The Jewish Law Annual, Vol. XIV

HALAKHIC ALTERNATIVES IN IVF-PREGNANCIES: A SURVEY

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1 *Introduction*

The advent of assisted reproductive technologies such as in vitro fertilization, egg and sperm donation, and gestational surrogacy offers hope to many infertile couples. But they also present a bewildering array of choices, many of which raise difficult ethical dilemmas. A married couple who participate in an IVF-program, for example, will have a number of options regarding the disposition of fertilized ova: implantation of all or some of the preembryos[1]; destruction or at least non-implantation; experimentation; or donation to an infertile couple

1 "Preembryos" is the term used by the American Fertility Society (now called the American Society for Reproductive Medicine) to describe a fertilized egg not yet implanted in the uterine wall. Where fertilization occurs within a woman's body, implantation generally occurs 0–14 days after fertilization. (In the case of an IVF-frozen embryo, implantation cannot occur until transfer to a uterus, perhaps years later.) Upon implantation, the embryonic stage begins. It lasts for about eight weeks, by which time there is at minimum rudimentary development of differentiated organs. From here on, the organism is termed a "fetus." See American Fertility Society, *Ethical Considerations of Assisted Reproductive Technologies* (Nov. 1994), henceforth ECART, 295–315.

or possibly to an unmarried woman desirous of being a mother. The couple must also grapple with the issue of whether or not to use third-party contributions of sperm, egg, embryo, or even uterus (a gestational surrogate) to enhance their reproductive efforts.

With the possible exception of gestational surrogacy, under the laws of most US states all these options are legitimate, though some are subject to varying degrees of governmental regulation.[2] As a result, the courts have generally validated whatever decisions the parties make — by formal contract or otherwise — and have faced difficulties only when the parties have not come to an agreement and are in a state of deadlock.[3] In an earlier article,[4] I tried to provide a halakhic answer to the problem of deadlock based on the principles of partnership law. It must be noted, however, that in a pure halakhic system the problem of decisional deadlock is less pressing simply because there are far fewer choices that are allowed.

The issue of "who decides" in the context of Anglo-American jurisprudence is indeed a major concern in many fields of medical ethics, from abortion to advance directives for the care of the terminally-ill. It is fair to say that American law is more preoccupied with **who** makes the decision than with **what** the decision should be. This is so because once the legal system identifies the individual entitled to make the decision, his authority is in many cases well-nigh absolute. Thus, the case reports and statutes focus on matters such as informed consent, delegation of surrogate decision-making, hierarchies of persons to consult where no surrogate has been designated, ethics committees, institutional review boards, and procedures in the event of deadlock.

The relatively recent introduction of the term "preembryo" has been criticized, as some argue that its usage is a veiled attempt to curtail the protections these potential lives should otherwise enjoy; they insist that once an ovum is fertilized, it is an embryo and should be treated as such. Usage within the medical profession is not consistent, and with respect to preimplantation fertilized ova, both terms are often used interchangeably.

2 See text at nn. 236–238 below.

3 See, e.g., *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. 1992) (recognizing the validity of advance directives of the gamete providers).

4 See Breitowitz, "Halakhic approaches to the resolution of disputes concerning the disposition of preembryos," reprinted in Feldman and Wolowelsky (eds.), *Jewish Law and the New Reproductive Technologies* (NY: 1997) (henceforth JLNRT), 155–186.

The focus on **who** rather than **what**, and the concomitant validation and encouragement of private agreements, are a reflection of the core values of autonomy, privacy, and bodily integrity that underlie much of Anglo-American law, circumscribing the state's authority to interfere with or override the individual's right to choose.

Halakha, a religious system premised on subservience to the Divine will, makes different assumptions. Rather than ask who decides, it focuses directly on what may be decided. It makes little difference who has the right to make dispositional decisions if halakha does not permit a decision to be made. Only if halakha legitimates a given course of action where both parties agree do we face the question of what is to be done where there is a dispute.

The purpose of this article is to address this question of permissible choice; it thus constitutes a "prequel" to my earlier piece. Using a standard IVF protocol as an example, this article, after summarizing the basic halakhic rules governing IVF, will address the following questions: may surplus preembryos be destroyed or allowed to thaw?; may such preembryos be utilized for experimentation and research?; may such preembryos be donated to other infertile couples?; may a Jewish couple utilize donated sperm, egg, or embryos of Jewish or non-Jewish origin in their own IVF protocol?; does halakha allow the use of a gestational surrogate, and if so, under what conditions?; does the halakhic system recognize a right of compensation to the egg and sperm (gamete) providers if preembryos are wrongfully destroyed without their consent?; do preembryos have inheritance rights, and do they "count" for purposes of *yibum, halitza*, and *pidyon haben*? To facilitate comparison to the secular legal system, an Appendix to this article describes the status of the preembryo under American law.

2 *General Halakhic Principles Governing a Standard IVF Protocol*

Before proceeding to a discussion of preembryos, it is important to present the rules governing the basic IVF procedure. All IVFs require procurement of semen from the donor or the husband, generally not through marital intercourse. By definition, some form of artificial insemination is necessary. Focusing for now on a "garden variety" IVF with the husband's sperm only, there is a vast halakhic literature on artificial insemination with the husband's sperm (AIH), and virtually all the halakhic concerns about AIH, particularly those involving the

methods by which sperm is procured, apply equally to standard in vitro fertilization.[5]

In my earlier article, I noted that "subject to careful supervision of the physician, waiting periods, and exploration of alternatives, AIH is generally regarded as a halakhically permissible procedure through which paternity can be established .... By and large, most *poskim* have assimilated IVF to AIH and have permitted its utilization subject to the same limitations."[6] R. Eliezer Waldenberg and R. Moses Sternbuch are notable exceptions;[7] they deny paternity in IVF-pregnancies and prohibit IVF outright on the grounds of its being *hotzaat zera levatala* (wasteful emission or destruction of male seed).[8] A somewhat intermediate position is taken by R. Judah Gershuni who, although denying paternity, nonetheless permits IVF on the grounds that because it does, or can, result in the birth of a human being, albeit one without a technical

5 See A. Steinberg, "Artificial insemination in the light of halakha," *Sefer Assia* 128–141 (1982) and R. A. Cohen, "Artificial insemination," *Journal of Halakha and Contemporary Society* 43 (1987), 13. These articles also discuss the myriad issues that arise when donor semen (AID) is employed.

6 See Breitowitz, n. 4 above, n. 7, and the sources cited there. Parts of this section are based on that paper.

7 See R. Waldenberg, *Tzitz Eliezer* 15:45. R. Sternbuch's ruling is quoted in *Beshvilei Harefua* 8 (1987), 33.

8 The prohibition against the wasteful emission of male "seed" (*hotzaat zera levatala*) is based on bNida 13a and codified in *Shulhan Arukh* (henceforth *SA*), EH 23:1. See also Genesis 38:7 and Rashi's comments. The prohibition is often referred to as *hashhatat zera* (destruction of seed) and the two phrases are generally regarded as synonymous. But cf. R. Moses Feinstein, *Igrot Moshe* EH 2:70, who attempts to identify a distinct additional prohibition called *niuf beyad* (adultery by the hand).

It should be noted that on their view, IVF is prohibited even if AIH is allowed, as it indeed is, by most decisors. Unlike AIH, where all sperm is deposited into the vagina or uterus, IVF transfers only the fertilized ovum, with the rest of the sperm being discarded. This alone constitutes a waste of "seed." Second, where fertilization occurs outside the woman's body, it is their view that one does not fulfill the commandment of procreation, nor is there a paternal bond with the resulting offspring. As such, IVF serves no halakhically recognized procreative purpose, and thus violates the prohibition against destroying seed. It should further be noted that R. Waldenberg would deny even a **maternal** relationship with an IVF baby even where the egg donor and birth mother are the same person.

There is a variation of IVF termed Gamete Inter-Fallopian Transfer (GIFT), where the egg and the sperm are mixed in a petri dish, then

father, the emission of the seed cannot be characterized as being "in vain" (*levatala*).[9]

In any event, the views of rabbis Waldenberg, Sternbuch, and Gershuni are definitely in the minority. Virtually all contemporary decisors have concluded that a sperm provider has a paternal relationship with IVF-generated offspring; and that the procedure, if undertaken for procreation by an otherwise infertile couple, does not violate the prohibition against destroying seed, at least to the extent AIH in general does not.[10] This article will be premised on this majority position.

It is, however, a matter of dispute whether AIH or IVF may be used where the husband and wife already have a son and daughter.[11] It is also unclear whether the birth of IVF-generated offspring constitutes fulfillment of the Torah commandment of *pru urvu* — "be fruitful and multiply," or just the "lesser" prophetic injunction of *lashevet*.[12]

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placed in the woman's fallopian tube, where fertilization takes place. See text at nn. 136–140 below. It would be interesting to see how rabbis Waldenberg and Sternbuch (as well as R. Gershuni) would rule in cases of GIFT, since fertilization does take place "in accordance with the natural way" (*kederekh kol haaretz*), although not through marital intercourse. GIFT seems nearly indistinguishable from AIH injected directly into the uterus.

9 *Kol Tsofayikh*, 361–367. Technically, he asserts there can be fulfillment of the commandment of settling (*lashevet*), even with children to whom one has no genealogical connection. See n. 12 below.

10 See, for example, R. Ovadia Yosef, *Tehumin* 1 (1980), 287; R. Avigdor Nebenzal, *Assia* 34 (1983); R. Shmuel Wozner, *Shevet Halevi*, 5:47.

11 The birth of a son and a daughter fulfills the Torah commandment to "be fruitful and multiply." While it is meritorious and perhaps obligatory to attempt to have a larger family, the basic commandment has been fulfilled. As such, there may be less justification for the obtaining of sperm outside marital intercourse, thereby making it "in vain." See Breitowitz, n. 4 above, n. 15; *Nishmat Avraham* EH 23:1 (citing R. S.Z. Auerbach as inclined, though with reservations, to permit sperm testing even where couples have already fulfilled the commandment of procreation). Contra: *Igrot Moshe* EH 4:73 (prohibiting sperm **testing** once the commandment of procreation has been fulfilled; it is not entirely clear how this applies to actual procreative use).

12 *Lashevet* is the shorthand expression for the verse, "He did not create the world to be desolate but rather inhabited" (Isa. 45:18). This is understood as a prophetic exhortation to populate the world that may be binding even on men who have already fulfilled the basic precept of procreation, and even on those not obligated to fulfil it, such as women. It may be

3 *May Surplus Preembryos be Destroyed or Discarded?*

The parties may, for various reasons, decide not to implant embryos. These reasons include health concerns of the mother; genetic abnormalities in all or some of the preembryos; the incremental risk to a successful pregnancy of implanting multiple preembryos; and changes in family dynamics (divorce, marital discord, and so on). Does halakha permit either the active destruction of these preembryos, or passive neglect until they disintegrate naturally?

In the early days of IVF, this was a pressing concern: before the discovery of techniques for freezing the preembryos, they could not be stored for future use. Any preembryos not implanted during a particular cycle would be discarded. Because of this, some halakhic authorities

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amenable to fulfillment in ways other than those that fulfill the commandment of procreation. See *Tosafot*, bHagiga 2a and bBaba Batra 13a, both s.v. *kofin*; and *Minhat Hinukh*, end of commandment 1.

Whether one fulfills the Torah commandment of procreation, or only the lesser prophetic exhortation of *lashevet*, through either AIH or IVF, appears to remain unresolved. R. Auerbach in *Noam* 1 (1958), states that the matter is unclear. R. Jacob Ettlinger in *Arukh Laner* on bJebamot 10a explicitly rules that one does not fulfill the commandment of procreation in the absence of a sexual act. But see *Minhat Hinukh*, commandment 1, noting that the commandment of procreation is not marital intercourse per se, but the actual having of children; the act which generates those children is nothing more than *hekhsher mitzva* (a necessary preliminary). On this analysis, it would seem that whether children are created through intercourse, AIH, or IVF is irrelevant to fulfillment of the commandment.

It should also be noted that the opinions that permit AIH or IVF only to those who do not yet have a son and daughter obviously presuppose that procreation via these procedures does fulfill the commandment of procreation, *pru urvu*. If the most that could be accomplished through AIH or IVF was fulfillment of *lashevet*, there would be no difference between those with two children and those with none.

Finally, there can be a possibility of fulfilling *pru urvu* only if the sperm provider has a paternal bond to the offspring. On the view of rabbis Waldenberg, Sternbuch, and Gershuni that sperm contributors do not have paternity in IVF cases, it is clear that the commandment of procreation cannot be fulfilled, though R. Gershuni would maintain that the *lashevet* commandment is fulfilled.

permitted IVF only if all fertilized eggs were implanted.[13] Since, however, the implantation of multiple preembryos could jeopardize the prospects of a successful pregnancy, this meant that only a few eggs could be extracted, generally no more than four. This in turn reduced the probability of successful fertilization, necessitating repeated IVF attempts. Since insurance plans did not, as a rule, cover IVF after two or three failed attempts, IVF was not very feasible for observant Jews.

Two developments have lessened these concerns. The development of cryopreservation (embryo freezing) allows fertilized ova to be stored for future use.[14] Second, use of specialized ova penetration techniques, such as intracytoplasmic sperm injection (ICSI), greatly increases the probability of fertilization, even with a small number of eggs.[15] Yet though the said concerns are less pressing, the problem of determining the disposition of preembryos remains: must a fertilized egg be implanted in an attempt to achieve a pregnancy?

a Abortion

The destruction of embryonic or fetal life falls within the halakhic strictures against abortion. The basic guidelines concerning abortion have been detailed in a number of places and need not be covered in depth here.[16] Briefly, they are as follows:

1. The killing of a fetus is not a capital crime, at least for a Jew.[17]
2. Notwithstanding (1), most halakhic authorities regard the killing of a fetus as a violation of Torah law. A small minority views the prohibition as purely Rabbinic.[18]

13 See R. J. David Bleich, *Judaism and Healing* (NY: 1981), 90 (suggesting this as a possibility).
14 See ECART, n. 1 above, 54S–59S.
15 See Van Steirteghem et al., "High fertilization and implantation rates after intracytoplasmic sperm injection," *Human Reproduction* 8 (1993), 1061 and ECART, n. 1 above, 61S.
16 The most complete English-language study of the halakhic aspects of abortion is R. J.D. Bleich, "Abortion in the halakhic literature," in Bleich (ed.), *Contemporary Halakhic Problems*, vol. 1 (NY: 1977), 325. See also *Nishmat Avraham*, HM 425.
17 Mekhilta, Exodus 21:12; bSanhedrin 84a.
18 An isolated reference in *Tosafot*, bNida 44a s.v. *ihu*, seems to suggest that the killing of a fetus may be permitted even Rabbinically, but most

3. Feticide is committed not only by the physician performing the procedure, but also by the woman who hires him and undergoes the operation. At minimum, making oneself available for an abortion violates the prohibition against aiding and abetting a transgression (*lifnei iver*), whether the physician is Jewish or not.[19]
4. The source of the Torah prohibition is controversial. Some view abortion as a form of murder (*retziha*), albeit one that does not carry the death penalty, akin to the killing of a *treifa*, where the prohibition against murder is transgressed, though the corresponding punishment is not incurred.[20] Others see it as falling

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commentators have concluded that it is either a scribal error, or should not be taken literally. See, e.g., the comments of R. Jacob Emden; *Igrot Moshe*, HM 2:69. See also *Ahiezer* 3:65 (14); *Beit Shlomo*, HM 132.

19 It is not entirely clear who the transgressor is — the physician who actually kills the embryo or fetus, or the woman (and perhaps the husband) who requests the service and, (in the case of the woman), makes herself physically available for the operation. If the former, the woman violates only the prohibition against causing another to transgress: "Thou shalt not put a stumbling block before the blind" (*lifnei iver lo titen mikhshol*) (Lev. 19:14), which is equally applicable to causing non-Jews to violate the Noahide laws; if the latter, the woman is a direct and primary transgressor, not merely an aider and abetter in someone else's sin. The resolution of this question may depend on how the prohibition against feticide is conceptualized. Deeming the woman a direct violator is logical if the reason abortion is proscribed is the affirmative obligation of saving lives (*hatzala*) — facilitating fetal destruction is as inconsistent with this duty as is actual destruction. This may also follow if abortion is conceived as noncapital murder, since, as Maimonides rules, one who hires a murderer is, at least in the eyes of Heaven, guilty of murder; see *Code*, Laws concerning Murder 2:1. On the other hand, it is difficult to regard the woman as a primary offender if the offense is defined as destruction of seed, since merely **allowing** seed to be destroyed does not appear to be an act of destruction. (And many maintain that a woman is generally not subject to the destruction of seed prohibition.) The same conclusion follows if abortion is prohibited as a form of wounding (*havala*), since the woman is not the "wounder."

It must be reiterated, however, that even if an woman is not a primary violator, she is prohibited from obtaining an abortion from either a Jewish or non-Jewish physician because of the prohibition against causing another to transgress.

20 See R. Meir Simcha Hakohen, *Meshekh Hokhma*, Exodus 35:2; *Igrot Moshe*, HM 2:71.

under the destruction of seed prohibition, in that it wastefully destroys that which could have blossomed into life.[21] A third view sees abortion as an unjustified act of wounding (*havala*), violating the prohibition of Deuteronomy 25:3.[22] Some who hold this view regard the wounding as wounding of the mother, others, as wounding of the fetus.[23] Another opinion prohibits abortion as inconsistent with the obligation to protect and preserve life and well-being, an obligation derived from the prohibition against standing idly by the blood of one's neighbor (Lev. 19:16), or the obligation to return lost articles (*hashavat aveida*), which includes 'returning a lost person' (*hashavat gufo*).[24]

5. The halakhic rationale for the prohibition will determine which, if any, extenuating circumstances suffice to justify its violation. If, for instance, the prohibition against abortion is based on its being construed as murder, abortion can be sanctioned only if the fetus qualifies as a "pursuer" (*rodef*)[25]; general considerations of mortal danger (*pikuah nefesh*) would not suffice. On the other hand, the prohibition against wounding may be set aside by lesser concerns, perhaps maternal health in general, or even psychological well-being. The injunctions pertaining to the destruction of seed and the saving of life can arguably be set aside in a case of mortal danger, even where the fetus does not qualify as a "pursuer," but nothing short of mortal danger will suffice.[26]
6. The foregoing refers to abortions performed by Jews (on Jewish or non-Jewish fetuses).[27] Abortion performed by

21 R. Yair Haim Bakharakh, *Havot Yair*, #31. See also n. 8 above.
22 R. Joseph Trani, *Responsa Maharit* 1, #97, #99. Cf. *Sridei Eish* 3:127 (who understands Maharit to refer to wounding of the fetus) and R. A. Lifschutz, *Aryei Devei Ilai*, YD:14 (who sees it as wounding of the mother).
23 See Abraham, *Nishmat Avraham*, HM 425.
24 See bSanhedrin 73a; Maimonides, *Commentary on the Mishnah*, Nedarim 4:4.
25 See the discussion in Bleich, n. 16 above, 337–339.
26 See ibid., 354–361.
27 A Jew is not permitted to perform an abortion on a non-Jew, but the reason is uncertain. If Jews are prohibited to perform abortions because feticide is regarded as a kind of murder, albeit non-capital, then just as a Jew is not permitted to murder a non-Jew, he is not permitted to abort a non-Jewish fetus. If, however, the abortion prohibition is grounded in the prohibition against the destruction of seed, the prohibition against wounding the child or mother, or the obligation to sustain life, none of which are obligations due non-Jews, why is it not permissible for a Jew to perform

non-Jews (whether on Jewish or non-Jewish fetuses) is a capital offense under the seven Noahide laws.[28] There is considerable debate over whether Noahides may perform abortions even where there is mortal danger to the mother, or the fetus qualifies as a "pursuer," and many authorities take a strict position.[29]

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an abortion on a non-Jew? The answer is that the Jew would be transgressing the injunction against causing another to transgress. If the woman herself would be committing the equivalent of an act of murder (indeed, in the case of a Noahide, capital murder), it would be prohibited for the Jewish doctor to facilitate such a transgression. Even if there are other doctors willing to perform the abortion if he declines to do so, his assistance is prohibited, because these others are themselves subject to the same proscription. (See R. Judah Rosanes, *Mishne Lamelekh*, Laws concerning Creditor and Debtor 4:2, who asserts that the existence of alternative facilitators obviates the prohibition against causing another to transgress only where such facilitators are **allowed** to extend assistance.)

Thus, if abortion is viewed as murder, the Jewish physician performing it on a non-Jew is the primary transgressor; if it is not viewed as murder, the physician is aiding and abetting a transgression of Noahide law committed by **the patient**. (This is so, however, only if the woman seeking the abortion can be characterized as the primary offender, see nn. 19 and 30).

28 bSanhedrin 57b, based on Genesis 9:6.

29 *Tosafot*, bSanhedrin 59a, remain in doubt as to whether the Noahide prohibition against feticide may be set aside where there is danger to the mother's life. R. Moses Feinstein rules that because of this doubt, the non-Jewish doctor should not perform the abortion, *Igrot Moshe*, HM 2:69. Indeed, decisors have indicated that even if the endangered patient is Jewish, it is preferable for a Jewish physician to perform the procedure. See *Nishmat Avraham*, HM 420:1(22).

At first glance, the uncertainty of the *Tosafot* appears problematic. Because Noahides are not obligated to observe the commandment of santification of the Divine name (*kidush hashem*), the Talmud in bSanhedrin 74b concludes that a Noahide need never submit to martyrdom, and may even violate the prohibition against idolatry if facing mortal danger. Why then should not the prohibition against abortion be waived to save the mother's life?

