Assisted Reproduction in Jewish Law

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Abstract

This Article attempts to untangle Jewish law regarding assisted reproductive technologies (ARTs), namely artificial insemination with husband’s sperm, artificial insemination with donor sperm, and in vitro fertilization. The author examines teachings by prominent Jewish law scholars and clarifies basic schools of thought regarding each method. He explores Jewish law prohibitions on incest and adultery and the laws regarding legal parentage and lineage of the child and explains the consequences of ARTs on those laws.

KEYWORDS: assisted reproductive technologies, artificial insemination, in vitro fertilization, Jewish law, halakhah

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ASSISTED REPRODUCTION IN JEWISH LAW

Daniel B. Sinclair*

I. ARTIFICIAL INSEMINATION USING THE HUSBAND'S SPERM ("AIH"): JEWISH AND CATHOLIC POSITIONS

This Section is devoted to a survey of Jewish law, or halakhah, in relation to AIH, and a comparative discussion of Jewish and Catholic approaches to reproductive technology in general. AIH accounts for a small proportion of artificial insemination cases, and is recommended in situations where the husband suffers from anatomical defects of his sexual organ or from severe psychological impotence. It is also used, although rarely, where the husband has a low sperm count. Occasionally, AIH may be recommended if the husband is scheduled to undergo medical treatment that will render him infertile or is likely to do so.

AIH is permitted by a majority of halakhists. The minority opposition argues that AIH breaches the halakhic prohibition on seed destruction. According to the minority view, any sexual act in which the husband does not ejaculate directly into his wife’s reproductive tract is considered seed destruction, and must be avoided.

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2. Talmud Bavli Yevamot 34b; Talmud Bavli Niddah 13a; Shulhan Arukh, Even HaEzer no. 10.

3. Responsum Divrei Malkiel 4 nos. 103-07; Responsum Yaskil Avdi 5, Even HaEzer 10; Responsum Ziz Eliezer 9 no. 51. These authorities prohibit AIH even if it is the husband’s intention to use the seed to establish a family. There is a strong mystical input into the prohibitionist school, which is especially pronounced in the view taken by the noted kabbalist, R. Ovadyah Hadaya. His approach to AIH is influenced by the mystical belief that any semen which does not travel directly into the female reproductive tract gives rise to demons of the night which remain in existence to plague the semen-emitter and his children right up until the moment of death. Responsum Yaskil Avdi 5. Similar reasons underlie his opposition to the use of AIH as a means of overcoming infertility resulting from early ovulation. Under Jewish law, sexual relations are prohibited during the menstrual period so that if a woman ovulates early in her menstrual cycle, when the halakhah prohibits sexual relations, she will be unable to conceive. See Steinberg, supra note 1, at 300. To overcome this difficulty, a number of authorities suggest the use of AIH during that part of the menstrual period in which regular intercourse is forbidden under rabbinic law only. See id. at 153. R. Hadaya maintains that in such a case, “the child would suffer
In accordance with this definition, the collection of semen for the purpose of artificial insemination runs afoul of the prohibition on seed destruction. Another argument used by these authorities against AIH is the concern that the husband’s sperm might be replaced, either inadvertently or by design, with that of a stranger, with the result that the legal status of the child will be seriously compromised. It is important to emphasize that there is no specific mention amongst the prohibitionists of any opposition to AIH on the grounds that it offends against the natural order of things.

Those who permit AIH do not find it difficult to overcome these objections. Regarding the prohibition of seed destruction, the permissive scholars maintain that if the goal of the procedure is to bring a child into the world, it is halakhically irrelevant that in the course of achieving that goal there is a break between the ejaculation of the semen and its entry into the female reproductive organ. Indeed, some semen always goes to waste, even in the course of “natural” sexual relations. Regarding the concern of sperm replacement, it is well established, on the basis of general halakhic principles, that the mere fear of such a scenario is not sufficient to prohibit an otherwise halakhically permitted procedure, especially when the object of the procedure is as worthy as the establishment of a family. In any case, it is possible to take measures to ensure that mix-ups are minimized. To this end, there are now trained supervisors available in a number of clinics used by observant Jews, who have the responsibility of ensuring that no foreign semen enters the procedure from the point of collection until insemination.

from a great burden of mystical impurity, which is not easily removable.” He is, therefore, opposed to using AIH to resolve the problem of early ovulation. See Responsa Yaskil Avdi 5, Even HaEzer no. 10. See generally Daniel J. Lasker, Kabbalah, Halakhah and Modern Medicine, 8 Mod. Judaism 1, 1-14 (1988) (discussing the kabbalah-based prohibition on seed destruction in the context of halakhic decisions on assisted reproduction). Of course, there is a long-standing relationship between halakhah and kabbalah in Jewish law, but it is also a feature of halakhic reasoning that the literary pedigree of a particular source is taken into account when dealing with a practical issue, and the outcome should be shaped by the normative ranking of the sources. See Bernard Jackson et al., Halakhah and Law, in The Oxford Handbook of Jewish Studies (ch. 26 forthcoming) (Martin Goodman et al. eds., 2002).

4. See supra Part II for a discussion on the legal ramifications of donor insemination in the context of adultery and mamzerut.

5. She'elat Ya'avez no. 43; Responsa Maharsham 3 no. 268; Responsa Zekan Aharon 2 no. 97; Responsa Pri Hasadeh 3 no. 53; Responsa Seridei Esh 3 no. 5; Responsa Minhat Yitzhak 1 no. 50; Responsa Yabia Omer 2, Even HaEzer no. 1; Responsa Iggrot Moshe, Even HaEzer 1 no. 71, 2 nos. 11, 18, 4 no. 32.

On the assumption that AIH is permitted, especially in relation to a couple for whom it is the only method for having children, the most halakhically acceptable method for collecting the semen would need to be worked out in consultation with a halakhic authority.\(^7\) Halakhic consultation would also be required when there is a possibility that in order to achieve conception, the insemination must take place during the wife’s menstrual period, during which intercourse between her and her husband would be forbidden under Jewish law.\(^8\)

A question that arises in relation to AIH is whether it constitutes fulfillment of the biblical commandment to “be fruitful and multiply.”\(^9\) Some authorities maintain that because sexual intercourse is a vital ingredient in the performance of this commandment (mitzvah), having a child through AIH does not constitute fulfillment of the obligation.\(^10\) The competing view is that the essence of the obligation lies in the production of live progeny, and the process is irrelevant. According to this view, the biblical commandment to procreate is, indeed, fulfilled by a husband who inseminates his wife in an artificial manner.\(^11\) A compromise position adopted by R. Shlomo Zalman Auerbach suggests that although AIH does not constitute performance of the full-blown biblical commandment to be fruitful and multiply, it does qualify for the fulfillment of the rabbinic obligations to populate the earth and not to leave it desolate.\(^12\) By downgrading the commandment to the rabbinic level, R. Auerbach ensures that AIH is still endowed with religious significance, even though it is not invested with the full normative force of a biblical precept.

Thus, according to the majority of halakhists, not only is AIH permitted, but also it constitutes the fulfillment of a mitzvah. Undoubtedly, this permissive approach also reflects the social conse-

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7. *Respona Iggrot Moshe*, Even Haezer 1 no. 70. In this context, it is noteworthy that R. Aaron Walkin forbids the extraction of semen for any other purpose but the insemination of a wife. *Respona Zekan Aharon* 2 no. 97; *see also Steinberg*, supra note 1, at 152.


11. *Respona Minhat Yitzhak* 1 no. 50; *Respona Yabia Omer* 2, Even Haezer no. 1; *Respona Ziz Eliezer* 3 no. 27.

12. *See Isaiah* 45:18; *Mishnah Eduyyot* 1:13; *Talmud Bavli Yevamot* 62a; *Feldman*, supra note 9, at 48; *Nishmat Avraham*, Even Haezer 1:9 (citing R. Shlomo Zalman Auerbach).
quences of infertility in observant circles. In these circles, children are an extremely important focus of religious, and hence, social practice. Sensitivity to the social, as well as the halakhic pressures on observant Jewish married couples to have children, undoubtedly contributes to the trend amongst halakhic authorities to find ways of resolving fertility problems.\textsuperscript{13}

It is significant that the prohibitionist authorities do not raise any fundamental ideological objection to the use of assisted reproduction on the grounds that it is not a natural process. Their objections are based upon specific legal prohibitions and upon reservations regarding the fulfillment of the positive commandment to reproduce. It would, therefore, appear to be unanimously accepted that there is no fundamental requirement in Jewish law that reproduction take place in a purely natural manner.

This approach is in marked contrast with that of Catholic Church doctrine, which prohibits any intrusion of technology into human reproduction. As a result, artificial insemination, using either the husband's sperm or donor sperm, and in vitro fertilization, are not options for a Catholic married couple struggling with an infertility problem. According to the Catholic doctrine, as laid down in the 1987 Instruction on Respect for Human Life in its Origins and on the Dignity of Procreation, (\textit{Donum Vitae}),\textsuperscript{14} it is forbidden to separate procreation from marital sex. This provision, often referred to as the "inseparability principle," requires that children must only come into being as a result of marital intercourse, and that any reproductive method that replaces intercourse as the cause of human generation is immoral.\textsuperscript{15} The inseparability principle is based upon the idea that children born in any context other than that of marital love will be adversely affected in terms of their own capacities to love and be loved. Additionally, there is the fear that artificial reproductive techniques may be easily abused.\textsuperscript{16} Thus, the Catholic approach is a naturalist one; \textit{Donum Vitae} gives strong

\begin{footnotes}
\item[13.] See \textit{The Longing for Children in a Traditional Jewish Family, in Be Fruitful and Multiply: Fertility Therapy and the Jewish Tradition} 5-11 (Richard V. Grazi ed., 1994).
\item[15.] See \textit{RICHARD A. MCCORMICK, THE CRITICAL CALLING: REFLECTIONS ON MORAL DILEMMAS SINCE VATICAN II} 333 (1989); \textit{see also P. Hannam, In Vitro Fertilization, 55 Irish Theological Q.} 14 (1989).
\item[16.] See McCormick, supra note 15, at 347-49. An example of abuse is the replacement of the husband's sperm with that of a donor.
\end{footnotes}
expression to this idea, and the dominant Catholic view is that artificial insemination by the husband is forbidden.

