in any case, the husband does not fulfill the obligation to procreate through donor insemination. If the husband cannot procreate, he is exempted from the commandment, and he should feel no guilt on that account. Thus if the psychological problems engendered by the asymmetry of donor insemination pose a significant threat to the marriage or if other concerns make them feel reluctant, a couple may, in full compliance with Jewish

law, elect not to use donor insemination to have children. If they wish to raise children, they should think of adoption as an alternative, but even that is not required by Jewish law.

3. Egg Donation

Similar conclusions apply to egg donation. The act is not licentious or adulterous since there is no contact of the genital organs of the egg donor and the husband, and so the child so conceived is fully legitimate. The identity of the mother for purposes of Jewish law follows the bearing mother. The same need for openness about the child's origins within the family, and the same desirability for the child to know as much as possible about the egg donor, apply to egg donation just as they apply to donor insemination. Because of the shortage of donated eggs, a fertile sister may donate eggs to her infertile sibling, despite the potential psychological problems involved, but only after appropriate counseling and only after all concerned determine that, on balance, the advantages of this arrangement outweigh its disadvantages. (We would not extend the same permission to brothers because there is no shortage and little cost in using donor sperm, and thus there is no need to incur the psychological risks involved in a relative's donation.) In order to avoid selective abortions as much as possible, a maximum of three eggs or zygotes may be implanted at any one time.

If the husband's semen is used to fertilize the egg(s) procured through donation, he fulfills the commandment to procreate through his wife's pregnancy by means of egg donation. Even so, a couple in this situation is not required to use egg donation to have children to fulfill the commandment; they may do so, but they also may opt not to do so. That is because the woman is not subject to the commandment, and the man, though obligated by it, is no longer forced to divorce his wife if he cannot have children by her. If a donor's semen is used as well as a donated egg, the husband does not fulfill the commandment to procreate, although here, as with donor insemination generally, he ceases to be obligated by the commandment and may fulfill many other commandments in the raising of the resultant child(ren).

While the risks to the donor inherent in egg donation are not so significant as to ban the procedure out of concern for the life and health of the donor, they are not negligible, and so egg donation should only be done when the couple has considered all other options of having children, including adoption.

4. Permissibility to Donate Sperm or Eggs

Men may donate their sperm to enable an infertile couple to have children, but only after due consideration of the implications of what they are doing and only with due respect and, indeed, awe for the whole procedure. Similarly, women may donate their eggs for the same purpose, but only under the same conditions and, in addition, only when they are assured, with their own medical condition duly examined, that they can undergo the procedure of harvesting eggs from their bodies without much risk to themselves. Recent studies suggest that women cannot safely serve as egg donors many times over because each instance of hyperovulation increases their risk of ovarian cancer. The evidence is not yet sufficient to ban egg donation entirely, but it does argue against undergoing multiple procedures of egg donation.

If semen or egg donors want to keep their identity confidential, they may do so. They do have a duty, however, to share as much of their medical history and personal characteristics with their offspring as they can consistent with that wish.

5. Adoption

Adoption does not fulfill the commandment to procreate, for Jewish law sees the child as the product of the biological parents. Nevertheless, people who adopt children fulfill many other commandments and do a real act of faithfulness and loving-kindness (חסד). As a result, adoption is a time-honored institution in Jewish law. Couples thinking about adopting one or more children should realize, though, that adoption often involves some special psychological problems for the social parents and for the child, especially during adolescence, and so the parents and child should get counseling, if possible, better to be able to cope with those issues.

Jewish law appreciates adoption of older children as much as infants, non-Caucasian ones as much as Caucasian ones, and handicapped children as much as able-bodied ones; indeed, since older, non-Caucasian, and disabled children are the primary populations of children waiting to be adopted, it probably is an even greater חסד to adopt them than it is to adopt a healthy, white infant. In any case, Jews must be educated to the Jewish acceptability of all these options for adoption and to the preferability of adoption over egg donation. They should also be educated to the possibility of adoption in addition to procreating and to the חסד involved in helping children with only one parent through programs like Jewish Big Brothers.

6. The Scope and Tenor of this Responsum

All of the above conclusions concerning artificial insemination and egg donation assume the case of the question asked – i.e., a married couple who cannot have children. This responsum does not treat, and therefore expresses no opinion about, the more complicated case of single women who wish to be inseminated (and, in some cases, also implanted with the egg of another woman), single men who artificially impregnate surrogate mothers, or single men or women who adopt children for purposes of becoming parents.

