

Assisted Reproduction: A Jewish Perspective

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Abstract

Judaism values medicine as a noble profession. Physicians are mandated by the Bible to heal, and those who are ill are obligated to seek healing from their physicians. In Jewish thought, infertility is considered an illness. Hence, in spite of many Jewish legal and ethical questions, assisted reproductive techniques such as artificial insemination, *in vitro* fertilization and surrogate motherhood, within certain limited circumstances, are viewed with favor by most current rabbinic authorities, provided the couple is unable to have a child in the normal manner and after standard medical or surgical interventions have failed.

Key Words: Assisted reproduction, artificial insemination, *in vitro* fertilization, surrogate motherhood.

Introduction

ON JULY 25, 1978, the research efforts of British doctors Patrick C. Steptoe and Robert G. Edwards culminated in the birth of Louise Brown. Steptoe and Edwards had introduced the technique of *in vitro* fertilization and re-implantation of the human embryo into the mother's womb (1). Two years later, the same investigators reported the birth of a boy by the same technique (2). Since then, tens of thousands of healthy babies have been born by this and even newer methods of assisted reproduction.

A woman becomes a "host" or "surrogate" mother when an ovum derived from another woman is fertilized and then implanted into her womb. This now-pregnant woman is the biological, but not the genetic mother. Not surprisingly, *in vitro* fertilization and re-implantation of the human zygote into the womb of either a genetic mother or a surrogate mother raises numerous legal, moral, social and religious questions (3, 4). This essay focuses on some of the Jewish issues and questions related to artificial insemination, *in vitro* fertilization and surrogate motherhood.

Ethical and Moral Concerns

There is no ethical difference between *in vitro* fertilization using the sperm of a man and

the egg of his wife, and artificial insemination involving only a husband and his wife. The main ethical questions relate to the use of donor eggs or donor sperm for *in vitro* fertilization, and the use of a surrogate mother as a womb donor. These interventions in the procreation process are becoming more frequent, more complex and more highly technological, thus altering people's understanding of the meaning of "procreation," "family" and "parenthood." The initial ethical question related to assisted reproductive technologies is whether they ought to be used at all (5). The separation of procreation from physical lovemaking is objectionable in Catholic teaching. Judaism and other religions, however, accept assisted reproduction as part of God's mandate to procreate (see below).

Americans cherish their rights of individual choice, liberty and autonomy. These values, however, may conflict with family and community values. People with autonomy are members of communities, and it may therefore be morally legitimate to limit individual choice about assisted reproduction. Critics argue that the introduction of a third party (i.e., a surrogate mother) interferes with the marriage covenant between husband and wife, thereby threatening the traditional societal value of the nuclear family. On the other hand, some people in our modern society condone the use of these new methods of reproduction by single people, and even by homosexual couples (5).

Another ethical concern is that of treating human reproduction as if it were a commodity. Altruism may be replaced by commercialism if women are paid to be egg donors or surrogate

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mothers. Limited access to assisted reproductive technologies by the poor and underprivileged is yet another ethical issue.

The legal and regulatory issues surrounding reproductive technologies concern the ability of government to ban or restrict noncoital reproduction because these technologies may harm embryos, children, consumers or public morals. In the United States, such regulation is a function of state legislatures and review by the courts. However, federal constitutional law significantly limits interference with individuals' exercise of their procreative choices (6).

Ethical and social reasons to oppose surrogacy arrangements include the commercialization of procreation; the destruction of the natural biological and psychological bonds between a woman and her fetus; the use of another woman's body; the loss of the marital bonds created by parenthood, birth and childbearing; and the "cheapening" of human life by the mechanized use of scientific technologies devoid of the love, devotion and intimacy of two happily married people created in the image of God.

Years of debate in scholarly and professional journals and books have failed to resolve these moral and ethical questions. *In vitro* fertilization is strongly opposed by some critics on moral grounds (7), and just as strongly justified by others, who argue that the procedure does not pose any moral problem (8). Despite certain moral objections to the use of the new reproductive technologies, some medical associations endorse these procedures. The American Medical Association has promulgated ethical guidelines for the use of artificial insemination, *in vitro* fertilization, frozen pre-embryos, pre-embryo splitting, surrogate motherhood and related reproductive techniques (9). These guidelines include the obtaining of informed consent (preferably written) after a full explanation and discussion of the proposed treatment, possible side effects, and any alternatives (e.g., adoption).