Mention should be made of a minority Catholic view that regards the total ban on assisted conception in *Donum Vitae* as being too strong an application of the inseparability principle. According to this view, where a married couple is desperate to have their own child and looks to assisted reproduction as the means for achieving this end, the act of reproduction becomes imbued with the same ingredient of marital love as that which suffuses the act of marital intercourse, and AIH should, therefore, be permitted. Regarding the fear of abuse, the argument offered by the liberal Catholic minority is that this fear may be met by a combination of religious sanctions and practical precautionary measures. It should not, in and of itself, provide the basis for a universal ban on artificial reproduction in all circumstances.

It is noteworthy that Islamic law in this area resembles Jewish law, in that it too has no principled opposition to the use of artificial reproductive techniques in overcoming a fertility problem within a marriage. AIH is, therefore, permitted under Islamic law.

The case against naturalism in the *halakhah* should not be made too strongly. Indeed, it may be argued that the naturalist approach manifests itself in the view that while AIH is not *halakhically* prohibited, it is not on par with the natural method with respect to qualifying as a means of fulfilling the *mitzvah* of procreation on a biblical level. This downgrading of the religious validity of AIH may very well serve as evidence of a weak form of naturalism in this area of Jewish law. The term "weak naturalism" indicates that although the *halakhah* does not designate naturalism in this area as a legal value, there are features of the *halakhic* doctrine that are compatible with the naturalist approach.

R. Immanuel Jakobovits expresses a strong naturalist position with regard to artificial reproductive technology in relation to artificial insemination using donor sperm ("AID"). As described *infra*, both the legal and moral ramifications of AID are far more serious than those of AIH. As a result, legal permission, when

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19. See Vardit Rispler-Chaim, Islamic Medical Ethics in the Twentieth Century 18-27 (1993). Islamic law insists that safeguards be adopted to prevent any donor semen from destroying the purity of the husband's line. *Id.*
given, is often qualified by reservations of a moral nature, including concern for the preservation of the family unit. Nevertheless, for the purposes of R. Jakobovits's naturalist argument, the fact that it is made in the context of AID is not critical, since its force is equally applicable to AIH. R. Jacobovits notes that although there is nothing intrinsically illegal about AID, it is, nevertheless, opposed by the majority of halakhic authorities on moral grounds.

According to R. Jakobovits, this moral opposition may be explained by the fact that the use of artificial reproductive techniques turns childbearing into a "mechanical" act, bereft of "those mystical and intimately human qualities that make man a partner with God in the creative propagation of the race." The reference to the "mechanical" nature of AID is highly reminiscent of the naturalist theory underlying the inseparability doctrine of the Catholic Church. In using these terms to describe the moral reservations on the part of halakhists towards AID, R. Jakobovits uses the naturalist discourse, which would undoubtedly speak to the readers of his path-breaking English language book on Jewish medical ethics. In this respect, it may be significant that the book was written in London and Dublin, and contains numerous references of a comparative nature to both Catholic and Protestant positions.

It is noteworthy that there is also one contemporary authority on Islamic law who maintains that a child born using artificial techniques lacks "feelings and human warmth." According to this one view, all artificial reproduction is prohibited.

There is, nevertheless, a significant difference between the weak form of naturalism in the downgrading of AIH reproduction to the level of merely fulfilling a rabbinic precept, and the principled objection to the use of reproductive techniques along Catholic lines. Indeed, the former may be understood as a response to the challenges mounted by reproductive technology to many of the traditional legal and moral underpinnings of family and society; it is clearly not a principled rejection. If the effect of this and other halakhic reservations regarding reproductive technology is to introduce a note of caution into its use, then weak naturalism may prove to be a wise course indeed. The important point is that it does not close off the technological option to couples who seek reproductive assistance. At the end of the day, even serious misgivings regarding the effect of a particular technology upon society as a whole are

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not strong enough to render an otherwise legally and morally acceptable method beyond the pale of the halakhah.

A final point with regard to the downgrading of the religious status of AIH is its role in ensuring that the new technology will not become a tool of abuse in the hands of an unscrupulous spouse. One of the practical halakhic ramifications of the downgrading is that if one or both parties in an infertile marriage do not wish to pursue assisted reproduction for understandable reasons, they are not obliged to do so. Indeed, they may even claim that in the absence of any possibility of fulfilling a biblical commandment by means of AIH, they are adopting the most virtuous course by refraining from it. In other words, AIH may not be invoked by one party to a marriage as a means of obtaining a divorce on the grounds that refusal to undergo it is tantamount to nullifying the biblical commandment to propagate, which is fundamental grounds for divorce in Jewish law. At the same time, not only is a couple struggling hard to overcome a fertility problem permitted to engage in AIH; with the production of a child they will even have a rabbinic mitzvah to their credit. The rabbinic status of procreation achieved by means of AIH provides the basis for an element of choice in this area, which might not be the case if AIH were held to be a valid means for fulfilling the biblical obligation to procreate. In this respect, an effort is made to ensure that a technology of hope is not turned into a tool of abuse.

II. Artificial Insemination Using Donor Sperm ("AID") and the Issues of Adultery and Mamzerut

From a legal point of view, the use of donor sperm in artificial insemination (AID) poses many more problems than insemination carried out using the husband's sperm (AIH). Amongst these problems are adultery, mamzerut, the possibility of incest between children of the sperm donor from different mothers, and a whole range of problems in the areas of family and succession law resulting from the fact that the origin of the AID child might not be a matter of public knowledge. At the same time, however, AID is the most widely practiced form of artificial insemination, and it is

24. A mamzer is the product of an adulterous or incestuous union, and may not marry another Jew. He may marry another mamzer or a convert but in both cases, the product is another mamzer. See The Principles of Jewish Law, supra note 22, at 435-38.
often the only solution for a wide range of fertility problems, including total male infertility, low sperm counts, complications arising out of incompatibility between a couple's blood types, especially the Rh factor, and problems relating to the immune system in the reproductive organs. AID is also used as a last resort in cases in which there seems to be no apparent reason for an infertility problem. It has been estimated that thirty percent of infertility cases are due to deficiencies in the male reproductive system. AID may often be the only hope for an infertile couple yearning for a child who is genetically related to the mother, and who she can carry in her womb through a full pregnancy culminating in birth. The tragedy of infertility and its special significance for traditional Jewish families was referred to in relation to AIH, and it is no less relevant in the present context.

The gravest legal issue relating to AID is that of adultery and the consequences for the children of an adulterous union. The halakhic answer to the question of whether or not AID constitutes adultery turns on a Talmudic passage dealing with the permissibility of a marriage between a high priest and a pregnant virgin. Under biblical law, a high priest is required to marry a virgin. In the Talmud, the following question is posed: Is a virgin who happens to be pregnant permitted to a high priest or not? In attempting to provide this scenario with some factual basis, the Talmud suggests that a virgin may become pregnant as a result of entering a bath into which a man had recently discharged his semen. It should be made clear that for our purposes, the significance of the discussion lies in the light it seeks to shed on the legal definition of sexual offenses in Jewish law, and not in the history or physiology of virgin conception. The question which the Talmud is seeking to answer is whether, in relation to the issue of marriage to a high priest, a woman ceases to be a virgin only as a result of having had intercourse with a man, or is becoming pregnant sufficient to deprive her of her virginal status, even in the absence of any act of intercourse?

If the answer is that virgin status is lost only as a result of intercourse, the pregnant virgin would be permitted to marry the high

25. See Steinberg, supra note 1, at 149.
27. Talmud Bavli Hagigah 14b-15a. Although some earlier authorities believed in the possibility of bathtub conception (Rabbeinu Hananel, Talmud Bavli Hagigah 15a; Tashbez 3 no. 263), the majority of halakhists deny the possibility of conception taking place in such circumstances. See Ozar Haposkim 1 no. 42.
priest, and more importantly, a general rule may be derived to the effect that in all sexual offenses, the physical element of the crime is intercourse and not impregnation. Thus, a married Jewish woman who is impregnated by the semen of a Jewish man other than her husband, without having had sexual relations with him, is not an adulteress. If, on the other hand, the answer is that pregnancy is incompatible with virginity, then the virgin is prohibited to the high priest. The general rule would then be that impregnation alone is sufficient to constitute the physical element of sexual offenses such as adultery and incest.

Both Rashi and Tosafot interpret the passage such that the conclusion is that intercourse rather than pregnancy renders a virgin unsuitable for marriage with a high priest. The majority of halakhic authorities would also appear to adopt this view of the passage and accept the conclusion that a high priest is permitted to marry a pregnant virgin. The rule which emerges from this interpretation is that sexual intercourse alone and not impregnation, constitutes the physical element in the definition of sexual offenses such as adultery and incest in Jewish law.

Another important halakhic source for this issue is a ruling by R. Perez of Corbeil, a French Tosafist, in relation to a woman who becomes pregnant during her menstrual period. Under Jewish law, sexual relations between a husband and wife are forbidden during menstruation. R. Perez addresses the scenario of a married menstruant who becomes pregnant as a result of lying on her husband's sheets shortly after his having ejaculated semen onto them. According to R. Perez, there is no question of any breach of Jewish law here, since no actual intercourse has taken place. However,
he goes on to say that a married woman must avoid lying on the semen-covered sheet of a man other than her husband. The reason for this is that if she does become pregnant and give birth, the resulting child may one day marry the progeny of his biological father, thereby committing incest. Any child of this marriage would then be a mamzer.32 R. Perez’s ruling that a married woman must not lie on the sheet of another man is based solely upon the fear of possible incest. There is no indication that, in the absence of sexual intercourse, conception from a stranger’s semen constitutes adultery. Indeed, in the absence of any such indication, it may be assumed that intercourse alone, and not impregnation, constitutes the defining physical element in the offense of adultery in Jewish law.

Two significant points emerge from R. Perez’s ruling. The first is a reiteration of the principle implicit in the Talmudic discussion of the high priest and the pregnant virgin that impregnation alone does not constitute the defining physical element of sexual offenses under Jewish law. The second is that the progeny of a married woman conceived as a result of her lying on a sheet covered with another man’s semen is not a mamzer: Since no act of intercourse is involved, the child is completely free of the taint of mamzerut.