Three distinct explanations have been suggested. (1) Although mortal danger indeed serves to waive observance for Noahides, a Noahide may transgress the law only to preserve his own life, not that of another. See *Minhat Hinukh*, 296. Thus, mortal danger to the **mother** does not provide the **physician** with a dispensation to abort the fetus. (2) Although a Noahide may violate Noahide law if someone threatens to kill him if he does not do so, he may not violate Noahide law to extricate himself from

> It is not entirely clear if this stringency should apply to a Jewish physician.[30]

b Abortion Prior to 40 Days

The Talmud states in several places that fetal development prior to the 40th day is "mere water." Thus, a miscarriage within 40 days carries no

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a life-threatening **illness**, since one's response to illness is an autonomous choice, as opposed to having a third party's will forced upon one. See *Minhat Hinukh*, 296; Maimonides, *Code*, Laws concerning the Fundamental Principles of the Torah 5; R. Meir Simcha Hakohen, *Or Sameiah* ad loc. (3) Although Noahides may, where there is mortal danger, violate any of their commandments, including the prohibitions against idolatry and sexual offenses, they may not violate the prohibition against murder. Since for Noahides abortion is equivalent to murder, and one soul cannot be set aside to save another, the procedure cannot be allowed even to preserve the mother's life (unlike the situation for Jews, for whom the fetus either lacks full personhood, or is deemed a "pursuer.") A good summary of these explanations appears in Bleich, "Fetal tissue research: Jewish tradition and public policy," *Tradition* 24 (1989), 87–88, n. 47.

In effect, therefore, a Noahide physician is prohibited from performing an abortion even to save the life of the mother, whether she is Jewish or non-Jewish. Paradoxically, however, from the perspective of the Jewish patient who indeed has a dispensation to abort due to mortal danger, the only possible transgression is the injunction, "Thou shalt not put a stumbling block" (*lifnei iver*), a "lesser prohibition" that is unequivocally waived to preserve her life. This leads to the anomalous result that while a Jewish woman is permitted to request and encourage a non-Jew (as well as a Jew) to abort her life-threatening pregnancy, the non-Jew — from the perspective of Noahide law — should decline to do so.

30 While it is clear in light of *Tosafot*'s uncertainly that a non-Jew should not perform a life-saving abortion on either a Jewish or a non-Jewish patient, an interesting question not addressed by R. Feinstein is whether a Jewish physician can perform an abortion on a non-Jewish patient whose life is in danger. This may depend on whether the Jewish physician is a primary offender or the aider and abetter of the Noahide; see n. 19 above. If the Jewish physician is a primary offender, because abortion constitutes non-capital murder, under no circumstances could a Jew perform an abortion on a non-Jew, since there is no obligation to save the patient's life that would override the prohibition against homicide. If, on the other hand, the sole reason a Jew cannot abort a non-Jewish fetus is because he would facilitate a transgression on the part of the woman, and hence would

impurity of childbirth, nor does it necessitate the bringing of an offering.[31] A widowed daughter of a priest (*kohen*) who was married to a *yisrael* is allowed to eat the heave offering in her father's house for 40 days after her husband's death, because even if she is pregnant, the embryo does not disqualify her.[32] Based on these teachings, some decisors have concluded there is no prohibition against abortion within 40 days of conception.[33]

To the extent that it is absolutely permissible to abort an under 40-day old embryo, there would obviously be a dispensation to destroy or discard a preembryo (regardless of how many days may have passed from fertilization), since its development has certainly not reached the 40-day point. However, the 40-day limit is highly controversial. The argument that an embryo of under 40 days is "mere water" is relevant to the abortion issue only if abortion is predicated either on its being **murder**, that is, the taking of life, or on its being wounding (*havala*) of the embryo — arguably, one cannot "wound" that which does not have the status of an existent person. The 40-day cut-off is clearly irrelevant insofar as wounding of the mother is concerned (though by definition this could not be a basis for prohibiting the destruction of an externalized preembryo). "Destruction of seed" is equally irrelevant — after all, it is prohibited even prior to fertilization.

Moreover, the obligation to preserve and protect life may well apply at all stages of embryonic development. There is a disagreement among the *rishonim* as to whether one is permitted to desecrate the Sabbath or otherwise violate the law to save or prolong the life of

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violate the prohibition against causing another to transgress, then if the woman is permitted to seek the abortion, the Jew would be allowed to supply it. Of the three explanations cited in n. 29, the first explanation would allow the endangered Noahide to seek the abortion; the second and third explanations would not. This would have direct bearing on whether the Jewish physician could perform the procedure at the patient's request.

31 bNida 30a.

32 bJebamot 69b.

33 See *Beit Shlomo*, HM 132; *Torat Hesed*, EH 42 (33); *Sridei Esh*, 3:127. See also *Ahiezer* 3, end of 65 ("perhaps" there is no Torah prohibition). A stricter view is taken by R. I.J. Unterman, *Shevet Miyehuda* 1:9, and R. Moses Feinstein, *Igrot Moshe* HM 2:69.

a fetus where the mother's life is not endangered.[34] According to some authorities, the "he shall live by them" (*vehai bahem*) (Lev. 18:5) dispensation applies only to those who have been born, and not to fetuses. The *Baal Halakhot Gedolot* seems to concede that the verse does not cover a fetus, but maintains that the potential for life and future observance of the commandments brings into play the principle that "it is better that one Sabbath be violated, so that many Sabbaths may be kept." The Behag apparently utilizes this concept as a justification for *pikuah nefesh* that is independent of the verse "he shall live by them." Nahmanides makes clear that according to the Behag, no distinction should be drawn between the pre- and post-40-day point. It is the **potential** for human life, not its actualization, that justifies the "mortal danger" dispensation to violate the law.

The law is in accordance with the view of the Behag.[35] Moreover, even on the view of those who disagree with it, it might still be argued that the obligations to save life and restore lost property obtain even with respect to a fetus, and even before the 40-day point, but do not fall within the parameters of *pikuah nefesh* when such obligations conflict with other prohibitions, such as the Sabbath prohibitions. In the absence of conflict, all might concede the duty to save life. Be that as it may, according to the Behag, one can clearly violate the Sabbath prohibitions for a fetus under 40 days old. Now it would be incongruous to permit — and apparently mandate — violation of the Sabbath to save a life that one is permitted to extinguish. Thus, the permissibility of desecrating the Sabbath to preserve such life should entail a prohibition against taking it away.[36] Note, however, that the converse is not necessarily true: the impermissibility of desecrating the Sabbath does not automatically imply that active termination is permitted.

34 See Nahmanides, bYoma 82a and *Torat Haadam* (Shaar Hasakana); *Noda Biyehuda* 2, HM 59.

35 See *Shmirat Shabat Kehilkhata* 36:2, but see Noda Biyehuda 1, HM 59; *Magen Avraham*, 330:15.

36 Indeed, *Havot Yair*, #31, utilizes this very point to prove that abortion prior to 40 days is prohibited. This argument is rejected by *Sridei Esh*, who argues that **even according to the Behag** abortion within 40 days may be permissible. The dispensation to desecrate the Sabbath to save a life does not, in his judgment, automatically entail a prohibition against terminating it. As noted by R. Weinberg himself, however, his assertion is contradicted by *Havot Yair*. See R. Bleich, n. 16 above, 340, n. 31.

Conceding, however, that abortion within 40 days is not murder or wounding of the fetus, does permit consideration of factors and mitigating circumstances that would otherwise be ignored. Thus, genetic defects or medical reasons falling short of "pursuit" or mortal danger, may, according to some views, justify abortion.[37]

c Abortion Prior to 40 Days under Noahide Law

The source of the Noahide ban on abortion is the verse "Whoso sheddeth man's blood, by man shall his blood be shed" (Gen. 9:6), which is interpreted as, "He who sheds the blood of a person within a person, his blood will be shed." As the Talmud points out, "person within a person" aptly describes a fetus.[38] Since, however, the Noahide prohibition refers to a "person," and an embryo of less than 40 days does not have the status of "personhood," some decisors have concluded that there is no Noahide ban on feticide before 40 days,[39] Noahides being enjoined only against the taking of actual life (even fetal), not potential life. The latter is proscribed only by dint of the "destruction of seed," procreation, wounding (of the mother) or "desecrate one Sabbath so that many other Sabbaths may be kept" injunctions, none of which non-Jews are obligated to observe.

This gives rise to two questions. Can a Jew perform an abortion on a Noahide if the embryo is less than 40 days old? Assuming the stringent view that Jewish law prohibits abortion even before 40 days, can a Jewish woman procure such an abortion from a non-Jewish physician? The answer to the first question appears to be in the affirmative. While a Jew may not take the life of a non-Jew, there is no positive duty to protect potential life. Nor is there the problem of causing another to transgress in aiding the woman to obtain the abortion, since the non-Jew herself is not subject to the affirmative commandment of saving life (*hatzala*). Thus, though a Jewish physician could normally not abort the fetus of a non-Jew, he is permitted to abort an under 40-day old Noahide fetus even according to the authorities who prohibit such an abortion for a Jew.[40]

37 See, e.g., *Tzitz Eliezer*, 9:51(3).
38 bSanhedrin 57b.
39 R. I.J. Unterman, *Shevet Miyehuda*, 1:9.
40 For reasons that are not clear to me, R. Bleich, n. 16 above, 343, limits this dispensation to "giving advice or rendering indirect assistance."

The answer to the second question, however, is negative. Given that the abortion prohibition applies not only to the physician performing the procedure, but also the woman who makes herself available for the operation and hires the physician, her obligation to preserve even potential life would preclude her utilizing a non-Jewish physician for this purpose.[41] Thus whatever leniencies may exist under Noahide law for the termination of a less than 40-day old pregnancy do not extend to a Jewish woman enlisting the assistance of non-Jews. (At the very least, this would also be prohibited Rabbinically under the rubric of *amira leakum*,[42] but in all probability would be a direct violation of the prohibition against standing idly by the blood of one's neighbor, or the obligation to return lost articles, certainly on the view of the Behag, and possibility even on the dissenting view.)

d Preembryo Disposition

Most contemporary decisors who have considered the issue allow the destruction, or at least passive discarding of, unwanted embryos, ruling that the strictures against abortion are inapplicable.[43] A number of rationales for this ruling have been offered:

1. As noted, some opinions permit aborting a less than 40-day old embryo because its status is that of "mere water." The preembryo's physiological development is far less advanced.

41 The statement in the text is premised on R. Unterman's analysis that the prohibition of abortion on an under 40-day embryo is not a matter of proscribing murder, but rather, it proscribes violation of the affirmative duty to protect and preserve even future life. Hence, it is clear that the woman is a **primary** offender and not merely an aider and abetter of the physician.

42 This refers to the general principle that a Jew may not ask a Gentile to do something for him that the Jew cannot do himself. This applies even where the activity is not prohibited to the Gentile, and is therefore to be distinguished from *lifnei iver*. This principle is not limited to the laws of the Sabbath; see *SA* YD 297:4, and *Shakh* ad loc.

43 See R. Mordechai Eliyahu, "Discarding fertilized eggs and fetal reduction," *Tehumin* 11 (1991); R. Chaim David Halevi, "On fetal reduction," *Assia* 12 (1990), 47–48; R. Moses Sternbuch, *Beshvilei Harefua* 8 (1987), 29; R. Ezra Bick, "Ovum donations: a rabbinic conceptual model of maternity," reprinted in JLNRT, n. 4 above, 83, 93.

2. The prohibitions against abortion, even if applicable to less than 40-day old embryos, apply only to procedures destroying life already implanted within the womb, and not to living cells **in vitro**. Since the cells are not in an environment in which they can achieve human viability, they are not considered a potential person (*nefesh*) entitled to protection.
3. Regardless of the 40-day rule, until implantation within the body of a human being, no human life can be said to exist even *in potentia*.[44]
4. Since the preembryo is microscopic, that is, invisible to the unaided human eye, the Torah does not invest its existence with any significance, just as microscopic insects are not deemed "creeping things" (*shratzim*).
5. At least where implantation of all preembryos poses a pregnancy risk to the successful development of any one of them, the law permits selective implantation; indeed, even actual reduction of fetuses already in utero may be permissible.[45]

Examining the inner logic of these rationales, it appears that only the first is conceptually unassailable. Clearly, if one may abort embryos in the womb that are under 40 days old, one may do the same to an externalized preembryo whose development is far below the 40-day point. The fifth argument, however, is essentially a non sequitur. While it is true that halakha would undoubtedly permit selective implantation to maximize the chances of a successful pregnancy, it is hard to see how nonimplantation would justify preembryo destruction, particularly in view of the possibility of cryopreservation for later use. Arguments (2), (3) and (4) all focus on the preembryo's attenuated

44 This differs from rationale (2). On (2), the laws governing abortion are inapplicable here because the externalized preembryo is not in an environment in which its life potential can be brought to fruition. In the event technology ever devises a self-sufficient artificial womb, a halakhic dispensation based on nonviability would lose its force. By contrast, on (3), any human cells that have not undergone uterine implantation do not qualify as human life, regardless of how far along their development is. Indeed, were a child "hatched" in an incubator, it might not be human at all. See Bick, n. 43 above, 92–93.

45 See generally, Grazi and Wolowelsky, "Multifetal pregnancy reduction and disposal of untransplanted embryos in contemporary Jewish law and ethics," *American Journal of Obstetrics and Gynecology* 165 (1991), 1268–1271.

humanity or lack of personhood as a basis for permitting its destruction, even where destruction of under 40-day old implanted embryos is prohibited. But even conceding the relevance of these arguments to the definition of "personhood," the conclusion that destruction is permitted does not necessarily follow.

If indeed one accepts the rule that abortions are prohibited where the pregnancy is under 40 days, but nevertheless attempts to distinguish the preembryo from the implanted early embryo, the distinction might be difficult to defend. Ultimately, the validity of the distinction depends on why abortions are prohibited in the first place. Because a preembryo is outside a woman's body, wounding (*havala*) of the mother is obviously not an issue. Nor is murder (*retziha*) at issue, since the preembryo, not being in an environment in which it can be brought to term and live, arguably does not have the status of a living being, even on the view of those who might accord such status to an under-40-day old (implanted) embryo. Nor is it likely that destruction of a preembryo could be regarded as a wounding of the preembryo, since no existent living being is being "wounded."

It must be remembered, however, that there are two additional halakhic grounds adduced for the prohibition of abortion. To the extent that abortion restrictions rest on "destruction of seed" considerations, these concerns should apply equally to the preembryo. The preembryo's lack of "present" humanity should be irrelevant, since even sperm, which is not "human" at all, cannot be destroyed.

Thus, at least on the reasoning of *Havot Yair*, there would be no justification for the indiscriminate destruction of preembryos. As noted, however, many authorities do refuse to equate abortion of any embryo or fetus with the sin of "destruction of seed," arguing that the latter occurs only at the time of seminal emission, and not after an ovum has been fertilized. They nonetheless maintain that early abortion is prohibited, not because it is the termination or wounding of an existing life, but because it constitutes failure to protect and preserve **future** life — not life that is, but life that could be, if not interfered with. If indeed there is a duty to protect the future potential of life, it is not at all clear why the present "diminished humanity" of the preembryo should be a mitigating factor.

I have already noted the view of the Behag and the argument of *Havot Yair* that whenever there is a dispensation to desecrate the Sabbath, there is a duty to sustain life and a corresponding prohibition not to diminish it. The fundamental question would therefore be: is

there in fact a religious obligation to preserve the life of a preembryo? If there is, that alone would prohibit its destruction and indeed, compel its implantation. Do the directives of "not standing idly by the blood of your neighbor," returning lost objects, and "it is better that one Sabbath be transgressed, so that many Sabbaths may be kept" apply to the externalized preembryo? While it may be true that the preembryo lacks some of the elements of personhood, recall that the Behag permitted Sabbath desecration for the pre-40 day embryo not on the grounds of its **present** personhood, but on the grounds of its **future** potential. Should not the identical standard apply to the preembryo, regardless of its present status?

In a recent responsum, R. Samuel Wozner of Bnei Brak ruled that even according to the Behag, one may not desecrate the Sabbath on behalf of a preembryo.[46] Since justified Sabbath desecration is based not on the presence of **actual** human life, but on the potential for it, where such potential is very remote or improbable (as it is here, given the present percentage of IVF pregnancies brought to term), there is no dispensation to desecrate the Sabbath or otherwise transgress. If we take this ruling to mean that there are no duties that mandate sustaining preembryo life, surplus embryos may indeed be discarded with impunity. If, however, as is more likely, R. Wozner's ruling is limited to cases where there are conflicts with other prohibitions, but in the absence of such conflict, there would indeed be an obligation to protect potential life, the unlimited right to discard unwanted preembryos cannot be assumed.[47]

46 *Shevet Halevi*, 5:47.

47 Two peripheral points that may seem to warrant leniency should be rejected. First, the fact that the preembryos are likely to be destroyed by a non-Jew would not in and of itself justify the procedure. Even if the non-Jew is free of transgression, as R. Unterman argued, the Jewish parents who authorize the embryo destruction are considered to be primary violators of their halakhic obligation to protect and sustain even potential life (on the view that a Jew may not abort an under 40-day old embryo). From the perspective of the "do not stand idly" injunction, there is no distinction between commission and omission. Moreover, should we view the prohibition against a Jew's aborting an under 40-day old embryo as based on recognition of the embryo's **actual** life rather than its **potential** to **become** life, in which case it is a form of noncapital murder, Maimonides makes clear that at least insofar as Heavenly judgment is concerned, hiring the murderer (even if for him — the Noahide — it is not murder) renders the hirer culpable. See *Code*, Laws concerning Murder 2:1.

I would suggest, however, an alternative basis for leniency. It must be kept in mind that what is involved in preembryo disposition is not necessarily active destruction, but simply allowing them to thaw out or disintegrate in storage. Thus, we are not dealing with active homicide (*retziha beyadaim*), but with omitting to act (*shev veal taase*) to save life. Moreover, given that the preembryo is "mere water" (*mayim bealma*), even active destruction would at worst violate only the duty to protect potential life, and would under no circumstances constitute murder.[48] Certainly, from the perspective of the couple, they are at worst authorizing the cessation of actions that would culminate in embryo transfer and implantation.

Assuming that in the abstract there is an obligation to sustain life based on "do not stand idly," "rescuing a lost person" (*hashavat gufo*); and "it is better that one Sabbath be transgressed" — at what cost? The halakha is very clear that one need not endanger one's life to preserve or protect even the existing life of another.[49] While it is permitted and

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A second argument for leniency might be that, in many cases, the preembryos will not be physically destroyed, but thawed out or left in storage, which will cause their inevitable spoilage and deterioration. Death will occur only via *gerama* (indirect causation). This too should not make a difference. Whether destruction is active and direct or merely indirect and gradual, it still constitutes failure to affirmatively preserve life. The gravamen of "do not stand idly" is not **how** the death occurs, but the fact that no steps were taken to prevent it. Moreover, even if the abortion prohibition is based on the prohibition against murder, Maimonides rules that indirect homicide violates the prohibition against murder though the perpetrator is not subject to capital punishment, see ibid.

48 This follows R. Unterman's analysis that pre-40 day abortions are proscribed because they constitute failure to preserve potential life, and not because they constitute murder.

49 The *Beit Yosef*, HM 426, quotes the Jerusalem Talmud as stating that one is obliged to expose oneself to **possible** danger to extricate another from **certain** danger. This rule is not quoted by either the *SA* or Rema. According to *Sema* and *Pithei Teshuva*, the Babylonian Talmud disputes the Jerusalem Talmud's premise, and the law is in accordance with the former. See also *Teshuvot Radbaz*, #627, who states that it is forbidden to endanger oneself to save another, and one who does exhibits "foolish piety." Others permit (but do not require) self-endangerment if the person to be rescued is a scholar or otherwise worthy personage, but prohibit such endangerment if the rescuer is more learned still (*Pithei Teshuva*, YD 252:1 in name of *Responsa Yad Eliyahu*, #43). In practice, altruistic

perhaps encouraged, there is no duty. It is also clear that the process of childbirth is a life-threatening condition that justifies Sabbath desecration.[50] Thus, a woman should not be halakhically compelled to receive a fertilized ovum in order to possibly preserve its life, because in that process she would be endangering her own.[51] Accordingly, fertilized eggs do not have to be implanted.[52]

Admittedly, this argument might prove too much. After all, it is clear that a healthy woman may not abort a viable pregnancy merely because childbirth per se is life-threatening. Because it is normal, common and natural, and the risk of danger is ordinarily low, the life of the fetus must be respected. Moreover, though a woman is technically not obligated to fulfil the precept of procreation, she certainly could not insist on contraception or abstinence on the grounds that pregnancy per se is a dangerous condition. The obligations and responsibilities of the marital bond, including sexual relations (*ona*), populating the world (*lashevet yetzara*), and the duty to facilitate the husband's obligation to procreate cumulatively neutralize the element of danger, which is in any event remote. However, where the prospect of rescue is in itself very remote, even remote dangers may justify inaction. Insofar as sexual relations and populating the world are concerned, these obligations do not require consent to an IVF procedure, nor would the wife be required to complete the procedure once begun.[53] (*Ona* can also be waived by mutual consent.)[54] In the absence of countervailing

volunteering is permitted, but not obligatory, regardless of the rescuer's status. See *Igrot Moshe*, YD 2, 174:4 re kidney transplants, and *Arukh Hashulhan*, HM 421:4, who cautions that one should not be overly solicitous of one's own safety and thus decline to render assistance. See *Nishmat Avraham*, YD 156:4 and 252:1.

