(British Medical Association, Oxford University Press, 1992) 188-209; T. Wilkie, *Perilous Knowledge* (London, 1994) 97-133; *Human Genetics : The Science and its Consequences* (Science and Technology Committee, House of Commons, HMSS, London 1995).

[28] See *Our Genetic Future*, ibid 191-192; Wilkie, ibid 97-111.

[29] See Wilkie ibid 109.

[30] See *Our Genetic Future*, ibid 192; Wilkie ibid 113-114.

[31] See F. Rosner, "Tay-Sachs Disease : To Screen or Not to Screen", in *Jewish Bioethics* (Ed. F. Rosner and J. D. Bleich, N.Y., 1979) 178.

[32] *Resp. Ziz Eliezer* 13 no. 102; 14 no. 100.

[33] *Resp. Iggerot Moshe, Hoshen Mishpat* 2 no. 69.

[34] See *Resp. Lev Aryeh 2 no. 32; Nishmat Avraham, Hoshen Mishpat* no. 425; Resp. *Mishneh Halakhot* 5 no. 233; 6 no.14; *Encyclopaedia of Jewish Medical Ethics* 2 (Heb.), (ed. A Steinberg, Jerusalem, 1991) 89-90.

[35] See D. Sinclair, *Tradition and the Biological Revolution* (Edinburgh, 1989) 93-98.

[36] See *Encyclopaedia of Jewish Medical Ethics* ibid 80-88.

[37] *Resp. Shee'lat Ya'avez* no. 43; *Resp. Rav Pa'alim, Even Haezer* no. 4.

[38] Maimonides, *Hil. Rozeah* 1:9; see J.D. Bleich, "Abortion in Halakhic Literature" in *Jewish Bioethics* ibid.

[39] See Sinclair ibid 76-78.

[40] R. Waldenberg cites *Resp. Havat Yair* no. 31 to the effect that these time limits are "merely inclinations of the mind", lacking any basis in normative halakhah; see however J.D. Bleich, "Abortion in Halakhic Literature" in *Jewish Bioethics*, (N.Y. 1979) (n. 28 above) 169 n. 34.

[41] See "Human Genetics : The Science and its Consequences", *Science and Technology Committee of The House of Commons*, (London, 1995) 41.

[42] *Resp. Ziz Eliezer* 14 no. 101.

[43] See A. Rosenfeld, "Judaism and Gene Design" in *Jewish Bioethics* ibid 401; F. Rosner, "Genetic Engineering and Judaism" in *Jewish Bioethics* ibid 417-419.

[44] *Our Genetic Future* ibid 185. Also see Wilkie ibid 152-158 for a comment on the darker side of the prospects offered to society by somatic-cell gene therapy.

[45] Wilkie, ibid. 158-165; *Our Genetic Future*, ibid. 185-188.

[46] *Berakhot* 10a.

[47] See Wilkie, ibid, 93-96; *Our Genetic Future*, ibid, 218-226; *Human Genetics* ibid, 64-73.

[48] Wilkie, ibid. 127-129; *Our Genetic Future*, ibid. 232-233; *Human Genetics*, ibid, 77-78

[49] Wilkie, ibid. 125-127; *Our Genetic Future*, ibid. 233; *Human Genetics* ibid. 77-82.

[50] *Deuteronomy* 19:14.

[51] See R. Isaac Herzog, *The Main Institutes of Jewish Law* I (London, 1965) 127-136; M. Elon, *The Principles of Jewish Law* (Jerusalem, 1974) 344-346.

[52] *Resp. Rosh* no. 68 : 10; *Tur, Hoshen Mishpat*, no. 384; R. Shlomo Zevin (n. 1 above) 318.

[53] R. Saul Yisrael, "The Kibiyeh Incident in the Light of the Halakhah" (Heb.), *Hatorah Vehamedinah* 4-6 (1953-54) 106.

[54] See N. Shulman, "Genetic Modification" *Le'ela* (September, 1994) 20.

[55] *Nedarim* 9:5: *Nedarim* 65b; *Shabbat* 6:1.

[56] "The Genetic Revolution", *Time*, January 17, 1944, p. 39; "Search for a Gay Gene", *Time*, June 12, 1995 p. 52.

[57] See *Human Genetics* ibid 22.

[58] *Berakhot* 33b.