The sole reason for prohibiting the married woman from lying on another man’s sheets is the fear of possible incest. It is only this be found in the Apocrypha. According to this legend, Simon ben Sira was conceived as a result of the prophet Jeremiah being forced into an act of onanism in a bath and his daughter having been impregnated with his semen as a result of entering the bath after he left. Midrash Alef Beth Debem Sira 43 (Y. Eisenstein ed., 1928); see also Steinberg, supra note 1, at 548-50. The legend supports the notion that bathtub conception cannot give rise to mamzerut since Ben Sira, notwithstanding his origin, was a “perfectly legitimate Jew” (“kasher hayah”). This legend appears in various halakhic works. See, e.g., Likkutei Maharil no. 5; Tashbez 3 no. 263; Helkat Mehokek, Even Haezer 1:18; Birkei Yosef, Even Haezer 1:14; Pahad Yizhak, sub voce ben bito; Responsa Yabia Omer, Even Haezer 8 no. 21. R. Ovadiah Yosef uses this legend to prove that the child of a married Jewish woman who underwent AID using Jewish sperm is not a mamzer. But see Responsa Ziz Eliezer 9 no. 51; Jakobovits, supra note 20, at 247-48 (denying the legend carries any serious legal weight).

32. Jewish law only recognizes natural parenthood, therefore, the father of an artificially inseminated child is always the sperm donor. See Michael J. Brodye, The Establishment of Maternity and Paternity in Jewish and American Law, 3 Nat’l Jewish L. Rev. 117, 118-19 (1988). R. Perez’s ruling is cited in Bayit Hadash, Yoreh Deah 195; Shiltei Hagiborim, Talmud Bavli Shevuot ch. 2; Birkei Yosef, Even Haezer 1:14; see also Maimonides, Commentary to the Mishnah, Sanhedrin 7:4 (holding that mamzerut is established even if the parents were unaware that their relationship was incestuous).
possibility that accounts for R. Perez's warning that a married woman must not lie on another man's sheets.

R. Perez's opinion is cited by all the major commentators on the Shulhan Arukh and it provides the primary supporting source for the many authorities who rule that in the absence of sexual intercourse, the insemination of a married woman with donor sperm does not constitute adultery.

There is no indication that R. Perez's discussion was related to an actual case. Indeed, the idea that pregnancy could be brought about other than by means of sexual intercourse was simply not accepted by most halakhists as a practical possibility. In the mid-twentieth century, however, things changed. With the advent of artificial insemination, the issue of conception without intercourse became a highly relevant halakhic topic, and the subject of a heated debate between two prominent North American authorities, R. Moses Feinstein and R. Yoel Teitelbaum. The debate began with a question posed to R. Feinstein concerning an infertile couple who were desperate to have a child. The problem clearly lay in the husband's lack of viable sperm. R. Feinstein, following the position in the Talmud and R. Perez, concluded that there was no issue of adultery in relation to donor sperm, and permitted the couple to undergo AID in a local fertility clinic. To overcome the problem of potential incest, upon which R. Perez's strict ruling regarding a married woman lying on another man's sheets is based, R. Feinstein confined his permissive ruling to a non-Jewish sperm donor. The reason for this is that non-Jewish paternity is legally

33. Turei Zahav, Even Haezer 1:5; Helkat Mehokek, Even Haezer 1:8; Beth Shmuel, Even Haezer, 1:10.
34. See, e.g., Responsa Shoel Umeshiv 3 no. 132; Responsa Mishpetei Uziel, Even Haezer no. 19; Responsa Seridei Esh 3 no. 5; Responsa Menahem Meshiv no. 26; Responsa Iggrot Moshe, Even Haezer 1 no 71; R. Shlomo Zalman Auerbach, Artificial Insemination, 1 Noam 145 (1958); see also Steinberg, supra note 1, at 154.
35. See supra note 27 and accompanying text.
36. In fact, a couple of years earlier, the topic of AID was the theme of an entire volume of the halakhic journal (1 Noam 145), but it was R. Feinstein's practical decision which raised a storm in the rabbinic world. It is noteworthy that in that volume, R. Auerbach ruled leniently on the status of a married woman who underwent AID using Jewish sperm, although he did declare that the offspring would be a doubtful mamzer, and he condemned the option of using non-Jewish sperm on both moral and ideological grounds.
37. Responsa Iggrot Moshe, Even Haezer 1 no. 71. It is noteworthy that R. Feinstein refers to a view cited in the Ozar Haposkim 1:42 that “AID using Jewish sperm constitutes adultery and any children will be mamzerim” but dismisses it on the grounds that “it is clearly not possessed of any halakhic weight.”
irrelevant under the *halakhah*. Jewish children fathered by a non-Jew share no legally significant relationship with each other on the paternal side, and are free to marry each other without any fear of transgressing the prohibition on incest.\(^{38}\) Indeed, even if the non-Jewish sperm donor were to convert to Judaism, marry a Jewish woman and one of the children of this marriage was to marry a "product" of the AID in which he had participated prior to marriage, no act of incest will have been committed. Because he was non-Jewish at the time of the AID, he was incapable of establishing any legally significant paternal link with his offspring under Jewish law. In R. Feinstein's view, it is safe to assume that the majority of sperm in North American sperm banks and fertility clinics is of non-Jewish origin. Hence, the couple in question may use the services of any sperm bank in order to help solve their fertility problem and avoid the breakdown of their marriage.

According to R. Feinstein there is no question of adultery or *mamzerut* in relation to AID, even if the sperm comes from a Jewish donor. It is only because of fear of possible incest between the AID child and other children of the same donor that his permissive ruling is confined to non-Jewish sperm. The majority of authorities appear to support the purely legal aspect of R. Feinstein’s approach,\(^{39}\) although, as will be pointed out in the following Section, they distance themselves from it on moral grounds.

R. Feinstein’s ruling came under heavy attack from a number of *halakhic* authorities.\(^{40}\) R. Yoel Teitelbaum, a staunch traditionalist, became R. Feinstein’s primary protagonist on this matter. Accord-

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38. Talmud Bavli Yevamot 45b; Maimonides, Hilkhot Issurei Biah 15:3; Tur, Even HaEzer 16; Shulhan Arukh, Even HaEzer 4:1.

39. See Steinberg, supra note 1, at 156-57. Regarding the issue of *mamzerut*, R. Auerbach maintains that the product of AID using Jewish sperm is a doubtful *mamzer*. Auerbach, supra note 34. According to R. Yehiel Weinberg, its status is that of a *shetuki*, one whose father is unknown. Responsa Seridei Esh 3 no. 5; see also The Principles of Jewish Law, supra note 22, at 437. A *shetuki* is treated as a doubtful *mamzer*, but unlike the latter, its status may be resolved by the mother’s statement regarding the identity of the father, or by a statistical analysis of the semen donors at the clinic attended by the mother.

40. The American *halakhic* journal Hamaor published a number of articles between 1961 and 1965 heaping criticism upon R. Feinstein in both *halakhic* and personal terms. Indeed, the author of the journal saw fit to state that R. Feinstein’s strict rulings in other areas were undoubtedly to be relied upon, because if even he could not permit, then the matter under discussion was surely prohibited beyond a shadow of doubt! His lenient rulings, however, needed to be treated most circumspectly since "his capacity for leniency exceeds that of the most lenient authorities in Israel." R. Meir Amsel, Further Important Details Regarding Artificial Insemination, 16:1 Hamaor 147 (1965).
The halakhic prohibition on adultery is defined in terms of causing lineage confusion, i.e., uncertainty with regard to the father, as well as forbidden intercourse. This idea is derived from a point made by Nahmanides to the effect that the word “for seed” is the biblical prohibition on adultery: “And you shall not lie carnally for seed with your neighbor’s wife,”\(^4\)\(^2\) carries the implication that lineage confusion is an inherent element in the definition of the offense.

Nahmanides’s interpretation is, in fact, cited by the author of the Sefer Hahnukh, an explanatory work on the Divine commandments, as an important reason for the prohibition on adultery.\(^4\)\(^3\) R. Teitelbaum gives the Sefer Hahnukh’s purely explanatory comment halakhic force, and argues that an act of lineage confusion constitutes adultery under Jewish law even in the absence of sexual intercourse. Since AID raises doubts as to the child’s paternity, R. Teitelbaum regards it as an act of adultery under biblical law.

R. Teitelbaum distinguishes between a case in which impregnation was purely accidental, as in the case of a woman lying upon sheets containing semen, and a planned pregnancy as in the case of AID. In R. Teitelbaum’s view, R. Perez’s statement that “since no act of intercourse is involved, the child is completely free of the taint of mamzerut” is based upon the fact that the semen-ejaculator did not intend to impregnate the woman in question, and she did not intend to become pregnant as a result of lying on his sheets. The pregnancy was completely unplanned. This is the only reason that it is not considered adultery, and the child is not a mamzer. Thus, R. Perez’s ruling may not be used to free the product of deliberate insemination from the taint of mamzerut, as it only applies to chance insemination.\(^4\)\(^4\)

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42. Leviticus 18:20. Nahmanides observes that the word “for seed” (Hebrew: “lezara”) might be used “in order to mention the reason for the prohibition on adultery, i.e., it will not be known to whom the child belongs, and as a result, great and wicked abominations might be done by both father and child.” In fact, Nahmanides only raised this interpretation as a possibility. He continues, that in his view “the correct interpretation” of the word is to emphasize that the sin is not merely lying with a forbidden woman, but lying with her in such a way that it is an act of sexual intercourse capable of bringing a child into the world. See Nahmanides, Commentary on the Torah.

43. Sefer Hahnukh, Yitro no. 5.

44. R. Teitelbaum provides a similar explanation for finding that Ben Sira was perfectly legitimate, notwithstanding his highly dubious origin. See supra note 31.
The problem with this argument is that nothing in R. Perez's text indicates that the crucial issue with which he is dealing is the intention of the parties, rather than the physical definitions of the offenses of sexual relations with a menstruant and adultery. Indeed, he states quite clearly, "since no act of intercourse is involved, the child is completely free of the taint of mamzerut." If the real reason for avoiding the taint of mamzerut was the lack of intention to transfer the semen from the man to the married woman by means of the sperm-covered sheet, then this should have been indicated in the text. Also, the role of intention in relation to the law of mamzerut is unclear. It is established law that the child of a woman who mistakenly believed her husband to have died, and, on that basis, was permitted to remarry by a rabbinical court, will, upon the reappearance of her first husband, be declared an adulteress and her children from the second marriage declared mamzerim.\footnote{45} This law suggests that mamzerut is defined solely in physical terms and that mental intention is irrelevant.

