

# Assisted Reproduction through the Prism of Jewish Law

By Yoel Jakobovits



Least anyone think that ethical issues regarding the generation of life are merely an academic footnote, consider the dominant concerns that determined the outcome of the recent US presidential election: abortion and stem cell research. Lingering fears engendered by 9/11, a largely unpopular war, with painful human and political costs, and a lackluster economy were all secondary issues in many voters' minds.

Historically, it was attempts at the reduction of the birth rate by the birth control revolution of the 1950s and '60s—and the latter's impact on society—that provoked many moral questions. Today, the rapid advances in the

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technology designed to increase the birth rate have generated new questions, largely overtaking the old ones. Society now faces many new ethical and legal dilemmas, which have yet to be fully resolved in the legislatures and courts. For religious Jews, the answers lie in *halachah*. Thus, rabbinic literature, paralleling developments in the scientific and legislative realms, has grown exponentially. I will present some of the key halachic issues surrounding assisted reproduction. Of course, the topic cannot possibly be surveyed here in its entirety.

## The Blessing of Fertility

Judaism has what has been called a "pronatalist thrust." Procreation is recorded as the very first mitzvah. Having children is the one absolutely indispensable achievement if we are to continue as a people. Furthermore, the Torah cannot be fulfilled without the

Jewish people since it was given to human beings, not angels.<sup>1</sup> Therefore, anything that assists reproduction, helping to overcome infertility, which Rachel Imeinu regarded as akin to death itself,<sup>2</sup> is welcome as a great blessing. For us, fertility is among the most cherished of life's successes. Fertility even has eschatological implications, as emphasized by the belief that there are a predestined number of people who must be born before *Mashiach* can come.<sup>3</sup>

This proactive approach to procreation is, in addition, partially shaped by innumerable lamentable events throughout our history, culminating in the tragic loss of a third of our people over fifty years ago. Within the collective subconscious of the Orthodox world, there is an urge to replenish these losses by achieving birth rates that are significantly higher than the general society's.

For these reasons, the pressure on

devout Jewish infertile couples is often more intense than that on other infertile couples. Whereas modern secular couples often choose to "protect" themselves against pregnancy during the early years of marriage, observant Jewish couples often yearn for the blessing of early parenthood. Actually, both types of couples are motivated by a similar consideration: to solidify a still tenuous relationship. Secular couples tend to believe that the premature arrival of children will undermine their vulnerable marriage ties. By contrast, religious pairs tend to believe that early parenthood is apt to cement the marital bond. These divergent views can be traced to fundamentally differing views of marriage itself: Many secular couples view the *privileges* of marriage as paramount, while many religious couples regard marriage's *responsibilities* as preeminent. In other words, the secular view stresses the couple's fulfillment in each other; the religious view emphasizes the couple's fulfillment through their offspring.

## Halachic Problems

With the advances in assisted reproductive technology, halachic difficulties abound. As in medical ethics in general, problems with fertility treatments can be divided into two groups: those prompted by Judaism and those prompted by medicine. The peculiarly Jewish concerns revolve around ritual issues: insemination during *niddus*, castration, conversion and Shabbat issues, to name a few. A principal issue that also falls into this category is the strict prohibition against *hotza'at zera levatalah*, emission of seed other than within the context of sanctioned sexual activity.

Then, there are moral questions prompted by medical and scientific aspects of this technology, questions that we ask together with society at large. For example, who shall be regarded as the rightful father and mother? What shall be done with unused fertilized eggs before they are implanted, or with implanted eggs whose continued presence poses a risk either to the mother, to other developing fetuses or to both? What about risk assessment in any new

technology?<sup>4</sup> How shall these medical advances be paid for, and how shall services be allocated when resources are limited?