[59] *Tiferet Yisrael, Kiddushin* 4:14. In fact the earliest versions of this story in Jewish sources contain no reference to Moses whatsoever, and the source is probably a passage in Cicero's *Tusculan Disputations* (London, 1927) 4 no. 80; see S. Leiman, "R. Israel Lipschutz and the Portrait of Moses Controversy", in *Danzig : Between East and West*, (ed. I. Twersky, Harvard University Press, 1985) 49.

Rabbinic Counselling for Infertile Couples

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This article discusses some of the major issues addressed by rabbis in their pastoral counselling. Dr Grazi is Director of the Division of Reproductive Endocrinology at the Maimonides Medical Center, Brooklyn, New York. Dr Wolowelsky is Chairman of Advanced Placement Studies at the Yeshivah of Flatbush, Brooklyn, New York, and an associate editor of *Tradition*.

There are three partners in the creation of a child, says the Talmud: the mother, father, and the Holy One, blessed be He. Until now, God's involvement has been for the most part subtle and supportive. Today, with the new-found involvement of fertility experts in the creation of some children, many couples look for more direct religious counselling as they set off on non-charted courses, and this often brings them to their rabbi with a request for guidance. The rabbi, in turn, is put in the situation of tracing a course he himself has not yet travelled. Reproductive technology is moving at such a fast pace that "general practitioners" — be they gynaecologists, roshei yeshiva, or congregational rabbis — have difficulty keeping up with the literature, let alone forming judgments about it.

Playing God

Compounding the problem is the general discomfort religious authorities feel in addressing the issue. Doctors always "play God" to some extent, but it is the Torah that permits them to preserve and maintain health: "'And he shall certainly heal' (Shemot, 21:19) — from here we learn that the Torah has given permission to heal." However, **creating** life is qualitatively different from **preserving** life, and it demands a humility that many religious authorities have found lacking in the medical community. Some *poskim* see doctors as cavalierly harvesting eggs, manipulating genes, creating a host of involved "parents" – gestational, genetic, surrogate – all to satisfy the needs of an "unfulfilled" childless couple. This often seems to bespeak an arrogance that it is man and not God who is the ultimate creator.

There is some truth in this, but it is wildly exaggerated. To cite a relevant anecdote, some time ago an important *beit din* in New York took up the question of whether to allow a multifoetal pregnancy reduction. The *dayyanim* were sceptical. The previous year a woman carrying twins, who wanted them reduced to a singleton for reasons of convenience, could not find a doctor in the tri-state area who would do the reduction. It seemed absurd in this age of abortion-on-demand to hear that this woman could not find someone willing to abort one of her foetuses. But specialists in this field generally have a great reverence for life. Rabbis would have a greater appreciation for this — and doctors would have a greater appreciation for rabbis — if there were more frequent interchange between them.

Halakhic Leniency

In any event, a *posek* must deal not only with theory but with individual couples who have their own specific personal and psychological needs. And, as Rav Aharon Lichtenstein has noted:

> A sensitive *posek* recognizes both the gravity of the personal circumstances and the seriousness of the halakhic factors.... He might stretch the halakhic limits of leniency where serious domestic tragedy looms, or hold firm to the strict interpretation of the law when, as he reads the situation, the pressure for leniency stems from frivolous attitudes and reflects a debased moral compass.[1]

It is therefore not surprising that, on an individual level, *poskim* often have been forthcoming with leniencies that appear to be at odds with public condemnations issued by senior halakhic authorities. Indeed, it is not surprising that many of these lenient decisions are made in consultation with those very same authorities. This is not the least bit hypocritical. On a public level, halakhists have a moral obligation to resist the tide of permissiveness that underlies too much of the drive to obtain fertility at any cost. But on a private level, it is the individual situation that must be addressed, not the global issues.

These lenient decisions are often circulated to only a small group of scholars lest they be exploited by those whose "pressure for leniency stems from frivolous attitudes [reflecting] a debased moral compass." This means that the rabbinic counsellor who relies only on the relatively few public statements available will have a myopic view of the halakhic options open to him when he meets with an infertile couple. Being aware of the true full range of halakhic options available — including the serious reasons calling for stringencies in some cases — is the first duty of the rabbinic counsellor.

Just as the rabbi must understand the halakhic intricacies involved, he must also be aware of the underlying family dynamics at play. Indeed, the most important initial advice that the rabbi might offer is that there is rarely a fertility problem that needs **immediate medical attention**.

