

## Medical Ethics at the Beginning of Life

Many practices central to Jewish life take place within the family: bringing new children into the covenant (*brit milah* / *brit banot*), Shabbat rituals around the dining table, the Passover seder, to name just a few. In this chapter, we turn to problems that can arise in forming a family.

Having children is a basic mitzvah, the first commandment God gives human beings in the Torah. But not everyone wants to become a parent, and some who want to have children find that they cannot. Modern medicine provides infertile couples a variety of options unknown to our ancestors for having children. Both men and women can undergo procedures to improve their chances of conceiving. Recent decades have added the possibility of surrogate motherhood: a second woman carries the pregnancy on the infertile couple's behalf, sometimes fertilized with the prospective father's sperm, sometimes using an implanted embryo from the couple's own egg and sperm, and in a few cases with a fetus bearing no genetic relationship to either parent.

Surrogacy and other forms of medically assisted reproduction raise questions unknown at least until the second half of the twentieth century. Exploring these matters will also suggest approaches to such basic questions as: How far should we go in order to carry out a mitzvah? What makes a parent? What creates a family relationship? Does the fact that science enables us to do something mean that we should do it?

### Case Study #1: Who Counts as a Parent?

The following story appeared in the *Topeka Capital-Journal* in 2016:

William Marotta provided sperm to a same-sex couple who posted a Craigslist ad, but he isn't legally the child's father, a Shawnee County [Kansas] District Court Judge ruled. . . .

The Kansas Department for Families and Children has sought since 2012 to have Marotta declared the father so he can be forced to pay child support. Meanwhile, Marotta, through attorney Charles Baylor, has long contended that he never intended to be the child's father. District Court Judge Mary Mattivi declared last week that both women, now separated, are obligated to support the child, not Marotta. . . .

Angela Bauer and Jennifer Schreiner in 2009 posted a \$50 ad for a sperm donor to help them conceive a child on Craigslist. Marotta stepped forward and signed a contract waiving his parenting responsibilities. Bauer and Schreiner split up in December 2010, and in October 2012, DFC filed a child support claim against Marotta to care for the girl. . . .

The women decided to inseminate Schreiner at their home, Bauer previously told *The Capital-Journal*, partly because of their previous awkward encounter with the doctor, but primarily because they wanted the act to be more personal.

Last year, genetic testing showed a 99.9 percent probability Marotta is the child's biological father, but in her ruling Mattivi provided ten reasons why he should not be considered the legal father. Among them, she pointed to an ongoing relationship between Bauer and the child, which Bauer wishes to continue. Apart from two meetings over the past five years, Marotta has had no relationship with the child and does not intend to provide emotional or financial support.<sup>1</sup>

At its heart, this case asks what makes someone a parent. If contributing genetic material is enough, William Marotta must be the legal father of the baby conceived with his sperm. But if the acts of raising a child—emotional and financial support—define parenthood, the written agreement Marotta made with Bauer and Schreiner holds up. The two women are the baby's parents.

### **Case Study #2: Choosing Single Parenthood**

A single Jewish woman, Sophia, is approaching forty. Since she's always wanted to have children but never found the right partner, she thinks she

should have a baby now before it becomes dangerous or impossible for her to become pregnant. A medically viable option is in vitro fertilization (IVF), a procedure in which doctors collect mature eggs from a woman's ovaries, the ova are fertilized by sperm in a laboratory, and a fertilized ovum is implanted back into the woman's uterus. May Sophia approach a sperm bank to hopefully become pregnant through IVF and raise the child as a single parent?

Further, *must* she? The case presents questions about the extent of the first mitzvah in the Torah: procreation. If a basic purpose of human life is to "be fertile and increase [and] fill the earth" (Gen. 1:28), does that mean that every Jewish woman must avail herself of opportunities to bear children, even without a partner? Finally, Sophia's situation raises questions about parental responsibility in regard to the (presumably anonymous) donor whose sperm she may use to conceive.

### **Case Study #3: Surrogate Motherhood**

In New Jersey in 1985, William Stern entered into a contract with Mary Beth and Richard Whitehead. Stating that his wife, Elizabeth Stern, was infertile, William Stern agreed to pay \$10,000 to the Whiteheads in exchange for Mary Beth's bringing to term a baby conceived with Stern's artificially inseminated sperm and turning the child over to the Sterns at its birth.

When the girl was born in March 1986, however, Mrs. Whitehead found herself unwilling to relinquish the infant. William and Elizabeth Stern sued to enforce the contract and to be recognized as the baby's legal parents. This suit became famous as the "Baby M case."

Who should win in court? Who are the baby's rightful parents?

The Baby M case raises painful questions about what makes a parent in a different form than Case Study #1. We can readily appreciate the Sterns's longing to have a child of their own. During the various trials in the case, William Stern testified that as the child of Holocaust survivors, he had no living blood relatives and wanted to pass on his family's genetic heritage. This desire helps explain his choice to seek out a surrogate mother rather than adopt a child. At the same time, it is not hard to understand Mary Beth Whitehead's feelings. Though she originally agreed to relinquish

her rights, after carrying the child through pregnancy and seeing her at birth, Mary Beth felt a strong attachment to the newborn. Additionally, as our text study will demonstrate, surrogacy presents legal issues about parental rights and Jewish identity.

#### **Case Study #4: Parenthood through Cloning**

Fast forward: we're now in the year 2060. Using IVF, Sophia in Case Study #2 had conceived a daughter, Sonoma, who is now an adult. Like her mother before her, Sonoma finds herself near the end of her childbearing years without the right partner. Not wanting to introduce an unknown donor's genetic material into her family line, Sonoma wishes to clone herself and raise the resulting baby as her daughter. Does Judaism approve her choice?

This fourth case raises provocative hypothetical questions. Other species have been cloned—the first mammal cloned from an adult cell was Dolly the sheep in England in 1996—and though science cannot clone a person yet, the day when it can may not be far off. Before that day comes, it behooves us to think through the ethical conundrums cloning presents. Can Jews fulfill the commandment to procreate by cloning children? What can Jewish tradition contribute to the weighty issues surrounding human cloning?

We begin our survey of classical texts related to medical ethics at the beginning of life by looking at the mitzvah underlying the entire subject: God's command to the first humans to procreate.

#### **Text Study #1: The Mitzvah of Procreation**

Text 1—Gen. 1:27–28

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AND GOD CREATED HUMANKIND in the divine image, creating it in the image of God; creating them male and female.

God blessed them and God said to them, “Be fertile and increase, fill the earth and master it; and rule the fish of the sea, the birds of the sky, and all the living things that creep on earth.”

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## QUESTIONS FOR INQUIRY

1. Why do you believe “be fertile and increase” is God’s first command to humans upon their creation?
2. What relationship do you see between the description of how God created humans in verse 27 and the blessing and commandments God gives them in verse 28?

## COMMENTS

These verses narrate the sixth day of the story of the creation of the world. God creates human beings, male and female, as the pinnacle of creation. God blesses them and instructs them to “be fertile and increase” — an update of the familiar translation “be fruitful and multiply.”<sup>2</sup> The many descendants of these new beings will rule over the rest of God’s creation, as verse 28 specifies.

The immediate instruction to procreate stems in part from the necessity of preserving human life. Like all species, human beings must propagate for their kind to remain on earth. Genesis teaches that the urge to procreate fulfills the divine plan.

The commandment to procreate became an expectation of all Jews. Everyone who could was expected to have children. Community and tradition encouraged Jewish couples to have as many children as possible. Many stories in the Bible and Rabbinic literature portray children as the greatest blessing God can provide. Countless generations of Jews went on to live by what moderns dub family values — raising children to live as Jews, who would in turn grow up to have many Jewish descendants of their own.

As we will see in Text 2, part of the Talmud’s discussion of the mitzvah of childbearing, Rabbinic commentators go to great lengths to stress the importance of performing this mitzvah.

### Text 2 — *Yevamot* 63b

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IT WAS TAUGHT IN a *baraita*:

Rabbi Eliezer says, Anyone who does not engage in procreation is like one who sheds blood, as it is said [Gen. 9:6], “Whoever

sheds human blood, / By human [hands] shall that one's blood be shed." And immediately afterwards is written [Gen. 9:7], "Be fertile, then, and increase."

Rabbi Jacob says, It is as if he diminishes the Divine Image, as it is said [Gen. 9:6], "For in the image of God / was humankind made." And immediately afterwards is written [Gen. 9:7], "Be fertile, then, and increase."

Ben Azzai says, It is as if he sheds blood and diminishes the Divine Image, as it is said, "Be fertile, then, and increase."

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#### QUESTIONS FOR INQUIRY

1. What "crimes" do the Rabbis accuse the person who does not procreate of committing?
2. In what sense could failing to have children be compared to shedding human blood?
3. In what sense could failing to have children be compared to diminishing God's image?
4. What is the overall message of the *baraita*?

#### COMMENTS

The *baraita* exemplifies the Rabbinic attitude toward procreation. It matters so much that the Rabbis compare failing to produce children to serious crimes. Here the three Rabbis seem to try to outdo each other in explicating the grievousness of the fault. Rabbi Eliezer compares it to shedding blood, meaning it is as if one took a human life. Rabbi Jacob ups the ante by comparing the failure to procreate to diminishing the image of God. Not to be outdone, or perhaps simply to combine his colleagues' ideas, Ben Azzai argues that the sin includes both of their suggestions: those who do not have children act as if they commit murder and diminish the Divine.

How is not having children like shedding blood? Rabbi Eliezer does not mean that the person who chooses not to procreate literally commits murder; the phrase "it is as if" (*ke-ilu*) indicates a simile or comparison. Rather, he proposes that passing up the opportunity to create new life

has an effect similar to prematurely ending a life. Both acts cut off the potential contributions the individual might make. As the Mishnah suggests elsewhere (*Sanhedrin* 4:5), the murderer ends not only the life of the murdered person, but all the lives that this person might have otherwise conceived. Rabbi Eliezer helps us see that deciding not to have a child deprives humanity not merely of one individual, but of every person who might one day descend from that individual.

Rabbi Jacob takes the discussion in a different direction. He sees harm not only to humanity but to God. The person who refuses to procreate diminishes the Divine. Genesis 1:27, Text 1 above, helps us grasp Rabbi Jacob's idea. God created humans in God's own image. That implies that each person represents a piece of the picture of divinity. Removing any person from the world removes a bit of God's image from the world. Rabbi Jacob extends this thought to include those who are never born. They, too, would bring into the world a bit of God that the world would otherwise never see. The world is diminished by the amount of God's image they represent.