The interplay of these and many other issues touches upon a host of halachic topics. A brief review of the principal issues follows.<sup>5</sup>

## Artificial Insemination

The most basic form of assisted fertility involves artificial insemination (AI)<sup>6</sup> using a donor's semen. Different questions are raised when using the husband's

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sperm (AIH), when using the sperm of a Jewish donor or when using the sperm of a non-Jewish donor. Central to our concerns—and in sharp contrast with non-Jewish attitudes—are the stringent restrictions on *hotza'at zera levatalah*.<sup>7</sup> Most rabbinic authorities maintain that these restrictions are overridden when the sperm is procured for procreative purposes.<sup>8</sup> Where cancer chemotherapy might cause infertility, some,<sup>9</sup> though not all,<sup>10</sup> authorities even permit banking the sperm of an unmarried man<sup>11</sup> for future use, since he also has the mitzvah of procreation. The preferred method is collection of semen during marital relations.<sup>12</sup> Impregnation during the *niddah* period should be avoided.<sup>13</sup> If otherwise impossible, however, Rav Moshe Feinstein<sup>14</sup> permits AI where ovulation occurs before the woman goes to the mikvah.

For a variety of reasons, all authorities rule that AI using an "outside" Jewish donor is forbidden.<sup>15</sup> Nevertheless,

because there is no actual sexual contact, such an act is not classified as forbidden intercourse. Therefore, the resultant child would not be considered a *mamzer*, even when the sperm is from a male with whom natural relations would normally produce a *mamzer*.<sup>16</sup> By the same token, it is by no means certain that fathering a child by a method other than direct physical impregnation fulfills the mitzvah of *peru urevu*, even if perhaps the lesser mitzvah of *lashevet yatzra* is fulfilled.<sup>17</sup> Irrespective of the fact that only direct physical relations constitutes a forbidden adulterous act, some leading authorities<sup>18</sup> rule that a married woman impregnated artificially with a Jewish man's sperm is considered an adulteress in that she may not remain married to her husband. However, many equally prominent rabbinic authorities maintain<sup>19</sup> that only actual physical relations would confer this status on the woman.

Ranking among the great rabbinic *causes celebres* of the past generation was the conflict between Rav Moshe, who, at least in theory, took a lenient position<sup>20</sup> regarding the use of donor sperm from a non-Jew,<sup>21</sup> and Rav Yoel Teitelbaum of Satmar and others,<sup>22</sup> who took a more restrictive position. A non-Jew's lineage or "*yichus*" is considered neutral. In other words, using the sperm of a Jew has the potential to lead to incestuous relationships among siblings who are unaware that they are, in fact, related. Using that of a non-Jew, however, would not be a problem in this regard because siblings, by virtue of sharing only a common non-Jewish father, are not halachically considered related to one another. Therefore, argues the lenient view, in the absence of direct sexual contact, it would be preferable for a married woman to be artificially inseminated with the sperm of a non-Jewish donor.

The "*yichus*" of donor semen obtained from a sperm bank is unknown. It follows that the same halachic debate pertains to the issue of using banks outside of Israel, where the overwhelming majority of donors can be assumed to be non-Jewish. All agree, however, that one should not use sperm banks in Israel,

where the sperm is likely to be from a Jewish donor.<sup>23</sup>

### In-Vitro Fertilization

In-vitro fertilization (IVF), first achieved in England on July 25, 1978, takes AI a step further. Here, instead of directly impregnating the woman by inserting the male's sperm into her body, the sperm is first mixed with the woman's ova outside of the body in an artificial medium. The resultant pre-embryo or zygote—terms used largely interchangeably—is then inserted immediately, or even after prolonged freezing at a later date, into the wife's womb, or into the womb of a surrogate mother.<sup>24</sup> As in AI, in this procedure, sperm must be obtained from a donor. The woman is treated with hormones in order to increase the number of eggs that are harvested.

Once again, in general, Judaism welcomes whatever medical technology can offer in order to achieve parenthood. Judaism does not subscribe to the notion that “tampering” with nature is prohibited. Quite the contrary: We are invited to “play God” in our role as custodians of the natural order and its resources.<sup>25</sup>

In about one third of infertile couples, the problem can be traced to blocked or absent fallopian tubes; for such couples, IVF can be the answer to their prayers. As stated earlier, semen procurement in AIH is permitted when it is intended for use in impregnating the wife. In IVF, however, semen is intended to “impregnate” eggs in a petri dish. Consequently, Rav Eliezer Waldenberg<sup>26</sup> prohibits IVF altogether, even when taking place between man and wife. Others<sup>27</sup> are more lenient, permitting IVF provided that great care is taken to ensure paternal and maternal identity.