Judaism and the New Reproductive Technologies

General Principles

The biblical commandment, *be fruitful and multiply*, as decreed first to Adam and Eve (Genesis 1:28) and later to Noah and his sons (Genesis 9:1 and 7) and to Jacob (Genesis 35:11), is discussed in the Talmud (Tractate Yevamot 63b). This biblical statement is at

once both a blessing and a commandment. A man is obligated to propagate the race and to sire at least one boy and one girl (Genesis 1:27 and 5:2). The use of assisted reproduction to enable a couple to have children and fulfill the commandment is therefore permissible in Judaism. Non-procreative intercourse, such as occurs if the wife is pregnant or postmenopausal or has had a hysterectomy, is also required, to satisfy the wife's conjugal rights (Exodus 21:10). Physical relations actually serve several purposes in Judaism: procreation, fulfilling the wife's desires, physical release of the husband's sexual pressures, and the maintenance of marital harmony and domestic peace (10, 11).

A cardinal principle in Judaism is that each moment of life is of infinite value. In Jewish law, all biblical and rabbinical commandments are set aside for the overriding consideration of saving a life. It is, therefore, permitted and even mandated to violate the Sabbath to save the life of someone who might not otherwise recover from illness (including mental illness) and/or trauma, or to treat someone who is dying

Another fundamental principle of Judaism concerns the sanctity of human life. Man was created in the image of God. Hence, human beings are holy and must be treated with dignity and respect, both in life and after death. Our bodies are God-given, and we are commanded to care for our physical and mental well being, and to preserve and hallow our health and our lives. Only God gives and takes away life. Are we tampering with the Divine plan for humanity when we perform *in vitro* fertilization and embryo re-implantation?

Since Judaism considers infertility an illness, assisted reproductive technologies may be used to "heal" that illness. Judaism allows, but does not mandate, these techniques for the fulfillment of the precept of procreation. The commandment *be fruitful and multiply* requires only conventional sexual activity within the context of a marital relationship. As long as the methods employed in assisted reproduction do not violate any Jewish legal concerns, such methods are discretionary and permissible (12). Some rabbis frown upon these technologies, because they transform the creation of a human being from a holy act of mutual feeling between husband and wife into a laboratory procedure devoid of the human dimension. The physical union of husband and wife is replaced by a laboratory environment. Lord Immanuel Jakobovits, widely recognized as the "father" of modern Jew-

ish medical ethics, in his classic work on the subject (13), expresses concern about “assessing human beings by their potential value as tool-parts, sperm donors or living incubators, and . . . replacing the . . . human personality [with] test-tubes, syringes and the soulless artificiality of computerized numbers. Man, as the delicately balanced fusion of body, mind and soul, can never be the mere product of laboratory conditions and scientific ingenuity. To fulfill his destiny as a creative [being] in the image of his Creator, he must be generated and reared out of the intimate love joining husband and wife together, out of identifiable parents who care for the development of their offspring, and out of a home which provides affectionate warmth and compassion.”

Despite these concerns, a majority of contemporary rabbis rule that it is permissible (but not obligatory) for physicians to offer assisted procreative technologies as a medical treatment for infertility (14). Helping couples to fulfill an explicit biblical commandment — and cure an illness — is thus given high priority.

Artificial Insemination

There is a considerable body of rabbinic writings devoted to artificial insemination (15). They discuss a number of Jewish moral and legal issues: the legal relationship of the offspring to the sperm donor; the possible fulfillment of the commandment of procreation by the sperm donor; the legality in Judaism of procurement of sperm from the husband for artificial insemination and the preferred methods for its procurement; the insemination of the husband's sperm into his wife during or shortly after her menstrual cycle, when she is *niddah* (ritually unclean); the possibility of the insemination itself rendering her ritually unclean by “opening the mouth of the womb”; the question of the woman becoming ritually unclean following birth after artificial insemination; whether a male child conceived in this manner may be circumcised on the Sabbath; whether or not a woman who is inseminated with donor sperm becomes prohibited to her husband; the legitimacy or bastardy of the offspring of artificial insemination using donor sperm; the case where sperm of the husband is mixed with donor sperm prior to insemination; whether or not a husband can divorce his wife if she has undergone artificial insemination without his knowledge; the obligation in Judaism of the father to support his child born after artificial in-

semination; the status of the child if the sperm donor was a bastard; the case of insemination of semen from a man of priestly descent (a *cohen*) into an adulterous woman; and the possible legality of using sperm from a Gentile donor for artificial insemination into a Jewish woman (16). These questions are discussed and debated by modern rabbinic authorities, based on their understanding of classical Jewish sources.