50 See *SA* OH 330:1.

51 See *Meshekh Hokhma* on Genesis 9:7, who offers this as an explanation of why women are exempt from the "be fruitful and multiply" commandment.

52 Even according to the Jerusalem Talmud, it is possible that there is no obligation to put oneself in danger here, for the obligation might be imposed only if it is fairly certain that the rescue will succeed. In view of the small percentage of implanted IVF embryos that are brought to term, the prospects of rescue are at best doubtful. See *Kesef Mishne*, Laws concerning Murder 1:14.

53 See *Nishmat Avraham* 5, EH 1 (App.).

54 See generally *SA* OH 240.

concerns, therefore, the woman's claim of danger, at least in the context of preembryo implantation, should be given credence.

The conclusions that emerge from this analysis are the following:

1. All extracted eggs that are fertilized should, optimally, be implanted.
2. The wife has the right to refuse implantation on the grounds that all pregnancies present some danger (*sakana*).
3. If the wife is willing, the husband has no right to abort the process.
4. Since preembryos are at best potential life and not actual life, to the extent there is no duty to sustain them because of danger to the mother, they can be actively destroyed. "Passive v. active" is an immaterial distinction when we are only considering an unrealized potential.[55]
5. Although the danger to the woman could be averted by donation of the preembryo to an infertile woman willing to assume the risks, the halakhic problems of such donation rule it out as an acceptable alternative.[56]

e Propriety of Initiating the Procedure

One question remains: given that a woman has the right to refuse the receipt of fertilized eggs, on the grounds that it poses a danger, is it proper to perform or authorize an IVF procedure that may result in more preembryos than the woman is willing to receive either now or later? Must the IVF protocol be structured so that only a very limited number of eggs are retrieved, to guarantee that all fertilized eggs will be "rescued"? Freezing for later implantation minimizes the problem, but does not eliminate it. If, for example, twenty eggs are retrieved and six fertilized, a woman may be unwilling to have all the embryos implanted even over a period of several years.

55 One difficult question may be, what if the woman's desire not to implant is not due to "danger," but some unrelated reason, for example, preimplantation genetic testing that revealed a defect, or because the woman was divorced from her husband? Whatever her reason for not wanting the procedure, halakha gives her the right to decline it.

56 See the discussion in sec. 6 below.

This question can be connected to a well-known dispute between Nahmanides and R. Zerahiah Halevi (Baal Hamaor).[57] In talmudic times, babies needed warm water after circumcision. If the circumcision was taking place on the Sabbath, the water had to be prepared before the Sabbath, because it is only a *makhshir mila* — something necessary for but not part of the circumcision ceremony. If the water was spilled after the circumcision, it is clear that more water could be boiled, due to the threat of mortal danger. But what if the water spilled before the circumcision? Is one allowed to perform the circumcision knowing that a dangerous situation will thereby be generated, necessitating desecration of the Sabbath, or is it preferable to defer the circumcision until the next day? Baal Hamaor rules that it should be postponed, while Nahmanides rules that the commandment should be carried out even with the knowledge that a situation of mortal danger will be generated.[58] While this dispute is not explicitly addressed in the *Shulhan Arukh*, the halakhic consensus follows Baal Hamaor: the circumcision must be deferred.[59]

If we can extrapolate from the Sabbath to other areas, the governing principle appears to be that one is not allowed to engage in conduct that is permissible in and of itself with the knowledge that a situation of mortal danger necessitating transgression will thereby be engendered. Applying this to the disposal of surplus embryos, while the in vitro fertilization may be halakhically permissible in and of itself — removal of eggs is not problematic, and the emission of sperm was for procreative purposes and not "in vain" — it would be halakhically improper to utilize the procedure in such a manner that there are likely to be surplus fertilized eggs that will then have to be discarded. Even if halakha permits those eggs to be discarded once they are generated (because of considerations of maternal health and mortal danger), it would be improper to bring about a life-threatening situation that will necessitate what would in other circumstances be a halakhic violation. In effect, therefore, unless the mother is willing to have fertilized ova

57 See *Sefer Hamaor* on Alfasi, bShabat 53a (standard Vilna edition). Nahmanides' view is cited by R. Nissim Gerondi.

58 For a full discussion, see R.M. Pirutinsky, *Sefer Habrit*, 266:6.

59 See *Mishna Brura*, 331:24, citing this as the position of "most *aharonim*"; if the circumcision does take place, however, one is certainly obligated to desecrate the Sabbath to extricate the child from danger.

cryopreserved for future use, extraction would have to be limited to the number of eggs that the mother is able and willing to have implanted.

The analogy to circumcision on the Sabbath may not be exact. Circumcising on the Sabbath in the absence of warm water will **inevitably** necessitate desecration of the Sabbath due to the threat of mortal danger, but the extraction of multiple eggs will not necessarily result in transgression. Presumably, even according to the Behag, the obligations of rescue, "do not stand idly," restoring lost objects, and so on, come into effect only upon fertilization. It may be that out of eight, ten, or even twelve eggs, only one or two, if any, will be fertilized. It is **possible**, of course, that multiple fertilizations will occur, thereby necessitating their disposal, but since this is only a possibility, not a certainty, the parties are permitted and indeed encouraged to proceed in any way that will enhance the efficacy of the procedure, regardless of what consequences **might** ensue.

This conclusion, which distinguishes between certainty and possibility, finds support in another law concerning circumcision on the Sabbath. The Rabbis of the Talmud had a tradition that for the first three days following circumcision (according to some, only the third day) the baby's health may be especially precarious, permitting violation of the Sabbath due to mortal danger. Some decisors have concluded that it is improper to perform a circumcision on Thursday or Friday (unless it is the eighth day), since this may necessitate desecration of the Sabbath.[60] The majority of decisors rule, however, that Thursday or Friday circumcision is permitted, and it is in fact improper to delay the performance of a mitzva.[61] While it is indeed true that purely elective surgery should not be performed after Wednesday given the mere possibility the Sabbath will have to be violated,[62] such possibilities carry no weight where a mitzva is being performed.

60 *Tashbetz*, 1:21, quoted in *Beit Yosef*, YD 268; *Birkhei Yosef*, YD 262; *Maharsham*, 5:7; *Yabia Omer*, 5, YD 23.

61 *Shakh*, YD 266:18; *Magen Avraham*, 331:9; *Eliyahu Rabbah*, 331:10; *Noda Biyehuda* 2, YD 166; *Hakham Tzvi, Additional Responsa*, #9; *Mishna Brura*, 331:73; *Shmirat Shabat Kehilkhata*, 32 (96). See also *Nishmat Avraham*, YD 262:3, quoting R. S.Z. Auerbach.

62 Some opinions prohibit this because of the prohibition against engendering situations of mortal danger. Others prohibit it merely because it is improper to cause unnecessary pain and suffering over the Sabbath. On the latter view, this halakha is of no relevance to the *pikuah nefesh* issue under discussion here. See *SA* OH 248, and commentaries ad loc.

IVF falls somewhere between a mitzva like circumcision, where only the **certainty** of desecration warrants postponement, and an optional medical procedure, where even the **possibility** of Sabbath desecration necessitates rescheduling. On the one hand, the obligations of procreation and "settling the world" (*lashevet*) have never been understood as compelling resort to any type of surgical procedure to achieve procreation.[63] At the same time, most decisors do consider the offspring produced from IVF as having a familial bond to the biological parents.[64] The father fulfils either the obligation of procreation, or at least the prophetic injunction of *lashevet*.[65] As such, the mitzva that one may achieve may be sufficiently great that one is permitted to pursue whatever avenues carry the greatest prospects of success, even if there is a possibility (not a certainty) that, because of mortal danger, violation of prohibitions, specifically, disposal of surplus eggs, may ensue.

In fact, one might argue that to the extent IVF is permissible only because the sperm was procured for purposes of reproduction, the "destruction of seed" prohibitions **require**, not only permit, that IVF be implemented in the manner most likely to produce a successful pregnancy and thus eliminate the need for repeated semen procurement. Since multiple egg retrieval greatly increases the chances of success, its utilization may actually be preferable, notwithstanding the "risk" of surplus embryos that will not be implanted.[66]

63 See n. 53 above.
64 See sources cited in Breitowitz, n. 4 above, nn. 7–16.
65 Breitowitz, n. 4 above, n. 16.
66 A more subtle analysis lends further support to this argument. If destruction of a fertilized ovum is prohibited, it is not because it is a "life," but because it is an organism that has the potential to develop into life. Justification of the obligation to rescue it is predicated on its future existence, not its present reality. The "sin" of destruction is not abortion or feticide, but rather, failure to actualize a certain potential. This failure obtains whether the fertilized ovum is discarded or the egg was not retrieved in the first place. Limiting ova retrieval to a small number of eggs does not eliminate this dereliction, hence there is no reason such limitation should be halakhically mandated. Ultimately, however, I believe this subtlety is unconvincing, because it would suggest that the failure to retrieve an egg, and the act of destroying or discarding an already fertilized egg, are morally and halakhically equivalent — a dubious proposition at best. I thus prefer to rest my conclusion on considerations of maternal danger (*sakana*).

4 *Experimentation*

Although the authorities disagree as to whether an aborted fetus or stillborn requires burial, it is clear that the "mere water" status of an under 40-day implanted embryo, and certainly any preembryo, renders burial totally unnecessary.[67] Nor does a preembryo transmit any impurity due to contact with a corpse (*tumat met*),[68] hence burial is not needed for that purpose. For the same reason, the prohibition against deriving benefit from a cadaver, which is the basis for prohibiting various forms of dissection and experimentation on fetuses and stillborns, should be inapplicable to preembryos that will not be implanted.[69] In short, to the extent the preembryo can be destroyed or discarded, it can be used for research or experimentation.[70]

Note, however, that halakha may impose two significant restrictions on such experimentation. First, nontherapeutic experimentation **followed by implantation** may very well be forbidden because of the potential harm it may cause to a future human being. Even if the preembryo itself is "mere water," there may be an obligation not to "stand idly by," that is, an obligation to prevent harm, not to the embryo, but to the person the preembryo might become. This approach parallels the recommendation of the American Fertility Society (now the American Society for Reproductive Medicine) that experimentation be permitted on embryos not destined for implantation, but prohibited on embryos that will be implanted.[71]

Second, current ethical guidelines specifically permit the creation of preembryos exclusively for research purposes, at least where there is

67 See, e.g., *Responsa Maharsham*, 4:146 (even a stillborn need not be buried if the miscarriage occurs in the first trimester).

68 R. Judah Rosanes, *Mishne Lamelekh*, Laws concerning Corpse Impurity 2:1.

69 I have not found an explicit source, but this appears to be an obvious corollary of their "mere water" status. See *Binyan Tzion*, #119 (no prohibition against benefit from a corpse when there is no obligation of burial).

70 Indeed, it might conceivably be argued that experimentation is preferable to disposal insofar as it minimizes "destruction of seed," but this line of reasoning has not, to my knowledge, been utilized by any halakhic authority.

71 ECART, n. 1 above, 79S. A similar concept exists under common law, which affords little or no protection to the embryo, but awards compensation to live human beings who suffered damages in vitro. See text at nn. 219–225 above.

the informed consent of the gamete providers and certain other conditions are met.[72] Since IVF involves the emission of seed outside the confines of marital intercourse, the only halakhic justification for it is procreation.[73] Seminal emission for the express purpose of generating an embryo that will **not** be implanted is a clear violation of the prohibition against "destruction of seed," and cannot be sanctioned.[74] For a Jewish doctor to facilitate such a protocol may constitute causing someone else to sin, or violate the Rabbinic prohibition against assisting in the commission of a transgression (*mesayeia lidvar aveira*).[75] Since, however, many authorities maintain that the prohibition against destruction of seed does not hold for non-Jews,[76] the physician would be

72 This is the consensus of the two major medical organizations dealing with this problem — the American Fertility Society (American Society for Reproductive Medicine), and the American College of Obstetrics and Gynecology. See ECART, n. 1 above, 79S. An identical position was taken in a 1994 report of a US government sponsored Human Embryo Research Panel. See National Institutes of Health, *Final Report of the Human Embryo Research Panel* (September 22, 1994). Note, however, that at least with respect to federal funding, the Panel's recommendations were never implemented. See below, text following n. 255.

73 Interestingly, certain types of preembryo generation may not involve the emission of seed at all, e.g., cloning. May an embryo be created by cloning for the purpose of experimentation? This is an especially important question given that so-called "therapeutic cloning" can be used to obtain genetically-compatible stem cells. See nn. 256–260 below. I plan to address this problem in a future work.

74 Moreover, in light of the analysis presented earlier, that predicates the permissibility of discard on considerations of danger, there would clearly be no justification for creating life potential with absolutely no intention of bringing it to fruition. Indeed, this could very well apply to a cloned embryo as well.

75 Technically, the biblical transgression of causing another to transgress only applies if the sin could not be committed without the aider and abetter. See bAvoda Zara 6a. But see n. 27 above. Nevertheless, even if there are others who could have enabled this sin, violation of the Rabbinic prohibition against assisting in the commission may be involved. See *SA* YD 151; comments of *Shakh*, sec. 6.

76 See *Tosafot*, bSanhedrin 59b s.v. *venahzor*. In point of fact, even if non-Jews were subject to the prohibition, it would not be a sin for a Jew to facilitate commission of the act. The prohibition against causing another to sin is inapplicable, because there are other physicians who can enable the sin to be carried out, and with respect to the Rabbinic law against "assistance" (*mesayeia*), the *Shakh*, ibid., rules that it is inapplicable vis-a-vis a non-Jew.

allowed to facilitate the emission of seed from non-Jewish donors even for experimental use. But where the IVF procedure is undertaken for procreation, and the parties later decide to donate the preembryo for research, this is nothing more than a decision to discard — an option that is halakhically valid.

5 *Preembryo Donation*

A fourth alternative to implantation, destruction or experimentation is the donation of the embryo to infertile couples. IVF clinics often encourage the exercise of this option, and some clinics even require that surplus preembryos be donated.

Embryo donation raises a number of halakhic problems, first and foremost, the identity of the mother. Where the woman who carries a baby to term is not the woman whose egg was fertilized, there is halakhic disagreement as to who the mother is.[77] If, for example, the embryo recipient is non-Jewish, is the child non-Jewish, based on the status of the birth mother, or Jewish, based on the status of the egg donor? Maternity is also important for establishing which relationships

77 One of the midrashic sources often cited in this context is the Aggada that Dina was originally conceived in Rachel's womb but miraculously transferred to the womb of Leah as a result of Leah's prayer; i.e., Joseph and Dina were switched embryos. See Targum Yonatan on Genesis 30:21. In effect, Rachel was the genetic mother of Dina, while Leah was the birth mother. Apart from the question of whether Midrash can serve as a halakhic source, the implications of this Aggada are not unequivocal. We might say that since Dinah is consistently described as the "daughter of Leah," motherhood must be defined by birth, rather than genetic origin. However, in light of another Midrash, which that teaches that Shimon married Dinah, an act that would be prohibited even under Noahide law if they shared a common maternal bond, we might conclude that Dina was halakhically regarded as **Rachel's** child. See *Tur* on Genesis 46:10. (The *Tur* assumes that Shimon and Dinah were Noahides, who are permitted to marry siblings with the same **father**.) As R. E. Bick, n. 43 above, points out, Rachel's "motherhood," which the *Tur* assumes, might be based on the fact that conception took place in her womb, and not on the fact that she was the egg donor. Hence the *Tur*'s remarks do not resolve the question of maternity for the case where eggs are fertilized in vitro and then donated to a recipient. A similar point can be made with respect to bHulin 70a. And see n. 78 below.

are incestuous. In a comprehensive study, R. J. David Bleich notes that the majority of authorities regard maternity as based on birth;[78] one minority view regards the egg donor as the sole mother.[79] Yet a third opinion maintains that although the woman giving birth will be deemed the exclusive mother where both the egg donor and the birth mother are Jewish, the genetic egg donor establishes maternity if one is

78 See R. Bleich, "In-vitro fertilization: questions of maternal identity and conversion," reprinted in JLNRT, n. 4 above, 46. See also R. Ezra Bick, n. 43 above, and R. Bleich's rejoinder, JLNRT, 10, as well as volume 5 of *Tehumin* (1984), in which rabbis Z.N. Goldberg, Avraham Kilav, and Zerah Warhaftig discuss this issue.

A text that is sometimes cited **against** this majority view is bHulin 70a, which discusses the case of an animal that is removed from the womb of its mother and transplanted into the womb of a second animal, from which it is eventually born. It is clear to the Talmud that the first animal is deemed to have had a calf, so that any other offspring it has in the future will be exempt from the law of the firstling (*bekhor*) — the first-born animal that must be given to a priest and brought as a sacrifice. The question is the status of the second animal. See Maimonides, *Code*, Laws concerning Firstlings 4:18. Taken alone, this passage might indicate that maternity is definitely assigned, at least in part, to the genetic mother, particularly since the Talmud refers to the fetus, vis-a-vis the first animal, as "hers" (*dida*), and vis-a-vis the second animal, as "not hers" (*lav dida*).

As R. Z.N. Goldberg convincingly argues, however, the animal from which the fetus was removed was far more than a mere egg contributor or genetic parent; it was the animal in whose body conception took place. It was also a "birth mother," since the fetus was removed at a point of fetal development that would qualify as a birth — the differentiation of limbs and organs — for otherwise its removal could not exempt a subsequent birth from the law of firstlings. As such, the most the Talmud teaches us is that once maternity is established in animal A via conception, gestation, and/or birth, it is not terminated by transfer to and (re)birth from animal B (though the latter may acquire attributes of maternity). The passage does not establish that mere egg donation or genetic connection, in and of itself, suffices to establish maternity.

In short, the Talmud does not really address the question of "genetic mother" v. "birth mother," but rather, that of whether the existence of a prior birth mother rules out a later firstling exemption for the second birth mother. Accordingly, it is not relevant to our concerns here. And see n. 212 below.

79 R. Shlomo Goren, *Hatzofe*, 7 Adar 1 (1984). See also R. Warhaftig in *Tehumin* 5 (1984), who seeks to demonstrate this from the law of *dmei vladot*.

a Jew and the other is not.[80] R. Bleich even asserts the possibility of dual maternity. R. S.Z. Auerbach concludes that the matter is uncertain, and one would have to be strict in considering the various possibilities.[81]

In light of this uncertainty, the following conclusions emerge. Donation of a preembryo to a non-Jewish couple (or to the IVF clinic, which, at least in the United States, will probably give it to a non-Jewish couple) cannot be countenanced, for if in fact the resulting child is Jewish, in light of the egg donor, he ought not be raised as a non-Jew. Moreover, even on the majority view that the child is non-Jewish, in light of his gestation, birth, or both, within the body of a non-Jew, embryo donation may be prohibited on the grounds of "giving birth to a child for idolatry."[82] It is also possible that if donation of the embryo will produce a child who is halakhically

80 This is the position of R. Avraham Kilav. See *Tehumin* 5 (1984), 260, 267.

81 See *Nishmat Avraham* (App.), EH 22:2, 186. In an entirely different context (the laws of meat and milk), R. Akiva Eiger, *SA* YD 87, suggests that a maternal bond may be forged during gestation, i.e., even prior to birth. This does not fully resolve the maternity problem of ovum donations for two reasons. First, in IVF using donated ova, there is no gestational process within the donor's body. Thus, even R. Akiva Eiger might well concede exclusive maternity to the birth mother. Even in uterine lavage, where fertilization does occur within the donor's body, R. Akiva Eiger's remarks seem to limit maternity to gestation beyond the first trimester. (His comments would become germane should technology ever develop the capacity to carry out full-fledged fetal transfers. If a fetus is transferred from one woman to another woman **after** the first trimester, R. Akiva Eiger might consider the first woman the halakhic mother, but IVF or uterine lavage are currently far from that point.)

Second, and more importantly, R. Akiva Eiger's recognition of a maternal bond on the basis of gestation does not preclude recognition of birth as a superseding indicator of maternity, nor does it preclude dual maternity. In short, his brief comments do not resolve the fundamental halakhic uncertainties.

82 R. Bleich notes that such a procedure is at the very least "contrary to the ideological norms of Judiasm." The Gemara in bAvoda Zara 26a permits assistance in birthing idolatrous children only where the withholding of such services will promote enmity or hatred towards Jews (*eiva*). While "enmity" may justify the practice of obstetrics, it certainly could not permit ovum or preembryo donation. It is, however, questionable whether the talmudic interdiction applies to non-idolatrous religions.

non-Jewish, as most would maintain, the Jewish sperm donor may be in violation of a different Torah prohibition, that against impregnation of a non-Jew.[83] Finally, even if such a child has dual maternity and is a "half Jew, half Gentile," it would still be forbidden to have him

83 Whether or not such a prohibition exists, apart from the general ban on intermarriage, is apparently a matter of dispute. The Mishnah in Megila states that one who interprets the verse "And of your seed you shall not give over to Molech" (Lev. 18:21) to mean: you shall not give of your seed to impregnate an Aramean woman, is silenced with a reprimand." Rashi understands this to mean that the verse in Leviticus is concerned exclusively with idol worship and **not** with the impregnation of a Gentile woman. However, *Targum Yonatan Ben Uziel* (a variant of *Targum Yerushalmi*) and the *Arukh* interpret the verse precisely in the manner the Mishnah seems to condemn. Indeed, the Gemara ad loc. cites R. Yishmael, who quotes the supposedly discredited teaching approvingly. (But cf. Rashi, who interprets R. Yishmael as telling us what we should **not** do.) Various explanations have been offered to reconcile this conflict, e.g., the Mishnah condemns any implication that such impregnation would be a capital offense, as true Molech worship is, but concedes that the prohibition of impregnation of a non-Jew is a valid secondary meaning of the verse. Alternatively, the Mishnah rejects limiting the verse to Arameans who are Molech worshippers when in fact it should be applied to all non-Jews. See *Tosafot Yom Tov, Tiferet Yisrael*, and *Maharsha* on bMegila 25a.