Ben Azzai decides not to choose between the two exaggerated stances of Rabbi Eliezer and Rabbi Jacob; anyone choosing not to have children deserves comparison to both. In the absence of any hypothetical child, the world loses both an entire lineage and an aspect of the divine image.

We need not take this text literally to appreciate the lesson the Rabbis teach. Procreation stands as one of the most important commandments. Jews are to have as many children as possible.

Given this background, we can understand the distress felt by Jews who have had difficulty bearing children: not only the loss of the personal future they dreamed of, but also the inability to contribute their share to the future of the Jewish community. Additionally, through no fault of their own, people around them might view them as terrible sinners. As a result, many Jewish couples want to try any available means to have children of their own.

Before considering assisted reproduction, let's look further at how the halakhic tradition developed and explained the commandment to have children. The first question seems obvious: How many children must a couple have in order to fulfill the mitzvah?



ONE MAY NOT ABSTAIN from procreation unless he [already] has children.

Beit Shammai say: [One must have] two boys, and Beit Hillel say: [One must have] a boy and a girl, as it says, “creating them male and female” (Gen. 1:27) . . .

A man is commanded to procreate but a woman is not. Rabbi Yoḥanan ben Beroka says: About both of them it states, “God blessed them and God said to them . . . be fertile and increase” (Gen. 1:28).

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#### QUESTIONS FOR INQUIRY

1. Why does Beit Shammai define the minimum obligation of procreation as having two sons?
2. Why does Beit Hillel define the minimum obligation of procreation as having a son and a daughter?
3. How do you understand the suggestion that men are obligated to procreate, but not women? Doesn't procreation require both sexes?

#### COMMENTS

As we have seen in earlier chapters, the halakhic process typically analyzes any commandment in the Torah to spell out the details of how to fulfill it. This Mishnah takes up two basic questions: the minimum number of children needed to satisfy the commandment and who exactly is responsible for procreation.

On the first question, the schools of Hillel and Shammai disagree. In support of having a minimum of both a male and a female child, Beit Hillel offers the Torah verse describing the creation of human beings as “creating them male and female.” The followers of Hillel may be saying that just as parents, in a sense, mimic God's ability to create life, parents should copy what God did in the first act of creation: not stopping until they have “created” at least a male child and a female child.



Beit Shammai's alternate standard for procreation, giving birth to two sons, may seem strange at first glance, since reproduction requires both a male and a female. The Talmud's discussion of this Mishnah (*Yevamot* 61b) claims that Beit Shammai bases its theory on the biblical Moses. In 1 Chron. 23:15, we read, "the sons of Moses were Gershom and Eliezer" — implying he had no other children. According to the anonymous theory in the Talmud, Beit Shammai argues that no Jew needs to do more to fulfill the Torah's requirements than Moses himself, the leader who brought the Torah to the Israelites.

Still, Beit Shammai's approach seems sexist to many moderns. Perhaps the school of Shammai valued sons more highly than daughters. Beit Hillel's approach at least hints at valuing members of both sexes equally.

Regarding the second question — does the commandment apply to all Jews, men and women alike? — here again the Mishnah records two contrary opinions. One, presented anonymously, claims the commandment applies only to men. Rabbi Yoḥanan ben Beroka, however, argues that since God's words to the humans (Text 1) are couched in the plural, logically implying that God speaks to men and women alike, both sexes share the obligation to produce offspring.

It is important to recognize that in the Mishnah, anonymous opinions — those not reported in the name of a specific Rabbi or Rabbis — are considered the majority view. The Mishnah does not ascribe them to anyone because the majority of the Tannaim accepted them. As a rule, later Rabbinic tradition considers such majority opinions in the Mishnah to be the law. As such, both of the major medieval codes, the *Mishneh Torah* and the *Shulḥan Arukh*, rule that the obligation to procreate applies only to men.

Many rabbis rely on this well-established halakhah to respond to situations like Sophia's in Case Study #2. Aside from any other moral qualms they may have about single motherhood, they declare that because women are not commanded to procreate, there is no reason to allow a single woman to become a parent.

However, a subsequent discussion of this Mishnah in *Yevamot* 65b–66a provides conflicting evidence about how we should understand the dispute in the Mishnah. Some Amoraim suggest the possibility that the

law follows Rabbi Yoḥanan ben Beroka, meaning that women, too, are subject to this mitzvah. Other participants in the discussion cite Torah verses they claim support the anonymous opinion. The talmudic discussion reaches no conclusion.

This ambiguity in the Talmud's handling of the mishnaic dispute leaves room for us to imagine why the Rabbis restricted the commandment of procreation to men, and what lessons their idea might teach us. Possibly the early Rabbis understood that some women cannot conceive, but did not grasp the possibility of male infertility. In that case, they may not have wanted to subject women to a commandment they might not have been capable of fulfilling.

Many writers on this subject follow a suggestion that originated with Rabbi Meir Simcha Hakohen of Dvinsk (1843–1906, Lithuania and Latvia). In his Torah commentary *Meshekh Hokhmah*, Rabbi Meir Simcha wrote that the Torah shows mercy by not obligating people to do things that will necessarily cause them pain. Since childbirth is painful, the Torah does not make it mandatory for every woman. Other modern writers suggest different interpretations. In his work on Jewish medical ethics, Rabbi Elliot Dorff proposes economics as the hidden reason for this law. “Since men were going to be responsible for supporting their children,” he writes, “it was against the man’s best economic interests to have children, and so it was precisely the men who had to be commanded.”<sup>3</sup> Dorff relies on the principle that the halakhah must sometimes force us to do what we would otherwise not choose to do. A man might prefer to limit the number of children he must work to support. That, the argument runs, is precisely why the Torah commands him to be fertile and increase.

What happens, though, if one physically cannot fulfill the mitzvah to procreate? Should a couple feel guilty over their inability to carry out the Torah’s commandment? On this point, Dorff notes, it is possible to reassure infertile Jews.

#### Text 4 — Dorff, *Matters of Life and Death*

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*IF A COUPLE CANNOT have children, the commandment to procreate no longer applies, for one can be commanded to do only what one*

is capable of. The religious commandment to generate children, which in any case traditionally is incumbent only 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. . . .

The context, then, for the entire discussion . . . on methods to overcome infertility must be made clear at the outset: it applies only to those couples who *choose* to use them. Jewish law imposes no obligation on infertile couples to employ any of them. . . . Whenever we *can* do something new . . . the moral and legal question of whether we *should* do so then arises, 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.<sup>4</sup>

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#### QUESTIONS FOR INQUIRY

1. What are Dorff's main arguments to exempt an infertile couple from the commandment to procreate?
2. What aspects of his argument are strong and convincing? What aspects are not as convincing?

#### COMMENTS

Sensibly, Torah and tradition command people to do only what they are capable of doing. Logically, then, those physically unable to produce children in the past would be exempt from the commandment, not guilty of violating it. But in our own day, if one cannot procreate through intercourse, and newer means of conception are available, does it now become the individual's responsibility to use those means?

Rabbi Dorff provides a commonsense answer. The Torah does not command anyone to do anything they themselves cannot do. Halakhah includes a category called *ones* that describes a person to whom an unavoidable accident happens, or who does something involuntarily. The principle in the Talmud is *ones raḥamana patreih* — the Torah exempts

someone unavoidably prevented (*Bava Kama* 28b and elsewhere). In a sense, an infertile male falls into this category: if he simply cannot carry out the commandment to father children, he is exempt from the rule. Thus Jewish law imposes no obligation on him or his wife to employ any medical means to rectify their situation.

What of those who may prefer not to have children? Before reliable contraception became widely available, few sexually active adults could choose to remain childless, but in recent decades Jews have asked if Jewish tradition approves their preference not to become parents. Not surprisingly, given their commitment to the divine origin of the commandments, Orthodox rabbis have responded unequivocally: every Jew who can must “be fertile and increase.” In 1979, the Reform movement’s responsa committee, represented by its longtime chair Rabbi Walter Jacob, showed some ambivalence (Text 5a). In contrast, in 2013 Rabbi Michael Panitz, a Conservative rabbi, would come to express sympathy for the point of view of a young woman questioner who could not imagine herself ever bearing or raising a child (Text 5b).

#### Text 5a—Jacob, “Jewish Marriage without Children”

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IF THEY ENTER THE marriage fully aware of the refusal of one or the other to have children—either because of a physical defect or because of an attitude—the marriage can be considered valid. . . . In light of the Holocaust and the current diminution of the world Jewish population, it is incumbent upon each of us to urge Jewish couples to have two or more children. Although young people may marry reluctantly and late, the marriage at least represents a step in the direction of children. In Jewish law, the marriage is valid, yet given the Reform emphasis on the underlying spirit of the law as a guide to modern practice, marriage without children is very distant from the Jewish ideal of marriage. The letter may permit it, but we must encourage every couple to have at least two children.<sup>5</sup>

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Text 5b—Panitz, “Must a Jew Have Children?  
A Conservative Answer”

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NONETHELESS, RABBINIC TRADITION CONSTRUED these words to the first humans as a mandate—humans not only can procreate, but they ought to, under the correct conditions.

That last restriction, “under the correct conditions,” may serve as a consolation for the questioner, and also as a spur to further reflection. She might want to explore the psychological roots of her lack of comfort with children—but regardless, if, upon mature consideration, she is convinced that she would not function well as a biological parent, then she may legitimately conclude that this is one commandment that she will not fulfill in its literal sense. . . .

Without in any sense promoting flippancy towards the non-fulfillment of one or another of the commandments, it is nonetheless appropriate to remind ourselves that, in the Rabbinic view expressed at the end of the Mishnaic tractate “*Makkot*,” God gave us many commandments to provide many opportunities for the refinement of our character. Instead of seeing “100% as the minimum passing grade” and being disabled by scrupulousness over the non-fulfillment of every last one of them, we ought to fulfill all the mitzvot that we can, and to seek to perform those deeds with both joy and reverence.<sup>6</sup>

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QUESTIONS FOR INQUIRY

1. On what grounds does Rabbi Jacob declare a childless marriage halakhically valid?
2. What is his attitude toward the couple’s choice not to have children?
3. How does Rabbi Panitz find justification in Jewish tradition for a woman’s choice to remain childless?
4. What is his attitude toward the couple’s choice not to have children?