When to Ask

There is tremendous pressure in the religious community to have children as quickly as possible. Barring any known medical conditions, it would be inappropriate to seek professional advice until the couple has been having regular sexual activity for, say, twelve months. (If the wife is of advanced age, a six-month period would be more appropriate.) The tension associated with the medical evaluation of infertility can create its own psychological problems, and the simple reassurance that time is on their side can itself help the situation. *Tseniut* considerations generally discourage a frank discussion of the couple's intimate lives. But such a discussion is in order here – and not simply to dispel a naive assumption that the admonition in the Shulchan Arukh that a Torah scholar have relations with his wife only on Friday nights needs to be taken at face value. The frequency of sexual activity is an important consideration in all infertility counselling. Indeed, some couples may be looking for a medical solution for a problem that should be solved with a therapist.

Even when the proper approach might well be to refer the couple to a competent doctor or therapist, the initial encounter with a religious authoritative figure may well influence any possible future counselling and therefore demands a thoughtful, responsible reaction. Religious counsellors and professional therapists have very different, yet legitimate, agendas in their respective discussions with childless couples. The mission of the latter is to help the couple come to terms with their situation and explore the family-dynamic consequences of the various options open to them, including remaining childless or adopting. Religious counsellors, on the other hand, have an obligation to help the individuals grow in their religious convictions and observances. These objectives are certainly not inherently contradictory, but they should be understood and resolved. Of course, any therapist to whom the couple is referred should have a thorough understanding of (if not commitment to) the halakhic values that guide the couple's lives.

The Rabbi's Role

A rabbi has a duty to advise the couple

spiritually, and the advice to engage in *teshuvah, tefilah, maasim tovim,* and the like, despite their "non-scientific" character, are all appropriate and important components of infertility therapy. But halakhah also requires concomitant medical treatment when it is appropriate, and the couple should leave the rabbi's study with an understanding of how and when they should be seeking medical treatment.

In making the suggestion to seek medical treatment, the rabbi should be careful to point out that a halakhically committed couple should raise with the doctor the necessity for a number of changes in the standard medical protocol. (This is discussed in detail in *Be Fruitful and Multiply.*[2]) The first is the medical work-up of the husband. Normally, the first course of action would be to check the quality and quantity of the husband's sperm. This involves a relatively inexpensive and non-invasive test but it usually involves masturbation, *coitus interruptus*, or other techniques which raise the problem of *hashkhatat zera*. It therefore should be put off until the wife has been thoroughly examined and there is some medical indication that the infertility might be due to a problem with the husband's sperm.

The second problem is that of *niddah*. The doctor should have a working knowledge of *hilkhot niddah,* how it impacts on the couple's sex life and how various treatments influence the niddah status of the wife. Some standard fertility treatments can clash with niddah status, frustrating all attempts to achieve pregnancy. It is unfair to place on the couple the burden of educating the doctor on this issue, and the rabbi, as part of his general pastoral duties, should have a professional relationship with doctors treating his congregants. (This too is discussed in detail in *Be Fruitful and Multiply.*)

Artificial Insemination

Often the issue of artificial insemination is raised. There is much halakhic leniency in allowing artificial insemination with the husband's sperm. But there is an accompanying fear — driven by sensational though rare media stories — that doctors are so intent on demonstrating professional success that they will substitute or add foreign potent sperm to the insemination. Most doctors will take umbrage at such a suggestion because the vast majority of professionals are ethical people who are well aware that such deception violates the professional standards of medicine (not to mention the malpractice liability to which it would expose them). Nonetheless, assurances should be sought and a review of the technical procedures conducted. (At Maimonides Medical Center, the Division of Reproductive Endocrinology has a *mashgiach* available to assure patients that no substitution of semen is possible.)

Much more complicated is the issue of donor semen, and this is because it involves not only halakhic issues, but core issues of personal identity. Couples sometimes naively think that this is a better option than adoption because at least one of the parents (the mother) is the genetic parent. But, at the least, this carries with it the possibility of tension and jealousy. This explains why even those halakhists who are willing to see the procedure as technically permissible are most reluctant to recommend it. While one end of the halakhic spectrum sees donor insemination as adultery pure and simple, the extent to which the lenient position is accepted is not adequately reflected in the written literature. Anyone who has had a close dialogue with halakhists and *roshei yeshivah* who deal with the problem knows that on a private level many *poskim* are willing to entertain this possibility when it can be seen as a therapy for a distraught couple. But it certainly should not be considered without a thorough investigation of the personal issues involved.