Jewish law clearly assumes that it is best for children to have both a mother and a father as it describes differing roles for both parents.¹⁰⁶ Furthermore, recent studies reaffirm the importance of fathers in the raising of a child, and a recent movie was

¹⁰⁶Thus in the case of divorce, children below the age of six must be put in the custody of their mother, for they are mainly in need of the physical care and attention that mothers typically give children at that age, and above the age of six boys must be with their father, so that he can carry out his obligation to teach his male children Torah, while girls must be with their mother so that she can instruct them in the ways of modesty; see B. Ketubbot 102b, 103a; M.T. Laws of Marriage (אשורת) 21:17; S.A. Even HaEzer 82:7. One talmudic passage even describes differing contributions of each parent in the physical make-up of the child, the mother contributing red matter (probably because menstrual blood is red) and the father contributing white matter (probably because semen is white), while God, each person's third parent according to the Rabbis, breathes life into the child; see B. Niddah 31a. These differing roles lead to differing reactions of the child to each parent, which, according to the Rabbis, explains why the Torah commands us to honor the father before the mother (Exod. 20:12), but to revere the mother before the father (Lev. 19:3); see Mekhilta, "Massekhta deBahodesh" (ed. Horowitz-Rabin), 8, p. 232 and its parallel in B. Kiddushin 30b-31a (although that version lacks the significant phrase, "Where a deficiency exists, He filled it"), and see Sifra "Kedoshim" 1:9 (p. 87a) and Mishnah Keritot, end (trans. H. Danby, p. 572), according to which even the mother must honor the father.

In modern times, we would certainly have a different understanding of what and how each parent contributes to the biological make-up of the child, and we would probably dispute the rigid roles for mothers and fathers delineated in the sources too; but the underlying point that parents of both genders have distinctive roles to play is, I think, still right. This is one instance of my general approach to matters of gender, for I have long affirmed that men and women are equal, but, at least in some significant ways beyond their anatomies, different; see my article, "Equality with Distinction," in "*Male and Female God Created Them*," by Judith Glass and Elliot N. Dorff (Los Angeles: University of Judaism [the *University Papers* series], Mar. 1984), pp. 13-23. More current research – e.g., Deborah Tannen's book, *You Just Don't Understand: Women and Men in Conversation* (New York: Ballantine Books, 1990) – confirms that thesis all the more. This makes it all the more important for children to have caring adults in their lives of both genders.

based on the search for her father by a child born through D.I. to a single mother.¹⁰⁷ An adequate treatment of the use of artificial insemination, egg donation or adoption by singles thus requires a full-fledged analysis of Jewish law and of contemporary psychological and sociological studies to determine how Jewish law should treat these new family configurations.

Such an analysis would also have to take into account the complications raised by American law, for protections against the paternity of the semen donor built into the Uniform Parentage Act and similar legislation have not been applied by recent court decisions to single parents.¹⁰⁸ Moreover, some states do not recognize the right of lesbians or gay men to be parents, even if they are the biological parents.¹⁰⁹

Adoption by single people on the face of it poses fewer problems since the child is already born and is, by hypothesis, an orphan; but, in contrast to cases of divorce or the death of a spouse, this involves consciously creating a single-parent home. Single parents often do a remarkable job of raising their children, and it is certainly better for a child to have one caring parent than foster parents or no parents at all. Still, if the child could be adopted by two parents, that might well be better for the welfare of the child.

¹⁰⁷ For a popular summary of this, see Lee Smith, "The New Wave of Illegitimacy," *Fortune*, 18 Apr. 1994, pp. 81-94. According to Smith:

Data on thousands of children collected for the Department of Health and Human Services show that:

- Kids from single-parent families, whether through divorce or illegitimacy, are two to three times as likely to have emotional or behavioral problems, and half again as likely to have learning disabilities, as those who live with both parents.
- Teenage girls who grow up without their fathers tend to have sex earlier. A 15-year-old who has lived with her mother only, for example, is three times as likely to lose her virginity before her 16th birthday as one who has lived with both parents (p. 82).