Rabbi Jacob, writing for the Reform rabbinate, takes a hard line on the question of remaining childless by choice. He acknowledges that no halakhah forbids a couple from marrying on the grounds that they do not want children. That said, he invokes the idea of the law's "underlying spirit," a set of abstract values that its rulings express. In this case the underlying ideal seems to be the need to preserve the Jewish people's future, especially given the losses the Holocaust inflicted on the world's Jewish population. Therefore, even though rabbis may officiate at weddings of couples who announce they will never have children, the rabbi must try to convince the couple to have children after all. (Rabbi Jacob's ruling that they should have "at least two" children follows the law based on *Mishnah Yevamot*, Text 3 above.)

The more recent responsum by Michael Panitz, a Conservative rabbi, takes a different view. As we have seen in this chapter's classical texts, Rabbinic tradition understood God's words to the first humans, "Be fertile and increase," not only as a blessing, but also as a commandment. However, Panitz describes it as a mandate only under the correct conditions. While presumably he has in mind that Jews should procreate only in adulthood and only with their duly married partners, he expands the idea of "correct conditions" to include psychological willingness to parent. The questioner's statement that she cannot "wrap her head" around children at all demonstrates that she lacks the emotional capacity for parenthood.

Panitz suggests that not every Jew can fulfill every commandment to the same extent. He references a Mishnah from tractate *Makkot* to argue that God asks each of us to do the mitzvot we can do to the best of our ability. If we devote ourselves to those commandments we fulfill and use them as a source of continuous self-improvement, we need not feel badly about the mitzvot we cannot carry out. His argument is similar to Rabbi Dorff's concerning infertile individuals (Text 4): the Torah commands us to do as much as we can. It cannot ask more of us than that.

Still, some infertile people suffer significant emotional pain. Many of them look to modern medicine to fulfill their dreams of having children

and contributing to the propagation of the Jewish people. Meanwhile, these new means of conception present new ethical dilemmas in and of themselves. We turn now to exploring the ethics of various means of assisted reproduction.

Before we begin, it is important to note a halakhic problem that may arise in regard to one such procedure—AIH, or artificial insemination by husband (distinguished from AID, artificial insemination by donor)—because of the need to procure the husband’s sperm. Generally, halakhah forbids a man to emit semen other than during marital intercourse. Any other emission falls into the prohibited category of *hashhatat zera le-vatalah*, wasteful destruction of seed. Since Jewish tradition forbade this activity based on the story of Onan in Genesis 38, some rabbis raise concerns about the need for a husband to masturbate to provide semen for use in AIH and IVF (in vitro fertilization). Those who allow the procedure reason that since the purpose is the same as in marital intercourse—to inseminate the wife with her husband’s sperm—such masturbation would not constitute an act of “destruction” of the seed and therefore, the husband may masturbate to produce the semen necessary for the procedure.

Notably, a few sources in the classical tradition do speak about insemination other than through marital intercourse. Most halakhic analysis of the issue begins with the following passage in the Talmud.

### **Text Study #2: Assisted Reproductive Technologies**

Text 6—*Hagigah* 14b–15a

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THEY ASKED BEN ZOMA: A virgin who became pregnant—may she marry a High Priest [who may marry only a virgin]? Do we consider the opinion of Shmuel, who said, “I can have intercourse several times without causing bleeding [from breaking the hymen]”; or perhaps what Shmuel describes is uncommon?

[Ben Zoma] told them: What Shmuel describes is uncommon. We are concerned that she may have become pregnant in a bath.

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## QUESTIONS FOR INQUIRY

1. What are the two ways the Talmud here suggests a virgin may become pregnant?
2. What analogies can we find in this text to methods of assisted reproduction?
3. What does the text contribute to considering the ethics of assisted reproduction?

## COMMENTS

To understand this rather strange discussion on its own terms, let's first review the special rules the Torah applies to the High Priest, the leader among the priestly caste. Leviticus 21:10–13 specifies: "The priest who is exalted above his fellows, on whose head the anointing oil has been poured and who has been ordained to wear the vestments . . . may marry only a woman who is a virgin." That rule is the background to the question posed to Ben Zoma. Supposing a woman became pregnant without physically losing her virginity—that is, without an act of intercourse that breaks her hymen—would she be eligible to marry the High Priest? Is such a woman legally a virgin? Or if semen entered her body and led to pregnancy, is she by definition no longer a virgin?

The anonymous questioners in the Talmud propose two ways of looking at the issue. They introduce a statement by the Amora Shmuel, who claimed he could have intercourse with a woman several times without causing the bleeding that would mark the end of her status as a virgin. If we took that statement seriously, it would follow that the pregnant woman who says she is still a virgin is indeed a virgin, making her eligible to marry a High Priest. On the other hand, if we treat Shmuel as an exceptional case, his experience would not teach us anything about other people's situations. In that case, the pregnant woman would not retain her virgin status and could not marry a High Priest.

Ben Zoma responds that the situation of Shmuel is indeed uncommon. He offers a different explanation for a pregnancy without coitus. We suspect that the woman became pregnant from sperm that a man ejaculated in a public bath before she got into the water. Technically, then, her virginity remains in place.

What Ben Zoma describes is implausible. Sperm are unlikely to survive long in bathwater, let alone manage the trip from the water up a woman's vagina to reach a mature egg in her fallopian tube. Why, then, do modern rabbis discuss this text when they ponder the ethics of assisted reproduction?

This passage provides a way for rabbis both ancient and modern to consider pregnancies that result from insemination by means other than sexual intercourse. Setting aside the weirdness of the details, we recognize an ancient discussion of noncoital insemination. Notably, none of the Rabbis in the Talmud express any concern about the legitimacy of a child born in this manner. As we will see, some modern rabbis found in that fact a reason to permit Jewish couples to make use of artificial insemination.

At the same time, insemination in a public bath differs significantly from the modern, medicalized forms of artificial insemination (AI), which we understand as the direct insertion of semen into a woman's cervix, fallopian tubes, or uterus by means other than sexual intercourse. Since this method enables sperm to take a relatively short trip to fertilize an available ovum, it helps in certain situations: where a man does not produce enough sperm, or his sperm are not strong enough to "swim" through the cervix and into the fallopian tubes on their own.

Also, by contrast to modern AI, the Talmud's "pregnant virgin" likely had no intention of bearing a child. Modern women do have such intentions: they typically pursue artificial insemination only when their attempts to conceive fail or when they have no partner with whom to create a child. Some modern analysts have found grounds in this difference to object to artificial insemination. Further texts from the halakhic tradition will show other reasons why not all writers in recent decades have approved of using artificial insemination and other noncoital means of conception.

Most halakhic ethicists who have examined the issues find it easiest to approve of artificial insemination using the husband's sperm (AIH). AIH spares us two questions that may arise if a married woman is inseminated with another man's sperm. First, there is no doubt that her husband is also the child's legal father (whereas in AID, the sperm donor may have a claim to paternity). Second, AIH does not raise the problem of adultery, since

there is no use of semen from anyone but the husband. One traditional text often cited to support this last point comes from a commentary on Maimonides' code of halakhah by Rabbi Judah ben Samuel Rosanes (1657–1727), rabbi of Constantinople. Here in *Mishneh LaMelekh*, a work whose title became an alternative way of referring to the author, Rosanes references the passage in *Hagigah* (Text 6) concerning the woman who conceived in bathwater.

Text 7—*Mishneh LaMelekh* on *Mishneh Torah*, Laws of Matrimony 15:4

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ABOUT A WOMAN WHO conceived in a bath: Is the child legally the child [of the woman's husband] in every respect?

There is no doubt that the woman is not forbidden to her husband [as an adulteress], because there is no prohibited intercourse. . . .

It is demonstrable that the child is legally the father's in every respect, since we take care that he not marry his half-sister on his father's side.

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QUESTIONS FOR INQUIRY

1. What legal problem does the *Mishneh LaMelekh* raise?
2. How does the *Mishneh LaMelekh* demonstrate that the woman in this situation did not commit adultery?
3. What additional halakhic concern does he raise?
4. What implications does the text have for the use of AIH and AID?

COMMENTS

Rosanes—*Mishneh LaMelekh*—directly addresses the question of whether a wife's conception in a public bath constitutes adultery if the sperm is not the husband's. While it might be argued that introducing sperm into the reproductive tract of a married woman by anyone other than her husband amounts to the same thing as having intercourse with her, the *Mishneh LaMelekh* rejects this suggestion. In the absence of an act

of intercourse, she is not “forbidden to her husband,” as a woman who committed adultery would be.

The *Mishneh LaMelekh* goes further. Rosanes argues that the child will legally be the child of the woman’s husband, even though another man most likely “donated” the sperm from which the infant was conceived. He mentions only a concern that the child not grow up to unwittingly marry a half sister. That is, the child may not marry a daughter of his legal father’s by a different mother. The same rule would apply to a child born through marital intercourse, reinforcing the ruling that this child belongs fully to the husband of his mother.

As we saw earlier, this idea of unexpected conception via sperm in a bath was the means premodern thinkers found to consider noncoital insemination. Our sources show that insemination without intercourse is not in and of itself a halakhic problem. Neither the mother nor the child suffers any legal consequences. The woman’s husband receives full legal status as the child’s father. Given this, the tradition seems not to have any difficulty with the idea of artificially inseminating a woman with her husband’s sperm if she cannot conceive through intercourse. Still, that permission does not automatically extend to AID.

From the *Mishneh LaMelekh* passage, we might conclude that halakhah allows AID. After all, the author rejects any idea that the mother sinned, and awards paternity to her husband, regardless of the source of the sperm. Nevertheless, we must take into account the aforementioned differences between noncoital insemination and modern medical procedures. When a couple today opts for AID, the woman’s ovum is intentionally fertilized with sperm from another man. That is a different choice than unknowingly entering a bath that contains viable sperm. If the donor is anonymous, as is often the case when women make use of sperm banks, we return to the problem of incest the *Mishneh LaMelekh* raises. When children with an unknown biological father grow up, they will not be able to know if people they meet are half siblings.

Rabbi Eliezer Tzvi Waldenberg, a twentieth-century Israeli haredi who became an expert in the halakhah of medical issues, is one among several modern authorities who have objected to the introduction of sperm into a wife’s body unless it is her husband’s. Waldenberg wrote

numerous volumes of responsa titled *Tzitz Eliezer*, “Eliezer’s Frontlet,” playing on a phrase in the Torah about the ceremonial garb worn by Eliezer the High Priest. As background to Waldenberg’s ruling against AID (Text 8b), we look first at a verse from the Torah as interpreted by the thirteenth-century Spanish commentator Rabbi Moshe ben Nahman, called by the acronym Ramban.

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Text 8a — Ramban on Lev. 18:20

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DO NOT HAVE CARNAL relations with your neighbor’s wife and defile yourself with her.