In contrast with AI, where sperm, but not eggs, can be donated, in IVF it is also possible to obtain eggs from another woman. If both eggs and sperm are donated, concerns can include confusion about the child's true relatives on both sides and the potential incestuous relationships that could ensue in later years. Much has been written regarding the halachic identity of a mother.<sup>28</sup> Though

most authorities<sup>29</sup> rule that the birth mother (the “surrogate” mother) is the true halachic mother, other possibilities include the biological mother (the egg donor),<sup>30</sup> both mothers<sup>31</sup> or neither mother.<sup>32</sup>

Even in cases where *halachah* sanctions IVF, the question remains as to whether one who used this technique has, in fact, fulfilled the mitzvah of procreation.<sup>33</sup> As stated earlier, parenthood, similar to the *mamzer* status, may require actual physical conjugal union.

Not all of the products of sperm-egg unions, known as zygotes, can possibly be inserted into a woman's womb. The disposition<sup>34</sup> of these unwanted “spares” raises questions of early abortion and of *hotza'at zera levatalah*. Even if the number of pre-embryos is reduced, frequently, too many eggs are eventually implanted. In order to reduce the risk to the mother's life as the result of carrying multiple fetuses,<sup>35</sup> as well as the risk to the fetuses themselves,<sup>36</sup> pregnancy reduction may be recommended. Some<sup>37</sup> also permit the selective discarding of pre-embryos found afflicted with severe genetic disorders. Selecting the gender of one's choice for implantation is a more frivolous application<sup>38</sup> of this technique, and is discussed in several reviews.<sup>39</sup>

### Newer Techniques

In IVF, the fertilized zygote is implanted into a host mother's uterus. A variation of this technique is called GIFT, an acronym for gamete intrafallopian transfer. This technique involves injecting the ovum/sperm mixture into the fallopian tube *before* fertilization takes place. In this situation, even Rav Waldenberg may rule permissively, since the actual fertilization takes place within the woman's body.

Fantastic, but not without precedent, is the question of uterine transplant. Though more a medical curiosity than a practical therapeutic option, it raises a host of interesting questions. This operation was first successfully performed as recently as 2002 on a twenty-six-year-old female in Saudi Arabia who lost her uterus due to a hysterectomy because of

post-partum hemorrhage six years earlier.<sup>40</sup> The live donor was a forty-six-year-old woman with multiple ovarian cysts, who had a total hysterectomy together with bilateral removal of the fallopian tubes. In such transplants, after a successful pregnancy, the uterus could be removed and the anti-rejection therapy that is necessary discontinued.

The procedure raises a host of halachic issues related to both donor and recipient. Issues concerning the donor include *seirus* (sterilization), *sakanah* (risk) and *chavalah* (mutilation). If the donor is a cadaver, *nivul hamet* (desecration of the dead) must be considered. For the recipient, questions of *sakanah* and *chavalah* pertain, as with any surgery. In addition, one would need to give consideration to answering these imaginative questions, among others: Is the uterine donor the mother, or is the uterine host the mother? In a case where the uterus was never pregnant while in the donor, would a child born from such a uterus in a recipient who had a prior birth from her “old” uterus be a *bechor*? Is *bechor* status conferred by passage through the uterine cervix or through the birth canal? What of *ervah* (prohibited physical contact) were the donor and husband to have a prohibited relationship? Would the recipient become a *niddah* through the menstrual flow of another woman's uterus? Would her immersion in the mikvah render her *tahor*? Dr. Edward Reichman has reviewed the historical and halachic framework of these questions.<sup>41</sup>

Closely allied to these issues are the myriad questions raised by cloning technology<sup>42</sup> and the development of the Human Genome Project. Both of these endeavors are still in their infancy but have already fascinated the minds of the public. In time, these new medical and scientific advances will also spur new halachic questions and debates.

It is evident that assisted reproduction is here to stay. It offers great hope to many couples. It is a technology that sits at the crossroads of many halachic issues, and its study in rabbinic circles will, no doubt, continue for some time to come. JA

### Notes

1. *Sefer Hachinuch*, no. 1.