In any event, on the view of the *Arukh* and *Targum Yonatan*, it follows that the insemination of a non-Jew with Jewish sperm may be a direct violation of the prohibition against Molech, even if insemination as such is normally not deemed a sex act. Note, however, that neither Rambam nor *SA* cite the reading of *Targum Yonatan*, suggesting that it is not halakhically definitive.

In discussions with rabbinical colleagues, I have heard it said that to the extent the child is not Jewish and bears no relationship to the Jewish father, the act of preembryo donation constitutes "destruction of seed" — the seed is literally going to waste, since it will not produce a child related to the sperm donor. This position is untenable. Given that most decisors permit even the physical destruction of a preembryo (see nn. 43–45 above), donation to a non-Jew obviously is no more destructive of the seed than actual destruction. The point is that as long as the seed was procured for purposes of procreation, and the emission was legitimate, what happens later is governed by the rules governing abortion, not those governing "destruction of seed." (But cf. *Havot Yair*, who prohibits abortion on grounds of "destruction of seed.") It is true, however, that the emission of sperm for the purpose of donating to a non-Jewish woman would unquestionably be "destruction of seed." See also n. 90 (use of a non-Jewish gestational surrogate may indeed involve "destruction of seed" if the child is deemed non-Jewish), but cf. the view of R. Gershuni, cited in n. 9.

raised as a Gentile, as his Jewish half is obligated to observe the commandments.[84]

Donation of a preembryo to a Jewish couple raises additional problems. At minimum, it would, of course, be improper to donate the embryo to a couple who will not raise the child according to the laws of the Torah. Even assuming the best case, an observant infertile couple, donation raises serious questions of adultery and *mamzeirut* (illegitimacy). By causing a married woman other than his wife to carry and bear his child, the sperm donor may be committing adultery and producing a (halakhically) illegitimate child (*mamzer*).[85] To the degree the identities of the donor couple are kept secret (as is common), there

84 See Bleich n. 78 above, 94, 94; Goldberg, *Tehumin* 5 (1984), 248. On R. Kilav's minority position that the child is Jewish because of the identity of the egg donor, the paternal relation is also maintained. Accordingly, embryo donation would not be "destruction of seed," and it is probable that it would not be deemed impregnation of a Gentile, though this is less clear. The only basis for prohibition would be the impropriety of raising a Jew as a non-Jew, an issue that would not arise in the case of, say, gestational surrogacy, since the non-Jewish surrogate returns the baby to the Jewish couple.

85 The issues of adultery and *mamzeirut* arising from the utilization of reproductive technologies were the subjects of a long-standing debate between the Satmar Rav, R. Joel Teitelbaum, and R. Moses Feinstein, in the context of an impregnation with donor semen (AID). The Satmar Rav took the position that any married Jewish woman who is impregnated with the semen of a Jewish man other than her husband has committed adultery, and the child born from such a procedure is a *mamzer*. Interestingly, he ruled that even the (male?) doctor mechanically introducing the semen into a married woman's body was guilty of adultery. See *Hamaor* 15(9) (1954), 3–13. See *Igrot Moshe*, EH 1:71; 2:11; 3:14; 4:32(5) for R. Feinstein's view to the contrary. Despite R. Feinstein's eminence, a number of decisors have stated that a child born to a Jewish couple from Jewish donor semen is at least a possible *mamzer*. See R. Auerbach in *Noam* 1 (who points out, however, that the woman is not forbidden to her husband); *Tzitz Eliezer*, 9:51. Even those who do not impose the stigma of illegitimacy conclude that such impregnation may violate Torah law. See *Shevet Halevi*, 3:175; *Maarakhei Lev*, #73; *Bnei Ahuva*, Ishut ch. 15 (citing Lev. 18:20).

R. Feinstein himself concludes that AID from a Jewish donor is forbidden not because of adultery or *mamzeirut* but because of the concern over the possibility of incest with paternal relatives. Accordingly, provided the donor semen is from a non-Jew, where there will be no paternity, he permitted the procedure in cases where the woman was suffering terribly from her infertility. He stated, however, that only an expert scholar and decisor was to make a determination as to when this condition was met.

is also the possibility of incest with unknown paternal and, on the view that the egg donor is the mother, maternal relatives as well.[86]

While donation to a single Jewish woman raises neither the problem of non-Jewish impregnation nor the issues of adultery and

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In his final pronouncement on the subject, he wrote that the decision should not be implemented, but, after the fact, the child is certainly not a *mamzer* and, if a girl, could even marry a *kohen*. (Nor does the wife become prohibited to her husband even if he is a *kohen*). See *Igrot Moshe*, EH 4:32(5). Contra: *Tzitz Eliezer*, 9:51, who absolutely condemns use of non-Jewish sperm, characterizing it as a "terrible spiritual catastrophe"; he concludes that a daughter so produced could **not** marry a *kohen*.

Whether the Satmar Rav's ruling applies only to direct insemination of a married woman, or includes IVF-fertilization of her egg outside her body, is debatable. Moreover, it could be argued that *mamzeirut* and adultery issues do not arise at all when a fertilized embryo, as opposed to sperm, is donated, since the donor sperm did not fertilize the ovum of another man's wife. Given, however, that there is at least a possibility of *mamzeirut*, this is reason enough to discourage embryo donation. See discussion at nn. 141–142.

86 The possibility of incest with unknown relatives of one's parents is the basis for the law that every widowed or divorced woman must wait at least 90 days before remarrying, to determine whether she is pregnant. Any marriage before that point could result in the birth of a child who might be raised as a premature child of the second husband but is in fact the full-term child of the first. Not knowing who his true father is, the child may wind up marrying forbidden relatives, e.g., his sister. See bJebamot 41a and *SA* EH 15:26.

On the view of most decisors, the child has no maternal tie to the genetic egg donor. Even R. Kilav, who accords maternity to the egg donor in Jewish–non-Jewish cases, concedes that birth is the exclusive determinant in "same religion" cases. Thus, the only potential incest problem would be with unknown **paternal** relatives. If, on the other hand, we adopt the position of R. Goren, who considers the egg donor to have exclusive maternity in all cases, or R. Bleich's view that there may be dual maternity, the fear of incest could arise with respect to maternal relatives as well, e.g., a maternal half-sister.

Note that if we accept R. Waldenberg's position that the use of IVF cuts off paternal relationships (see n. 7 above), the preembryo has no father or mother, and its subsequent transfer to a recipient generates no problems with respect to adultery, *mamzeirut*, or potential incest with unknown paternal relatives. (R. Waldenberg's reference to *mamzeirut* in *Tzitz Eliezer* 9:51 must be limited to AID where sperm is deposited directly into the woman's body. In light of *Tzitz Eliezer* 15:45, this could have no application to IVF outside the woman's body, since the sperm donor has no paternity. In any case, R. Waldenberg's position is not generally accepted.)

mamzeirut, it would generally be contrary to Jewish ethical norms to facilitate a woman's bearing children out-of-wedlock. And even if the recipient is single, the problem of future incest with unknown paternal or maternal (if the egg donor is the mother) relatives remains.

In sum, donation of preembryos, whether to Jewish or non-Jewish couples or to single women, raises numerous halakhic problems. It cannot be regarded as an acceptable option, at least as long as the gamete providers are alive.[87] Whether these concerns apply to pure egg donation will be discussed below.[88]

6 *Use of a Gestational Surrogate*

If a woman is capable of producing eggs but incapable of carrying them, she may desire to employ a surrogate who, pursuant to some agreement, will carry the baby to term and (hopefully) deliver it back to the sperm and egg contributors.[89]

87 The possibility of embryo donation after the father's death is discussed below in the text following n. 142.

88 A point that calls for further elucidation is whether, notwithstanding the halakhic difficulties, donation is nonetheless preferable to destruction. Many decisors have indeed permitted virtually indiscriminate destruction of preembryos. See text at nn. 43–45 above. Nevertheless, if we uphold the view of the Behag, n. 34 above, it may be a mitzva to try to sustain even pre-embryonic life, on the grounds of the "it is better that one Sabbath be transgressed" principle. If there is in fact an obligation to observe the "rescue" precept and "protect" preembryonic life, should that not override concerns such as possible future incest, generating *mamzeirim*, "giving birth to a child for idolatry," and the other problems mentioned? Are we dealing with something akin to sexual transgressions where the law is that one must kill himself or let himself be killed rather than commit such a crime (*yehareg veal yaavor*)? See Maimonides, *Code*, Laws concerning the Fundamental Principles of the Torah 5:2. It is also possible that, in light of R. Wozner's ruling prohibiting desecration of the Sabbath on behalf of the preembryo (see text at n. 46 above), intervention to protect it would not justify any transgressions, even of Rabbinic strictures not deemed to fall into the category of the three precepts never to be transgressed. This indeed entails the counterintuitive notion that destruction or at least passive neglect is preferable to donation.

89 The term "surrogate motherhood" actually describes two very different types of situations. Type 1 involves a woman who contributes both egg and womb; it is exemplified by the notorious Mary Beth Whitehead-Elizabeth Stern case in New Jersey, see 537 A.2d 1227 (NJ: 1988).

The issue of "who is the mother?" in gestational surrogacy is identical to that arising from embryo donation. If the surrogate is non-Jewish, the child may — and probably will — require conversion. The sperm contributor may be violating a prohibition against the impregnation of a Gentile.[90] If the surrogate is a Jew married to a Jew, the surrogacy arrangement may be tantamount to adultery, and the child a *mamzer*, depending, again, on who is deemed the mother. The same would be true if the surrogate is single but the relationship is halakhically incestuous, e.g., a woman carrying her sister's embryo. To the extent the identity of the Jewish surrogate is concealed from the child, there is the possibility of incest with unknown maternal relatives.

While surrogacy arrangements have been roundly condemned by many leading decisors on both halakhic and ethical grounds,[91] the Israeli Chief Rabbinate has given its qualified approval to the use of surrogates, subject to the following conditions:[92] (1) the gestational

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The American Fertility Society report was sharply divided on the ethics of such an arrangement; see ECART, n. 1 above, 76S–77S. From the halakhic perspective, maternity in type 1 cases is not an issue; the surrogate is unequivocally the mother (except on R. Waldenberg's decidedly minority view, see n. 7). Type 2 involves a woman who is simply the incubator of another woman's egg. She is termed a gestational surrogate mother. The AFS viewed this arrangement slightly more favorably, see 69S–70S. It is the gestational surrogate that poses the halakhic uncertainties discussed in this article.

90 It is also probable that the emission of sperm with the express intention of fertilizing an egg (even that of a Jewish spouse) that will be carried by a Gentile surrogate constitutes emission of seed in vain, since the resulting offspring has no relation to the Jewish father. (But cf. the view of R. Gershuni, n. 9 above.) According to R. Kilav, however, since the child is halakhically Jewish and does bear a relation to the Jewish sperm provider, such an arrangement might be permitted. Note, however, that even according to R. Kilav, who maintains that the child is Jewish, the use of a non-Jewish gestational surrogate might be strongly discouraged on spiritual grounds. See *SA* YD 81:7 (against use of a non-Jewish nurse for a Jewish baby) (Rema).

91 See *Nishmat Avraham*, (App.) EH 5(2).

92 As reported in *Haaretz*, February 14, 1995.

surrogate must be a single woman who does not bear a prohibited relationship to the father;[93] (2) accurate records must be kept detailing the identities of both the surrogate and the egg donor, that is, the mother who will raise the child, so that the child will not marry relatives of either; (3) to emphasize the surrogate's maternal status (at least as a matter of doubt), the parents who will to raise the child must go through formal adoption procedures; (4) each case must be individually evaluated and approved by a special commission with at least one member representing a halakhic perspective; (5) authorizations will be limited to demonstrated cases of need; and (6) surrogacy cannot be legitimized by public statute, but must remain under administrative regulation.[94]

In essence, while it is regarded as ethically inappropriate for a single woman to be the recipient of sperm, egg, or embryo in order to bear an out-of-wedlock child she will raise, the Rabbinate views the matter somewhat differently when the single woman functions as a facilitator enabling a married couple to raise a child and the husband to fulfill his obligation to procreate. Whether the Rabbinate's ruling will be accepted by other decisors, and what effect it will have on the growth of surrogacy, remain to be seen.[95]

93 There are actually two distinct reasons for prohibiting the use of **married** surrogates. First, the possibility of adultery and *mamzeirut*. In addition, R. Wozner cites the Sages' interpretation of "He shall cleave unto his wife" (Gen. 2:24) — his wife, and not the wife of his friend. Interestingly, in a discussion of the permissibility of AID, the *Bnei Ahuva* cites another verse — Leviticus 18:20 — as a basis for not giving one's seed to another's wife; see n. 85 above. Why this verse would not be equally applicable to gestational surrogacy is unclear (One reason might be that in gestational surrogacy, the husband's sperm is fertilizing his wife's egg). In any event, at most, these verses prohibit use of a married surrogate. The use of an unmarried surrogate who bears an prohibited degree of family relation to the sperm provider could only be proscribed on a theory akin to the Satmar Rav's, a stringency that R. Auerbach, for one, was willing to consider.

94 Although the Rabbinate did not explicitly address this point, there should presumably also be a requirement that the surrogate be Jewish in order to avoid the problems mentioned in n. 83.

95 It is not clear whether the Rabbinate's guidelines are limited to gestational surrogacy or can be extended to type 1 surrogates as well, and if not, why not? In any case, even the rabbinical courts under the Rabbinate's jurisdiction have continued to condemn surrogacy. See the authorities cited in *Nishmat Avraham*, (App.) EH 5(2).

To summarize, the range of halakhically acceptable options for preembryos includes implantation, cryopreservation for later implantation, destruction, experimentation, and possibly gestational surrogacy along the lines approved by the Chief Rabbinate. Donation of embryos to other infertile couples — Jewish or non-Jewish — would appear to be improper.[96]

7 *Utilization of Third Party Sperm, Eggs or Embryos*

The previous section focused on the Jewish couple who have generated embryos from their own egg and sperm and face various options with regard to the embryos' disposition. This section will examine the extent to which a Jewish couple can utilize the third party contributions of others — egg, sperm, or embryo — in their own reproductive efforts. In many cases of infertility, a woman may be capable of carrying a baby to term, but not of producing eggs that can be fertilized, or perhaps her chromosomes have a serious genetic defect. There may also be a factor in the male sperm which hinders reproduction. Third party contributions can often help the couple out, but, as to be expected, the halakhic obstacles may be formidable.

a Sperm or Embryo Receipt from Non-Jews

Obviously, to a considerable degree the issues raised by receipt mirror those raised by donation. Nevertheless, because of the configuration of

96 At least one US state seems to require that unwanted preembryos be donated. See Louisiana Revised Statutes 9:124–9:133. This may be the case in Illinois and Minnesota as well. See n. 218 below. This creates a serious problem for an Orthodox couple in these states, since the requirements of state law may contravene halakha. The couple would accordingly have to limit egg retrieval to the number of eggs that can be implanted in the wife's womb, although this may drastically reduce the efficacy of the procedure. A strong case can safely be made, however, that mandatory donation statutes are unconstitutional under *Roe v. Wade* and, to the extent they violate religious belief, inconsistent with the First Amendment. But cf. Robertson, n. 215 below, 453, n. 46. (*Roe v. Wade* does not rest on a constitutional right **not** to be a biological parent, but on protection of a woman's bodily integrity. Accordingly, as long as the state does not force a woman to carry a child, her constitutional right of privacy is not violated.)

Jewish family law, and its technical definitions of maternity and paternity, certain types of transfers that would be prohibited in one direction may be permissible in the other direction.[97]

This will be particularly true in the case of contributions from non-Jewish sources. As noted previously,[98] R. Moses Feinstein was willing, in cases of great emotional distress, to allow impregnation with non-Jewish donor sperm; the female recipient is not deemed to have cohabited with a non-Jew, and is consequently permitted to remain with her husband even if he is a *kohen*. Although he expressed reservations about implementing this ruling in practice, he never retracted its basic permissibility. Presumably, the Satmar Rav, who equated Jewish donor insemination with adultery, would similarly construe non-Jewish donor insemination as forbidden intercourse with a non-Jew. As a result, the act would not only be sinful in and of itself, but would render the recipient forbidden to marry a *kohen* (assuming his rule applies to IVF procedures and not just uterine sperm deposits).[99] There would clearly be no problem of incest with unknown paternal relatives, because a non-Jew who impregnates a Jewish woman has no paternal bond with the offspring.

How would this work in the case of embryo transfer? An embryo is nothing more than a combination of egg and sperm, and it might be assumed that whatever dispensation or lack thereof may exist with regard to sperm donation would apply equally to embryo transfer. Embryo transfers are more complicated, however, because they involve the question of split maternity: who is the mother — the egg donor, birth mother, or both?

It is here that there is some asymmetry in the halakha, at least according to some authorities. It was noted above that if a Jewish embryo, that is, a fertilized ovum from a Jewish woman, is transferred to a non-Jewish woman, the children that result will, on most views, be regarded as non-Jews, because only the birth mother bears a maternal

97 One example, by way of analogy, involves organ donation. Although many decisors maintain that a Jew cannot authorize the removal of his heart for transplantation, he may be allowed to put his name on a waiting list of potential recipients. See R. Aaron Soloveitchik, "Death according to the halacha," *Journal of Halacha and Contemporary Society* 17 (1989), 41, 45–47.

98 See n. 85 above.

99 See text at nn. 141–142.

bond to them. This should lead to the conclusion that, for the very same reason, children resulting from an embryo transfer from a non-Jew to a Jew do **not** need conversion. Since maternity is defined by the birth mother, who is Jewish, the children should automatically acquire the status of Jews. However, on the basis of bJebamot 78a, R. Z.N. Goldberg argues that this is not the case. Children born of a Jewish birth mother do indeed need conversion. Paradoxically, however, once they do convert, they are deemed related to their birth mother (though, of course, not to the birth mother's Jewish husband).[100] R. A. Kilav regards such children as altogether non-Jewish, and thereby requires conversion, the children being deemed to have no relation to their birth mother.[101] Presumably, R. Bleich's suggestion of dual maternity would similarly necessitate a conversion, but the child would retain his tie to his birth mother by virtue of his pre-conversion half-Jewish status. While the conversion and maternal identity issues are serious, these uncertainties alone seem to pose no particular impediment to utilization of the procedure.[102]

100 *Tehumin* 5 (1984), 248.

101 Ibid., 260. R. Kilav's position has the virtue of consistency. In transfers from Jew to non-Jew, he accords maternity to the egg donor. He does exactly the same in transfers from non-Jew to Jew, thereby necessitating conversion.

102 Without repeating the extensive analysis in R. Bleich's article, the essence of the problem is that the Gemara in bJebamot 78a makes clear that when a pregnant woman converts, the fetuses undergo conversion as well, and are thus considered converts, not born Jews. According to Nahmanides (bJebamot 47b), if they are male, they do not acquire the status of Jews until circumcision. (But cf. *Nimukei Yosef*, commentary on Alfasi, Jebamot 16a (Vilna, ed.), in the name of R. Aaron Halevi, who rules that they are Jews even prior to circumcision.) This alone rules out the possibility that birth is the exclusive determinant of maternity since, were this so, conversion would be unnecessary. At the same time, bJebamot 97b informs us that halakhically speaking, brothers born of such a convert share a fraternal relationship and common mother. R. Kilav understands this to mean that initially, religious identity and genealogical (maternal) affiliation are determined at the moment of conception, i.e., a fertilized ovum of a non-Jewish woman is non-Jewish. However, the bond that in effect renders the embryo or fetus non-Jewish is erased or transformed by conversion. The embryos now become Jewish; once Jewish by virtue of conversion, a new post-conversion maternal bond is created by birth from a Jewish mother, a bond that creates a maternal relationship. By contrast, where a non-Jewish embryo is transferred to a Jewish recipient and no

Since the babies produced from non-Jewish preembryos will bear no relationship to the non-Jewish egg and sperm providers, at least after the conversion, the problems of secret incest that can arise with Jewish donor sperm are nonexistent. Other than the need for a conversion, "receiving" a non-Jewish preembryo seems analogous to "receiving" non-Jewish donor sperm, which R. Feinstein was in theory willing to permit, at least in cases of anguish. It may be that even the reservations he eventually expressed concerning implementation of the ruling would apply only to a married Jewish woman impregnated with the semen of a non-Jew, and not to the implantation of an already-fertilized embryo.

Note, however, that the Satmar Rav's construct equating insemination with a forbidden sex act **might** mean that the receipt of a fertilized non-Jewish embryo is equivalent to impregnation with non-Jewish sperm, which in turn is tantamount to intercourse with a non-Jew.