Perhaps sensing the weakness of the argument from lack of intention, R. Teitelbaum goes on to claim that the offense of adultery must be understood on many levels, some of which are only comprehensible to the mystics:

> And, in truth, there are many more hidden reasons than revealed ones and they are only known to the mystics. Indeed, there are such lofty matters involved in the commandments that no human being is capable of fathoming their entire significance.\footnote{46}

It is, therefore, dangerous to rely upon a purely rational understanding of halakhah, especially in relation to an offense as serious as adultery. In R. Teitelbaum's view, "the correct approach is to exercise great caution before permitting any course of action, which might even conceivably constitute the crime of adultery."

R. Teitelbaum also criticizes R. Feinstein in terms of the theory of halakhic decision-making. R. Feinstein's halakhic decisions are almost always based directly upon Talmudic sources. He does not generally pay much attention to later commentators or codifiers. R. Teitelbaum cites the ancient debate between those authorities who arrive at their decisions on the basis of the Talmud alone, and those who interpret those sources on the basis of later halakhic

\footnote{45} See Arukh Shulhan, Even Haezer 17:56; see also The Principles of Jewish Law, supra note 22, at 412.

\footnote{46} Responsa Divrei Yoel, supra note 41. See generally Lasker, supra note 3 (regarding the influence of mysticism in this area of halakhah).
He prefers the view of R. Joseph ibn Migash, the principal spokesman of the second of the above-mentioned schools of thought, who maintains that it is more appropriate to arrive at halakhic rulings with the aid of later gaonic responsa, than to rely solely upon the Talmud, since "there is no scholar in our times who is able to fathom the true meaning of the Talmud without the aid of gaonic commentaries." In R. Teitelbaum’s view, this statement of R. Joseph ibn Migash applies even more strongly in contemporary times “when halakhic knowledge in general is at a high premium and a profound understanding of all its levels is virtually non-existent.” Regretfully, there are “contemporary authors who, on the basis of vain and unsubstantiated inferences from the Talmud, produce terrible leniencies in the strictest of matters such as adultery and mamzerut.” R. Teitelbaum’s conclusion is that AID constitutes adultery and any resulting children will be mamzerim.

R. Feinstein responded to the entire range of R. Teitelbaum’s criticisms in another responsum on AID in Jewish law. Regarding the definition of adultery, R. Feinstein insists that a strict distinction must be made between sexual intercourse, which is the physical element in the offense of adultery, and lineage confusion, the avoidance of which may or may not be an extra-halakhic, peripheral dimension of the prohibition. R. Feinstein makes his point by observing that acceptance of lineage confusion as a core legal element in the offense of adultery may well lead to the patently false argument that adultery with an infertile woman is not illegal, since there is no danger of lineage confusion in such a case. Clearly, sexual intercourse alone constitutes the sole core element in the offense of adultery; lineage confusion is at best, a peripheral, extra-halakhic dimension of the offense. R. Feinstein also argues that the major source used by R. Teitelbaum for the idea that lineage confusion constitutes an integral part of the offense of adultery, Nahmanides’s Commentary on the Torah, is not, strictly speaking, a halakhically authoritative work. As such, there is no genuinely normative basis for R. Teitelbaum’s major legal argument in favor of including lineage confusion in the biblical offense.

47. See Menachem Elon, Jewish Law 1229-31 (1994).
48. R. Joseph ibn Migash, Responsa Ri Migash no. 114. The Gaonim were post-talmudic authorities located mainly in Babylon who originated the halakhic literary genres of codes and responsa in an effort to summarize and consolidate the vast body of Talmudic law. See Elon, supra note 47, at 42-43, 1150-67, 1468-73.
49. Responsa Divrei Yoel, Even Haezer no. 110.
50. Responsa Iggrot Moshe, Even Haezer 2 no. 11.
of adultery. Moreover, R. Feinstein argues that the remark about lineage confusion and adultery may be the work of an errant disciple, and not of Nahmanides himself.

Regarding his general approach to decision-making, R. Feinstein turns the tables on both R. Teitelbaum and his other critics by claiming that whereas his ruling is based upon purely objective halakhic analysis, their rulings are influenced by "external opinions," with the result that they "prohibit the permitted, and permit the prohibited." He insists that halakhic rulings be evaluated according to objective legal criteria, and that lenient decisions are not refuted purely on the grounds of their leniency.

All my opinions are based solely upon the knowledge of the Torah and are completely free of any external ideas. For the laws of the Torah are true whether their effect is to be strict or to be lenient. There is no halakhic validity whatsoever in external ideas or inclinations of the mind, even if they lead to a strict ruling. The idea that a strict result is necessarily purer and more holy than a lenient one is false.

R. Feinstein does not elaborate on the "external ideas" upon which his protagonists in the contemporary debate rely. Presumably, one of them is the notion that it is always better to err on the side of strictness when confronting a novel situation, as in the case of AID. Another is the use of a whole range of non-halakhic arguments commonly used by his contemporary opponents to refute his position. The feature common to all these "external ideas" is their

52. The halakhic status of Nahmanides's Commentary on the Torah is a matter of debate. See R. Yechezkel Landau, Responsa Noda Biyehuda 2, Yoreh Deah no. 28; Daniel Sinclair, The Status of Human Healing and Coercive Medical Treatment in Jewish Law 18-19, in Shenaton Hamishpat Haivri 270 (1992-94). It ought to be noted that Nahmanides only offers lineage confusion as one possible explanation of the phrase in question. See supra note 42. It is also evident that according to Maimonides, any law derived from Leviticus 18:20 is restricted to the male adulterer and would not apply to a female. See Sefer Hamitzvot, Negative Commandments no. 347.

53. The "errant disciple" or "forger" is not an uncommon theme in R. Feinstein's responsa. See Responsa Iggror Moshe, Hoshen Mishpat 1 no. 69 (discussing the abortion of a Tay-Sachs fetus). It may be safely assumed that these claims are not based upon historical research but are a formal device used in order to remove the tension between R. Feinstein's conclusions regarding any particular halakhic matter, and the opposite view taken by less than leading precedents in that area. In the present case, the method is used with regard to Nahmanides's Commentary on the Torah which, as pointed out in supra note 52, is not a primary halakhic source. Similarly, the sources dismissed on the basis of this argument in the context of abortion are not front rank decisors, as far as R. Feinstein and his classical approach to halakhic decision-making is concerned.

54. See supra note 52.
lack of formal halakhic pedigree. He takes pains to point out that until the onset of this debate, no significant halakhic authority had ever adopted the view that a child produced by the product of AID might be a mamzer. The few authorities that do represent a vast minority and their views were, at best, of a tentative nature only:

They are, in fact, completely irrelevant, since they do not possess the normative authority of the more classical sources, and their opinions are formed entirely on the basis of external factors, which are at odds with the very fundamentals of the laws governing forbidden sexual relations as laid down in the Torah and the Talmud.55

R. Feinstein is clearly of the opinion that a strictly legal approach is to be adopted in this area, and it should not be compromised by non-halakhic sources.

R. Feinstein’s opinion, therefore, remains unchanged, and in his view there is no halakhic bar to AID provided that non-Jewish sperm is used. Indeed, if the resulting child is female, there would not even be any restriction on her marrying a kohen (priest).56

In 1965, a book appeared in Brooklyn purporting to carry a retraction by R. Feinstein. In the book, he is reported to have stated that his lenient decision is not to be relied upon in practice, since he permitted the use of AID with non-Jewish sperm only in the gravest of cases, and the discretion to decide whether a particular case falls into this category is, in fact, beyond the capacity of even the most experienced halakhic authority.57 However, some twenty years after his original debate with R. Teitelbaum, R. Feinstein obviously felt the need to reiterate his position on AID, and in another responsum on the topic, he emphasizes that everything which he had written in his two earlier responsa is “true and clear law and there is absolutely no basis for any retraction.”58 He does, however, add that he did not always give practical rulings in accordance with his view of the halakhah, but used his discretion in line with considerations of a pastoral nature. R. Feinstein explains that it is important to realize that AID may not bring a couple together, but may instead drive them apart. In particular, without proper counseling, there is no guarantee that the husband of the inseminated

55. See supra note 52.
56. Priests are restricted in the type of women whom they are allowed to marry and the daughter of a non-Jew falls within these restrictions. See The Principles of Jewish Law, supra note 22, at 361.
57. R. Zvi Freidman, Zvi Hemed, kuntresim 41-43 (1965). This retraction is also cited in Responsa Ziz Eliezer 9 no. 51; Responsa Helkat Yaacov 3 no. 47.
58. Responsa Iggrot Moshe, Even Haezer 4 no. 32.
woman will accept the child. Since there are no halakhic grounds for regarding AID as a compulsory procedure, as artificial insemination per se may not be a valid method for carrying out the biblical commandment to procreate, it should only be recommended to couples who are properly prepared for receiving a child through AID. Nevertheless, regarding its halakhic status, R. Feinstein reiterates his earlier position, and categorically states that if a couple proceeds with AID using non-Jewish sperm, "the child is perfectly legitimate and may even marry a kohen."

At the same time as R. Feinstein's original responsum was issued, R. Shlomo Zalman Auerbach also argued that since the product of AID using non-Jewish sperm would be free of all legal impediments, the use of the technique may well be permitted to a couple "in dire need." However, R. Auerbach's view was expressed in the form of a theoretical insight rather than a practical ruling, and was accompanied by a stern warning to the effect that his words were to be treated as a basis for experienced authorities to use in future rulings and not as binding halakhah. This presumably saved it from becoming the focus of the type of criticism leveled at R. Feinstein's responsum. He also took care to express strong reservations of a moral nature with regard to the use of non-Jewish sperm.