*Commentary:*

The verse literally says “for seed,” which appears redundant. Possibly it says “for seed” to stress the reason for the prohibition, because it will not be known to whom the seed belongs. Many abhorrent and evil things will result for both of them.

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Text 8b — Waldenberg, *Responsa Tzitz Eliezer*

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A CHILD BORN TO a married woman from another man’s sperm: logic indicates that the child is at least of doubtful status [and may be illegitimate because of possible adultery].

The very act of artificially introducing semen into a woman’s body, even an unmarried woman, is greatly abhorrent and involves serious prohibitions . . . among them, that the child may marry his half-sister on his father’s side.<sup>7</sup>

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QUESTIONS FOR INQUIRY

1. What anomaly in the phrasing does Ramban notice in the verse? How does he make sense of it?
2. How does Rabbi Eliezer Tzvi Waldenberg use the idea from Ramban to conclude that artificial insemination amounts to adultery?

3. What other concern does *Tzitz Eliezer* have about artificial insemination?
4. In what ways does the comparison between artificial insemination and adultery make sense? In what ways are the two not comparable?

#### COMMENTS

Understanding Ramban's commentary requires looking closely at the Hebrew of the verse. Translated literally, it says, "Do not have carnal relations with your neighbor's wife for seed" (in Hebrew, *le-zara*). *Seed* in such contexts in the Torah means sperm. Since the command makes sense even without the phrase "for seed," Ramban suggests that the Torah must have a lesson in mind aside from prohibiting adultery. To him, the verse hints at the underlying reason the Torah forbids adultery: no one will know the identity of the resulting child's father. Thus the child could grow up and unwittingly marry a half sibling.

Extending the concern Ramban identifies, Waldenberg holds that even in a medical context, even in the interest of fulfilling the mitzvah to procreate, insemination outside of marital intercourse violates Judaism's moral code. The resulting child is, at the very least, suspected of being the product of adultery—a serious legal debility, which among other things forbids the child to marry a Jew.

This responsum leads us to think about a concern couples considering AI may have. It's true that the resulting baby will come from the "seed" of someone other than the prospective father. In modern terms, the baby will be genetically related to the mother, but not to the legal father. Both partners need to decide they can accept that reality before they undertake AI.

Understanding the concerns that Waldenberg points to, however, does not preclude noticing an additional way in which modern AI in a medical context differs from a discussion in the older sources. Whereas the comment from Ramban that Waldenberg relies on refers to adultery, a married woman wishing to conceive from donor sperm does so with her partner's full awareness and agreement. That fact, in addition to the

absence of sexual contact, precludes many of us from interpreting what happens as adultery.

Rabbi Waldenberg's conclusions reflect one side of a debate among Orthodox ethicists about artificial insemination. In Text 9, the Orthodox rabbi and law professor Michael Broyde summarizes several other positions taken by Orthodox experts.

Text 9 — Broyde, “The Establishment of Paternity  
in Jewish and American Law”

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RABBI [MOSHE] FEINSTEIN [WRITES] that artificial insemination is permitted and that the paternity of the child is established by the genetic relationship between the child and the father. Thus, he who donates the sperm is the father. Furthermore, Rabbi Feinstein is of the opinion that the act of artificial insemination does not violate Jewish law and does not constitute an act of adultery by the woman.

The second position, that of the Divrei Yoel [Rabbi Yoel Teitelbaum], is identical to that of Rabbi Feinstein's in acknowledging that the genetic relationship is of legal significance and the paternity is established solely through the genetic relationship. However, he also maintains that the genetic relationship predominates to establish illegitimacy and the legal propriety of these actions. Thus, heterologous artificial insemination is an act of adultery. . . .

Two other positions are also offered on this topic. The first is that of Rabbi Waldenberg. [See Text 8b.]

A fourth position is advocated by Rabbi [Mordecai] Breish, who maintains that heterologous insemination is not an act of adultery. . . . Nonetheless, he maintains 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.”<sup>8</sup>

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## QUESTIONS FOR INQUIRY

1. According to each of the four positions described here, is artificial insemination permitted under halakhah?
2. According to each of the four positions described here, who is the legal father of a child conceived by artificial insemination?
3. Which position do you find most convincing? Why?
4. How do these rabbis' conclusions reflect a variety of concerns aside from purely halakhic analysis?

## COMMENTS

Unsurprisingly, various twentieth-century Orthodox ethicists confronting new forms of artificial insemination reached differing conclusions. Rabbi Moshe Feinstein, widely respected among American haredim, permitted AI and saw no violation of the law against adultery. He did, however, designate the sperm donor, not the husband, as the child's legal father. The longtime leader of Satmar Hasidism, Rabbi Yoel Teitelbaum, agreed with Feinstein about paternity, but parted in believing that because providing sperm makes a man the child's father, adultery has taken place when a woman conceives with sperm from anyone but her husband. (That is the meaning of *heterologous* in Rabbi Broyde's article.)

The third position is that of Rabbi Waldenberg (Text 8b): introducing semen into a woman's body amounts to an adulterous act of intercourse. Finally, Rabbi Mordecai Breish adopts parts of the other positions. He acknowledges that AI does not amount to adultery, which means children born from it are legitimate. However, he believes that AI practices reflect a lowering of the moral standards that Jews should adhere to. Apparently, married Jewish couples should only have children through intercourse, as the use of others' sperm—and perhaps other interventions—would be immoral.

This text serves as another reminder that close study of classical halakhic sources can lead to divergent conclusions. Interpreting the same sources, these four rabbis develop a range of opinions from approving artificial insemination to labeling it adultery. Rabbi Feinstein would disagree with the court ruling in Case Study #1 and declare William Marotta, the sperm donor, the child's legal father. Rabbi Teitelbaum's

and Rabbi Waldenberg's concerns about adultery would not apply to the mothers in the case, who were not married at the time. Assuming the parties were Jewish, Rabbi Breish would disallow the arrangement they made on moral grounds, even apart from the question of their lesbian relationship.

Case Study #2 raises at least one issue not directly addressed by these thinkers. Sophia is unmarried; she cannot commit adultery, unless we define using donor sperm from a married man, should it occur, as such. But here, too, no Jewish consensus exists (again, even within a given movement) about the propriety of single women choosing to bear children. Rabbi David Golinkin, chair of the Va'ad Halakhah (law committee) of the Masorti movement, the Conservative movement in Israel, wrote a responsum about AI for an unmarried woman that four of his male colleagues voted to approve. (No women's names appear on the *teshuvah* [responsum], though women serve as Masorti rabbis.) The *teshuvah* forbids such insemination for five reasons:

1. Halakhah and tradition forbid destruction of sperm. Since a woman is not commanded to have children, any donor would waste sperm unnecessarily.
2. The fact that Israeli law forbids revealing the identity of a sperm donor raises concerns that the child will later form a forbidden marriage.
3. While using sperm from a non-Jewish donor would alleviate reason #2, donors to Israeli sperm banks are presumably Jews.
4. The sanctity of the Jewish family is of concern, as is the negative effect on children of growing up with only one parent.
5. Procreation is not the only purpose of Jewish marriage. It also includes loving companionship, which the woman in question lacks if she never marries.<sup>9</sup>

By contrast, Rabbi Susan Grossman of the North American Conservative Movement's Committee on Jewish Law and Standards wrote a *teshuvah* that reached a different conclusion.

FOR THE SINGLE INDIVIDUALS who want to turn to adoption or ART [alternative reproductive technologies] to become parents by choice, this teshuvah permits them to do so. Their decision to pursue adoption or ART is usually part of a painful and personal recognition that the chance of finding a marriage partner with whom to have children has become unlikely, particularly as individuals begin to age out of their optimal childbearing years. Rather than considering this desire for parenthood a rejection of marriage, this teshuvah embraces the desire for parenthood and the resulting decision to pursue adoption and/or ART as an affirmation of a commitment to raise Jewish children and build a Jewish family.

Nothing in rabbinic law technically prohibits adoption or the use of ART by a single.<sup>10</sup>

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#### QUESTIONS FOR INQUIRY

1. What kinds of reasons does this *teshuvah* offer in support of allowing single Jews to become parents?
2. How does it differ from the Israeli rabbis' approach?

#### COMMENTS

Rabbi Grossman opens her *teshuvah* with the story of a baby she named in her synagogue at the request of a single woman who used reproductive technology to become a mother. Several older congregants criticized Rabbi Grossman for “legitimizing” a child born “out of wedlock.” As the rabbi well knew, halakhah does not impose any sanction on a child born to an unmarried mother. Only a child born from incest or adultery suffers the stigma of being a *mamzer*, who is not allowed to marry another Jew. Partly in response to that episode, she set out to explore whether Jewish tradition links the commandments to marry and to procreate, or whether it is permitted to fulfill one mitzvah without the other.

As this excerpt from near the end of her *teshuvah* makes clear, she concluded that marriage does not necessarily have to precede procreation. Acknowledging (as we learned in the discussion of Text 3) that women technically are not commanded to have children, Grossman argues that the exemption does not mean they may not choose to procreate if they so desire. Nothing in the halakhah forbids that choice.

The two divergent Conservative movement responses to the question of single parenthood illustrate ways that social concerns may influence legal rulings. The Israelis worry about the future of a child born to an unmarried woman. The American rabbi is concerned about contemporary social realities in which Jewish women either have not found husbands while they are still capable of childbearing or may never marry, even if they want to. In her view, these should not be reasons to deny such women the opportunity to become parents. She also expects no major difficulties for a dearly desired child growing up with one parent.

Our social outlooks may similarly influence our responses to Sophia in Case Study #2. Those who share the concerns of Rabbi Golinkin and his Israeli coauthors about the use of sperm from unknown donors and who share their understanding of the sanctity of Jewish marriage will likely be reluctant to sanction the formation of a single-parent household. Those who see the positive side of the wide variety of modern family structures, or simply accept them as reality, will likely not find reason to discourage single parenthood and will be more open to this request.

### **Text Study #3: Surrogate Motherhood**

In situations where the prospective mother cannot conceive, or cannot carry a pregnancy to term, couples may turn to surrogacy. The Baby M case, Case Study #3, exemplifies one kind of surrogacy. In this method, the prospective father provides sperm to fertilize the surrogate's ovum. Doctors then implant the embryo in the surrogate mother's uterus, where it will develop until birth. By prior agreement, the woman who donates her ovum and carries the pregnancy relinquishes parental rights over the baby to the genetic father and his spouse.

This arrangement is called ovum surrogacy or traditional surrogacy: the baby's genetic parents are the husband (whose wife will adopt the baby) and the surrogate, whose ovum was fertilized. In a second type, called gestational surrogacy, the future parents' sperm and ovum are fertilized in a laboratory (in vitro) and the resulting embryo is implanted in the surrogate's womb to develop. A gestational surrogate has no genetic relationship to the child.