Discretion

Another important issue is confidentiality. With adoption, at least some members of the surrounding community are aware of the circumstances. However, there is a real possibility of keeping donor sperm a secret, provided the couple have not shared this information with **anyone** at the time of conception. (Indeed, many doctors advise their patients, "Tell no one!") There are many issues to consider when a child has been conceived by means of donor sperm, as with adoption, and they should be worked out thoroughly with a fully-trained therapist before proceeding. We shall not outline these issues here, but note briefly three additional important points that are relevant to Jewish couples and should be raised at the outset. (We assume that sperm from a gentile is being used. There are a host of additional problems that arise if sperm from a Jewish donor is used.)

Halakhic Problems

The first is that of *chalitsah*. If a man dies childless, his surviving brother must release the widow through a *chalitsah* ceremony before she can remarry. The husband in our case is in fact childless, and his widow would have to reveal the facts to her surviving brother-in-law should she wish to remarry.

The second is that of priestly status. A son would be unrelated to the husband and would not inherit his status as a *kohen* or *levi*. (There is an opinion that in such cases the child inherits the status of its maternal grandfather.) This would make it almost impossible to keep the facts a secret as they would become known when the son was called up to the Torah.

The third is that of inheritance. The child cannot legally inherit from the deceased husband because there is no familial bond between them. This can be addressed easily by preparing a halakhic will.

More complicated is the matter of donor ova. Here the major consideration is not so much the halakhic prohibitions involved — the charge of adultery is not really

heard — but the halakhic consequence. There is widespread agreement that the gestational mother is the halakhic mother, but if the donor is Jewish some would consider both the gestational and genetic mothers as the halakhic mother. If the donor is not Jewish, there is a question of the religious identification of the child. Some would hold that the child is Jewish, others that it is a non-Jew who needs conversion (and who would then be halakhically unrelated to either of its parents), and a third opinion that it requires some form of conversion but remains related to its genetic father and gestational mother. It is too early for a consensus to have developed around any of these opinions.

Surrogate Mother

The other side of this coin is the issue of surrogacy, where the wife is fertile but cannot carry the child. In Israel, the rabbinate seems ready to give its unenthusiastic consent to a secular law that would allow surrogacy if the surrogate is Jewish and single, and is officially recognized as the child's mother. The couple would then legally adopt the child. This whole issue has not been thoroughly explored in the halakhic literature.

Sometimes rabbis advise their colleagues to simply refer infertility cases to one or two *gedolim*. One must be careful, however, about the possibility of these decisions being based on the information provided by the *posek's* assistant rather than the doctor directly. In such cases, the decision is actually being made by the **assistant** who, by virtue of the way he collects and presents the information, frames the conclusion. A true halakhic decision requires a personal consultation with the doctor concerning the patient's specific medical condition. It is simply too important an issue for a small number of people to handle.

Similarly, a *posek's* deferral to his own medical consultants is problematic. For example, a *posek* might be convinced that with proper care a multi-foetal pregnancy of some specific size could be carried to full term and, indeed, the medical expert he consults might concur. But every individual patient is unique, and to reach decisions on such issues requires thoroughly evaluating the medical profile of the individual patient. Just as the doctor may not "play God", the *posek* may not "play doctor". If the *posek* relies on his own consultant's medical judgment, then once again, in the end it is the consultant and not the *posek* who is rendering the halakhic decision. The couple, thinking they are getting a halakhic judgment, is actually getting a medical referral and is thus misled.

It is indeed awesome to consider that many of the halakhic problems that an infertile couple must face have not yet been thoroughly resolved. As we noted at the outset, technology is moving so fast that there will probably be a permanent time lag leaving all rabbinic counsellors ill-at-ease in advising couples who may well consider themselves in a desperate situation. But the internal and external pressures to have a child are so overwhelming that it is simply not acceptable to advise the couple to remain childless or adopt.

Travelling this road towards pregnancy demands courage and humility on the part of all concerned. But travel it we must. And it certainly requires *tefillat haderekh*.

Notes

[1] Rabbi Aaron Lichtenstein, Abortion: A Halakhic Perspective, *Tradition*, 25:4, Summer 1991, p.11.

[2] Therapeutic Considerations and Solutions in R. Grazi ed. *Be Fruitful and Multiply*, Feldheim: Genesis Press, 1994, 141-174.

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