Concerning the practical question of establishing the non-Jewish origin of sperm obtained from a sperm bank, R. Feinstein relies upon the fact that the majority of donors in a country like the United States are non-Jewish. Hence, it may be assumed that the sperm in any particular case will have come from a member of the majority, i.e., a non-Jewish donor, and the problem of potential incest is, therefore, entirely avoided. R. Teitelbaum, on the other hand, insists that a more stringent standard must be applied with regard to lineage determination and hence, even if he were to accept R. Feinstein's argument regarding the definition of adultery, he would still be unable to accept his lenient ruling, since the possibility of incest amongst the various children of the sperm donor may only be discounted if it is definitely known that the donor sperm is from a non-Jew. Since this was not the type of information generally given to an infertile couple requesting AID at the time of the debate, the procedure may not be used.

R. Teitelbaum appears to be in the minority on this issue as well. For example, even R. Weinberg, who maintains that AID using

59. See Auerbach, supra note 34.
Jewish sperm results in a shetuki, a child with a known mother but an unknown father and therefore, a doubtful mamzer, agrees that if the sperm is non-Jewish, then, by virtue of the majority principle, the child is not subject to any legal defect. Therefore, in terms of the purely legal consensus, R. Feinstein's solution appears to be free of complications. It is, however, rejected by the majority on moral grounds, as we will see in Part IV, infra.

III. Other Halakhic Problems Associated with AID

Another halakhic problems associated with AID is the fear that a woman whose husband was childless and who had conceived by means of AID, might remarry upon the husband's death without first obtaining halitzah from her brother-in-law. Under biblical law, the widow of a man who died without any issue is required to marry his brother in order to continue the line of her dead husband. The brother of the dead husband may, however, release her from the levirate marriage in a ceremony called halitzah. She is then free to marry whomever she pleases. Today, halitzah is the norm and if the dead brother's wife does not carry it out, she may not remarry. If she does remarry, her second husband is required to divorce her. Clearly, if AID is permitted, a woman who gave birth as a result of artificial insemination with donor sperm will, on the death of her husband, be in a position to avoid halitzah by concealing the fact of her child's AID origin. Some authorities consider this possibility sufficiently grave as to provide a serious objection to permitting AID. Others, such as R. Feinstein, argue that the problem may be avoided by identifying AID children to the rabbinic authorities responsible for registering marriages. Indeed, the lack of secrecy as to the halakhic identity of sperm donors and their offspring is an essential element in R. Feinstein's liberal approach to AID.

60. Talmud Bavli Kiddushin 74a; Maimonides, Hilkhot Issurei Biah 15:12; Shulhan Arukh, Even Haezer 4-26; The Principles of Jewish Law, supra note 22, at 437.
61. Responsa Seridei Esh 3 no. 5.
62. See Steinberg, supra note 1, at 155 (providing a detailed list of problems).
63. Deuteronomy 25:5-6.
64. However her children from the second marriage will not be mamzerim. See Talmud Bavli Yevamot 13b; Maimonides, Hilkhot Ishut 4:14; The Principles of Jewish Law, supra note 22, at 403-09.
65. Responsa Zekan Aharon 2 no. 97; Responsa Ziz Eliezer 3 no. 27.
The possibility of concealing the fact that a particular child was born through AID is also disturbing in relation to those areas of Jewish law in which male lineage is a legally constitutive element. In this context, it is important to note that Jewish law defines paternity in natural terms only.\textsuperscript{67} It does not recognize adoption as a substitute for natural parenthood.\textsuperscript{68}

One area in which the establishment of natural paternity is legally significant is the establishment of priestly identity. Priestly status only passes to the male descendants of a priest. Therefore, if the sperm donor is a non-priest, and the donee’s husband is a priest, their son is not entitled to priestly status. The husband may, however, be tempted to conceal his son’s origins and bring him up as a priest. Similarly, if the sperm donor is a priest, his son will also be a priest, and if the donee’s husband is a non-priest, he may be tempted to conceal the child’s priestly identity in order to avoid making the nature of his son’s conception public knowledge. Once again, modern halakhic authorities are divided over the seriousness of this issue. Some see it as a serious objection to the use of AID,\textsuperscript{69} whereas others claim that it is easily overcome by requiring complete openness with regard to the use of AID in relation to all paternity related matters.\textsuperscript{70}

Problems may also arise with respect to the establishment of the actual paternity of an AID child. According to the majority of authorities, if the sperm donor is Jewish, he is the father in all respects, including priestly status and inheritance.\textsuperscript{71} Other authorities argue that because AID always has an element of uncertainty with regard to the identity of the sperm donor, he is only considered the father with respect to stringencies, such as the ban on sibling marriage. In all other respects, such as inheritance rights, paternity is not established, and the child’s lineage follows that of its mother or maternal grandfather.\textsuperscript{72} This is yet another issue in relation to which openness with regard to the fact that the child in question was conceived using AID will solve the problem.

\textsuperscript{67} See Broyde, \textit{supra} note 32, at 118-19.
\textsuperscript{68} See \textit{The Principles of Jewish Law}, \textit{supra} note 22, at 440.
\textsuperscript{69} \textit{Responsa Minhat Yizhak} 6 no. 140.
\textsuperscript{70} See Steinberg, \textit{supra} note 1, at 155.
\textsuperscript{71} See Tashbetz 3 no. 263; \textit{Beth Shmuel, Even Haezer} 1:10; \textit{Helkat Mehokek, Even Haezer} 1:8; see also Auerbach, \textit{supra} note 34, at 156.
\textsuperscript{72} \textit{Turei Zahav, Even Haezer} 1:8; \textit{Responsa Mishpetei Uziel, Even Haezer} no. 19; \textit{Responsa Zekan Aharon} 2 no. 97; cf. Broyde, \textit{supra} note 32, at 120 n.24 (citing authority holding that the Talmud implies through its silence that paternity is established through artificial insemination).
In this context, it is noteworthy that the general trend today in many jurisdictions throughout the world is to keep a register of sperm donors, and to provide all relevant information to their AID children. The primary purpose of such a register is to prevent incest and marriage within the prohibited degrees of affinity. Information may also be supplied in relation to the donor's ethnic type and genetic health. There is as yet no generally accepted right of an AID child to know the identity of her biological father. Under Swedish law, however, a child does have the right to know the identity of her sperm donor upon achieving the age of majority.\textsuperscript{73}

IV. Moral Objections to AID

The majority of halakhic authorities agree with R. Feinstein that AID does not constitute full-blown adultery under Jewish law. Nevertheless, they are opposed to it either because of the other halakhic problems that it engenders, or on moral grounds.\textsuperscript{74} Since most, if not all, of the attendant halakhic problems related to AID can be resolved with the full knowledge of the sperm donor's identity, we return to the point made by R. Jakobovits that the strong opposition expressed by many modern authorities to AID is based upon moral rather than legal considerations.\textsuperscript{75} In R. Jacobovits's view, the major objection to AID is that it is a "mechanical act," bereft of the human qualities associated with the act of marital love. This remark expresses the profound moral discomfort raised by assisted reproduction. It also manifests a weak form of naturalism, which is discussed infra.

R. Yehiel Weinberg bases his opposition to AID on the notion that the introduction of a stranger's semen, including that of a non-Jew, into the womb of a married woman constitutes "an ugly act and an abomination of Egypt."\textsuperscript{76} The reference to "an abomination of Egypt" is biblical in origin, and the source is in the moral prologue to the chapter in Leviticus dealing with the laws of forbidden sexual relations. These laws are introduced with a general warning not to follow in the ways of the Egyptians and the Canaanites, and not to practice any of their abominations.\textsuperscript{77} By

\textsuperscript{73} See J. Kenyon Mason & Alexander McCall Smith, Law and Medical Ethics 66-67 (1999).

\textsuperscript{74} See Steinberg, supra note 1, at 154-55.

\textsuperscript{75} See Jakobovits, supra note 20, at 248-49.

\textsuperscript{76} Responsa Seridei Esh 3 no. 5.

\textsuperscript{77} See Leviticus 18:3, 26-30; Ezekiel 23:19; see also Encyclopedia Mikra'it 466-68 (1982).
including AID in this general warning, and not in any of the specific prohibitions in the chapter, R. Weinberg indicates that while there is no major *halakhic* prohibition against AID, it is mainly forbidden on moral grounds. It is an offense against sexual mores rather than sex laws.

R. Yaakov Breisch, with whom R. Weinberg corresponded on this matter, adopts a similar approach. In common with the majority view, R. Breisch does not agree with R. Teitelbaum's view that the product of AID is a *mamzer*, but he does maintain that "from the perspective of our religion, it is clearly forbidden to do such ugly things which are comparable to the deeds of the lands of Egypt and Canaan and their abominations." R. Breisch adds that AID is contrary to "religious sensibility in general." In this respect, he goes a little further than R. Weinberg, suggesting that when the morality of AID is tested against the standard of "religious sensibility," it is generally found to be lacking. R. Breisch also maintains that AID is contrary to the "spirit of Judaism." Presumably, his point here is that artificial insemination offends the traditional Jewish value of modesty in matters of sex and reproduction by making public that which ought to remain private. This value is central to the Jewish ethos, especially in its biblical setting, and plays a highly significant role in distinguishing the Israelites from the other nations—Egypt and Canaan—and in shaping their identity as a chosen people.

R. Waldenberg, who maintains that it refers specifically to the issue of lineage confusion, advances a more limited interpretation of the category of "Egyptian and Canaanite abominations." According to R. Waldenberg, it is a "great abomination" to introduce another man's semen into a married woman's womb since, according to the Talmud, the Divine Presence only rests on offspring who are certain of their lineage. It is noteworthy that he does not adopt R. Teitelbaum's designation of lineage confusion as a legal constituent of the biblical offense of adultery. As far as he is concerned, it is a purely moral offense, falling into the general rubric of the "abominations of Egypt and Canaan."

The moral opposition on the part of many modern *halakhic* authorities to AID also focuses on R. Feinstein's suggestion that non-

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80. *Responsa Ziz Eliezer* 3 no. 27.
Jewish sperm be used in order to avoid the problem of possible incest. In addition to the idea that it offends against a wide range of mystical concepts relating to the bio-spiritual disadvantages of non-Jewish sperm, it is also stands accused of opening a back door to assimilation. There is, indeed, something odd about the fact that many Jews regard marrying a non-Jew as anathema, whereas a prominent halakhic authority recommends the use of his sperm for solving an infertility problem!