Here, too, halakhic literature provides scarce precedents for a method of creating children unimaginable before the late twentieth century. Some considering the ethics of surrogacy turn to two stories in the Torah involving the matriarchs Sarah and Rachel, in which the apparently infertile matriarchs use slaves to bear a child who will "belong" to their mistresses. (In Text 11a God has not yet changed the names of Sarah and Abraham; here they are still "Sarai" and "Abram.")

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Text 11a — Gen. 16:1–4,15

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SARAI, ABRAM'S WIFE, HAD borne him no children. She had an Egyptian maidservant whose name was Hagar. And Sarai said to Abram: "Look, the Lord has kept me from bearing. Consort with my maid; perhaps I shall have a child through her." And Abram heeded Sarai's request. So Sarai, Abram's wife, took her maid, Hagar the Egyptian . . . and gave her to her husband Abram as a concubine. He cohabited with Hagar and she conceived. . . . Hagar bore a son to Abram, and Abram gave the son that Hagar bore him the name Ishmael.

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Text 11b — Gen. 30:1–6

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WHEN RACHEL SAW THAT she had borne Jacob no children, she became envious of her sister; and Rachel said to Jacob, "Give me children, or I shall die." Jacob was incensed at Rachel, and said, "Can I take the place of God, who has denied you the fruit of the womb?" She said, "Here is my maid Bilhah. Consort with her,

that she may bear on my knees and that through her I too may have children.” So she gave him her maid Bilhah as concubine, and Jacob cohabited with her. Bilhah conceived and bore Jacob a son. And Rachel said, “God has vindicated me, and indeed, [God] has heeded my plea and given me a son.” Therefore she named him Dan.

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#### QUESTIONS FOR INQUIRY

1. How do Sarai and Rachel each respond to their experience of being unable to bear children?
2. In what ways do these stories parallel modern surrogate motherhood?
3. In what ways do these stories differ from modern surrogate motherhood?

#### COMMENTS

Difficulty in conceiving is a recurrent theme in the TANAKH. A number of significant figures suffer from infertility: not only the matriarchs Sarai and Rachel, but also Hannah, mother of the prophet Samuel; the unnamed mother of Samson; and others. That each of them eventually bears a son illustrates the theme of God’s trustworthy nature. In God’s own time, each of these women gives birth to a son who carries on God’s covenant with the People Israel.

In the stories of Sarai and Rachel from Genesis, both women turn to a female slave to provide her with the child she cannot herself conceive. Notably, while the slave has intercourse with the mistress’s husband, conceives, and carries the child to term, the child “belongs” to the mistress. Sarai and Rachel name the children and count as the official mothers. That fact suggests a parallel to ovum surrogacy, where the wife of the man providing the sperm officially adopts the child as mother, while the surrogate relinquishes parental rights.

There are other ways in which these stories resemble modern surrogacy. Writing for the Conservative movement’s Committee on Jewish Law and Standards, Rabbi Elie Spitz enumerated these similarities:

DESPITE SOME DIFFERENCES BETWEEN the *shifchah* [maid servant] and the contemporary surrogate, there are significant shared values to glean from the Bible’s acceptance of a third party to procreation. First, the use of a third party is a permitted last resort to assure genetic continuity for the husband. Although the patriarchs and matriarchs could have adopted a child, a legal category in the ancient world too, they chose the option of using a *shifchah*. Second, although children were born to the *shifchah*, the Torah recognized the maternal role of the “intended mother” and gave her rights. The offspring were adopted by the matriarchs and named by them. Third, although the *shifchah* was not recognized as a “wife,” her offspring were treated as a descendant of the patriarch, which entailed full inheritance rights.<sup>11</sup>

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#### QUESTIONS FOR INQUIRY

1. What similarities between the Torah’s narratives and modern surrogacy does Rabbi Spitz discover?
2. What important differences do you notice between ancient and modern practices?

#### COMMENTS

Rabbi Spitz describes the maidservant stories in the Torah as precedents for using a third party to carry on the husband’s genetic line when he and his wife cannot conceive a child together. He argues that the biblical characters chose this option over adoption—though whether the Torah is familiar with what moderns call adoption is an open question. Spitz considers the matriarchs the adoptive mothers of the maids’ children. He notes that the children received the full rights of the patriarchs’ children.

At the same time, significant differences exist between what the Torah portrays and what modern medicine allows. The Torah’s stories



assume a polygamous society in which a man could marry more than one woman simultaneously. The husband's relationship with the slave/concubine differs dramatically from his relationship with a modern surrogate mother. A consequential difference is that Hagar and Bilhah have no say in the matter. Neither could choose not to bear a child for her master and mistress. Today, a surrogacy agreement must be freely entered by all parties, including the surrogate.

Jewish ethicists confronting surrogacy have arrived at widely varying conclusions. Some have found the moral problems great enough to reject the idea. Others have suggested a number of reasons to permit couples to use surrogates, while disagreeing among themselves both about the bases for the permission and its wisdom. The next three texts (12a–c) are a sampling of opinions opposed to surrogate childbearing. Rabbi Marc Gellman (Reform) wrote his in the popular journal *Sh'ma*. Rabbi Barry Freundel (Orthodox) considered surrogacy in his book, *Contemporary Orthodox Judaism's Response to Modernity*. Rabbi Immanuel Jakobovits, an expert in Jewish ethics who served as chief rabbi of the United Kingdom, presented his arguments in his book, *Jewish Medical Ethics*. We will follow these excerpts with a sampling of three opinions in favor of surrogacy.

#### Text 12a — Gellman, “The Ethics of Surrogate Motherhood”

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SURROGATE MOTHERHOOD EXPOSES THE contracted mother to the risks of pregnancy without justifying those risks. The Jewish prohibition against risk taking is derived from the fourth chapter of Deuteronomy, *v'nishmartem m'od l'nafshoteichem*, “guard your lives carefully.” The rabbinic elaboration of this biblical law basically prohibits risking your health or life if there is no *mitzvah* which justifies the risk. . . . Pregnancy, no matter how routine, presents risks to the pregnant woman, risks which are justified if she is bearing her own child and thus helping her husband to fulfill the *mitzvah* of *p'ru ur'vu*, “be fruitful and multiply.”<sup>12</sup>

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Text 12b—Freundel, *Contemporary Orthodox  
Judaism's Response to Modernity*

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THE TALMUD DESCRIBES THE parent-child relationship as based on responsibilities that the parent has to the child (the reverse is also true, but that is not relevant here). . . . In a surrogate situation, a biological relationship is created by the surrogate mother with a child, which is then legally severed through a contract entered into by the adoptive and biological parents. To me this smacks of the biological mother shirking her responsibilities. The surrogacy situation differs from the usual adoption case where, under the duress of difficult circumstances, a baby is given up to a better home. In the case of surrogacy the adoption transfer is premeditated and calculated. I find this reality troubling.<sup>13</sup>

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Text 12c—Jakobovits, *Jewish Medical Ethics*

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TO USE ANOTHER WOMAN as an incubator . . . for a fee . . . [is a] revolting degradation of maternity and an affront to human dignity<sup>14</sup>

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QUESTIONS FOR INQUIRY

1. What differing reasons does each author propose to explain why he believes surrogacy is not a morally sound Jewish choice?
2. In your view, do these writers respond appropriately to the new reality of surrogacy?

COMMENTS

These excerpts present several considerations the authors claim disqualify surrogacy as an appropriate choice for Jews. Marc Gellman relies on a well-known halakhah that we may not knowingly risk our safety if there is no mitzvah that justifies the risk. Fulfilling the commandment

to procreate justifies the usual choice to conceive, but since the surrogate herself is not fulfilling the mitzvah—at best, she is helping the couple do so—she may not take on the risks pregnancy presents.

Barry Freundel's idea depends on an understanding of how halakha establishes who is a child's legal mother. Along with many traditional writers, he believes that gestation determines maternity: whoever carries and births the baby is that child's legal mother. Thus Freundel suggests that entering into a contract to relinquish a child following gestation amounts to shirking parental responsibilities. (See chapter 1 for the halakhot he references.) While Freundel recognizes that this argument might also require rejecting adoption, since the birth mother also surrenders her parental rights to the baby, he holds that the cases are different. In adoption, unusual challenging circumstances justify finding a better home for the baby. Since the surrogate mother could presumably raise her own child safely and well, this justification is not available.

Immanuel Jakobovits presents a broader moral argument: surrogacy is an unethical use of a human body for others' benefit. Looked at from one angle, hiring a surrogate amounts to paying a woman to serve as an incubator for someone else's fertilized egg. Following the principle that we may not treat human beings as instruments for our benefit, then we may not use surrogates to bear children.

Each of these rabbis raises credible concerns about surrogacy. The surrogate undergoes risks while relinquishing (Freundel would say "shirking") responsibility for the future child. And certainly Jakobovits's concern about using human beings merely as tools to serve the adopting parents deserves strong consideration.

At the same time, each of these objections can be met with worthy counterarguments. Granted that the surrogate mother does not pursue the mitzvah of procreation with her own husband, we might see her as performing the mitzvah of contributing to others' desire to fulfill the commandment. While pregnancy carries risks even in the best of circumstances, surely adult women can make informed decisions about whether and when to become pregnant. These objections need not end the discussion.

Rabbi Freundel's concern matters only for those who agree with him that halakhah recognizes childbirth as the sole means of establishing maternity. Logically, that view would forbid a woman both from entering into a surrogacy agreement and from giving up her child for adoption. Those who believe that halakhic parenthood can be established by means other than childbirth will dismiss his concern, pointing out further that the child will have someone to carry out the halakhic duties of parents.

Meanwhile, inasmuch as Jewish thinkers opposed to surrogacy raise valuable objections, good arguments appear on the other side as well. The next three authors elucidate why they support surrogacy. Rabbi Walter Jacob led the Reform rabbinate's Responsa Committee for many years. Rabbi Elie Spitz wrote a *teshuvah* for the Conservative movement's Committee on Jewish Law and Standards. John Loike, a biologist and bioethicist at Touro College, and Rabbi Moshe Tendler, an Orthodox expert in halakhic medical ethics, published their opinion in *Hakirah*, an academic journal on Jewish law and thought.