2. Bereishit 30:1, “Give me children, otherwise I am dead.”

3. *Yevamot* 62a, 63b; *Niddah* 13b.

4. See J. David Bleich, “Hazardous Medical Procedures,” *Tradition* 37:3 (2003): 76-100.

5. See *Be Fruitful and Multiply: Fertility Therapy and the Jewish Tradition*, ed. Richard V. Grazi (Jerusalem, 1994).

6. The first successful case of AI is ascribed to John Hunter in London in 1785. See Julius Preuss, *Biblical and Talmudic Medicine*, trans. F. Rosner (New Jersey, 1993) for Talmudic references to non-therapeutic AI. Evidently, Rabbeinu Chanel, on *Chagigah* 15a, considered the procedure to be naturally impossible.

7. *Divrei Malkiel* 4:107-108; *Tzitz Eliezer* 9, 51:4:6.

8. Maharsham 3:268; *Minchat Yitzchak* 1:50.

9. See Mordechai Halperin and Dan Malach in *Assia* 51-52 (5752): 299. Cf. Rosh on *Yevamot* 7b, sec. 12, who states that the mitzvah of *peru urevu* exists independent of marriage and could, at least in theory, be fulfilled with a *pilegsh* (concubine).

10. *Binyan Av*, 2:260 citing Rav Yosef Shalom Elyashiv.

11. J. David Bleich, “Sperm Banking in Anticipation of Infertility,” *Tradition* 29:4 (1995): 47-60. This applies to the unmarried, since one can only procreate with sanction once one is married.

12. See, for example, *Tzitz Eliezer* 20, no. 50.

13. Rav Yoel Teitelbaum, *Hamaor* (Av-Elul 5724 [1964]); *Divrei Malkiel* 4:107; *Chazon Ish*, cited by Rav Kalman Kahana in *Taharat Bat Yisrael*, 6th ed. (5737 [1977]), 135.

14. *Iggerot Moshe, Even Haezer* 2:18; *Yabia Omer* 2, *Even Haezer* 1. See review by J. Green in *Assia* 5 (5746): 112-124.

15. Among others, *Tzitz Eliezer* 3:27 explains that it is prohibited because it undermines the family unit. My late father, HaRav Immanuel Jakobovits, z”l, in his *Jewish Medical Ethics* (New York, 1959), forbade it because it disturbs the partnership between husband, wife and God in the creation process. *Seridei Aish* 3:5 explains that permitting it might allow an adulterous woman to claim that she conceived a child from another man through artificial means. *Tzitz Eliezer* 3:27 and *Iggerot Moshe, Even Haezer* 1:71 and 2:11 speak of the risk of possible incest that can arise when the identity of the donor is unknown. M. McCurie, *New England Journal of Medicine* (1979): 300:585, reports an actual case.

16. For example, see *Seridei Aish* 3:5; *Iggerot Moshe, Even Haezer*, 1:71; Rav Shlomo Zalman Auerbach, *Noam* 1 (5718 [1958]), 145-166.

17. See the excellent summary of Avraham S. Avraham, *Nishmat Avraham, Even Haezer* 1:5.

18. *Hamaor*, loc. cit., and *Minchat Yitzchak* 4:5.

19. Rav Auerbach, *Noam*, loc. cit., *Seridei Aish* 3:5; *Iggerot Moshe, Even Haezer* 1:71 and 2:11; *Tzitz Eliezer* 3:27 and 9:51:4.

20. *Iggerot Moshe, Even Haezer* 1:71, 2:11, 2:18, 3:14 and 4:5. Reiterated again in 4:32:5, where he states that though technically it is permitted, he did not, in practice, advise this because since the husband cannot fulfill his mitzvah of procreation, this could cause him to have jealousy towards his wife who can conceive.

21. In *Tzvi Chemed* by Zvi Friedman (New York, 1965), 41-43, Rav Moshe is reported to have withdrawn this ruling. However, see previous note.

22. *Divrei Yoel*, 107-110. See also *Tzitz Eliezer* 3:27 and 9, 51:4:5; *Chelkat Yaakov* 1:24 and 3:45; *Minchat Yitzchak* 4:5 and *Seridei Aish* 3:5.