Nevertheless, the majority of authorities shy away from declaring a halakhic ban on non-Jewish donor sperm, and choose instead to express strong moral and ideological disapproval of its use. In practice, this means that a couple resorting to AID know in advance that there will be no serious halakhic problems resulting from the procedure. Indeed, R. Breisch, who condemns AID using non-Jewish sperm in very strong moral terms, takes pains to point out that legally, sperm from a sperm-bank outside of Israel may be assumed to be non-Jewish, and the resulting child will, therefore, be free of any serious halakhic stigma. It is noteworthy that the option of using R. Feinstein’s approach is presented in a recent handbook on fertility issues aimed at observant Jews in the United States. In Israel, the availability of non-Jewish sperm is a special feature of many Israeli fertility clinics. In this respect, observant Jews are voting with their feet regarding AID, and tend to rely upon R. Feinstein’s approach in order to solve particularly pressing fertility problems.

However, the moral dimension of artificial reproduction should not be ignored. Since the future of this technology is shrouded in uncertainty, as far as its full moral ramifications are concerned, the sounding of a low note of caution may not be a bad thing. In addition to the issues raised in this Section, matters such as the traditional family structure, are implicated by this technology, and the fear that it will, indeed, destroy this structure is one of the moral

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82. See Responsa Ziz Eliezer 3 no. 27; Responsa Yaskil Avdi, Even Haezer no. 10; Responsa Divrei Yoel no. 107-10.
83. Responsa Helkat Yaakov no. 24. This assumption is based upon the majority principle. See Responsa Iggrot Moshe, Even Haezer 1 no. 71.
84. See Richard V. Grazi & Joel B. Wolowelsky, New Ethical Issues, in Be Fruitful and Multiply, supra note 13, at 202-03. According to these writers, “a Jewish couple who is sensitive to halakhic concerns should insist on obtaining donor semen from a non-Jew. Not all couples are aware of this, and the physician should discuss this in his or her counseling session.” Id.
arguments against AID raised by R. Jacobovits. His weak form of naturalism, and the cautionary note it sounds in relation to the use of reproductive technology, should, therefore, not go unheeded.

V. **In Vitro Fertilization (“IVF”)**

Certain cases of female infertility may be overcome by using IVF, a process in which egg production is stimulated hormonally, and a number of eggs are fertilized with sperm in a glass dish. Three to four fertilized eggs are typically implanted in a uterus, in the hope that at least one will successfully be brought to term. Any excess fertilized eggs are normally frozen for future use by the couple undergoing IVF, or for purposes of donation.

Amongst modern authorities, R. Waldenberg is most strongly opposed to IVF, even for a married couple using the wife’s eggs and implanting the embryos into her womb and not that of a surrogate. He raises a number of objections to the procedure, the first of which relates to the offense of seed destruction. As already observed, AIH is often used to overcome the husband’s infertility stemming from anatomical defects in his sexual organ, or severe psychological impotence. According to R. Waldenberg, the argument used in the context of AIH to justify a husband depositing his seed outside of his wife’s reproductive tract is that this is the only way he can overcome his infertility problem, and fulfill his religious obligation to reproduce. This argument fails in relation to IVF, which in R. Waldenberg’s opinion, is designed to deal exclusively with female infertility. Since the obligation to propagate does not apply to her, the husband is not justified in destroying his seed in order to facilitate IVF.

Another objection raised by R. Waldenberg is that the grounds for concern over the possibility of a sperm or embryo mix up are more serious in relation to IVF, than they are in the case of artificial insemination. This is due to the time factor involved. In IVF, both semen and egg are placed in a glass tube for a period of two to three days. During that time, the egg is fertilized and placed in a uterus. The period during which both the egg and the sperm are in vitro is longer than with artificial insemination in which the sperm is injected directly into the woman’s reproductive tract. Hence, R.

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86. See Jakobovits, *supra* note 20, at 248-49.
87. *Responsa Ziz Eliezer* 15 no. 5.
Waldenberg's misgivings regarding the serious possibility of gamete or embryo mix up.

Finally, R. Waldenberg argues that because IVF takes place in a test tube, the resulting child is totally without lineage, and has neither a father, nor a mother under Jewish law. R. Waldenberg uses this position to rule that the husband involved in IVF will not have fulfilled any mitzvah, even on a rabbinical level, and he should, therefore, avoid this procedure.

Now R. Waldenberg's point concerning the prohibition on seed destruction in regards to AIH is contested by the majority of authorities who maintain that as long as the ultimate aim is procreation, the prohibition on seed destruction does not apply to either AIH or IVF. Also, as discussed supra, practical measures may be taken in order to ensure that mix-ups of sperm and eggs do not occur. In the light of these measures, the chances of sperm or eggs being replaced are extremely small, and would not appear to justify outlawing the procedure as a whole.

Regarding the total absence of lineage, the source of this idea lies in a ruling by R. Menachem Azariah of Fano that the child of a "strange combination has no lineage—neither paternal nor maternal—under Jewish law." The context of R. Azariah's statement is a marriage between a Jewish woman and a non-Jewish man. The lack of paternal lineage in the case of a non-Jewish father is established halakhah, and plays a key role in R. Feinstein's allowance of AID using non-Jewish sperm. The novelty of R. Azariah's ruling lies in its denial of any maternal lineage to the child of this union. However, the reason for this is the sinfulness of the union, and not because of any "strangeness" connected with the physical process of conception. The "strangeness" of the combination referred to by R. Azariah, is the result of the commission of an offense. There is no evidence that R. Azariah means to deprive a child born in a physically "unnatural" way of its maternal lineage. The word "strange" is used in a legal sense only. Nevertheless, R. Waldenberg argues that the "strange combination" referred to by R. Azariah includes any reproductive process in which the encounter between the egg and the sperm takes place outside of a woman's body. As far as the establishment of maternity is

89. See supra Part I.
90. Responsa Rema Mifano no. 116.
91. R. Malkiel Tenenbaum posited a similar argument in relation to artificial insemination, observing that "once semen has been emitted and has warmth only because of the ministration of the physician and his skill with the pipette or due to the
concerned, the notion that any artificiality in the course of fertilizing the mother’s egg destroys the maternal link with the child is completely unfounded, since under Jewish law, the maternal link is established by birth, not gestation. The fact that the sperm and the egg met in a glass dish is, therefore, irrelevant to the establishment of maternity.

It becomes evident that R. Waldenberg rejects IVF on the basis of its unnaturalness. This is why he relies upon R. Azariah’s phrase “strange combination” as applied to an embryo or fetus. He clearly regards the “strangeness” of the technology involved in IVF as a negative phenomenon and expresses his disapproval of it by putting the resulting child beyond the pale of the traditional family framework. R. Azariah’s minority ruling regarding a child of a mixed couple, gives him the opportunity to base his opposition on a precedent, even if that precedent is hardly a convincing one. In this respect, R. Waldenberg’s ruling is a clear instance of the intrusion of naturalism into the halakhah and, as such, it is not surprising that R. Waldenberg has remained a lone voice amongst halakhists in this area.

R. Waldenberg’s ruling prompted a firm rebuttal on the part of R. Avigdor Nebenzahl, the rabbi of the Jewish Quarter of the Old City of Jerusalem. R. Nebenzahl begins by pointing out the human cost of prohibiting IVF to a couple desperate to conceive their own child using the wife’s eggs and womb. Such a course of action could lead to divorce, and “the destruction of the family unit in relation to the preservation of which, the Torah permitted the holy Name of God to be washed away.” R. Nebenzahl repeats the claim made by the permissive school in relation to AIH, arguing that the prohibition on the destruction of seed is inapplicable in the context of fertility treatment involving a married couple. Since the sole intention behind every act of seed emission in this context

See Respensa Divrei Malkiel 4 no. 107. R. Tenenbaum’s view is almost entirely unique, and he himself does not rule in accordance with it. See J. David Bleich, Contemporary Halakhic Problems 238-42 (1995).

92. See supra Part IV; see also Bleich, supra note 91, at 239.


94. A reference to the ritual of the sotah, a wife suspected of adultery who was compelled to swallow a drink containing a parchment slip with God’s Name written on it. Clearly, the liquid would erase the Divine Name, nevertheless, in order to restore peace between a man and his wife by proving that the woman had not committed adultery, the erasure of God’s Name was permitted. See Numbers 5:11-31; see also Talmud Bavli Shabbat 116a.
is to bring about the birth of a child, the concept of seed destruc-
tion is simply irrelevant.

Regarding R. Waldenberg's concern over the switching of eggs
and sperm, R. Nebenzahl maintains that whilst "the potential for
such abuse always exists, it would hardly seem right for the future
of a Jewish couple to be determined on the basis of a concern over
a purely potential abuse."

In a direct attack on R. Waldenberg's ruling that the artificiality
of artificial reproductive techniques per se deprives the resulting
offspring of all lineage, R. Nebenzahl points out that "we ought not
to follow external form, but ought to focus on inner content," and
as long as the aim is the fertilization of the egg, the mode of fertili-
ization should be irrelevant. According to R. Nebenzahl, there
should be no distinction between the acceptance of modern tech-
nology with regard to, say, the mending of severed limbs, and its
application in relation to reproduction. Just as no one would sug-
gest that the "artificiality" of artificial limbs offends the halakhic
mandate to heal, so too, modern reproductive technologies should
not be stripped of their therapeutic significance merely as a result
of their artificial nature.

R. Waldenberg's application of R. Azariah's concept of a
"strange combination" to the IVF offspring of a Jewish couple is
also disputed by R. Nebenzahl. The two cases are entirely differ-
ent. R. Azariah deals with a forbidden relationship under Jewish
law, namely, a Jewish woman impregnated by a non-Jewish man.
IVF involving a Jewish married couple poses no such legal problem
and there is, therefore, no question of the child being a "strange
combination." Indeed, "both the husband and the wife in the case
of IVF are potentially capable of producing their own biological
child; all they need is a little help."