One of the major sources which the modern rabbis cite is the talmudic discussion (Chagigah 14b) about a virgin who became pregnant in a bathhouse by the accidental insemination of the sperm of a man who had previously discharged semen there. This passage indicates that procreation *sine concubito* was recognized by the talmudic sages. Rabbi Judah Rozanes of Constantinople, the renowned commentator on Maimonides' code of Jewish law, the *Mishneh Torah*, expresses doubt that impregnation through bathing in water into which a man had previously discharged semen can occur (17). However, many authorities, including Rabbi Chaim Joseph David Azulai, Rabbi Jonathan Eybeschutz, and Rabbi Jacob Ettlinger, differ with him and interpret the talmudic passage literally (18).

The second major ancient source indicating the possibility of pregnancy without sexual intercourse is the *Hagahot Smak* (19), by thirteenth century Rabbi Peretz ben Elijah of Corbeil. He describes the possibility of impregnation of a woman who lies on the bed upon which a man other than her husband had slept and had ejaculated on the bed sheets. Several things emerge from Rabbi Peretz's statement. First, generation *sine concubito* was recognized. Second, the offspring is considered legitimate. Third, no prohibition is mentioned concerning cohabitation of the woman with her husband afterwards, even if she has become pregnant from the other man's semen. The only reason for her to avoid contact with the linen upon which another man had lain is to prevent the possibility of incest at a later date, i.e., the child marrying its own sibling. Finally, only prohibited intercourse would make her forbidden to her husband, irrespective of whether or not her male partner had emitted sperm into her genital tract during the prohibited sexual act.

Based on these and other early sources, the modern rabbinic debate can be summarized as follows: Most twentieth-century rabbis rule that artificial insemination using normal semen from the husband is preferred if there is no other way that the wife can become pregnant. Artificial insemination using the semen of a

donor other than the husband is frowned upon by most rabbis for a variety of reasons, including the possibility of incest (the child born of such insemination may later marry a sibling, unknowingly), the lack of genealogy (the father's identity is unknown), and problems of inheritance (does the child inherit from the genetic father, the legal father, or both?). A few rabbis (Rabbis Judah Leib Zirelson, Abraham Lurie, Ovadya Hedaya and Eliezer Waldenberg) regard such insemination as adultery, requiring the husband to divorce his wife and the wife to forfeit the marriage settlement (*ketubah*). More authorities, however (Rabbis Ben Zion Uziel, Moshe Feinstein, Sholom Schwadron, Yehoshua Baumol and Aaron Wolkin), state that if no sexual act is involved, the woman is not guilty of adultery and is not prohibited from cohabiting with her husband (10–16).

Regarding the status of the child, rabbinic opinion is divided. Most consider the offspring to be legitimate, as in the case of Ben Sira, the product of conception *sine concubito*. According to homiletical sources, Ben Sira was born to the daughter of the prophet Jeremiah, following impregnation in a bathhouse, in a case similar to that of the virgin described above. A small minority of rabbis (Rabbis Zirelson, Lurie, Hedaya and Breisch) consider the child illegitimate, and at least one rabbi (Waldenberg) considers the child to be a “possible bastard.” Many rabbis (10–16) regard the child (legitimate or illegitimate) to be the offspring of the sperm donor in all respects (i.e., inheritance, support, custody, incest, levirate marriage, and the like). Some regard the child to be the donor's offspring only for some legal aspects, but not for others. Some rabbis state that although the child is considered the donor's offspring in all respects, the donor has not fulfilled the commandment of procreation. A minority of rabbinic authorities assert that the child is not considered the donor's offspring at all (10–16).