23. See, for example, I. Indig in *Dinei Yisrael* 2 (1971), 106-107.

24. The success rate in 1980 for IVF was 16 percent. By 1983, it was 30 percent, and today it approaches 55 to 65 percent. It should be noted that because laboratories often view fertilization, impregnation and live birth as success, it is difficult to define success rates.

25. See the Tiferet Yisrael, *Mishnah Yadayim* 4:3, n. 27, who opines that the Torah cites things that are prohibited; unless prohibited, actions are assumed permissible.

26. *Tzitz Eliezer* 15:45. In contrast with most *posekim*, who permit IVF when it is conducted purely within the context of marriage, Rav Waldenberg argues that there is no mitzvah of procreation outside of the womb that suffices to counteract the prohibition of *hotza'at zera levatalah*. Also see Rav Moshe Sternbuch quoting Rav Yitzchak Yaakov Kanievsky in *Bishvilei Harefuah* 8 (5747 [1987]), 29-36.

27. *Yabia Omer, Even Haezer* 21.

28. J. David Bleich, “In Vitro Fertilization: Question of Maternal Identity and Conversion,” *Tradition* 25:4 (1991): 82-102, relates maternity to the birth mother. Cf. Ezra Bick, “Ovum Donation: A Rabbinic Conceptual Model of Maternity,” *Tradition* 28:1 (1993): 28-45.

29. Rav Elyashiv in *Nishmat Avraham* 4; *Even Haezer* 5:2; Rav Moshe Sternbuch, *Bishvilei Harefuah* 1, pp. 29-36 and others.

30. Rav Shlomo Goren, cited by Avraham Steinberg in *Encyclopedia of Jewish Medical Ethics*, 584, ff54.

31. Rav Auerbach in *Nishmat Avraham* 4; *Even Haezer* 5:2; J. David Bleich, *Judaism and Healing*, 15-16.

32. *Tzitz Eliezer* 15:45. Cf. 19: 40 and 49.

33. Rav Ovadiah Yosef, cited in *Nishmat Avraham, Even Haezer* 1:3, maintains that the mitzvah has been performed, while Rav Waldenberg, in *Tzitz Eliezer* 15:45, believes it has not.

34. Yitzchok Breitowitz, “Halachic Approach to the Resolution of Disputes Concerning Disposition of Pre-embryos,” *Tradition* 31:1 (1996): 64-91; Aryeh Yehuda Warburg, “Solomonic Decisions in Frozen Pre-embryo Disposition: Unscrambling the Halachic Conundrum,” *Tradition* 36:2 (2002): 31-44.

35. See, for example, Rav Yitzchak Zilberstein, *Assia* 45-46 (1989): 62-68.

36. See *Nishmat Avraham, Choshen Mishpat* 425:1 (21) citing Rav Auerbach; *Tzitz Eliezer* 20:2 citing Rav Elyashiv.

37. Rav Zilberstein, *Assia* 51-52 (5752): 54.

38. The mandate to “tamper” with God's will as expressed in nature extends to medical intervention. *Iggerot Moshe, Orach Chaim* 3:90 suggests that the mandate does not apply to non-medical situations.

39. For example, Rav Auerbach, in *Minchat Shlomo* 3:103:16, prohibits embryo selection and destruction simply for purposes of sex selection because it violates the *zera levatalah* restrictions. See also J. Flug, “A Boy or a Girl? The Ethics of Preconception Gender Selection,” *Journal of Halacha and Contemporary Society* 48 (2004): 5-27.

40. A. Altchek, “Uterus Transplant,” *Mount Sinai Journal of Medicine* 70:3 (May 2003): 154-162.

41. Edward Reichman, “Ovarian Transplants,” *Tradition* 33:1 (1998) and “Uterine Transplantation and the Case of the Mistaken Question,” *Tradition* 37:2 (2003).

42. See, for example, John D. Loike and Moshe D. Tendler, “*Ma Adam Va-teda-ehu*: Halachic Criteria for Defining Human Beings,” *Tradition* 37:2 (2003): 1-19.