Two of the issues in the debate between R. Waldenberg and R.
Nebenzahl have merited a special introductory section in the entry
on IVF in Steinberg's Encyclopedia of Jewish Medical Ethics.95
The first issue is the virtue of naturalism so strongly espoused by R.
Waldenberg. According to Steinberg, "Judaism does not accept
the view that nature is supreme and that technology ought not to
be allowed to intervene in natural processes. On the contrary, man
is a partner with God and his role is to improve the world in all its
aspects." Steinberg goes further, and states that in the context of
medical therapy, there is a halakhic obligation to develop new

95. Avraham Steinberg, Encyclopedia of Jewish Medical Ethics 2, 125
technologies in order to conquer all manner of physical disability, especially in an area in which the physical issue also affects the relationship between man and wife.96

The second issue concerns the fear of abuse in the course of the procedure and, in particular, the introduction of donor sperm and the possibility of mixing gametes in vitro. R. Nebenanzahl rejects the view that the existence of such a fear, even if it is justified, ought to result in a blanket prohibition on the use of modern reproductive technology. Steinberg addresses this issue in an appendix to his entry on IVF and makes a number of salient points.97 In principle, there is no power in contemporary times to make the entire Jewish people subject to new prohibitions aimed at protecting either biblical or rabbinic laws. This power ceased with the Talmud,98 and any subsequent protective legislation is perforce, local in its scope. There is also a general trend not to add local protective legislation to that already in place under Talmudic law, unless it is considered vitally necessary by all the authorities in any particular place.99 Steinberg sums up the various rules and regulations regarding the halakhic approach to protective legislation in cases where the fear of breaching the law is based upon considerations of a practical nature, and concludes that there is no halakhic basis for ruling against IVF on those grounds.100 He also points out that halakhic authorities in this area need to possess a high degree of scientific and medical expertise in order to base their rulings upon fact, and not upon surmise. The “strict is best” policy, therefore, should be used sparingly, if at all, in areas where halakhic authorities are often not sufficiently skilled to make accurate judgments with regard to empirical facts.101

In conclusion, the debate between R. Waldenberg and R. Nebenanzahl focuses on the position that halakhah ought to adopt vis-à-vis new, morally unsettling technology. R. Waldenberg strenuously argues for a stringent, non-permissive approach based

96. Id. at 126-27. Steinberg also refers, in this context, to the Talmudic statement regarding the erasure of the Divine Name for the purpose of bringing about peace between a man and his wife.
97. Id. at 150.
98. See Rosh, Talmud Bavli Shabbat 2 no. 15; Sedei Hemed, Maarekhet Gimmel no. 11; see also Steinberg, supra note 95, at 155 n.11.
99. See Respona Rivash no. 271; Respona Rashba 3 no. 411; Respona Maharil no. 121; see also The Principles of Jewish Law, supra note 22, at 679-779 (discussing the general topic of communal enactments).
100. See Mishnah Yadim 4:3; Talmud Bavli Berakhot 60b; Rash, Talmud Bavli Bezah 2b, sub voce deheterah; Sedei Hemed, Maarekhet Kaf no. 19.
101. See Steinberg, supra note 95, at 158-66.
mainly upon a naturalistic approach to the way in which children are brought into the world. R. Nebenzahl sees no principled halakhic objection to the use of modern reproductive technology in a reproductive context, when the sole motivation of all concerned is to enable a married couple to have a child of their own, and to avoid the possibility of the break-up of a marriage as a result of infertility-related stress.102 In many respects, there is an interesting parallel between this exchange and the one between R. Feinstein and R. Teitelbaum over the issue of AID using non-Jewish sperm. In both cases, the permissive position is based upon a formalist approach to halakhic decision-making, together with the rejection of the view that any deviation from natural procreation is morally and religiously wrong. The prohibitionist position relies upon a highly eclectic approach to the sources and maintains that with one or two exceptions, only natural procreation is morally and religiously acceptable.

VI. HALAKHIC PROBLEMS IN RELATION TO IVF USING DONOR EGGS OR A SURROGATE MOTHER: THE ESTABLISHMENT OF MATERNITY AND JEWISH IDENTITY

Many forms of female infertility are only treatable using donor eggs or a surrogate mother, and both methods raise significant halakhic problems in relation to the establishment of maternity and Jewish identity.

The question of maternal identity—which is important for the halakhic issues of incest, Jewish identity, and some aspects of civil law—arises with regard to IVF in a case where the genetic mother and the birth mother are two different people, such as a surrogate mother.103 One widely accepted view amongst halakhic authorities is that the birth mother alone is considered to be the halakhic mother of the child.104 The leading Talmudic precedent for this view is the ruling that brothers, whose mother converted to Juda-

102. See S. Barris & J. Comet, Infertility: Issues From the Heart, in BE FRUITFUL AND MULTIPLY, supra note 13, at 19-37 (discussing the high social motivation underlying the trend to seek infertility treatment amongst Orthodox Jews).

103. See Steinberg, supra note 95, at 133; see also Nehemiah Zalman Goldberg, Establishing Maternity in the Case of Fetal Implants, 5 Tehumin 249 (1984); Moshe Hershler, Test Tube Babies According to the Halakhah, 1 Halakhah Urefah 313-20 (1980); Avraham Kilav, Is Maternity Established by Conception or Birth?, 5 Tehumin 260-67; Moses Sternbuch, On Test Tube Babies, 8 Bishvilei Harefuah 29-41 (1978); cf. Yehoshua Ben-Meir, The Lineage of a Child Born to a Surrogate Mother and an Egg Donor, 41 Assia 25-40 (1986); Ezra Bick, Ovum Donations: A Rabbinic Conceptual Model of Maternity, 28 Tradition 28-45 (1993).

104. See Broyde, supra note 32, at 131-40.
ism during pregnancy, are not included in the law of levirate marriage and halitzah but are, nevertheless, forbidden to marry each other's wives. The reason for the non-applicability of the levirate law is that the brothers are not related on their father's side, since non-Jewish paternity is not recognized under Jewish law, and the levirate law only applies to brothers from the same father. However, they are related on their mother's side, and are therefore, forbidden to each other's wives, because they emerged from her womb after her conversion. In other words, since any biological relationship with their non-Jewish father lacks legal significance under Jewish law, the obligation to perform halitzah to each other's widows does not apply. However, the prohibition on having intercourse with a brother's wife does apply, because they are considered brothers on their mother's side.

The question then posed by the Talmud is that since conversion to Judaism severs all pre-existing legal links between members of the same biological family, why are the two brothers considered related on their mother's side? Because they are all converts to Judaism, they should be considered total strangers, both to each other, and to their mother. Proof that conversion does indeed cut all legal links between members of the same biological family is found in the law that a convert is permitted to marry any converted female relative, since all family members undergoing conversion are considered as if they were born anew. It should be pointed out that under rabbinic law, such marriages between biological relatives are forbidden, since they offend against universally accepted moral conventions. The question posed by the Talmud is answered by maintaining that the fact that the brothers come out of a Jewish womb, and not because they are genetically related to their mother, is the reason that they are considered her children, and therefore, bound by the law forbidding brothers from marrying each other's wives. This point is made by Rashi who comments that, as far as the issue of marrying sisters-in-law is concerned, the link between the brothers is established by their birth since their converted mother "is like any other Jewish woman who gives birth." Thus, maternity is established through birth, and not

105. See Talmud Bavli Yevamot 97b; see also supra notes 14-15.
106. Leviticus 18:16.
107. See Talmud Bavli Yevamot 22a; Maimonides, Hilkhot Issurei Biah 14:12; Shulhan Arukh, Yoreh Deah 69:1.
109. Tur, Yoreh Deah 269.
110. See Rashi, Talmud Bavli Yevamot 97b, sub voce aval hayavin.
genetics. Therefore, the rule in surrogacy situations is that it is the woman who gives birth to the child who is the legal mother, and not the egg donor.

There is a minority view that views the egg donor as the halakhic mother. The majority of halakhic authorities have not accepted this view, as it is based primarily on non-legal sources.

R. David Bleich makes an important contribution to the modern debate on establishing maternity, arguing that in light of the doubtful state of the law in this area, a child born to a surrogate has two mothers for legal purposes. Citing a number of examples drawn from the laws of agriculture, R. Bleich develops a general theory that in a case where there is doubt about the status of a plant transplant, it is best resolved by adopting a stringent approach, and treating the transplant, for the purpose of all relevant prohibitions, as being an organic part of the plant onto which it has been transplanted. Similarly, the product of a surrogate mother is forbidden to marry two sets of relatives; those of the egg donor and those of the surrogate.

In fact, the analogy with agricultural laws is not new in this area of the halakhah. R. Yekutiel Kamelhar discussed the legal implications of ovarian transplants in a halakhic journal published in Warsaw in 1932. Regarding the maternity of a child born to the recipient of a transplanted ovary, R. Kamelhar held that maternity was determined by the birth mother since the ovary became an integral part of her body upon its implantation. His reasoning was based, inter alia, upon the law of orlah, the prohibition upon eating the fruit of a newly planted tree during the first three years after planting. According to a plain reading of the Talmud, the fruit of an orlah branch grafted on to a tree that is older than three years may be eaten, since the transplant has become an integral part of the plant.

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111. See TOSAFOT, TALMUD BAVLI KETUBOT 11a, sub voce matbilin oto.
113. See BLEICH, supra note 91, at 238.
114. See TALMUD BAVLI SANHEDRIN 91b (discussing the time of ensoulment, which is apparently at conception. Hence, maternity is also fixed at conception.); see also TALMUD BAVLI NIDDAH 31a (stating that there are three partners in a person, i.e., father, mother, and God. Each partner makes his or her contribution at the time of conception, hence, that is the moment at which maternity must be established.); Exodus 21:22 (describing a miscarriage as “the loss by a woman of her offspring.” Therefore, maternity is relevant to the fetal stage and does not only arise at birth.). None of these arguments are, however, legally definitive.
115. See BLEICH, supra note 91, at 237-72.
116. See 12 ENCYCLOPEDIA JUDAICA 1467-68 (1972).
part of the tree on to which it was grafted. R. Kamelhar applies this principle directly to the case of an ovarian transplant, and decides in favor of the birth mother.

R. Bleich undertakes an extensive analysis of the sources dealing with plant transplants, and reaches the conclusion that in all of them, the final status of such a transplant remains halakhically unresolved. As a result, any legal ramifications of the transplant are to be dealt with by applying the strictures relating both to the transplant and to the transplantee. In other words, the transplant should, "for safety's sake," be treated as if it were the product of both the donor and the donee. Therefore, a child born to a surrogate mother using a donor egg is halakhically bound to refrain from marrying into the families of both the egg donor and the birth mother.