Smith also cites David Popenoe, a Rutgers University sociologist, who says that while the social sciences can seldom prove anything in the strict sense of proof, there remains "a strong likelihood that the increase in the number of fatherless children over the past 30 years has been a prominent factor in the growth of violence and juvenile delinquency." Thus more than half of the 14,000 inmates surveyed by the Justice Department in 1991 did not live with both parents while they were growing up (p. 82). The consensus of the experts Smith consulted indicates that "a father shows a child, especially a boy, how to fit into the community. Dr. Frank Pittman, an Atlanta psychiatrist, says in his recent book, *Man Enough*, that a father's role is not to make his sons more aggressive or to show them how to take what is theirs. On the contrary, his function is to define the limits of manhood. A boy doesn't have to be John Wayne. Jimmy Stewart is man enough" (p. 94).

The movie cited is *Made in America* (1993), with Whoopi Goldberg and Ted Danson, in which the daughter presumably born using the sperm Danson's character donated to a sperm bank in his teens seeks him out when she is a senior in high school. The movie bespeaks two worries about D.I. — i.e., that the children will have a deep-seated need to know their biological fathers, and that sperm banks will not keep accurate records.

¹⁰⁸ That was the ruling of the Juvenile and Domestic Relations Court in *C.M. v. C.C.* (1977), the California Court of Appeals in *Jhordan C. v. Mary K. and Victoria T.*, and the Colorado Supreme Court in *In the Interest of R.C.* (1989), (all at n. 75 above), and also the Oregon Court of Appeals in *McIntyre v. Crouch*, 780 P.2d 239, 98 Or. App. 462 (1989).

¹⁰⁹ This was the basis of the recent Virginia ruling that Sharon Bottoms could not retain custody of her daughter, born by artificial insemination. Virginia is one of just four states where legal precedent deems gay parents unfit (Arkansas, Missouri, and North Dakota are the others), and New Hampshire and Florida categorically bar gays as adoptive parents. On the other hand, in the nation's capital, local officials held a seminar this past summer to instruct gays on how to adopt, and New Jersey, Massachusetts and six other states explicitly permit a lesbian to adopt her lover's child and become a second parent. See "Gay Parents: Under Fire and on the Rise," *Time*, 20 Sept. 1993, pp. 66-71. American law in all its diversity, then, is another factor which must be considered in artificial insemination of single women, and the matter is clearly complicated further if the women involved are lesbians.

This responsum, in any case, has not carried out the necessary analysis of these situations.¹¹⁰ Its task, instead, is to respond to the far more numerous cases of artificial insemination, egg donation, and adoption being used by infertile couples to have children.¹¹¹

As medicine becomes ever more adept at helping infertile couples conceive on their own, donor insemination, while necessary and permissible now, may no longer be necessary. Just recently, Belgian scientists “invented a new treatment for male infertility that they say may allow virtually any man, no matter how few or misshapen or immobile his sperm cells, to father a child” through the direct injection of a single human sperm cell into a human egg in a petri dish.¹¹² Hopefully, one day egg donation will not be necessary for infertile women either.¹¹³ Then the emotional, moral, and legal problems these procedures raise may resolve themselves.

¹¹⁰Our colleague, Rabbi David Golinkin, has written a responsum on one aspect of these questions; see his paper, “Artificial Insemination for a Single Woman,” *Respona of the Va’ad Halakhah of the Rabbinical Assembly of Israel* (Jerusalem: The Rabbinical Assembly of Israel and The Masorti Movement, 5748-5749), vol. 3, pp. 83-92. I am sure, though, that his is only the first of many responsa which will deal with what is, for all of us, a very new kind of family. The question is no longer whether such families exist, for a considerable number of women have already been artificially impregnated; the question is rather what Jewish law should say about such procedures, and why.

Newsweek (2 Aug. 1993, Michele Ingrassia et al., “Daughters of Murphy Brown,” p. 59) recently reported that,

The greatest burden of single parenthood falls on the children. As research increasingly shows, children reared in one-parent families tend to have more educational, emotional, and financial difficulties than those who grow up with two parents. Since the problems are often economic, some of the effects may be eased for children of well-educated, middle-class women.

Psychologist Anna Beth Benningfield argues that children can accept any situation as normal, as long as there’s a strong sense of family. Though [single parent Jane] Saks would have preferred a more conventional setup, she believes it makes little difference in an era of sky-high divorce rates. . . .What is critical is how mother responds when her child asks: where’s Dad?