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Text 13a—Jacob, "Surrogate Mother"

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WE WOULD . . . TREAT THE use of a surrogate mother as a new medical way of relieving the childlessness of a couple and enabling them to fulfill the *mitzvah* of procreation. It should cause us no more problems than modern adoptions which occur frequently. There, too, the arrangement to adopt is often made far in advance of birth, with the complete consent of one or both biological parents. Here we have the additional psychological advantage of the couple knowing that part of the genetic background of the child which they will raise as their own.<sup>15</sup>

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Text 13b—Spitz, "On the Use of Birth Surrogates" (continued)

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AT FIRST IMPRESSION THERE may be a visceral discomfort with these relatively new modes of reproduction, specifically the transfer of genetic material or the use of a womb for another couple. Yet,

when we examine this new technology in the context of its outcome, we find the blessing of children to couples who want them very much. The bigger picture, which includes the intended result, makes surrogacy more acceptable upon reexamination. . . . It is permissible to employ a surrogate, whether gestational or ovum, to overcome infertility and to serve as a surrogate. A man fulfills the mandate of procreation in having a child with a surrogate.<sup>16</sup>

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### Text 13c—Loike and Tendler, “Gestational Surrogacy”

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THE FACT THAT MATERNAL-FETAL cell exchange takes place in normal pregnancies is consistent with the few studies that it occurs in surrogacy as well. This information . . . indicates that the surrogate is more than merely an incubator for fetal development. Rather, she plays a critical role in fetal development and in the future behavioral and physiological health of the child.

We therefore propose the following scenario to avoid as many halakhic issues as possible and to allow surrogacy to become a viable therapeutic alternative for infertile couples. . . . We suggest that the gestational surrogate be non-Jewish and that the child should undergo conversion after birth. Anonymity of the surrogacy should be implemented in a computer-based registry. Finally, when the child born from the surrogate is ready to marry, he or she should undergo genetic testing with the prospective spouse to ensure that they are not genetically related. Adopting this paradigm may avoid potential halakhic problems and protects all parties involved in this therapeutic process and allows the dreams of the infertile couple to be fulfilled.<sup>17</sup>

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### QUESTIONS FOR INQUIRY

1. What reasons do these writers offer for approving surrogacy?
2. What concerns do they express, even as they approve surrogacy?

3. In your view, do these writers respond appropriately to the new reality of surrogacy?
4. Which side, pro or con, offers the more compelling arguments?

#### COMMENTS

These sources demonstrate, in order, that Reform, Conservative, and Orthodox rabbis all find support in the Jewish tradition for approving surrogate motherhood. Both Rabbi Jacob and Rabbi Spitz stress the infertile couple's desire for children above other factors. That serves as their trump card: whatever other concerns must be allayed, they want to do everything possible to help Jews fulfill the commandment to procreate. Both find it possible to overcome reservations about this method in order to serve that larger goal.

Rabbi Tendler, too, wishes to help fulfill "the dreams of the infertile couple." Supporting his views with medical information from Dr. Loike, he proposes allowing surrogacy agreements under specific conditions, given that the latest science shows that the gestating woman does not, in fact, merely "incubate" the fetus. Cell exchanges take place such that the pregnant woman influences fetal development. Gestating in a specific woman's body affects the child's future both physically and psychologically.

Given as well the aforementioned assumption that giving birth creates legal maternity, Tendler prefers that Jewish couples hire only non-Jewish surrogates. This way, there will be no issue with the child having a Jewish mother other than its adoptive one. This also necessitates that the infant undergo conversion to Judaism (based on the halakhah that Jewish identity passes only through the mother, a rule not adopted by all American Jewish communities today). Tendler also addresses the concern expressed by some sources (see Texts 6 and 8b) that the child might grow up to unknowingly marry a close relative, suggesting that such a scenario can be avoided through genetic testing before marriage.

This discussion exemplifies how strongly Judaism values the family. These rabbis work hard to find license in the tradition for couples to make

use of a new means of overcoming infertility. Some would argue that they try too hard. Given the moral and legal considerations opponents of surrogacy emphasize, perhaps some means of procreation are simply not appropriate even for fulfilling the most important of mitzvot.

At the same time, Rabbi Spitz aptly points out, “At first impression there may be a visceral discomfort with these relatively new modes of reproduction.” Often, new technologies make us uncomfortable. As time passes, however, we become acclimated to the new and more inclined to see the good in it. While still not an everyday experience as of this writing, surrogacy agreements have become more commonly accepted. Interestingly, one place where they operate under established law is the State of Israel.

Israeli law reflects the high value Jewish tradition places on procreation. A law enabling surrogacy arrangements, passed in 1996, requires Israeli couples to follow certain procedures.

#### Text 13d—State of Israel Ministry of Health, “Surrogacy in Israel”

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BY LAW, A MAN AND WOMAN who are partners are entitled to find a surrogate independently, or through a surrogacy agency, and to enter into a surrogacy agreement with her.

The surrogacy agreement is submitted to the Board for Approval of Surrogacy Agreements, which checks the compatibility of the parties to the process: a check that the surrogate is not entering the process out of (emotional or financial) distress, emotional and physical suitability of all those involved in the process, etc.<sup>18</sup>

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#### QUESTIONS FOR INQUIRY

1. What underlying values does Israeli surrogacy practice, summarized here, reflect?
2. How does the Israeli law endeavor to address previously raised concerns about surrogacy?



Israeli society supports families raising children. The government provides tax rebates to couples with children and subsidizes large families. Additionally, public policy supports couples wishing to make use of reproductive technologies such as IVF. Israeli law treats surrogacy as one among several techniques certain couples and individuals who are infertile may choose in order to have children. In 2018, the Knesset amended the law to allow single women to pursue surrogacy arrangements and to forbid it to same-sex couples. (Some perceived the last rule as a concession to the *haredi* parties in the Knesset and the official Israeli Rabbinate.)

Notably, the procedure described in this source does not consider matters important to halakhah. It shows no concern for the legitimacy of the resulting child. Maternity and paternity are not in question. The law does evince care about the psychological welfare both of the surrogate and of the adopting parents. All of them must undergo an evaluation of their psychological readiness for the process. Everyone involved must have medical exams to assure that they will not endanger their health.

The Israeli law includes one other very important consideration: to avoid situations wherein a surrogate mother enters the contract out of desperation for money she believes she can only earn this way. Israel's vetting process aims to ensure that an infertile couple does not exploit the surrogate's financial struggles and thereby undermine her ability to freely choose to make this agreement.

Similarly, the board that approves the agreements is entrusted to make sure that the prospective surrogate is emotionally prepared for the rigors of surrogacy. If she is emotionally unstable, she may not make a free and informed decision. She may not have considered the discomfort she will experience during pregnancy and its potential dangers. She may not have thought clearly about the psychological impact of going through pregnancy and childbirth and then immediately surrendering the child to the adoptive parents. She must satisfy the board on all of these points. If all parties pass the evaluation by the board, they may proceed with their surrogacy arrangement.

## Text Study #4: Parenthood through Cloning

We now turn our attention to a form of assisted reproduction that does not yet exist, but may in the near future. Our look at what Jewish tradition contributes to the debate over human cloning begins with a talmudic discussion about human beings creating new life out of nothing.

### Text 14 — *Sanhedrin* 65b

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RAVA SAID: IF THE righteous wanted, they could create a world, as it is said, “But your iniquities have been a barrier / Between you and your God” [Isa. 59:2].

Rava created a man and sent him to Rabbi Zeira. Rabbi Zeira spoke to him, but he did not reply. Rabbi Zeira said to him: “You were created by one of the Sages. Return to your dust!”

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### QUESTIONS FOR INQUIRY

1. On what condition does Rava claim certain people could “create a world,” including human life?
2. Why did Rabbi Zeira destroy the man Rava created?
3. Does the text contribute usefully to the modern debate about human cloning?

### COMMENTS

The Babylonian sage Rava asserts that the righteous could, like God, create a world from nothing. The verse from Isaiah he cites in support implies that this is true only of perfectly righteous individuals. Sinful people face a barrier that blocks them from achieving the godly powers available to the righteous.

As the story unfolds, Rava creates a man. Tradition labels this kind of being a *golem*, from a Hebrew root meaning “unformed”; in a sense, the golem is a mold that looks like a person but is not. Rava sends his creation to Rabbi Zeira, but once he finds the artificially created being unable to speak, R. Zeira orders it to return to its dust, to the material from which it was formed, ending its existence. Apparently R. Zeira considers the

ability to speak the mark of humanity. What Rava created looked human, but it was not actually so. Perhaps to avoid confusion, R. Zeira destroys it.

Some interpreters of this text read it as prohibiting attempts to create human beings outside of the reproductive process. R. Zeira decides that Rava's creation is not human (some commentators point out that had it been human, R. Zeira would have been guilty of murder). It may follow that any being we create outside of the "natural" process of reproduction would not be fully human, and thus we should not undertake any such creation. But the discussion of reproductive cloning does not end here. In theory, if it became possible to produce babies by that means, they would grow up to share the power of speech with all other people. Such persons would not be subject to the stricture R. Zeira establishes.

Underlying the dispute is a basic disagreement about how far people should go in using capabilities created by new scientific discovery. We often must decide whether the fact that we can do something is enough to establish that we should. Already in medieval times, Jewish thinkers debated this question. We will study two contributions to the debate. The first appears in the Talmud commentary of Rabbi Menachem ben Shlomo HaMeiri, a leading scholar in thirteenth-century Provence. The second appears in a collection of responsa by Rabbi Tzvi Hirsch Ashkenazi, an important legal authority in seventeenth-century northern Europe.

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#### Text 15a — Menachem HaMeiri on *Sanhedrin* 67b

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ALL ACTIONS DONE NATURALLY are not considered [forbidden] witchcraft. Even if one knew how to create creatures by means other than sexual reproduction . . . it is permitted to do, because anything natural does not fall into the category of witchcraft. It is similar to medicine.

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#### Text 15b — Ashkenazi, *Responsa Hakhham Tzvi* 93

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I AM SKEPTICAL WHETHER a person can be created . . . like that which *Sanhedrin* reports, "Rava created a man." . . . It appears to

me that since R. Zeira said, “You were created by one of the Sages. Return to your dust!” . . . that there is no prohibition of murder. Because the verse [Gen. 9:6] says, “Whoever sheds human blood / By human [hands] shall that one’s blood be shed” — that applies specifically to a person that was created inside another, i.e., a fetus that developed inside its mother’s womb. That man that Rava created did not come from inside its mother’s body.

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#### QUESTIONS FOR INQUIRY

1. Do you find Meiri’s comparison to medicine convincing?
2. Rabbi Ashkenazi expresses skepticism about the possibility of this kind of creation. What opinion about creation seems to undergird his distrust?
3. Which side has the more convincing argument?