The notion of double maternity is not without its critics. R. Auerbach objects to the very existence of any analogy between agricultural laws and the halakhah governing the assisted conception of human beings. R. Nebenzahl raised a similar objection to this point.

In addition to the question of the appropriateness of these sources for resolving the issue of maternity in a human context, there is also a basic difference between the issue of doubtful maternity generated by IVF, and that of the agricultural hybrids referred to above. In most of the precedents taken from agriculture, there is no solution in the Talmud with regard to the halakhic implica-

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117. Talmud Bavli Sotah 43b; Talmud Bavli Menahot 69b.
118. See Yekutieli Greenwald, 1 Kol Bo Al Avelut 306 (1973) (citing Yekutieli Kamelhar, Hatalmud Umadei Hatevel 44-45). R. Kamelhar also makes the point that it is the womb rather than the egg that nurtures the fetus and cites another Talmudic rule, this time in the area of animal husbandry to indicate that nurturing plays an important role in arriving at a definition of maternity. See Talmud Bavli Hullin 79a; see also J. David Bleich, Contemporary Halakhic Problems 1, 106-09 (1977).
119. See Z. Low, Concerning the Children of Surrogate Mothers, 133 Or Hamizrach 150-60 (1989) (analyzing maternity from the standpoint of laws concerning agriculture and animal husbandry, which provided the setting for R. Bleich's argument).
120. Clearly, R. Bleich reads the Talmudic discussion in Talmud Bavli Menahot 69b in a more complex manner than did R. Kamelhar, and he also analyzes other cases ranging from the status of produce reaching growth prior to the offering of the Omer sacrifice to the prohibition on planting mixed agricultural species in a vineyard. See 12 Encyclopedia Judaica, supra note 116, at 169-72, 1382-84.
121. See Low, supra note 119, at 158.
122. See id.; see also Kilav, supra note 103, at 267; supra text accompanying notes 93-102 (discussing R. Nebenzahl's views on IVF using the gametes of a married couple).
tions of the transplant, and the questions remain unresolved. This is not the case with regard to the establishment of maternity. Here, there is Talmudic support for the birth mother, and while it is the only way of resolving the issue, there is not the same type of official uncertainty with regard to maternity, as there is in relation to plant transplants. R. Bleich's view is, therefore, not entirely convincing. Also, Avraham Steinberg's above-mentioned remarks in relation to the need to avoid resolving doubtful cases arising out of new technologies on the basis of stringency alone, need to be taken into account in any assessment of the dual maternity concept.

From a scientific perspective, however, the double maternity approach looks quite promising if the uncertainty amongst modern authorities regarding maternity in surrogate situations is read as a response to the challenge raised by modern genetics to the traditional approach. Clearly, modern genetics provides the basis for a very strong argument in favor of the egg donor, as opposed to the birth mother. It is also clear that traditional Jewish law does not really have any clear concept of the role of the female ovum in human reproduction and hence, it is quite unlikely that any definitive halakhic model exists for the establishment of maternity on the basis of conception alone. Against this background, any support for a more genetically friendly approach on the part of Jewish law, expressed in terms of recognition of the claim to maternity of the egg donor, is welcome. This is the case even if R. Bleich's analogy with agricultural laws is not quite convincing. From this perspective, the double maternity approach leads us to the issue of the role of science in the halakhah. For present purposes, it is sufficient to observe that in general, the relationship between scientific theory and halakhic decision-making is a dynamic one, and there are past examples of scientific concepts being taken on board by halakhists, notwithstanding the perceived initial lack of fit between these concepts and traditional halakhic precedents. This may also be the case in relation to the adoption of at least a partly ge-

123. See Steinberg, supra note 95, at 423 nn.209-14. Indeed, it would appear that the majority view was that a woman's "seed" consisted of her menstrual blood.

124. See Dov Frimer, Jewish Law and Science in the Writings of R. Isaac Halevy Herzog, 5 JEWISH L. Ass'N STUD. 33 (1991); Daniel B. Sinclair, Torah and Scientific Methodology in Maimonides Halakhic Writings, 39 LE'ELA 30 (1995). In general, the fit between traditional notions of parenthood and the reproductive options available as a result of modern technology is coming into question and there is a very real possibility that the concept of parenthood itself will need to be defined in an entirely new way. See Y. Weiler, Surrogacy and Changes in the Concept of Parenthood, 57-58 ASSIA 141-72 (1966).
ngetic criterion for establishing maternity, although only the future will tell whether or not this will, indeed, come to pass.

The other major problem associated with egg donation and surrogacy is the establishment of Jewish identity. According to the halakhah, birth to a Jewish mother determines Jewish identity. It might have been assumed that since birth determines maternity, as long as the surrogate is Jewish, the identity of the egg donor is irrelevant. However, it is not so simple. Some modern authorities insist that the product of a non-Jewish egg and a Jewish womb must undergo immersion in a ritual bath—one of the main prerequisites of conversion to Judaism—before he or she is qualified to enter into the “sanctity of Israel.” This immersion is, indeed, a form of conversion applicable in cases where there is Jewish maternal lineage, but full affinity with the Jewish people has not yet been achieved. According to this view, both birth and conception must take place in the body of a Jewish woman in order that her child is considered fully Jewish. The source for this view is the Talmudic ruling that a child born to a woman who converted during her pregnancy is Jewish because her mother underwent the ceremony, and by virtue of being inside her womb, the fetus also became a convert to Judaism. If the child is male, then the circumcision which takes place after birth doubles as a conversion circumcision, as well as the one required for every Jewish boy under biblical law. In order to reconcile this view with the principle of birth being the determinant of identity, a distinction is made between Jewish maternal lineage, and the act of conversion necessary for endowing an individual with the holiness of an Israeliite. A child conceived by a non-Jewish woman who converted during pregnancy is born to a Jewish mother and hence, possesses Jewish identity. However, conception by a non-Jewish mother constitutes a flaw as far as the “holiness of Israel” is concerned, and the product of such a conception, even if she is born to a Jewish mother, requires conversion. It follows from this position that if a fertilized

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125. Talmud Bavli Kiddushin 66b; Shulhan Arukh, Even Haezer 4:19-20.
126. Hiddushei HagraNat, Nashim Unezikin 11a, sub voce vahanireh bazeh; see also Bleich, supra note 118, at 258-62; Sternbuch, supra note 103, at 36.
127. Talmud Bavli Yevamot 78a.
128. This would, indeed, seem to be the essence of the ruling since the Talmud goes on to establish that the mother’s body does not constitute a barrier between the fetus and the waters of the ritual bath in which the immersion is performed. The reason for this is that being inside its mother is “part of its natural growth” and natural barriers do not render the immersion invalid. See Rashba, Talmud Bavli Yevamot 47b-48a; Nimmukei Yosef, Talmud Bavli Yevamot 16a; Beth Yosef, Yoreh Deah 268; Dagul Merevaveh, Yoreh Deah 268:6 (citing Nahmanides’ opinion).
non-Jewish egg is transplanted into a Jewish surrogate, the resulting child still requires conversion.\textsuperscript{129}

Not all commentators adopt this understanding of the Talmudic ruling in question; some maintain that the child of a convert is fully Jewish merely by virtue of being born to a Jewish mother.\textsuperscript{130} R. Shlomo Zalman Auerbach maintains that a child born from a non-Jewish egg and a Jewish surrogate requires conversion.\textsuperscript{131} However, R. Nehemiah Zalman Goldberg argues that a fertilized non-Jewish egg implanted into a Jewish surrogate results in a Jewish child without any act of conversion being required, provided that the implantation took place in the very early stages of fetal development. The basis for this view is the Talmudic principle that a fetus is a limb of its mother, at least in the early stages of pregnancy.\textsuperscript{132} R. Aaron Soloveitchik, who maintains that an embryo implanted prior to the fortieth day of gestation gains the religious and national identity of its mother by virtue of birth alone, adopts a similar approach.\textsuperscript{133} Since implantation in current IVF procedures takes place within three days of fertilization, it is clear that the surrogate mother will determine the Jewish identity of the child.

The different approaches to the case of the Jewish status of the pregnant convert, also impact upon the halakhic outcome in a case involving a Jewish egg donor and a non-Jewish surrogate. According to the view that conversion is required, it might conceivably be argued that the child is Jewish on the grounds that it was "conceived in holiness." Once conceived in holiness, there is no going back, even if a non-Jewish surrogate brings the pregnancy to term.\textsuperscript{134}

CONCLUSION

Jewish law has a long history in the area of medical law, beginning some 3000 years ago with the Bible, and continuing into the 21st century in the form of rabbinic responsa on the latest advances in medical research and technology. It contains a vast storehouse of primary and secondary principles, and a strong case-oriented ap-

\begin{itemize}
  \item \textsuperscript{129} See BLEICH, supra note 118, at 258-62.
  \item \textsuperscript{130} See BIUREI HAGRA, YOREH DEAH 268:5; see also Broyde, supra note 32, at 136-38.
  \item \textsuperscript{131} See Low, supra note 119, at 170 (also citing R. Nebenzahl in support of his view).
  \item \textsuperscript{132} See supra note 103 and accompanying text.
  \item \textsuperscript{133} See R. Moshe Soloveitchik, Test-Tube Baby, 100 OR HAMIZRAH 127-28 (1981) (citing his father, R. Aaron Soloveitchik).
  \item \textsuperscript{134} See Kilav, supra note 103, at 262; see also BLEICH, supra note 91, at 269-70.
\end{itemize}
approach to the resolution of problems in this area. Its legalistic framework allows for a greater measure of flexibility with regard to emerging assisted reproductive techniques than the naturalist approach of some other religious systems. At the same time, a note of caution is always present in halakhic discussions in this field, and we would do well to heed it before plunging headlong into the mass application of all that science has to offer as far as assisted reproduction is concerned. Undoubtedly, one of the most important lessons to be learned from the halakhah is that reproduction, however it is carried out, is a serious and sacred task requiring the utmost responsibility and commitment. It constitutes the fulfillment of a religious commandment, whether biblical or rabbinic, and as such, is not a matter of choice, but of obligation. This approach contrasts with the notion of "reproductive autonomy" which features in much contemporary discussion, both legal and ethical, in this area. Jewish law starts with the concept of "procreative obligation," and meets the needs of individuals within the interstices of the legal principles that make up the halakhah in this area. There may be a valuable lesson for bioethics in general in this approach.