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conversion process takes place, the old maternal connection arising from conception has never been severed. As a result, no new bond can be created by birth. The children are born, and remain, non-Jewish, unless and until they convert. Not only do such children need conversion, but even after conversion, the birth mother is not deemed to have a maternal bond with them. (As R. Bleich notes, R. Kilav's position is difficult to sustain in light of Nahmanides' view that circumcision is required for conversion if the children are born male. If no conversion occurred before birth, how can birth establish a bond to the birth mother? R. Kilav's opinion does fit well with the view of R. Aaron Halevi cited in *Nimukei Yosef*.)

R. Z.N. Goldberg analyzes the text very differently. His position is that for genealogical purposes, maternal bonds are generated exclusively by birth, even if the embryos were non-Jewish. Thus, whether the birth mother converted during pregnancy, or non-Jewish embryos were implanted in a Jewish woman, she is deemed to have a maternal bond with the children. This is true even when their conversion takes place after their birth, as in the scenario envisaged by Nahmanides. Conversion is nonetheless required, however, because of the need to establish *kedushat yisrael* and obligation to observe the commandments. Conversion achieves that limited purpose, and does **not** erase prior relationships.

Thus, virtually all authorities agree that the children born from non-Jewish embryos implanted in a Jewish birth mother must be converted. The authorities disagree as to whether, after the conversion, the mother is deemed to have a maternal bond with the children. The relevance of this text to IVF is open to question. See text at nn. 109–114.

This would indeed furnish a substantive halakhic basis for prohibiting embryo transfer.[103]

In any event, a non-Jewish embryo transfer is no more problematic than the use of non-Jewish semen (except for the need for conversion) and, on the logic of R. Moses Feinstein, may be justified when other alternatives have been exhausted.[104] It is also clear that even if halakha does not prohibit the practice, the husband has fulfilled neither the precept of procreation, nor that of "settling the world," so there may be little point in proceeding.

b Ovum from a Non-Jew

With respect to a donated ovum from a non-Jew (which would then be fertilized in vitro), the conversion and lineage problems are identical to those arising in the case of the preembryo. The children would need conversion by virtue of their genetic origin; according to R. Goldberg, their birth mother would retain her maternal ties to them, but whether they would be related to their Jewish biological father is questionable.[105] Indeed, it is probable, though not certain, that there is no filial connection to their biological Jewish father. On the view of R. Kilav, the Jewish parents would be deemed unrelated to them. At least according to R. Kilav, and probably according to R. Goldberg as well, the utilization of non-Jewish egg donation may involve potential violation of the

103 See the discussion in the text at nn. 141–144 below.

104 I speak, of course, in theory. In practice, R. Feinstein did not permit use of donor semen. See n. 85.

105 If the children are genealogically Jewish by virtue of the birth mother, and if their later conversion does not sever that tie, one might assume that there is a paternal relationship as well. I believe this is incorrect. Paternity arises upon fertilization, not birth. At the time of fertilization, the ova were of non-Jewish origin, thereby severing the paternal bond. Once severed, it is not reestablished by the children's Jewish birth. Thus, we are presented with an anomalous situation of children born from a Jewish mother and a Jewish father who are halakhically Jewish (in the genealogical sense) despite their genetic origin, yet nonetheless, their father has no paternal bond to them. Indeed, it would appear that even on the minority opinion, cited above, that transplanted non-Jewish embryos under 40 days old do not need conversion **for any purpose**, a paternal relationship may not exist.

prohibition against destruction of seed, since the Jewish partner will have no paternal relation to the child.[106]

Ironically, therefore, the use of a non-Jewish ovum, fertilized by the husband via IVF, may be more problematic than use of a non-Jewish embryo, or even use of non-Jewish sperm.[107] It is also possible, though unlikely, that use of a non-Jewish ovum to be fertilized by Jewish sperm constitutes an impermissible act of intercourse between Jew and non-Jew (on the approach of the Satmar Rav), since "egg" and "sperm" unite in a prohibited attachment.[108]

c Conversion Issues in Embryo/Ovum Donation from Non-Jews

As indicated, a number of decisors require the conversion of children born to a Jewish mother where the egg/embryo was obtained from a non-Jewish source. Their proof-text is bJebamot 78a, which states that where a non-Jewish mother converts while pregnant, the embryos also undergo a conversion process.[109] By the same token, any transfer of a non-Jewish embryo to a Jewish birth mother would necessitate some conversion, and, if not undergone by the birth mother (because she is already Jewish), would have to be undergone by the children after birth. The text, however, is equivocal, for at least three reasons. First, the presumptive non-Jewish status of the embryos that necessitates their conversion in utero may stem from their being conceived and implanted within the body of a Gentile. Where no such conception or implantation occurs, viz., an IVF fertilization outside the Gentile's

106 Even on the dual maternity thesis of R. Bleich, he would lack paternity, since at the time of fertilization, the ova were not Jewish. See text at nn. 181–186. Note, however, that on the analysis of R. Gershuni, n. 9 above, even if the Jewish sperm contributor lacks paternity, it would not be considered "emission of sperm in vain."

107 The problem of emission of sperm in vain could be resolved in some cases by exposing the sperm to the Jewish spouse's eggs along with the non-Jewish donor's. Even if the sperm fertilizes the non-Jewish eggs, its emission has not been in vain, as there was potential for a paternal relationship with an offspring.

108 See text at nn. 152–153 below.

109 See n. 102 above on the disagreement between R. Kilav and R. Goldberg regarding the scope of the conversion.

body, the resulting children may indeed be deemed Jewish by birth, not conversion, since there is no other event that would confer on them the status of being non-Jewish.[110] There is no direct proof from the passage that a **genetic tie** alone can give rise to a maternal relationship.

Second, even embryos conceived **within** the body of a Gentile may not require their own conversion (that is, they are deemed "born Jews") where the mother converts within 40 days of their conception, since at the time they became an "actual life," the mother was already Jewish.[111] This too would suggest that where an IVF-embryo that has not reached the 40-day point is implanted into the uterus of a Jewish woman, the child does not require a conversion after birth.

Third, the talmudic passage in question necessitating conversion of the embryos in **utero** upholds the view that a fetus or embryo is not part of the mother's body (*ubar lav yerekh imo*). On the view that the fetus or embryo is part of the mother's body (*ubar yerekh imo*), if the mother is Jewish, by conversion or otherwise, the fetus is automatically Jewish.[112] By extension, any embryo transfer to a Jewish woman would **automatically** make the embryo and the resulting child Jewish.[113] Since many decisors do in fact rule that the fetus or embryo is part of the mother's body,[114] conversion may not be necessary at all.

Assuming, however, that conversion of the children is required because of their non-Jewish origin, a number of questions arise. The Talmud in Jebamot 78a clearly indicates that if the mother is non-Jewish, her immersion in the *mikve* for conversion will constitute a valid immersion for the fetus. (Whether a male child, when born, will need circumcision to complete the conversion process is the subject of dispute between Nahmanides and R. Aaron Halevi.)[115] What if the

110 This is the thesis of R. Bick, n. 43 above.

111 See R. Elchanan Wasserman, *Kovetz Hearot*, no. 73 (in name of R. Chaim Soloveitchik) and *Or Hamizrah* 127 (1981) (in name of R. Aaron Soloveitchik).

112 *Avnei Miluim*, EH 4:3 and 13:4.

113 This argument is advanced by R. Z.N. Goldberg in *Tehumin* 5 (1984), 253–255. But R. Bleich, n. 78 above, 63, disputes this analysis.

114 See, for example, *Shakh*, YD 79:8 and *Taz*, YD 79:5. See also *Sdei Hemed, ayin*, rule 62, for a list of sources. (There is a misprint in n. 42 of R. Bleich's article cited in n. 78 above: the references to *Taz* and *Shakh* should be to 79, not 89.)

115 See n. 102.

mother does not convert, that is, is already Jewish? Can she effect a valid immersion for the fetuses by going to the *mikve*, or must their immersion await their birth? R. Bleich convincingly argues that she can, but the contrary view admittedly has strong support.[116]

A second issue is whether the conversion of children in utero constitutes a conversion by dint of Torah law or Rabbinic law. According to a number of authorities, the conversion of minor children, expressly validated by bKetubot 11a, effects conversion only at the Rabbinic level, since by Torah law, benefits cannot be conferred on a minor (*ein zekhiya lekatan*) who by definition is incapable of consent or acquiescence.[117] R. Akiva Eiger argues, however, that where a pregnant woman undergoes conversion on her own behalf, the conversion for the fetus will be effective at the biblical level on the grounds of the principle "that which is effective for oneself can simultaneously be effective for another" (*migo dezakhai lenafshai zakha nami lehavrai*) even where that other is incapable of consent.[118] Invoking the principle of *migo*, however, presumes an efficacious conversion on the part of the mother; where the mother is Jewish and not converting, the immersion might effect valid conversion only at the Rabbinic, and not the biblical,

116 See R. Bleich, n. 78 above, 63–64, who argues that the conclusion of bJebamot 78a-b that the mother's body is not a barrier (*hatzitza*) between the mikve water and the fetus applies not only to "natural mothers," but to host mothers who receive fertilized embryos, and applies whether or not the immersing mother intends to effect a conversion for herself. A contrary view is expressed by rabbis S.Z. Auerbach, A. Nebenzahl and A. Kilav. According to R Bleich, R. Auerbach's reservations were based not on *hatzitza*, but on the lack of parental authority for a host mother to effect a conversion of a minor, since she herself lacks a maternal bond until birth. R. Bleich convincingly argues that a host mother, even before giving birth, is certainly not inferior to an adoptive parent, who generally is authorized to effect a conversion of a minor.

117 See, e.g., *Tosafot*, bKetubot 11a s.v. *matbilin* (first explanation). It is likely, however, that the law is not in accordance with this position. See n. 119.

118 See *Drush Vehidush* on bKetubot 11a s.v. *matbilin* (first explanation). It seems to me that R. Akiva Eiger's analysis can apply only where the child is a girl or, in accordance with the view of R. Aaron Halevi that circumcision is unnecessary to complete the conversion process. See n. 102. According to Nahmanides' view that the conversion for male children immersed **in utero** is not completed until their circumcision after birth, the conversion would remain at the Rabbinic level (according to *Tosafot*).

level.[119] This alone, however, would be no reason to defer immersion until after birth, because even then the conversion may be only of Rabbinic force. Nevertheless, given that there are authorities who do not permit conversion of the embryos where the mother is not undergoing a conversion,[120] it is advisable to defer the conversion until the children are born.

A final issue is whether children from IVF-generated embryos who undergo conversion, though born to a Jewish woman, have the right to renounce it upon reaching adulthood. According to bKetubot 11a, a non-Jewish minor who is converted has the right to renounce his conversion upon attaining adulthood.[121] The matter is much more complicated in cases of egg or embryo donation, where the need for conversion is in itself questionable. Certainly, the views that regard birth as determinative[122] would not permit renunciation; the children are Jews by birth,

119 It is not clear what the practical difference between a Rabbinic and a biblical conversion would be, since the *Tosafot* conclude that even where a conversion is valid only Rabbinically, the convert may marry a Jew. Presumably, however, one whose conversion is only of Rabbinic force would need to "reconvert" as an adult in order to be fully obligated to observe the precepts. Based on my own personal observations, such a reconversion in the case of a non-Jew originally converted as a minor is never required, implying rejection of the construal of such conversion as merely Rabbinic.

120 See n. 116.

121 This rule clearly applies when non-Jewish children are converted after birth. (But see *Responsa Hatam Sofer*, YD 253, who rules there is no right of renunciation if one or both of the parents converted along with the child). Whether the right of protest applies where the conversion of the minor was effected by the mother during pregnancy is a matter of dispute. See *Pithei Teshuva, SA* YD 268:8 quoting *Tiferet Lemoshe*. Such a distinction may be based on R. Akiva Eiger's ruling that conversion effected during pregnancy has biblical rather than Rabbinic force (see n. 118 above), with the protest rule applying only to Rabbinic conversions. But see n. 119 above (we apparently rule that the conversions of all minors, even after birth, are of biblical force). It should also be noted that, according to R. Chaim Soloveitchik, if a woman converts within 40 days of conception, it is clear that the child could not renounce the conversion, because he would be a Jew by birth, not conversion. See n. 111.

122 See discussion at nn. 111–112. I would note, however, that on R. Goldberg's position, although the children are related to their mother through birth, to terminate their precept obligation, renunciation would still be possible. The statement in the text is limited to those authorities who maintain that conversion is unnecessary for any purpose whatsoever.

not conversion. Similarly, on R. Bleich's dual maternity approach, where the children are half-Jewish–half-non-Jewish,[123] practically-speaking, renunciation would be impossible, since the children would, even after renunciation, retain the status of half-Jew by virtue of their birth mother. While it is true that in light of these uncertainties, we follow the stricter view and advise that conversion take place, this surely cannot be the basis for a leniency allowing renunciation. In effect, one would have to treat the progeny of an IVF where the eggs are of non-Jewish origin as falling into the category of doubtful Jews by birth or Jews by conversion, and impose the stringencies of both categories.

It should also be noted that because of halakhic uncertainties, it would be essential that the progeny of an IVF-pregnancy who underwent a conversion due to uncertainty (*giyur misafek*) be informed of his status, though, in the unlikely event of repudiation, his status as Jew or non-Jew would be highly uncertain.[124] This is an important point to keep in mind since many parents using egg donation prefer to keep the process undisclosed even to their own children.[125]

d Embryo or Ovum Receipt from Jewish Donors

As mentioned, these cases generally raise a number of serious halakhic concerns, including the potential for unknown incest with relatives of the egg donor (since the egg donor may be deemed the mother),[126] and, in the case of embryo receipt, the father, as well as immodesty and the undermining of domestic peace if the donor's identity were made known. In the case of an embryo transfer, if we equate embryo transfer with donor insemination, there is also the possibility of adultery and *mamzeirut*, on the Satmar Rav's position.[127] A pure ovum donation

123 See R. Bleich, n. 78 above, 53–57.

124 On the view of R. Moses Feinstein, in the case of a minor convert who was not informed of his conversion, the right to renounce or protest remains even afer adulthood; failure to renounce cannot be deemed acquiescence when the person did not know there was anything to renounce; see *Igrot Moshe*, YD 1:162. How this would play out in an undisclosed IVF-pregnancy is anyone's guess.

125 The author is personally familiar with a number of these cases. Egg donation, by definition, is a more discreet procedure than, say, gestational surrogacy, and many parents seek to keep it that way.

126 See n. 79 above.

127 See text at nn. 141–142 below.

from a married woman is less likely to constitute adultery or generate *mamzeirut* even on the view of the Satmar Rav, but uncertainty remains.[128] It would thus seem that a single, unmarried unrelated donor is preferable, though even here, if her identity is unknown, there is still the problem of future incest.

e Ovum Receipt via Uterine Lavage

In garden-variety IVF using donor gametes, the egg is fertilized by sperm in a petri dish, then transferred to the uterus of the infertile woman. It is possible, however, for fertilization to take place **within** the body of the egg donor, with the preembryo then being transferred to the uterus of the recipient either immediately after removal, or after a period of cryopreservation. In uterine lavage (UL), a woman is inseminated at the predicted time of ovulation with sperm from the husband of an infertile woman. Five to six days later (before implantation), the preembryo is flushed from her uterus and transferred to the uterus of the infertile woman.[129] Despite some early indicators of success, the American Fertility Society report regards uterine lavage as an experimental procedure not recommended for general use.[130]

The "split motherhood" issue appears to be more acute in UL than in standard IVF using ovum donation. In UL, the ovum donor is not only the genetic mother of the child, but the woman in whose body conception took place. Thus, whether UL is employed from Jew to Jew or non-Jew to Jew, a strong argument can be made that in either case the egg donor should have **a** maternal tie, if not the exclusive one. Nevertheless, the halakhic authorities who have debated the matter have not differentiated between IVF and UL. R. Goldberg's conclusion that in Jew to Jew transfers the birth mother is the sole mother was articulated in the context of an intrauterine transfer, and a fortiori

128 See text at nn. 149–153 below.

129 See Buster, Bustillo et al., "Non-surgical transfer of in-vitro fertilized donated ova to five infertile women: report of two pregnancies," *Lancet* 1983 (2), 223 and Buster, "Embryo donation by uterine flushing and embryo transfer," *Journal of Clinical Obstetrics and Gynecology* 1985 (12), 815.

130 ECART, n. 1 above, 52S.

would apply to IVF. R. Kilav's conclusion that the identity of the ovum donor is determinative where one of the parties is non-Jewish applied even to IVF, and a fortiori would apply to UL. Thus, at least as reflected in most contemporary rabbinic writing, the questions pertaining to maternal identity appear to be identical in both procedures.[131]

Nevertheless, UL does pose distinct halakhic problems, particularly on the view of the Satmar Rav. If the ovum donor is Jewish and married, direct insemination within her body is more likely to be adulterous than the insemination of the donor's egg in a petri dish.[132]

If the ovum donor is not Jewish, the general prohibitions against intercourse with non-Jews, and the possible prohibition against impregnation of non-Jews,[133] may be germane as well. The emission of semen to impregnate a non-Jewish woman may also be "emission of seed in vain," even where the embryo is then flushed out and transferred to a Jewish woman, viz., the sperm provider's wife.[134] In short,

131 A notable exception is R. Ezra Bick, n. 43 above, who accords great significance to where conception takes place. At present, UL can only be employed at a very early, pre-implantation stage. We can imagine, however, a "brave new world" in which implanted embryos, or even developed fetuses, could be transferred into another woman's uterus. At some point in the gestational process, it may become increasingly difficult to accord sole maternity to the birth mother. Moreover, at some stage of embryonic or fetal development (40 days? end of first trimester?), the woman from whose uterus the embryo or fetus was removed would herself have the status of a birth mother, since the removal of the child would be a birth. Surely a 9-month fetus that is transplanted to another woman would not lose its filial connection to the woman who first carried it. R. Auerbach alludes to this conceptual difficulty. See *Nishmat Avraham* (App.), EH 1:15. Fortunately, these issues as yet are of no practical importance. See n. 81 above regarding R. Akiva Eiger's views as to the status of the embryo in the first trimester, and M. Broyde, "The establishment of maternity and paternity in Jewish and American law," at http://jlaw.com/Articles/maternity1.html.

132 Indeed, at least with respect to adultery, UL is no different from AID, which the Satmar Rav expressly condemned as adultery. On whether UL may result in *mamzeirut* as well, see below at n. 154.

133 See n. 83 above.

134 I do not mean to suggest that every time a Jew has intercourse with a non-Jew, he is guilty of violating the prohibition against "wasteful emission of seed." Even though he will not have a paternal bond to any resulting child, the act of intercourse, though prohibited, is nonetheless not "wasteful" (*levatala*), since the semen was emitted in the course of normal sexual relations. See, e.g., *Tosafot*, bJebamot 12b s.v. *shalosh*.

UL is certainly no less problematic than other forms of ovum donation, and may be considerably more so.[135]

f Ovum Receipt via GIFT

GIFT is essentially the opposite of uterine lavage. As an alternative to traditional IVF, where fertilization takes place in a petri dish, physicians in the mid-1980's developed a procedure known as GIFT ("Gamete Intra Fallopian Transfer") where ova are mixed with sperm and deposited directly into the fallopian tube, where fertilization occurs (if it does) as it would naturally.[136] Passage of the fertilized egg through the tubes is thought to increase the probability of successful uterine implantation in ways not yet fully understood. (As IVF has improved, however, its success rate has become as good as or better than GIFT.) The disadvantage of GIFT is that it necessitates **two** surgical procedures in the very delicate area of the fallopian tubes and ovaries — one to remove the eggs from the ovaries, the other to insert them into the fallopian tubes.[137] Moreover, GIFT can be employed only if there is no tubal blockage, while IVF is helpful precisely where blockage exists. From the perspective of halakha, GIFT may have certain advantages over IVF. Consider R. Waldenberg's minority position that

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However, in cases of IVF or artificial insemination, the sperm was by definition not emitted in the course of sexual relations. To the extent it is permitted at all, the emission is permitted only because it is a vehicle to produce a child. If the child will not bear any relationship to the sperm provider, the entire justification loses its force. But cf. R. Gershuni's view cited in n. 9 above.

135 Theoretically, UL could be employed without using the sperm of the recipient's husband: a woman could be impregnated with donor sperm, then undergo UL. The issues here, from the perspective of the Jewish woman **receiving** the embryo, are identical to those discussed above in the text at nn. 97–102. As far as I know, this variant of the procedure has not been employed, perhaps because it is too close to outright baby selling.

136 See ECART, n. 1 above, 38S.

137 GIFT can be used **without** ovum donation, in which case both procedures are performed on the same woman, but here we consider the case where the eggs are removed from one woman and inserted into the body of another.

would deny paternity and maternity to IVF participants because fertilization occurs outside of the woman's body.[138] Could it not be argued that GIFT essentially replicates natural reproduction and should thus be halakhically sanctioned even on this minority view?