Most rabbis allow the husband to provide semen both for analysis and for insemination, but a difference of opinion exists as to the method to be used in its procurement. Masturbation should be avoided if at all possible; *coitus interruptus*, retrieval of semen from the vagina, or the use of a condom (assuming it has no spermicide) seem to be the preferred methods.

***In Vitro* Fertilization**

The use of a man's sperm and his wife's eggs for *in vitro* fertilization and re-implanta-

tion into the wife's womb, as in the Louise Brown case, is permitted. The rabbinic reasoning is that there is no question of adultery involved, since the sperm used is that of the husband. Sperm and egg procurement for this procedure are permissible, based on a talmudic passage (Yevamot 76a), because the aim is to fulfill the biblical commandment of procreation. The offspring is legitimate and the parents thereby fulfill their obligation to have children. Most twentieth-century rabbis, including Rabbis Auerbach, Baumohl, Frank, Feinstein, Mintzberg, Schwadron, Shapiro, Waldenberg and Wolkin, support this view (11).

However, certain serious moral and Jewish legal problems arise if one uses sperm other than that of the husband. These objections have been discussed above. Furthermore, if one obtains several eggs from the mother's ovary at the same time and fertilizes them all, so as to select one or more for re-implantation, is one permitted to destroy the other fertilized eggs? Do they not constitute human seed, which is not to be “cast away for naught”? Is one permitted to perform medical research on the unused fertilized eggs? Is the destruction of such fertilized ova tantamount to abortion? Is such a fertilized ovum regarded as “mere water” during the first forty days of its development? The generally accepted Judaic view is that a fertilized egg does not attain human status until it is implanted in the woman's womb. Hence, excess fertilized eggs may be frozen for later use, discarded, or used for the advancement of scientific knowledge (11, 12, 20). Some rabbis prohibit the use of donor eggs for *in vitro* fertilization primarily because of concern about “chaos in the world,” that is, confusion about one's relatives and the remote possibility of a brother-sister marriage years later (12, 21).

Surrogate Motherhood

For a woman who is unable to carry a pregnancy to term, the permissibility of resorting to host motherhood poses serious questions in Jewish law (10–16). The foremost question is whether the would-be egg donor, i.e., the woman in whom a pregnancy is contraindicated or not anatomically possible, can agree to *in vitro* fertilization of her ova prior to their implantation into a host. The related question is whether the intended host is allowed to undergo an implantation procedure. Questions analogous to those in artificial insemination arise, as discussed above.

Maternal identity in situations involving a host mother is discussed in great detail by noted Jewish bioethicist Rabbi J. David Bleich (21), who concludes that “the consensus of rabbinic opinion is that a maternal-filial relationship is generated between the gestational mother and the child despite the absence of any genetic relationship, by virtue of parturition alone.” The possibility that Jewish law may recognize the existence of a maternal relationship between the genetic mother, i.e., egg donor, and the child, cannot be excluded even if that child was born to a surrogate mother.

Other Jewish legal questions in regard to the identity of the mother include the following: Assuming the paternity to be different, are children conceived *in vivo* related to a child born to their mother when she serves as a surrogate? Are these children prohibited from marrying that child? What is the Jewish law if the egg donor is not Jewish, and the surrogate or host woman is Jewish? What about the situation in which the egg donor is Jewish, but the host mother is not? Bleich (21) rules that in this situation, the child requires conversion. What happens if the host woman was not Jewish when the fertilized ovum was implanted into her womb, but converted to Judaism during the pregnancy — is the child required to undergo conversion? If a surrogate mother gives birth to a boy, does he, if he is a firstborn, undergo redemption of the firstborn?

Conclusion

Technical advances in the area of *in vitro* fertilization and surrogate motherhood have resulted in significant changes in the concepts of fertility, parenthood, and family identity. Many advances in reproductive technology have brought great hope to infertile men and women. It is thus an important medical approach to a serious problem. Ethical and legal issues arising from this technology have been considered in detail and depth by modern rabbinical authorities.

The Talmud states that there are three partners in the creation of a human being: the Holy One, blessed be He, the father, and the mother. (Niddah 31a). Some physicians can now serve as a fourth partner, facilitating these three in the siring of children by assisted reproduction.

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