In checking with some child psychologists I know, current research indicates that children, on average, do indeed do worse with one parent rather than with two, but only when that single parent is isolated as the only care-giver for the child. If the parent has sufficient funds to hire help, or if, in poor or rich families, there is a strong network of support from family and friends, children do no worse, on average, than they do with two parents. In making these comparisons, one must remember that the criteria for measuring adjustment and well-being are themselves sometimes at issue and that many contemporary families with two parents are themselves dysfunctional. Still, this remains a concern.

The one clear thing is that children born to a Jewish woman through artificial insemination are fully Jewish.

¹¹¹According to the 1987 national survey commissioned by the United States Office of Technology Assessment (see n. 8 above), 11,000 physicians around the country provided artificial insemination services to approximately 172,000 women. Eighty percent of the requests for artificial insemination were prompted by male infertility in the husband of a couple; only four percent (approximately 5,000 women) were cases of single women seeking to become pregnant. On the other hand, The California Cryobank, based on its own records, estimates that approximately twenty-five percent of the women requesting artificial insemination today (1994) are without male partners. That is quite some discrepancy! Still, even with the twenty-five percent figure, the vast majority (seventy-five percent) of artificial inseminations are done for infertile couples, the subject of this responsum. See Fader, *Sperm Banking* (at n. 23), pp. 6, 11.

¹¹²Gina Kolata, “New Pregnancy Hope: A Single Sperm,” *New York Times*, 11 Aug. 1993, p. C11. I would like to thank Rabbi Avram Reisner for drawing my attention to this. Fader, though, maintains that Alan Trounson reported success with microinjection of an individual human sperm into a human egg at the Sixth World Congress on Human Reproduction in Tokyo in 1987; see Fader, *Sperm Banking* (at n. 23), p. 10.

¹¹³In any case, it appears that the health care reforms planned by the Clinton Administration do not include payment for IVF, and since egg donation requires that, it may become the privilege of only the rich and therefore quite rare. See Edwin Chen and Robert A. Rosenblatt, “Clinton Promises Sweeping Coverage in Health Care Plan,” *Los Angeles Times*, 11 Sept. 1993, pp. A1, A16, and the exclusions listed on p. A17.

Conclusion

In the future, as technology develops yet further, we may no longer be faced with some of the specific questions addressed in this responsum. In the meantime, though, artificial insemination, egg donation, and, especially, adoption are Jewishly permissible procedures within the parameters outlined above. Even in those cases where the commandment to procreate is not fulfilled, these techniques enable the social parents to experience the joys and challenges of parenthood, thereby growing themselves, and they add to the numbers of the Jewish people at a time when that is nothing short of critical. Because of the way the commandment to procreate has been interpreted in Jewish sources, because of the physical dangers sometimes incurred, and because of the psychological problems involved in the asymmetry that these methods of having children sometimes create, infertile couples are not required to engage in these procedures to have children. For those who do use them, though, our endorsement of their choice to have children by these methods is not grudging, but enthusiastic. May God grant them the children they seek, and may they raise their children to Torah, the wedding canopy, and to good deeds.¹¹⁴

¹¹⁴I would like to thank the following physicians for helping me with the medical and general ethical aspects of this responsum: Dr. Brenda Fabe, M.D., a gynecologist/obstetrician at Kaiser Permanente Medical Center in West Los Angeles and director of physicians for Camp Ramah in California; Dr. Michael Grodin, M.D., Professor of Medical Ethics at Boston University School of Medicine; and Dr. Cappy Miles Rothman, a male infertility specialist and urologist in Los Angeles. I would also like to thank Professor Vicki Michel, J.D., past Co-Chair of the Los Angeles County Joint Commission on Bioethics of the American Bar Association and the American Medical Association, and Professor Arthur Rosett of UCLA School of Law, both of whom helped me with the sections of this responsum referring to American law and some general ethical concerns as well. In addition, Rabbis Kassel Abelson, David Feldman, Aaron Mackler, Avram Reisner, and Joel Roth, my fellow members of the Subcommittee on Bioethics of the Committee on Jewish Law and Standards, had significant input on many aspects of this responsum, and I am indebted to them. As usual, none of the people mentioned here is responsible for any of the errors or judgments of this responsum, but they have all contributed immensely to my own thinking on these complicated issues, and they have my sincere appreciation as colleagues and as friends.