#### COMMENTS

These premodern sources engage in a debate that feels contemporary. Unaware of the idea of cloning, they use the Talmud’s description of a rabbi creating a “person” to argue about the ethics of humanity creating new life in a manner other than the one embedded in nature.

Meiri comments on a passage in the Talmud analyzing the Torah’s prohibition of “witchcraft” (see Exod. 22:17 and Lev. 20:27). He proposes a negative definition: if something is done naturally it is not prohibited witchcraft. He compares such acts to medicine. Just as medical science transforms natural products and discoveries about the human body into means of healing, so, too, those who create new entities by means drawn from nature contribute positively to the world.

While the Meiri passage does not directly address the story of Rava’s golem, it does imply that Rava’s act might have been permissible. If we define the means Rava used as part of nature, then Meiri would say there is nothing wrong with his action. It follows that since cloning humans would make use of nature—in the form of new scientific understandings of genetics, cell biology, etc.—it would fit into the broad category of medicinal healing and merit ethical approval.

Rabbi Ashkenazi, who lived some four centuries later, draws the opposite conclusion. While doubting that such a creature could arise, he does not consider a golem a human being or a positive contribution to the world. He requires that a person be born directly of another person. The interpretation flows from two adjacent words in Genesis 9:6. First the text says “Whoever sheds the blood of *ha-adam*,” meaning “man” or “human being”; then it continues, “*ba-adam*, By human [hands] his blood shall be shed.” The phrase translated in context as “by man” literally means “in man.” Therefore, Rabbi Ashkenazi reasons, only a person created “in” a person—that is, inside a woman’s womb—is truly *adam*, a human being. This interpretation asserts that humans do not have the right to create beings by these “inhuman” means.

Modern thinkers recapitulate this debate. Rabbi Yosef Elyashiv, an important legal authority for *haredi* Orthodoxy in Israel in the late twentieth and early twenty-first centuries, forbids reproductive cloning (cloning to give “birth” to a new person) on the grounds that it brings a new creation into the world that is not part of God’s plan. He allows cloning for medical research, however, including it in the well-established halakhic mandate that physicians do what is necessary to heal.<sup>19</sup>

By contrast, the American Orthodox ethicist Rabbi Michael Broyde denies that a cloned embryo would constitute a new “creation,” writing:

One could argue that the activity which defines the obligation to be fruitful and multiply solely involves a man giving genetic material to produce a child who lives. Such a child is produced in this case. There is at least one mother (gestational mother) and in most circumstances there will be a father/second parent. . . . This is particularly true when the fertilized egg is implanted in a woman, thus producing a child and a birthlike process that clearly resembles the natural birth process and motherhood.<sup>20</sup>

In short, a cloned infant would meet the criterion established by the *Hakham Tzvi*. Broyde sees it as fully human and not much different from a fetus created by IVF.

To make an ethical decision about human cloning, we need to decide which side has the better argument. Does cloning amount to playing God, which humans should avoid? Or is it the next step in human progress in helping infertile couples reproduce?

Before considering these questions in greater detail, let's look at some other issues that arise when we consider the possibility of cloning a human being. One of these has to do with a basic Rabbinic teaching about the nature of human beings.

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Text 16 — *Mishnah Sanhedrin* 4:5

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THAT IS WHY ONLY a single human was created . . . to teach us the greatness of the Holy Blessed One. When a human being makes coins with one mold, each looks exactly like the others. But the King of kings, the Holy Blessed One made all human beings in the mold of the first human, but not one of them looks just like their fellows. Therefore, each person is obliged to say, the world was created for my sake.

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QUESTIONS FOR INQUIRY

1. What lesson does the metaphor of the coins teach?
2. What lesson does the Mishnah teach about the nature of humanity and its place in the world?
3. What does the Mishnah imply about the question of whether we ought to clone human beings?

COMMENTS

The Mishnah creates a metaphor about a manufacturing process familiar in its time and still in use today. Coins are minted by creating a mold from which each new coin can be struck. Each coin emerges exactly the same. That, of course, is the point: to create a uniform currency. Notice, the Mishnah's authors suggest, that each person born comes, in a sense, from the mold of the first human. Yet unlike coins, no two of them are

alike. Each person has unique qualities. Even identical twins differ from each other in numerous ways.

That is the difference between what humans make and what God creates. If we make a mold, everything we use it for is identical. God, on the other hand, created a “mold” for humanity from which each of us emerges recognizably human, yet different. This, in turn, is a basic idea in Jewish ethics: The value of each person flows, in part, from his or her uniqueness. No one can replace any individual. Each individual matters equally to the world.

Weighing the Jewish ethics of cloning people involves considering the Mishnah’s implications. What if the clone lacks the uniqueness essential to being human? The clone, who by the nature of cloning has the same genetic makeup as the original, might be like a coin struck from a mold: a precise replica of its progenitor.

Still, arguably a clone would not come out as a duplicate of the other person with the same genes. Since the clone would gestate in the uterus and be born like any infant, the exchange of cells between fetus and mother would likely make a difference. Furthermore, modern science instructs us that the nature/nurture debate is really nurture *and* nature: environmental factors combine with genetic ones to create each unique individual. Given that the clone would grow up with different parents than its progenitor, and in a different social milieu, it seems highly unlikely that humans could produce an exact replica of another person.

Reproductive cloning might, however, allow parents to predetermine the qualities they prefer their future child to have. The contemporary Jewish ethicists Rabbi Elliot Dorff and Laurie Zoloth, a professor of religion and ethics at the University of Chicago Divinity School, refer to this possibility as “rekindling our anxieties about designing our descendants.”<sup>21</sup> Intuition tells us that designing babies to meet our preconceived preferences is an abuse of scientific capabilities. Moreover, from a Jewish point of view, doing so would deny the child who will be born the opportunity to develop into the unique individual carrying the seal of the Divine. Some thinkers, including the great rabbinic medical ethicist Eliezer Tzvi Waldenberg, have responded to these and other concerns by prohibiting human cloning before it becomes possible.



ABOUT THE IDEA TO bring forth a person through the astonishing procedure that is known as cloning. . . . This is what is called a complete biological creation of a human creature according to a predetermined plan, that will bring into reality traits its creators desire. Can one really call them offspring that are related to their parents? Besides the fact that their creation is distorted by being brought into the world in this manner, it is something that is likely to cause destruction and ruin to human creation. Chaos will reign and the problem of procreation will turn into a scientific procedure lacking humanity. Scientists have already protested against this and have expressed their fears about the expected future. Behold a generation will arise in which all who see it will say (Deut. 32:17), “New [gods] . . . whom your fathers did not know” —to see creations like this almost lacking free will and being artificial, lacking true familial relationships.<sup>22</sup>

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#### QUESTIONS FOR INQUIRY

1. What specific concerns does Waldenberg express about cloning humans?
2. Does Waldenberg agree with those who see a clone as a person, or those who see it as a golem (see Texts 15a and 15b)?
3. Do you agree with his assessment that human cloning is likely to lead to chaos?

#### COMMENTS

Rabbi Waldenberg’s tone in this *teshuvah* expresses revulsion at the prospect of reproductive cloning. To him, it represents the possibility of a dystopian world. His first objection is to “complete biological creation of a human creature according to a predetermined plan”: ostensibly, making a human entirely through scientific manipulation, with no connection to the natural process of reproduction. More than that, the product of the process would have only “the traits its creators desire.” This would deny

the resulting persons the opportunity to develop what Judaism teaches is their God-given uniqueness. They would appear to have no choice but to become what their laboratory designers wanted them to be.

Waldenberg asks rhetorically if a clone can truly be related to the clone's parents. We saw earlier in the chapter that most Orthodox thinkers define maternity based on who gives birth, and paternity based on who provides the fertilizing sperm. Given that a human clone would still need to gestate in a uterus, Waldenberg's concern here is somewhat unclear. Possibly he has in mind a situation similar to surrogacy, where a man has his DNA inserted into a donor ovum and gestated either by the donor or by another surrogate. In such a case, the halakhic mother would be the surrogate and not the male donor's partner. In the absence of the usual process of fertilization, Rabbi Waldenberg may be at a loss to identify a halakhic father.

The next few sentences bring us to the heart of Waldenberg's unease about reproductive cloning. He fears that "procreation will turn into a scientific procedure lacking humanity." He takes literally the Torah's command that husband and wife come together to procreate. Disagreeing with other Jewish thinkers whose ideas we have encountered (for example, Texts 10, 13c), Waldenberg does not allow for ART (alternative reproductive technologies). Reducing the human interchange to a sterile procedure in a laboratory strikes him as engendering a world devoid of human qualities. As our study of *Mishnah Sanhedrin* 4:5 (Text 16) showed, Jewish tradition indeed cares for the unique qualities of each person. Yet not every rabbinic ethicist agrees with Waldenberg's conclusion that a clone by definition cannot meet the criterion of uniqueness in God's image.

Waldenberg correctly emphasizes that many scientists object to human cloning. In 2003 the American Medical Association approved physicians' participation in cloning stem cells solely for medical research to cure diseases. Laws in the United States, Canada, Great Britain, and France all make the same distinction, allowing research to help cure diseases but forbidding the creation of human life. The 2005 United Nations General Assembly Declaration on Human Cloning also forbids human cloning as a violation of the principle of human dignity.<sup>23</sup>

Thinking along similar lines, Waldenberg forcefully points to the unrecognizable world we would enter if we cloned human lives. The products of cloning strike him as “artificial,” more golems than human beings. The presence of beings created in this manner would weaken family relationships forming the very basis of society. All social ties would be in danger.

On the other hand, perhaps the author of *Tzitz Eliezer* allows his imagination to run away with him. Perhaps a cloned person would be a human being in every respect. Like the products of IVF, clones would develop in a uterus and be born in the same manner as every baby. While defining parentage based on mitochondrial DNA represents a change from the past, it would hardly be the first significant change in the history of reproductive technology.

Indeed, other Jewish thinkers argue that we have no reason to fear adopting new technologies despite how bizarre they may strike us at first. The authors of a guide for Jewish couples facing infertility show that not all Orthodox halakhists agree with Waldenberg’s restrictive view. In our concluding text study, Richard V. Grazi, a fertility doctor who studies Jewish ethics in his field, and Joel B. Wolowesky, an Orthodox rabbi and ethicist, discuss both points of view and how Jewish ethics may adapt to these new developments.

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#### Text 18—Grazi and Wolowesky, *Overcoming Infertility*

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[CLONING] SHOULD PRESENT LESS ethical difficulty than, say, donor insemination. Transferring the husband’s cell nucleus to the wife’s egg and implanting it in her uterus seems more acceptable than involving a third person in the procedure. The “artificial” nature of it all will eventually fade as the procedure becomes more common—just as IVF did. . . .