As to the question of maternity, let us consider whether GIFT might resolve the problem of "split" maternity that arises in ovum donation. Presumably, an ovum, which is simply inert human tissue incapable of reproduction, becomes part of the body onto which it is engrafted. Even the opinions that seem to regard the egg donor as the sole (or joint) mother may concede that where fertilization occurs within the body of the woman who gives birth, she is the sole mother despite the lack of a genetic connection. Accordingly, a non-Jewish ovum transferred to a Jewish woman via GIFT might **not** require conversion; an ovum from a married Jewish woman would be totally free of the stigma of *mamzeirut* even according to the Satmar Rav; and since the egg donor would have no maternal relationship with the child, potential incest with relatives of the Jewish egg donor would not be a concern.[139] Ovum donation coupled with GIFT does not appear to raise the traditional fears associated with AID.[140]

Excursus: The Satmar Rav on Third Party Facilitators — Sperm, Egg and Embryo Donation

The foregoing has discussed issues that arise when third parties contribute eggs, sperm, or embryos to a married couple. Repeated reference has been made to the Satmar Rav's ruling on AID. It may be helpful to briefly summarize some of the uncertainties this position raises. According to the Satmar Rav, a married Jewish woman who is

138 See text at n. 9 above.

139 This also appears to be the position of R. Bick, n. 43 above, 38, who draws an analogy from responsa dealing with ovarian transplants, where it is clear that the recipient is regarded as the mother of any resulting offspring notwithstanding the lack of any genetic connection. See also R. Zahn, *Birkhat Banim*, 11:27 and *Tzitz Eliezer*, 7:48.

140 Note, however, that alternatives to GIFT such as ZIFT (Zygote Intra Fallopian Transfer) continue to raise problems, since fertilization does take place in vitro, with the preembryo placed in the fallopian tube rather than directly into the uterus. Halakhically, ZIFT appears to be indistinguishable from standard IVF.

impregnated with the sperm of a Jewish man other than her husband has committed adultery, and is forbidden to her husband. A child born from such an insemination is halakhically a *mamzer*. The generation of *mamzeirut* does not depend on the occurrence of a sex act, and can be effected simply by sperm penetrating a woman's body. The implications of this very stringent position on the range of options for third party assistance in reproduction are unclear. Consider the following problems:

1. **AID with IVF** While the Satmar Rav clearly regards AID into the recipient's uterus as adulterous, would his ruling apply to donor sperm that fertilizes the recipient's egg in vitro, with the fertilized egg then being transferred? At that point, it is not "seed" that is penetrating the woman's body, but a new living being. Is there a difference between a pure AID procedure and one that is coupled with an IVF? My assumption would be that there is no difference, at least as regards the *mamzeirut* problem, since a child was born from the union of sperm with the egg of a Jewish woman who was married to someone else. On the other hand, it is less likely, though possible, that the implantation of a full-blown embryo — even one from the woman's own ovum — would constitute an act of adultery rendering a woman prohibited to her husband.[141] (It should also be noted that on the minority view of *Tzitz Eliezer*, which denies paternity in IVF-pregnancies, the child would presumably not be a *mamzer*, because halakhically he has no father, and thus could not be regarded as the progeny of adultery.)[142]
2. **AID with or without IVF after donor's death** Assume a married Jewish woman is impregnated with donor sperm after the donor has died. Or, assuming the Satmar Rav's ruling applies to IVF, the donor sperm fertilizes her eggs in vitro and the embryos are then

141 It could be argued that where impregnation, i.e., fertilization, did not take place within a woman's body, no adultery has occurred. A new living embryo is being implanted, not seed (semen). See M. Halperin, "In-vitro fertilization, embryo transfer and embryo freezing," *Jewish Medical Ethics* 1 (1988), 25–30. After suggesting this, Halperin concludes that IVF using donor sperm may be preferable to direct artificial insemination from a donor.

142 This is analogous to a non-Jew's impregnating a married Jewish woman, where the non-Jew lacks paternity and the child is not a *mamzer*. See *SA* EH 4:19.

transferred to her uterus. Indeed, the donor could even be the woman's first husband. Are the children illegitimate? Do they have a paternal bond to the now-deceased sperm donor? On the one hand, we could not regard the impregnation of a woman after the death of the donor as a prohibited sex act. On the other, is it not the essence of the Satmar Rav's position that *mamzeirut* is predicated on the fact of a married Jewish woman's giving birth to a child from a Jewish man who is not her husband, whether or not prohibited intercourse took place?[143]

3. **AID from non-Jewish source** While neither *mamzeirut* nor paternity is an issue, is the woman guilty of intercourse with a non-Jew? Is the woman forbidden to her husband as a result of the impregnation? May the woman marry a *kohen*? Although the Satmar Rav does not explicitly treat these matters, presumably the same parameters that define adultery and *mamzeirut* between Jews will define prohibited intercourse with non-Jews. Here too there may be a distinction between direct deposit of sperm and transfer of an embryo after IVF.[144]

143 Whether there can be a *mamzeirut* problem after the sperm contributor died is uncertain. Arguably, once the first husband has died, he is incapable of committing adultery — "once a man is dead, he is free of religious obligations" (bShabat 151b, bNida 61b) — and hence, incapable of generating *mamzeirut* even on the view of the Satmar Rav. On the other hand, it may also be the case that *mamzeirut* does not depend on the commission of a technical act of adultery, but merely on the fact that a married woman bears a child from a Jewish man who is not her husband. As such, the problem of *mamzeirut* exists whether the first husband is dead or alive. See Maharsha on bJebamot 77a s.v. *ketnai*; but see *Shaar Hamelekh*, Laws concerning Levirate Marriage and Release 6:11 (at the end).

Note too that on R. Shaul Yisraeli's view (see text at n. 175 below) — as interpreted by Makhon Eretz Hemda — a sperm contributor who died even after fertilization of the embryo but before its implantation bears no paternal relationship to the resulting child. This would clearly preclude *mamzeirut*, since given that the child has no father, the recipient is not bearing the child of a man other than her husband. As will be discussed, both R. Yisraeli's definition of *klita* and his extension of the *Noda Biyehuda*'s ruling beyond the area of *yibum* are problematic. Most authorities fully recognize a paternal bond to the sperm donor even where fertilization does not occur until after the donor's death. (On the view of R. Waldenberg, who denies paternity to **any** IVF-offspring, there could not, of course, be *mamzeirut* even if the sperm donor were alive.)

144 Even though it is the Jewish woman's own egg.

4. **AIH with embryo transfer after woman remarries** Indeed, even implantation of an embryo generated from the husband's sperm could create a halakhic problem. This is obviously the case where the first husband's sperm fertilizes his ex-wife's egg after their divorce and her subsequent remarriage, since the first husband is then like any other sperm donor.[145] But consider the following scenario: IVF-embryos are generated from a husband and wife. They divorce. The wife remarries and desires implantation of those embryos. Maybe the first husband consents, maybe he does not.[146] Are the children illegitimate? Has the wife committed adultery with her ex-husband? On one hand, there was an embryo transfer involving the sperm of a Jewish man other than her present husband. Is this analogous to a new impregnation after divorce or remarriage to a new husband, which is unquestionably adulterous? Or, given the fact that at the time of the fertilization the first husband was married to the wife, is it tantamount to a pregnancy predating the second marriage, in which case the child could not be a *mamzer* regardless of when it was born?

   Is there a distinction between *mamzeirut* and adultery? Is it possible that the child is not illegitimate, because its fertilization was not the result of an incestuous or adulterous union of egg and sperm, but the transfer of the embryo after remarriage is nonetheless an act of adultery, rendering the woman prohibited to her second husband? Can embryo transfer itself be a prohibited sex act?[147] Can a child become a *mamzer* through embryo transfer and birth if *mamzeirut* was not created at conception?[148]

145 If such fertilization takes place after the first husband's death, this would raise the question of postmortem adultery, point (2) above.

146 Recall that in *Davis v. Davis*, n. 3 above, the sperm provider, in the absence of an advance directive, was given a presumptive veto to assert his right not to be a biological parent. On the other hand, another case, in the 1996 *Nahmani v. Nahmani* decision, CA5587/93, 50(4)PD661, the Israeli Supreme Court gave greater recognition to the wife's right to bear a child, at least where it might be her last chance. *Nahmani*, however, did not consider the potential rights of the second husband, who might well object to his wife's bearing a child from her first husband.

147 This issue can, and was, raised before with respect to AID combined with IVF. See (1). However, even if it is accepted that an embryo transfer **may** constitute an adulterous act, this might not be the case where, at the time of fertilization, the sperm and egg providers were married.

148 As in gestational surrogacy, discussed in (9) below.

5. **Ovum donation from a Jew** The Satmar Rav regarded AID as tantamount to adultery. Assuming that his ruling applies to AID coupled with IVF (see (1) above), how would this play out in ovum donation? Assume, for example, that a woman is capable of carrying a baby to term, but either does not ovulate, or her eggs are genetically defective. An egg is donated by a married woman or a woman who is a close relative, such as her sister or mother. The husband's sperm fertilizes the donor egg, which is then transplanted into his wife. Obviously, his wife has committed no act of adultery by receiving a married woman's egg. By definition, adultery cannot be committed between two women. The question, however, is whether the husband's act of fertilizing the donor's egg is an act of adultery with the egg donor, and whether the resulting child is therefore a *mamzer*. In other words, does ovum donation raise the same concern as sperm donation? In sperm donation, the possibility of adultery exists between male donor and female recipient, whereas in egg donation the adultery would be between the husband of the infertile woman and the egg donor.

   Given that the man's sperm never entered the egg donor's body, either directly or through the transfer of an IVF-generated embryo, it is intrinsically improbable that the union of sperm and donor egg in a petri dish, which is transferred **into his own wife's body**, could ever be regarded as an act of adultery with the egg donor. It is, I believe, safe to conclude that the married egg donor need not leave her husband.

   The absence of adultery, however, does not necessarily resolve the *mamzeirut* problem. If indeed it is the essence of the Satmar Rav's position that *mamzeirut* can arise even where no prohibited sexual act was committed, as long as the child is a product of a union that would be adulterous or incestuous, the child born from an ovum donation could conceivably be tainted **if** the egg donor is deemed the mother. However, since, according to most decisors,[149] maternity in egg donation cases is assigned exclusively to the birth mother, not the egg donor, the child is not deemed the progeny of an adulterous or incestuous union, but rather, the progeny of his

149 It should be reiterated that where both donor and recipient are Jewish, most decisors conclude that the birth mother is the sole mother. The argument between rabbis Goldberg and Kilav applies only to **Jewish–non-Jewish** situations.

father and birth mother. On this view, with respect to the issue of *mamzeirut*, there would be no reason to insist that egg donors be single or unrelated to the husband and wife.

If, on the other hand, maternity is assigned to the genetic egg donor (a decidedly minority position), or, as R. Bleich suggests, there can be dual maternity, illegitimacy is indeed a potential problem. At least one of the mothers — the egg donor — has an adulterous or incestuous relationship with the sperm provider, thereby generating *mamzeirut* (or partial *mamzeirut*), despite the absence of a prohibited sexual act. On the basis of R. Auerbach's ruling that because maternity is uncertain, we must be strict in considering all possibilities, the child would be of doubtful legitimacy (*safek mamzer*).[150]

In short, egg donation probably does not involve adultery even where the donor is related or married. On the majority view that assigns maternity to the birth mother, there would also be no problem of illegitimacy, even on the strict position of the Satmar Rav. However, because of the other views, which assign maternity in whole or part to the egg donor, one would have to be strict about not permitting married or related persons to donate. Note that here I am addressing only the issues of adultery, incest, and illegitimacy. Other reasons for restricting egg donation, even from single women, were discussed above.[151]

6. **Ovum donation from a non-Jew** As noted, the child will need to be converted, and there is a dispute regarding the maternal relationship after the conversion.[152] Here too it is unlikely that the use of a Jewish husband's sperm to fertilize a non-Jewish egg which is then transferred to his Jewish wife could be construed as an act of prohibited intercourse with a non-Jew, since his sperm never penetrated her body. There may, however, be violation of other prohibitions, such as "destruction of seed" and, though this is less likely, impregnation of a Gentile.[153]

150 See text at n. 81 above. Note that the status of *safek* (or half)-*mamzer* is actually more restrictive than that of a definite *mamzer*. One who is illegitimate may marry someone illegitimate, whereas one of doubtful or partial legitimacy may not (though he may marry a convert). See *SA* EH 4:24.

151 See text at nn. 82–88 above.

152 See text at n. 102 above.

153 See text at n. 83 above.

7. **Ovum donation coupled with GIFT** Where fertilization occurs within the wife's fallopian tubes, rather than in the petri dish, the assignment of maternity to the recipient is much stronger. It probably gives rise to neither *mamzeirut* nor adultery. Any dispensation that would cover egg donation in general would clearly cover GIFT, though R. Auerbach's caution may apply even here, barring the use of married or related ovum donors.
8. **Ovum donation via uterine lavage** Uterine lavage starts off identically to AID. The depositing of sperm in the body of a married woman would clearly be adulterous, and the married woman impregnated in such a way prohibited to her husband. However, this would not necessarily result in *mamzeirut*. Given the fact that most decisors rule that in Jew to Jew transfers, maternity is established through birth, the child's "mother" is the woman who is married to the sperm provider. In the halakhic sense, the child is not the **product** of an adulterous or incestuous union. This creates a paradox: a child conceived from a adulterous union will not be a *mamzer* if he is born to a woman whose connection to the sperm provider is not adulterous and that woman is deemed his sole mother.

   Once again, however, if we adopt R. Auerbach's position, a UL child (from a married Jewish woman) would be of uncertain illegitimacy, or, if we accept R. Bleich's notion of dual maternity, partial illegitimacy. It is also possible that the case for the maternity of the egg donor is stronger in UL cases, increasing the probability of *mamzeirut*.[154]
9. **Gestational surrogacy (Jewish surrogate)** Assume a woman's ovulation is in order, but she cannot carry a baby to term. Her egg may be fertilized with her husband's sperm in vitro and then transferred to a gestational surrogate who agrees to deliver the baby to the couple upon its birth. Assume further that the gestational mother is a married Jewish woman. Would the transfer of the fertilized embryo be an act of adultery? Would the child born from the embryo transfer be illegitimate? Here, we face the opposite of the egg donation quandary. Instead of the husband's sperm fertilizing the donor's egg, which is then transferred to his wife, the husband's sperm fertilizes his wife's egg, which is then transferred to a surrogate. On the view of most authorities, maternity will be

154 See R. Ezra Bick, n. 43 above.

assigned to the birth mother, probably in whole, and at least in part. The child is thus the progeny of a union that is adulterous or, if the surrogate is a sister or mother, incestuous. There is thus more reason to require that a gestational surrogate be single and unrelated than there is to impose such a requirement on an egg donor, and indeed, the Israeli Chief Rabbinate has so ruled.[155]

Nevertheless, theoretically speaking, it is still possible that adultery occurs only when the man's sperm enters a married woman's body as sperm, or at least fertilizes her egg, which is then transplanted into her body. When it fertilizes his wife's own egg, which is then transferred to a married woman's body, no prohibited sex act can be said to have occurred, since the union of egg and sperm occurred neither within a married woman's body (unlike UL), nor with her egg. What is transferred is a separate living being. Adultery can occur only at the moment of union, not at the moment of transfer. Thus, the argument could be made that a gestational surrogate has not committed adultery, even technically, and would not be prohibited to her husband.

Notwithstanding this, in light of the assignment of maternity to the surrogate, the *mamzeirut* problem remains a concern (but see (2) above). This too creates a paradox, though the converse of that discussed in (8): a child could be **conceived** in a union that is neither adulterous nor incestuous, and nevertheless be illegitimate because it is born to a woman whose connection to the sperm provider is adulterous (and possibly incestuous), and that woman is deemed to be his mother in whole or in part.

10. **Gestational surrogate (non-Jew)** Illegitimacy will not be a concern here even if the surrogate is married, since the child will need a conversion after birth. Whether the sperm provider is committing a forbidden sexual act with a Gentile depends on whether embryo transfer, as opposed to sperm injection, is the equivalent of intercourse — an issue discussed in (1), (4), and (9). The two additional halakhic problems would be impregnation of a Gentile and wasteful emission of seed.[156] It should be noted that on the view of

155 See text above at nn. 89–96, and in particular n. 93, for additional reasons a married surrogate should not be used.

156 See nn. 83, 90 above. The Rabbinic prohibition against "giving birth to a child for idolatry" clearly does not arise, since the surrogate agrees to return the child to the Jewish couple at birth.

R. Kilav, who assigns maternity to the egg donor in Jew to non-Jew cases, neither of these problems arise, and it is possible that a non-Jewish surrogate would be **permitted**.[157] His, however, is a minority view.

11. **Embryo donation from a Jewish couple** Donation of a fertilized embryo to a married Jewish couple seems to raise the same concerns as gestational surrogacy, namely, a married woman is carrying an embryo that was fertilized by the sperm of a Jewish man who is not her husband. Embryo donation may or may not be an act of adultery on the part of the recipient (see (9)), but in either case, the assignment of maternity to the recipient will raise the problem of illegitimacy, in that a child has been born to a woman married to someone other than the father.

    A possible distinction between gestational surrogacy and embryo donation should be noted. In surrogacy, although the husband's sperm initially fertilized his own wife's egg, it was done with the intention of transfer to a surrogate. Perhaps this renders the "union" adulterous in a way that embryo donation is not. In embryo donation, the fertilization is not initially undertaken to impregnate a third party. If this subtle distinction is accepted, a married woman cannot consent to be a gestational surrogate, but could perhaps be a recipient of an embryo donation, at least where the transfer was not contemplated at the time of the fertilization. However, this distinction does not appear to be relevant to the problem of illegitimacy. As long as maternity is assigned to a birth mother who is married to someone other than the sperm provider, the illegitimacy problem exists, again highlighting the paradox of non-adulterous fertilization resulting in *mamzeirut* through embryo transfer and birth.

    If it is assumed that embryo transfer to a married Jewish woman constitutes adultery, embryo transfer to a non-Jewish woman would similarly constitute prohibited intercourse with a Gentile. The two other problems noted in (10) would also apply.

To summarize this excursus, the resolution of these various hypotheticals essentially hinges on two problems. **First**, what is the definition

157 In light of R. Wozner's argument, however, the non-Jewish surrogate would have to be unmarried. See n. 93 above.

of adultery once we extend it beyond the parameters of physical intercourse, as does the Satmar Rav? Assuming that AID is a prohibited act of adultery, is this prohibition limited to the direct deposit of sperm in a married woman's body, or does it include the transfer of an embryo fertilized outside her womb? If adultery does include embryo transfer, does it make a difference whether the transferred egg is her own or that of another woman (the sperm provider's wife) which she receives and brings to birth? Conversely, does the fertilization of a married woman's egg either inside (UL) or outside (IVF) her body constitute adultery where the fertilized egg is transferred to the sperm provider's wife? Determining the precise parameters of adultery is significant, because a woman who commits adultery may not remain with her husband.

The second issue is the relationship between adultery (or incest) and *mamzeirut*. The Satmar Rav asserts that the insertion of donor sperm, at least within the body of a married woman, constitutes an act of adultery, and that it generates illegitimacy. He does not clarify whether these two outcomes are dependent or independent, that is, whether the second outcome is a function of the first. Are the resulting offspring illegitimate **because** AID constitutes a prohibited adulterous sex act, in which case, in the absence of such an act, *mamzeirut* cannot arise?[158] Or alternatively, does *mamzeirut* arise whenever a child is born of parents whose union **would have been** incestuous or adulterous, whether or not a prohibited sex act took place? Can a child whose conception was non-adulterous (IVF with husband's sperm and wife's egg) nonetheless acquire the status of *mamzer* by virtue of later implantation in a married gestational surrogate, who gives birth to the child? Conversely, can a conception that was arguably adulterous (UL) and prohibited nevertheless not generate illegitimacy upon later implantation in the sperm provider's wife? The apparent paradox of the uncoupling of two ordinarily inextricably-linked phenomena (adultery without *memzeirut* and *mamzeirut* without adultery) merits further investigation and analysis.

158 I speak of the original creation of *mamzeirut*. Once the status of *mamzer* is established, it will automatically be passed on to the *mamzer*'s offspring, even if the *mamzer*'s relationships are fully permissible, e.g., if he marries a convert.

8 *Jewish Law Tort Remedies Against Unauthorized Preembryo Destruction*

American law has recognized that gamete providers may have a tort remedy against third parties who destroy preembryos without consent.[159] Would halakha recognize such a remedy? The Torah provides that if one hits a woman and as a result, causes a miscarriage, the perpetrator must pay compensation (*dmei vladot*) to the woman's husband (*baal haisha*).[160] Assuming, for a moment, that the principles of *dmei vladot* apply to preembryos, the following conclusions emerge:

1. The father is entitled to compensation.
2. According to most authorities, this entitlement exists even if the father was not married to the woman at the time of the accident.[161]
3. The right to compensation passes to the father's heirs if he dies after the wounding takes place.
4. If the father died before the wounding, the compensation goes either to his heirs (Raavad) or to the mother (Rambam).[162]

The application of *dmei vladot* liability to Noahides, however, may be somewhat problematic. First, does it apply to non-Jews at all? After all, this is a particular law found in the Book of Exodus, and like many particularistic laws in the Torah, may be limited to Jews. There is no textual evidence that liability for *dmei vladot* represents a universal

159 See *Del Zio v. Columbia Presbyterian Hospital*, No. 71-3588 (SDNY 1978). A jury awarded a couple $50,000 damages for intentional infliction of emotional distress when a physician who objected to their efforts at IVF without prior Institutional Review Board approval destroyed the preembryo. But cf. *Doe v. Irvine Scientific Sales Co.*, 7 Fed. Supp. 2d 737 (1998), which imposed no liability for negligent infliction of emotional distress resulting from contamination of embryos with virus.

160 Exodus 21:22.

161 The Talmud in bBaba Kama 43a clearly states this to be the case. R. Saul Yisraeli has attempted to demonstrate that according to Maimonides, if the father and mother were not married, or if they were divorced before the accident, *dmei vladot* would be payable to the mother. *Minhat Hinukh*, #49, seems to reject this understanding of Maimonides. See Breitowitz, n. 4 above, 165–166.

162 Maimonides, *Code*, Laws concerning Wounding and Damaging 4:2, and Raavad's comments.

principle applicable to non-Jews under the Noahide laws.[163] Second, in Jewish law compensation can exist only in the absence of a capital crime.[164] To the extent injury results in a homicide for which capital punishment can be imposed, there is no monetary liability. Feticide committed by Jews is not a capital crime, but feticide committed by Noahides is.[165] If destruction of fetal or embryonic life by non-Jews incurs capital punishment, this alone may preclude any liability for fetal damage.[166] If, on the other hand, the destruction of an externalized preembryo is not a capital offense under Noahide law, financial liability may indeed arise.[167]

It is probable, however, that even for Jewish tortfeasors, halakha does not recognize liability for the destruction of preembryos. First, it is doubtful whether liability can ever attach to wounding incurred by

163 Whether Noahides are subject to *dmei vladot* liability may depend on the scope of the Noahide commandment of *dinim*. If, as Maimonides says, it simply necessitates the establishment of a court system to enforce the other six Noahide commandments, the various civil liabilities of the Torah would generally not apply to Noahides (except, perhaps, to the degree that halakha would place its imprimatur on self-imposed legislative or judicial expansion of rights by the non-Jewish societies themselves). See Maimonides, *Code*, Laws concerning Kings 9:14. According to Nahmanides, at least as he was understood in *Responsa Rema*, #1 and *Responsa Hatam Sofer*, 6:14, *dinim* encompasses virtually all the Torah's interpersonal laws and obligations, except where Scripture specifically excludes them. Thus, Noahides might indeed be liable for *dmei veladot*. But see *Haamek Sheeila*, sheilta 2:3; *Even Haazel*, Creditor and Debtor 27:1; and *Arukh Hashulhan Heatid*, Sanhedrin 79:15, who interpret Nahmanides differently.

164 Indeed, the law of *dmei vlalot* is one of the sources for this principle; see bKetubot 36b. (By emphasizing that there is monetary liability because no one has been killed, the Torah implies that had a homicide occurred, e.g., had the mother been killed, no compensation would be imposed.)

165 See text at nn. 27–30 above.

166 My hesitation stems from the fact that it is not entirely clear that the "a lighter penalty is not imposed where a heavier penalty is imposed for the same offense" (*kam lei bidraba minei*) rule, which precludes monetary liability in the event of a capital offense, applies to Noahides. See *Minhat Hinukh*, #49. It is also possible that even if the halakhic rule exempts Noahides from financial liability where there is a capital crime, Noahide society could adopt a contrary rule by dint of its authority to establish laws (*dinim*).

167 See text at nn. 31–33 above.

an embryo under 40 days old. The principle of "mere water" may mean that functionally speaking, such an embryo is considered nonexistent. Second, regardless of its level of development, no monetary liability should arise from destruction of an externalized embryo. The amount awarded as *dmei vladot* is calculated not on the basis of damage to the fetus, but on the basis of damage to the woman's person.[168] The perpetrator pays the difference in value between a pregnant woman and a non-pregnant woman. While this measure may indeed suggest liability for the destruction of an **implanted** embryo even if it is under 40 days old, it precludes liability for the destruction of an externalized preembryo, no matter how developed.[169]

9 *Parentage of the Preembryo for Purposes of* Yibum, *Inheritance and* Pidyon Haben

Although maternity in the event of a donated preembryo or ovum is a matter of sharp controversy, the standard IVF protocol, where the fertilized egg is transferred back to the woman from whose womb it was removed, poses no such problem. In such a case, virtually all decisors

168 See Maimonides, *Code*, Laws concerning Wounding and Damaging 4:2. This position, however, is not universally accepted. See bBaba Kama 48b–49a; *Tosafot*, bBaba Kama 47a s.v. *vekhen*; *Lehem Mishne*, Laws concerning Wounding and Damaging 4:2. If there is indeed separate compensation for the destruction of the fetus, such compensation might be available even for the destruction of preembryos.

169 There are three additional points that might rule out *dmei vladot* liability for the destruction of externalized preembryos: (1) R. Shaul Yisraeli has argued, based on a responsum of the *Noda Biyehuda*, that no paternal relationship can exist until uterine implantation, a stage that preembryos have not achieved. As such, there is no "father" who might have a right to recover. (Could the mother recover?) As explained below, this may be a misinterpretation of the *Noda Biyehuda*'s ruling. (2) A passage in bSanhedrin 69a can be construed as suggesting that paternity arises only upon completion of the first trimester. R. Akiva Eiger, *SA* YD 87, applies this to maternity as well. See n. 81 above. If so, the preembryo has neither father nor mother. However, none of the codes limit *dmei vladot* liability to fetal miscarriages after the first trimester. (3) On R. Waldenberg's view, IVF-generated embryos, even after birth, have no halakhic father or mother. Accordingly, there may be no *dmei vladot* liability even for wounding that occurs after implantation. This too is a minority position that has been rejected by most decisors. See n. 7 above.

accord full parental status to the couple involved.[170] Assuming that a preembryo transfer back to the ovum donor results in full maternity and paternity rights — a relatively uncontroversial position — there are a number of implications.

a Yibum

1 *Postmortem Implantation*

Consider the mitzva of *yibum*: The Torah states that if someone dies without children, his brother is obliged to either marry the widow or release her through the ceremony of *halitza* (Deut. 25:5–10). If someone dies leaving no brothers, but his mother had a frozen preembryo, which was later implanted, resulting in a pregnancy and birth, would the deceased's widow need *yibum* or *halitza*? Is she allowed to get married if such a preembryo exists? This would appear to pose no halakhic difficulty. The Mishnah in Jebamot lays down the rule that any brother born after the death of his sibling does not perform *yibum* and *halitza*, nor can he prevent the widow from remarrying. Thus, even were the deceased's mother pregnant at the time of his death, there would be no *yibum*. Obviously, an unimplanted preembryo whose development is clearly not beyond "mere water" cannot have a status greater than that of a fetus in its ninth month.

The *yibum* question does become more difficult, however, if we look at the widow herself. Assume her husband died but left either frozen sperm or fertilized preembryos. What is her status regarding *yibum* or *halitza*? Unlike the laws pertaining to the term "brother" (*ah*), those where the term "son" (*ben*)[171] appears are more expansive. The Torah says there is *yibum* if one brother dies "and has no child" (*uben ein lo*): if "*ein*" here is read "*ayen*," it means "you must investigate," implying that even an unborn son may obviate the duty of *yibum*. Consequently, the law is very clear that if a woman is pregnant at the time of her husband's death, whether or not she will need *yibum* depends on whether the child is born dead or alive.[172] If the child is born alive (even if he or she dies shortly after birth), the widow is

170 See text above at nn. 6–10.
171 The term "*ben*" in this context includes "daughter" as well as "son."
172 See *SA* EH 164:2.

permitted to marry without *yibum* or *halitza*. If the child is born dead, the widow requires *yibum* or *halitza* (There is an argument in the Gemara between R. Johanan and R. Shimon b. Lakish over whether *halitza* received **while** she was pregnant would suffice in the event the child is stillborn).[173] It is equally clear that the live birth of a child after the husband's death would qualify as a "son" for purposes of obviating *yibum* even if the pregnancy at the time of the husband's death was **under** 40 days old. Its status as "mere water" is irrelevant. This is evidenced by the fact that a widow cannot get married before a minimum of 90 days have elapsed, 90 days being the amount of time after which a pregnancy is recognizable.[174] If a pregnancy is not treated as a "son" until it is at least 40 days old, the only question that would be relevant would be whether the woman was carrying such an embryo at the moment of her husband's death, which could be discovered after 50 days.

Since any pregnancy that eventually results in a live birth terminates the obligations of *yibum* and *halitza*, the status of a frozen preembryo must be addressed. Little has been written on the subject, but R. Shaul Yisraeli has ruled that a postmortem implantation of a preembryo (and certainly sperm) does not confer posthumous paternity on the deceased, and the widow would require *halitza* even if the baby is brought to term.[175] His primary source is a responsum of the *Noda Biyehuda*.[176] According to the law, the "absorption of seed" (*klitat zera*) may take place up to 72 hours after intercourse.[177] If so, asks the *Noda*

173 bJebamot 35b. The law is in accordance with R. Shimon b. Lakish's view that a second *halitza* is necessary; *SA* EH 164:2.

174 bJebamot 41a; *SA* EH 164:1.

175 See *Torah Shebeal Pe* 33 (1992), 41–46.

176 *Noda Biyehuda*, 1, EH 69.

177 See *Tosafot*, b.Jebamot 37a s.v. *rov*. *Klita* seems to be understood by R. Yisraeli as referring to implantation of a fertilized ovum in the uterine wall. This is problematic, however, since implantation could actually occur up to 10–14 days after fertilization. See n. 1 above. An alternative explanation of *klita* would be penetration and fertilization of the egg. The halakha would thus reflect the idea that sperm are capable of fertilizing an egg up to 72 hours after ejaculation, a concept articulated in other contexts as well; see e.g., *SA* YD 196:11. If so, the *Noda Biyehuda* never intended to require implantation as a condition for paternity. This interpretation of *klita* casts serious doubt on R. Yisraeli's ruling regarding preembryos.

Biyehuda, why is a childless widow permitted to have *halitza* or *yibum* after 90 days? Perhaps she had intercourse immediately before her husband's death, and the seed was not "absorbed" until 72 hours later. As a result, the pregnancy would not be recognizable until 93 days after death. Therefore, if a woman received *halitza* between days 90 and 93 and proceeded to marry, such a marriage would turn out to be sinful in the event the child is stillborn (because the interim *halitza* given to a pregnant woman is invalid). Conversely, in the event she elected to have *yibum* after day 90, the union with the levir would be sinful if the child is later born alive. To avoid these problems, the Rabbis should have enacted a 93-day waiting period, after which the absence of a pregnancy could be definitively established. The *Noda Biyehuda's* answer is that if *klitat hazera* did not occur by the time of the husband's death, halakhically speaking he did not have a son on the date of his death. Paternity cannot be established by postmortem *klita*, though it can certainly be established by a postmortem birth. Thus, on day 91, assuming no visible pregnancy, the widow may undergo levitate marriage in any event. She is either not pregnant at all, or any pregnancy is a result of postmortem *klitat hazera*. Either way, the "has no child" requirement is fulfilled. The *yibum* is valid even if she eventually gives birth to a child. She would need *halitza* to marry anyone else even if she gives birth to a child. By the same token, any *halitza* given after day 90 will suffice to permit her to remarry, even if the child is ultimately stillborn. R. Yisraeli argues that these considerations certainly apply to frozen preembryos and (a fortiori) to sperm.

It appears to this writer, however, that the analogy may not be apt. While R. Yisraeli's analysis is unquestionably correct in the case of frozen sperm that is not utilized until after the husband's death, extending the *Noda Biyehuda*'s ruling to preembryos would be justified only if the term *klitat hazera* refers to uterine implantation. If, as is likely, *klita* refers to penetration and fertilization of the egg by the sperm, in the case of a preembryo a *klitat hazera* has indeed occurred during the lifetime of the husband, even where transfer and implantation take place after his death. Accordingly, in the event of a postmortem embryo transfer that culminates in a live birth, the widow would not require *halitza* to be able to remarry.

If the above assumption, viz., that a preembryo is a child for purposes of *yibum*, is correct, problems may arise concerning the timing of *halitza*. In accordance with the view of R. Shimon b. Lakish, *halitza*

performed while a woman is pregnant is invalid.[178] This has two consequences: she is not permitted to receive *halitza* and marry during her pregnancy, lest she miscarry. In the event she did receive *halitza* while pregnant and then miscarried, she would need a new *halitza*. (If the baby is born alive, the widow may of course marry without *halitza*.) How would this apply to a preembryo? One possibility might be that even if a preembryo is a child for purposes of *yibum*, the widow is not considered pregnant for the purpose of invalidating her *halitza*. As such, in the event the woman decided not to have the embryos implanted, she could undergo *halitza* any time after the 90th day following her husband's death.[179] If, on the other hand, the woman is deemed to be pregnant at the time of her husband's death, no *halitza* can take place unless the embryos are implanted into her body and then stillborn or (spontaneously) aborted, or else destroyed and not implanted (assuming this is halakhically permissible).

In any event, even where the *klitat hazera* clearly occurred after the husband's death, not all the decisors have followed the *Noda Biyehuda*.[180]

178 bJebamot 35b; *SA* EH 164:2.

179 She would still have to wait 90 days to rule out the possibility of another pregnancy.

180 See e.g., *Noam* 1, 155 (1958). In this early article exploring the halakhic problems of artificial insemination, R. Auerbach ruled that sperm with which the wife is inseminated after the death of the husband cannot produce a child for purposes of *yibum*. Accordingly, the woman must undergo *yibum* or *halitza* even if the insemination produces a live birth. This also means that any *halitza* the woman undergoes while pregnant will immediately permit her to marry even if the pregnancy eventually results in a stillbirth. (This ruling appears obvious, since sperm alone is not deemed a child.)

R. Auerbach was in doubt, however, with regard to the case where the sperm was placed in her body before her husband's death but there was no *klita* until afterwards. Thus, if she underwent *halitza* while she was pregnant, but the baby was stillborn, a new *halitza* should be carried out due to the uncertainty.

(If the baby is born alive, there is no need for a second *halitza*: if posthumous *klita* cannot produce a child even if it culminates in a live birth, the *halitza* she underwent while pregnant was valid, since the pregnancy does not count. If posthumous *klita* can produce a child, a live birth exempts her from *halitza*, and she can marry for that reason alone. The validity of *halitza* during such a pregnancy becomes important only where there is a later stillbirth. If the pregnancy does not count as a potential child (as in the case of posthumous insemination), there is no need for another *halitza*. If, however, such a pregnancy is deemed a child for purposes of *yibum*, the *halitza* would be invalidated due to her pregnancy (*halitzat meuberet*).)

2 *Third-Party Contributions*

If an otherwise childless woman bears a child via a donated embryo of Jewish or non-Jewish origin, such a child is obviously not a child (*ben*) for purposes of *yibum*, because the woman's husband clearly has no paternity. Conversely, if a woman gave birth to a child through IVF and ovum donation from a Jewish donor, and the egg is fertilized by her husband's sperm, *yibum* or *halitza* (assuming a live birth) would clearly not be necessary, because regardless of whether maternity resides with the birth mother or egg donor, the husband is the father and that is all that matters. For purposes of exemption from *yibum* and *halitza*, the existence of paternity suffices.[181]

If the ovum came from a non-Jewish source and was fertilized by the husband's sperm and then transferred to his wife's uterus, it would appear that such children would **not** exempt their mother from *halitza*. According to R. Kilav, such children are non-Jews who must undergo conversion, after which they have no filial connection with either the mother or the father.[182] According to R. Goldberg, the peculiarities of their conversion would not sever their filial bond to their Jewish birth mother, but there would appear to be no basis for the father to claim paternity.[183] Indeed, even on the view that conversion is not necessary and the children are born Jews,[184] there would probably be no **paternity** on the part of the Jewish father, since paternal bonds are generated, if at all, at the time of conception, and at that time, the ovum was of non-Jewish origin. If a paternal relation was severed at the time of fertilization, it can probably not reestablish itself later. For the same reason, the dual maternity analysis of R. Bleich[185] (half born Jew–half convert) would probably not suffice to generate a filial bond to the father.

As a consequence, children born from non-Jewish egg donation do not exempt their mother from *yibum* or *halitza* regardless of how one resolves the maternity/religious status issue. Conversely, if years later,

181 Of course, if one accepts the minority views of R. Waldenberg and R. Sternbuch that no paternity exists in IVF-pregnancies, obviously the preembryo would not count as a *ben* for *yibum* purposes. As noted, this view is not widely accepted. See text at nn. 6–12 above.

182 The notion that paternity arises from conception is the basis of the ruling in bJebamot 97b. But cf. R. Akiva Eiger, *SA* YD 87, and n. 81 above.

183 See n. 102 above.

184 See nn. 111–112 above.

185 See R. Bleich, n. 78 above.

a "natural sibling" (born without egg donation) dies without children, his widow could not receive *halitza* from an IVF-generated brother, and if he were the only brother, would not have to receive *halitza* at all. This is yet another reason why parents of IVF-generated children from donated eggs should inform their children of this fact.[186]

Where a child is born from a non-Jewish gestational surrogate but from his wife's egg, the analysis is a bit more complicated. Here, paternity very much depends on maternity. One could argue that a proper paternal relationship was in fact generated at the moment of conception/ fertilization. The question then becomes whether that paternity is forfeited by transfer of the embryo to the non-Jewish woman who becomes the birth mother. According to R. Kilav, the child is deemed a Jew by virtue of his genetic origin, without any need to convert. Hence, the paternal relationship which arose upon conception has not been severed. The same is true on R. Bleich's dual maternity approach: if the child is indeed half Jew–half non-Jew, the paternal bond remains by virtue of the "half" of the child that remained Jewish.[187] Hence, the widow would be exempt from *yibum* and *halitza*. On R. Goldberg's view, the child is a definite non-Jew, conversion is required, and the child does not exempt its genetic mother from *halitza*. On R. Auerbach's view, this would be a "doubtful case" (*safek*), and *halitza* would be required as a stringency (*lehumra*).

b Inheritance

1 *Postmortem Implantation*

A child who is born after the death of his parent clearly has inheritance rights, and may compel a reallocation of the parent's estate even after the other heirs have already taken possession.[188] There is considerable disagreement among the decisors as to whether he inherits as a fetus or

186 See text at nn. 124–125 above.

187 This is not true in the case of non-Jewish egg donation, for although here too the child might be half Jew–half non-Jew, the paternal bond was already severed at the time of conception, since the egg was, at the time, of totally non-Jewish origin.

188 If one accepts the minority view of R. Waldenberg that no paternity exists in IVF pregnancies, then obviously the embryo will not have inheritance rights even if it is implanted and then born in the lifetime of the father.

owns nothing until he is born, but it is indisputable that once he is born, he has a share of the parental estate.[189] R. Auerbach has ruled that these principles apply not only to fertilized preembryos that are implanted subsequent to the father's death, but even to sperm.[190] R. Yisraeli argues (without citing R. Auerbach) that the same definitions that exist for *yibum* should be determinative for inheritance purposes.[191] As such, postmortem implantation cannot establish paternity.[192] In support of R. Yisraeli's position, it should be noted that the phrase "has no child" (*ben ein lo*) appears in connection with both *yibum* and inheritance.[193]

2 *Third-Party Contributions*

If the egg donor is Jewish (whether married or not), the child is a born Jew. Assuming that full paternity exists in IVF-pregnancies, the child has a Jewish father, namely, the sperm provider. As such, the child will clearly have rights of inheritance in his father's estate regardless of the identity of his mother. Whether he would share in the distribution of his birth mother's estate depends on the question of maternity, discussed

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The issue of posthumous implantation would be moot. Ironically, however, on his approach direct implantation with the husband's sperm after his death could result in a later child having inheritance rights while a child who is born from a IVF-transfer in the lifetime of his father would not.

189 See generally *Tur*, HM 210 and YD 331 and commentary of the *Beit Yosef*. See also Maimonides, *Code*, Laws concerning Heave Offerings 8:4; *Biur Hagra*, HM 275; *Or Sameiah*, Nahalot 1:13; *Hidushei Rabeinu Haim Halevi*, Terumot 8:4. For a complete discussion, see R. Binyamin Rabinowitz-Teumim, *Hukat Mishpat* (1976), 1:5 and 2:9–10.

190 See article cited in n. 180 above. Indeed, this seems to be the position of the *Noda Biyehuda* despite his ruling on *yibum*. See *Noda Biyehuda*, I, EH 69.

191 See *Tora Shebeal Pe* 33 (1992), 44, where R. Yisraeli writes that the ruling cited in n. 190 is a legal error (*taut behoraa*), and children born from postmortem implantation do not have inheritance rights.

192 This again rests on R. Yisraeli's assumption that in cases of a preembryos, no *klitat zera* has occurred. If *klita* is conceived as fertilization, the most the comparison to *yibum* could do is negate paternity in cases of postmortem insemination, not embryo transfer.

193 It must be admitted, however, that the *Noda Biyehuda* himself clearly assumed that his ruling applied only to *yibum* and not to inheritance, and that a child could inherit from his father even if the *klitat zera* took place after the father's death.

earlier.[194] It will be recalled that in Jew to Jew transfers, a majority of decisors would indeed assign maternity to the birth mother.[195]

Where the egg donor is not Jewish, it would appear that the children would not inherit from their biological father for the same reasons they do not constitute children for purposes of *yibum*.[196] According to R. Kilav, such a child is born a non-Jew, and must undergo conversion, and thus, has no filial bond with either his birth mother or his biological father. While R. Goldberg recognizes the maternity of the birth mother, notwithstanding the fact that the child must undergo a conversion for *kedushat yisrael*, there appears to be no basis to establish the paternity of the biological father, since at the time of fertilization, the ovum was "non-Jewish." The same is true on R. Bleich's position, and indeed, on the view that does not require conversion at all.

Whether the child could inherit from his birth mother in the event the biological father predeceases or divorces his wife depends on the various approaches discussed above. R. Kilav would deny such a right. R. Goldberg and R. Bleich would recognize it, for different reasons.[197]

194 Normally, when a married woman dies, her assets are inherited by her husband and not her children; *SA* EH 90:1. Maternity as such, therefore, will have no direct impact on inheritance rights. If, however, the husband predeceased his wife or divorced her, upon her death, her assets would go to her children.