According to [the] view [of Rabbi Yosef Elyashiv], the cloned individual is a new *beriah*, a new creation not intended by God’s plan. Using cloning to achieve a pregnancy is impermissible. . . .

A completely opposite conclusion [permitting human cloning] is reached by Michael Broyde. . . . Regarding the viewpoint that the

cloned individual is a new *beriah*, Broyde . . . points to the *prima facie* evidence that, by virtue of its gestation in utero and birth to a human mother, the child must be human. . . . It is unlikely that there will be a reconciliation of these opposing views, as it is not only differing halakhic analysis that divides them. Rather, they are basing themselves on radically different understandings of man's place in God's plan.<sup>24</sup>

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#### QUESTIONS FOR INQUIRY

1. Why does Rabbi Elyashiv forbid human cloning, and how does Rabbi Broyde refute his concern?
2. Do you think cloning raises more problems than other forms of ART? Why or why not?

#### COMMENTS

These excerpts from an essay by an infertility specialist and a rabbi present two ways that Jewish ethicists might respond to human cloning. One, represented by the Israeli *haredi* rabbi Yosef Elyashiv, would forbid cloning because it would create a person in a manner not intended by God. (Review the discussion of Texts 15a–b to see that Elyashiv is consistent in this view.) In an opinion that may derive from Rabbi Zeira's reaction to the golem created by Rava (Text 14), humans may not create the way God did. Any manner of bringing a person into existence without uniting male and female gametes amounts to human beings usurping God's role. Rabbi Broyde, in contrast, argues that gestation in a uterus and birth through the natural process suffice to make a hypothetical cloned infant equivalent to every other human being. On this basis, he would permit Jews to use cloning to have children.

Grazi and Wolowesky note that these opposing views allow for no compromise. They are not different analyses of halakhic literature, but irreconcilable standpoints concerning human beings' roles in relation to God's creation. Ethicists differ irreparably on where to draw the line between the appropriate use of human scientific ingenuity, which tradition encourages, and playing God, which it forbids. Human cloning

unavoidably confronts us with this problem. Deciding about its ethics requires deciding how far we are willing to go toward making new creations in God's world.

For their part, Grazi and Wolowesky distinguish between cloning as a medical solution to infertility, which they would permit, and cloning to make the child emerge exactly as the parents wish, which they would forbid. They write: "The use of such procedures on healthy . . . embryos in order to alter physical, mental or other characteristics that may render them more 'desirable' would be a frivolous intervention and therefore . . . prohibited."<sup>25</sup>

We may agree with these writers that a line is crossed when cloning goes from being a fertility technology to a means of selecting a child's characteristics. But the argument that such an intervention is "frivolous" does not complete the ethical case against such activity. Some might even see Jewish value in the possibility of bearing a Jewish child with certain desirable physical or psychological characteristics: perhaps a future Torah scholar of the caliber of Maimonides or Rashi, or super-strong Jews bred to defend the future State of Israel from violent attacks. If cloning and related technologies become practical, decisions about using them will require careful ethical analysis.

Dr. Grazi and Rabbi Wolowesky observe that no matter how strange and upsetting new technologies at first appear, in time we come to see them as normal. Imagine, they write elsewhere in their survey of future directions in reproductive technology, how it felt in 1909 to look up in the sky over New York City and see Wilbur Wright flying an airplane around the Statue of Liberty. No human then alive had ever seen such a sight. It must have been equal parts exhilarating and terrifying; indeed, many feared Wright would crash into the statue. In not too many years, however, people came to take flight for granted. Similarly, Dr. Grazi suggests, time will adjust us even to the cloning of human life.

### **Conclusion**

The first mitzvah in the Torah is procreation. Generations of Jews considered having large families central to living a Jewish life and preserving the Jewish future (Texts 1–3). For these reasons, Jewish ethicists tend to

sympathize with the desire to try any available means to help a couple have a child. While no one is required to try extraordinary methods, many rabbis and thinkers offer maximum flexibility to fulfill the dream of parenthood. While a few dismiss noncoital fertilization using donor semen as equivalent to adultery (Text 8b), many interpreters of the Rabbinic tradition consider IVF a permissible means of overcoming infertility (Text 7).

Jewish thinkers also express contesting views regarding surrogate motherhood. Our text study reveals that while some ethicists objected to surrogate motherhood, especially when it was new and unfamiliar (Texts 12a–c), many others came to see it as a legitimate means for Jews to achieve their dream of parenthood (Texts 13a–c). Concerns about exploitation of women and the shirking of parental responsibilities gave way to appreciation of this method of fulfilling the commandment to procreate. Elie Spitz (Text 13b) offers a poignant reminder of the joy and blessings surrogacy can bring to those who desperately desire children. It seems we can find good reasons to support the decisions the Sterns made in Case Study #3, and to agree with the court that they were Baby M's rightful parents.

In modern times more frequently than in the past, some adults prefer not to have children, or choose to become single parents. The Talmud frowns on those who abstain from procreation (Text 2), and some contemporary rabbis maintain that view (Text 5a). Others find ways to interpret the tradition to support the choice to remain childless (Text 5b). Similarly, some thinkers rely on the Talmud's decision that the commandment to procreate does not include women (Text 3) to deny them the choice to become single mothers.

Throughout this chapter, we confronted questions about the definition of parenthood. Does it derive from biology, or from the process of rearing children? As we've seen, most Jewish ethicists consider a child born through artificial insemination or surrogacy the child of the parents who raise it (Texts 6, 7, 9). Some Orthodox thinkers dissent (Texts 8b, 9) and argue that only genetic relationships establish parenthood. The majority opinion seems to favor Angela Bauer and Jennifer Schreiner in Case Study #1. Their written agreement with William Marotta, who



donated sperm to them, that he would have no parental relationship to their child, finds support in halakhic ethics.

Sophia's desire to have a baby without a partner (Case Study #2) recalls our study of the Torah's command to procreate (Texts 1, 2). *Mishnah Yevamot* (Text 3) rules that the Torah obligates only men to procreate, though our discussion showed that talmudic authorities of later generations disagreed on this point. Susan Grossman's *teshuvah* (Text 10) demonstrates that no law forbids a single woman to bear or adopt a child. She encourages all Jews who so desire to build Jewish families. These considerations support Sophia if she chooses to conceive through ART.

Case Study #3—the Baby M case, which brought issues of how ART establishes parenthood to public attention in the 1980s—raises dilemmas that remain current. A number of Jewish thinkers express discomfort with surrogacy as a method of fulfilling the commandment to have children. Those who share concerns about the potential dangers pregnancy poses to the surrogate (Text 12a), about women shirking the responsibilities of parenthood (Text 12b), or about surrogacy's inherent exploitation of the surrogate (Text 12c) would oppose its use and believe the court erred in finding for the Sterns over the Whiteheads. On the other hand, other Jewish ethicists who agree with Walter Jacob (Text 13a) that couples may hire surrogates as an alternate means of procreation compare surrogacy to adoption, allowing those who assume legal parenthood to be recognized as the child's halakhic parents. Still others may be swayed by Elie Spitz's sympathy for couples' profound desire to become parents (Text 13b) or agree with John Loike and Moshe Tendler that the surrogate serves as more than an incubator for the infant (Text 13c). Such thinkers would support the Sterns in their case against Mary Beth Whitehead.

It is hard to find a middle ground between these two positions. The writers we studied who expressed concern about the surrogate mother opposed this method of childbearing, while those whose analysis focused on the infertile parents permitted it. The decision one makes may depend on which of these parties one more naturally sympathizes with.

Regarding Case Study #4, Sonoma's desire to bear a cloned version of herself so as not to introduce an unknown donor's genetic material into her family line, various Jewish ethicists argue that only gestation



in a womb creates human life (Texts 14, 15b), that cloning detracts from the required uniqueness of each person (Text 16), and that cloned babies have no genuine familial relationship to their parents (Text 17). Yosef Elyashiv goes further, contending that cloning impermissibly brings a new creation into the world (Text 18). Yet other ethicists like Menachem HaMeiri contend that Jewish tradition approves almost anything that human beings learn to do with their God-given intelligence (Text 15a). Since in practice human cloning would require a fertilized ovum to gestate in a uterus, Michael Broyde sees cloning as equally ethically acceptable to in vitro fertilization and surrogate motherhood (Text 18).

Additionally, we saw that cloning would also enable manipulation of the fetus's genes to allow parents to choose their child's characteristics. Relying on a precedent in the Talmud (Text 14), Jewish ethics might consider that an improper intervention in God's creation. Difficult problems of deciding when we are or are not playing God lie ahead.

Ultimately, then, Sonoma might find permission in Broyde's reasoning that even if fertilization happens through cloning, the child must gestate in her womb and be born in a natural manner. Our study leads to the conclusion that she could go forward if her only goal is to have a child, but not if she wants to predetermine her child's characteristics.

Hopefully this material has additionally offered us broader lessons surrounding ethical choices. Many difficult decisions are best made not in an intellectual vacuum, but when taking into account actual people and their experiences. There may also be divergent compassionate approaches to a complex matter: compassionate ethicists can reach opposite conclusions. And it is prudent to contemplate proactively scientific advances that may be on the horizon.

Two further examples come to mind. First, in 2019 scientists reported for the first time successfully editing genes in embryos to eliminate a mutation that causes serious heart disease. Not only would the editing prevent the heart condition in the embryo itself, should it develop until birth, but individuals benefiting from the editing would pass on the new genetic characteristic to their children. Gene editing thus promises the eventual possibility of preventing many diseases and disabilities before

birth. At the same time, though, it opens the door to a new form of breeding technology—eugenics. Parents might be able to predetermine their children's attributes, selecting for height, athletic ability, certain kinds of intelligence, eventually even gender.

A second advance on the horizon is an artificial womb—an environment where a fetus could develop from fertilization to birth outside the human body. Such a device would offer a new path to parenthood for women whose wombs have been surgically removed, or who for medical reasons cannot safely carry a pregnancy. At the same time, we can imagine companies gestating infants for sale to couples wishing to adopt. It is hard to imagine a more dystopian example of playing God than creating a market in human lives. It seems we will need to continually wrestle to define the moral boundaries between helping nature and playing God.

In *Kiddushin* 30b the Talmud says, “There are three partners in a human being: the father, the mother, and the Holy One.” (See chapter 1 for discussion of this text.) Advances in technology force us to think carefully about the precise roles played by each of the three partners in creating human life.