Even where the wife predeceases her husband and her estate passes to him, maternity may be important due to the law that upon death of a father, the male children of a previously-deceased wife take the value of their mother's *ketuba* before the rest of the estate is divided among all the heirs (*ketubat banin dikhrin*); see bKetubot 52b and *SA* EH 69:1–2. To the extent the IVF-child is not a child of the mother, the *ketubat banin dikhrin* law would benefit her other children.

195 In light of R. Auerbach's ruling that the situs of maternity is unresolved (see text at n. 81 above), it appears that the children generated from donated ova of Jewish origin would have no right to inherit from either mother, because the heirs of each woman can assert that maternity resides with the other (*hamotzi meihaveiro alav hareaya*). Conversely, on R. Bleich's dual-maternity view, perhaps the child could inherit from both!

196 See nn. 182–185 above.

197 Note, however, that the right to inherit the mother's estate will not carry with it the entitlement of *ketubat banin dikhrin* if their mother dies first. See n. 194 above. That right exists only if the children are also the children of her deceased husband. If halakhically they are not (notwithstanding the biological reality that they were conceived from his sperm), this right would not arise.

R. Auerbach would treat the right of inheritance as a "doubtful monetary case" (*safek mamon*) and as such, apply the rule of *hamotzi meihaveiro alav hareaya* (the burden of proof falls on the one who asserts a right to recover).

Where the child is born from a non-Jewish gestational surrogate, the inheritance rights from the biological father depend on the assignment of maternity.[198] R. Kilav would grant full inheritance rights, as would R. Bleich. R. Goldberg would deny them. R. Auerbach would apply the rules for doubtful monetary cases.[199]

In the case of AID or embryo transfers, there will, of course, be no inheritance from the recipient's husband, as he is not the father of those children. With respect to inheriting their birth mother's estate, children produced from AID (Jewish or not) where the birth mother's own eggs were fertilized, would clearly inherit. Children resulting from embryo transfer raise the same issues of split maternity as do ovum donations.

3 *Preembryos and the Law of Primogeniture*

The foregoing section dealt with the inheritance rights of preembryos that are implanted after the father's death. Even where implantation and indeed live birth took place in the father's lifetime, the ability to freeze and preserve embryos may raise questions concerning the definition of "first-born" (*bekhor*). A male child who is his father's first-born is entitled to a double portion of inheritance (Deut. 21:17). Assume an embryo is frozen, but another child is born first (either naturally or through IVF). Which child is deemed the first-born for purposes of the law of primogeniture? In spite of the fact that the Torah describes the first-born as "the beginning of his [the father's] strength" (Deut. 21:17), the consensus of most decisors is that the double portion goes to the first male child of the father that is actually born, not the first to be conceived.[200]

198 See the explanation for *yibum* in the text at n. 187 above.

199 The positions of rabbis Kilav and Goldberg are reversed with respect to egg donation and gestational surrogacy. It is only R. Bleich who would recognize inheritance rights in both, due to his dual maternity construct.

200 See *Shoel Umeishiv*, 3:52; *Haamek Davar* on Deuteronomy 21:15. But see the fascinating comments of the Vilna Gaon in *Kol Eliyahu* to Deuteronomy 21:15, suggesting that the double portion be awarded to the first **conceived**. Even the Vilna Gaon, however, might concede the contrary position with respect to an embryo fertilized outside the womb.

If both children were born after their father's death, for instance, if two frozen preembryos were transplanted to the wife at different times, the law of primogeniture does not apply at all and both children inherit equally.[201]

c Pidyon Haben

Assuming the fertilized egg is implanted into the Jewish woman from whom it was taken, there is no question that if a male child is later born from the IVF and would otherwise qualify as the first-born, as the child who "opened" his mother's womb (*peter rehem*) — there is an obligation of redemption of the first-born son (*pidyon haben*). Whether the obligation devolves on the father, or on the child after he attains adulthood, depends on recognition of paternity in IVF pregnancies, a paternity that virtually all decisors recognize. It is also clear that in the case of frozen preembryos, *pidyon haben* would devolve on the first to be **born** — emerge from the womb — and not the first to be fertilized.[202]

Questions arise, however, when we consider cases of preembryo transfer or ovum donation from either Jewish or non-Jewish sources.

Recipient Issues If a Jewish woman is impregnated by a non-Jew and has a male child, that child, if otherwise a *peter rehem*, is subject to the mitzva of *pidyon haben*.[203] Although there is no halakhic father who is obligated to observe the mitzva, the son must do so when he reaches adulthood.[204] What about an embryo transfer from a non-Jew to a Jewish woman? On the view of R. Goldberg, who maintains that the child bears a genealogical connection to his birth mother despite the need for conversion, it would appear that a *pidyon haben* is mandated. The child is a first-born son of a Jewish mother.[205]

201 See *SA* HM 277:4 (assuming, of course, they are both male or both female).

202 This is true regardless of how the double portion law is interpreted, since *pidyon haben* is clearly a matter of "opening the womb."

203 *SA* YD 305.

204 See the comments of *Taz, SA* YD 305 (11) and Shakh in *Nekudot Hakesef* on whether it would be proper for the mother or the court to redeem the child as a minor, or it is best that the *pidyon* be deferred until adulthood.

205 The *SA* rules that if a non-Jewish woman converted while pregnant, the baby that is subsequently born must have a *pidyon haben*. Since R. Goldberg treats every transfer of an embryo from a non-Jew to a Jew as endowing the birth mother with full maternal status (though conversion is necessary), an embryo transfer would be analogous to a fetus not conceived prior to conversion but born afterwards (*horato shelo bikdusha veleidato bikdusha*).

Nevertheless, in view of the absence of a Jewish father, the obligation of *pidyon haben* would not devolve on the father, but on either the child, when he reaches adulthood, or the court (*beit din*). The same result would follow on R. Bleich's dual maternity view.

By contrast, on R. Kilav's view, namely, that the child is a non-Jew who does not bear a relationship to his birth mother, he could not be a first-born, and there is thus be no obligation to redeem him. It seems likely, however, that even according to R. Kilav, the birth of such a child would mean that the birth mother's **next** child would not be a *bekhor*, since he would not be a *peter rehem*.[206] Thus, on R. Kilav's view, there would be no *pidyon haben* at all. This same argument would hold true for ovum donations fertilized with the husband's sperm **in vitro**.[207] For the reasons noted above, it is possible that ovum donation coupled with GIFT would necessitate a *pidyon haben* even on R. Kilav's view.[208]

Donor Issues It is also clear that if a Jewish woman donated an ovum that was fertilized and implanted in another woman (Jewish or non-Jewish), or utilized a gestational surrogate, the resulting child would **not** be her *peter rehem*, and a subsequent male birth on the part of the egg donor would indeed be subject to *pidyon haben*. This is definitely the case on the view of the decisors who assign maternity to the birth mother — and even R. Kilav does so in Jew to Jew transfers — and would probably be the case even if the egg donor is deemed the mother, since the child nonetheless did not emerge from her womb. This creates the interesting anomaly of a woman's first-born son's not needing a *pidyon haben* (at least where he is born from a non-Jewish

206 See *SA* YD 305. Even where the child does not bear a genealogical tie to the birth mother, the physical birth of a child from a woman's womb renders subsequent births exempt from *pidyon haben*. Thus, if a non-Jewish woman had children and then converted, her first child with a Jew will not require a *pidyon haben*. On R. Kilav's understanding, embryo transfer appears to be analogous to this situation.

207 The only possible distinction between embryo transfer and ovum donation is the fact that in the latter, husband's sperm fertilized the egg, arguably creating a Jewish father. If, according to R. Goldberg, the child needs a *pidyon haben*, the obligation could possibly devolve on that father. I have already argued, however, that even if the child bears a relationship to its birth mother, it does not bear a relationship to its biological father. See text at nn. 182–185 above.

208 See text at nn. 136–140 above.

birth mother or from a Jewish woman who already had children) but the second-born son's requiring it.[209]

Uterine Lavage Even if the Jewish egg donor contributed an embryo via uterine lavage, it is likely that a later male birth will be subject to the obligation of *pidyon haben*. The only difference between a naked ovum donation coupled with IVF, and UL, is that in the latter, conception occurred within the donor's body, the embryo entered the uterus, and it was removed via the vaginal canal. Such removal does not constitute a "birth" for the purpose of exempting a subsequent child from *pidyon* unless the fetus had reached the developmental stage of having differentiated organs[210]; the embryo removed via UL is far below this level of development.

Of course, in the event technology ever makes possible full-fledged inter-uterine fetal transfers, the situation might be different: a second child of the donor mother might be exempt from *pidyon haben* even if the birth mother is deemed the child's sole mother.[211] Conversely, the child might be deemed "born" of its genetic mother — depending on how far along the pregnancy was — but still exempt a second child of the birth mother from *pidyon haben* on the grounds that the second child of the birth mother is not a *peter rehem*, given that the

209 If a woman gives birth to a child via a caesarian, neither that child nor the next one, even if delivered vaginally, requires a *pidyon haben*, the first because it is not a *peter rehem*, the second because it is not a first-born; see *SA* YD 305:24. This may mean that if the ovum donor is deemed the mother — which at best is but a minority position — the preembryo would be deemed akin to a caesarian birth (*yotzei dofen*) and exempt subsequent vaginal births by the egg donor from *pidyon haben*. This rule, however, does not appear to apply where the first child was never carried in the womb at all. See the ruling of R. S. Wozner quoted in R. G. Oberlander, *Pidyon Haben Kehilkhato* 2:21, n. 48 (ectopic or tubular pregnancy). An externalized preembryo is even further removed from the womb than an ectopic pregnancy. Indeed, even a uterine lavage will not constitute a "birth" for the purpose of exempting the next child from redemption. In any case, on the majority view that in Jew to Jew transfers, the birth mother is deemed the sole mother, it is certain that a subsequent male birth on the part of the egg donor will be subject to redemption.

210 See *SA* YD 305:23 (Rema).

211 In such a case, the child might be a *peter rehem* of the birth mother but at the same time exempt subsequent children of its genetic mother from *pidyon haben*.

first child "opened her womb," although genealogically it is not her child.[212]

Appendix: The Preembryo under American Law

a Criminal Liability for the Destruction of Embryonic Life

Under American law, the responsibilities owed to preembryos or indeed, embryos or even fetuses, are somewhat limited, though they have undergone expansion in recent decades.[213] For the most of

212 See bHulin 70a; Maimonides, *Code*, Laws concerning Firstlings 4:18; and R. Goldberg, n. 78 above, 257–259. The discussion in Hulin deals, not with *pidyon haben*, but with the sanctified, sacrificial status of a first-born animal. The Tamud discusses the case of an embryo transfer from one animal to another animal, with the second animal giving birth. The question is whether the birth of the fetus from animal 2 qualifies as "birth" to exempt a subsequent birth from animal 2 from the sanctity of the law of the firstling, although animal 2 is neither the genetic mother nor the animal in whose body conception takes place. The upshot of the discussion is that it is clear that the second animal born from animal 1 is not a firstling, but we remain in doubt concerning the second animal born from animal 2. The Talmud does not resolve the question and leaves the matter in doubt. In the case of animals, the doubtful firstling must be treated as though it has sanctity, i.e., one cannot shear or work with the animal, though its uncertain status precludes bringing it as a sacrifice. In the case of humans, however, a doubtful first-born is relieved of the obligation of redemption entirely, because of the principle that doubts in connection with monetary obligations are resolved to the benefit of the obligor. In short, even if in a late-stage uterine transfer, maternity is not assigned to the "birth" mother — as in the case in Hulin — the emergence of that child from her womb will, at least due to the uncertainty, exempt subsequent births from *pidyon haben*.

213 Ironically, this expansion has taken place at a time when the courts have recognized a woman's right to terminate her pregnancy. See *Roe v. Wade*, 410 U.S. 113 (1973) (a woman has a constitutional right to terminate a pregnancy prior to the final trimester; the state may engage in only limited regulation thereafter). While *Roe* has been under severe attack, its basic structure survives. See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (5–4 decision striking down Nebraska's ban on partial-birth abortion).

The principles of fetal/embryonic rights, on the one hand, and a woman's right to choose, on the other, maintain an uneasy coexistence within the universe of our legal system. There will inevitably be some tension between them, and the precise parameters of the balance remain somewhat unclear. See text at nn. 261–267 below.

the history of the common law, and in most American jurisdictions through the mid-19th century, abortion prior to quickening (fetal movement) was not a crime at all and, even after quickening, was at worst a misdemeanor, not a felony.[214] (A preembryo, an entity that in any case was unimaginable during this period, would certainly be at the prequickening stage, and its destruction would therefore not have been punishable under the common law.)[215] The widespread criminalization of even early-stage abortion, a process that rapidly accelerated in the mid-19th century, was motivated, at least in part, by concerns for the mother's health — given the dangerous nature of the procedure — rather than any notion of an inherent "right to life" of the fetus (though the diversity of statutes enacted does reflect multiple objectives).[216] In any case, the general criminalization of early-term abortions — even if it applied to externalized preembryos, which is questionable — was declared unconstitutional under *Roe v. Wade*,[217] and is no longer a source of fetal/embryo protection.

214 See, e.g., Coke, *Institutes* III, *50; I Blackstone, *Commentaries* *129–130; *Commonwealth v. Bangs*, 9 Mass. 387 (1812); *Miller v. Bennet*, 56 S.E. 2d 217 (Va. 1949). Note that some historians have argued that Coke was either mistaken or intentionally misstated the law, and that even a postquickening abortion was not originally a crime under English common law, but only an ecclesiastical offense. See Means, "The phoenix of abortional freedom," 17 *N.Y.L.F.* 335 (1971). Regardless of its accuracy, Coke's declaration that postquickening abortion was a common law crime (albeit not a felony) was accepted in the United States as well as England. See, e.g., *Lamb v. State*, 10 A. 208 (Md. 1887).

215 Note that even under the common law rule, if the fetus was born alive (i.e., died after full expulsion from the womb and some evidence of independent vitality, such as respiration, crying, etc.) and then died of injuries suffered in utero, the perpetrator could indeed be guilty of murder, but only if the injury was inflicted after the quickening stage. See LaFave and Scott, Jr., *Criminal Law* 2nd ed. (West 1986), §7.1(c) at 607–609 and Robertson, "Reproductive technology and reproductive rights: In the beginning — the legal status of early embryos," 76 *Va. L. Rev.* 437 (1990).

216 See the discussion in Justice Blackmun's majority opinion in *Roe v. Wade*, 410 U.S. 113 (1973), 148–149. He also notes that as late as 1840, only eight states had statutes dealing with abortion, and even when abortion statutes were more widely enacted, they continued to differentiate between quickened and nonquickened fetuses, at least in terms of the severity of the punishment. It was not until the end of the 19th century that the quickening distinction began to disappear; by the end of the 1950's, it was largely gone. Ibid., 139–140.

217 410 U.S. 113 (1973).

It is only in the 20th century that we see the full-scale extension of felonious homicide statutes to the intentional or reckless destruction of fetal life, but many of these statutes do not cover early-stage embryos or IVF preembryos.[218]

b Tort Liability

It is equally clear on the civil side that preembryos, embryos and pre-viability fetuses are not "persons" entitled to legal protection, at least under the common law.[219] Whatever protections these entities enjoyed

218 Recently, several states have extended homicide or feticide protection to fetuses even when they are not born alive. In most cases, however, a fetus must have reached viability or at least quickening (movement) to fall within the protection of the law. See *Commonwealth v. Cass*, 392 Mass. 799, 467 NE 2d 1324 (1984) (viable fetus falls within definition of "person" as used in motor vehicle homicide statute); *Commonwealth v. Lawrence*, 404 Mass. 378, 536 NE 2d 571 (1989) (viable fetus is human being for purpose of common law crime of murder): *State v. Horne*, 319 SE 2d 703 (S.C. 1984) (action for homicide may be brought if fetus is viable). To the same effect are statutes in Cal. Penal Code §187; Fla. Stat. Ann §782.09 (willful killing of an unborn child after quickening is first degree manslaughter); Iowa Code Ann. §707.7 (intentional termination of human pregnancy after the end of second trimester is feticide); Oklahoma St. Ann. title 21, §713 (same); Rhode Island Gen. Laws §11-23-5 (same); Wash. Rev. Code §1232.060.

Other states have gone further. Minnesota provides a maximum punishment of life imprisonment for first degree murder of the unborn, defined as existing "from conception." Minn. Stat. Ann. §609.266. See also *State v. Merrill*, 450 NW 2d 318 (Minn. 1990) (upholding the constitutionality of this statute as applied to a man who killed a woman who was only six weeks pregnant). Illinois provides that it is a crime to kill an unborn child, other than by lawful abortion. "Unborn child" includes "an individual of the human species from fertilization until birth." Section 720 ILCS 5/9-1.2 (2000). See also Louisiana Rev. Stat. Ann. §9:129 (bars intentional destruction of embryo).

Except in the cases of Illinois, Louisiana, and Minnesota, the application of any of these statutes or court decisions to externalized preembryos is highly uncertain. See Robertson, n. 215 above; "Prior agreements for disposition of frozen embryos," 51 *Ohio State Law Journal* 414 (1990); "Resolving disputes over frozen embryos," 18 *Hastings Center Report* 7–12 (1989).

219 Although *Roe v. Wade* recognized the state's authority to regulate post-viability abortion, this type of regulation did not confer legal rights or personhood on the unborn. Indeed, *Roe* explicitly declared that the "fetus" is not deemed a "person"; whatever regulatory authority the state has is predicated on protecting and nurturing potential for the future.

were based on later claims asserted by or on behalf of the "persons" these entities become after birth.[220] Put differently, while a preembryo, embryo or fetus has historically enjoyed no rights under American law, the human being that is eventually born has a right to be protected against, and compensated for, conduct perpetrated against him at those earlier stages. The post-natal entity, not the embryo, is the repository and possessor of these rights.[221] For example, many courts may permit a child or his parents to recover damages for injuries committed in utero or for wrongful death only if the child was born alive.[222] In some states, this action will lie for tortious conduct committed any time after conception.[223] A minority impose liability only for injuries inflicted after the point of viability.[224] Yet a third group goes to the other extreme and would impose liability even for preconception behaviors that result in harm to a child eventually born, an extension that New York, among other states, explicitly rejects.[225]

220 This was also true of the "born alive" rule originally applicable to homicides. See n. 215 above.

221 See the discussion in Prosser and Keeton, *Handbook of the Law of Torts*, 5th ed. (1984), §55; Note, 22 *Suffolk University Law Review* 717, 754–756, nn. 54–58 (1988); and Dobbs, *The Law of Torts* (2000), 781–801.

222 The original common law rule was that the tortfeasor incurred no liability at all for harm perpetrated on an unborn child, even if the child was later born alive. See, e.g., *Dietrich v. Northampton*, 13 Mass. 14 (1884) (no duty due to lack of legal personhood). This is to be distinguished from criminal law, where the "born alive" rule was always applied; see n. 215 above. The landmark case of *Bonbrest v. Kotz*, 65 F.Supp 138 (D.D.C. 1946) established the "born alive" rule for torts, allowing recovery for injuries inflicted prenatally as long as the child was born alive, albeit momentarily. (If the born child died from the injuries, a wrongful death action could be brought.) By 1972, *Bonbrest* was universally accepted throughout the United States. See Annotation (Chase), "Liability for Prenatal Injuries," 40 ALR 3d 1222 (1972).

223 This is the rule adopted by Restatement of Torts (2nd) §869. **Accord**: *Sylvia v. Gobeille*, 220 A.2d 222 (RI 1966) and *Group Health Ass'n v. Blumenthal*, 453 A.2d 1198 (MD 1983).

224 See, e.g., Ferguson v. District of Columbia, 629 A.2d 15 (District of Columbia Court of Appeals, 1993).

225 See *Renslow v. Mennonite Hospital*, 367 N.E. 2d 1250 (Ill. 1977) (child allowed to maintain action in tort for injuries sustained as a result of a **pre-conception** blood transfusion to mother); *Jorgensen v. Meade Johnson Laboratories*, 483 F.2d 237 (10th ca. 1973) (father as special administrator of the estate of deceased mongoloid child could bring an action based on birth control pills the mother ingested, resulting in the birth defect). As noted, New York rejects the notion of liability for a preconception tort. See *Albala v. City of New York*, 429 N.E. 2d 786 (N.Y. 1981).

The "born alive" rule on its own affords no remedy in cases of fetal life terminated before birth. As occurred in the criminal context, with the enactment of fetal homicide statues, many courts have gone beyond the "born alive" rule of *Bonbrest*, and have been willing to allow wrongful death actions for fetuses killed in the womb anytime after viability.[226] A few decisions — still a minority — have even allowed recovery for the death in utero of a nonviable fetus.[227]

In sum, with few exceptions, even the intentional destruction of preembryos generally entails neither civil nor criminal liability. This was true even prior to *Roe v. Wade*, which constitutionalized the right to terminate a pregnancy in its early states, and after *Roe* would arguably be truer still.[228] Because of quickening and/or viability requirements, the destruction of preembryos is not subject to fetal homicide statutes, nor, in most states, would a wrongful death action lie. Indeed, even one of the few cases that did recognize a cause of action for the wrongful death of a nonviable fetus noted *in dicta* that its ruling may not apply to externalized IVF preembryos.[229]

Two qualifications to the above must be made: first, some states have indeed moved in the direction of protecting preembryonic life. In recent years, sensitized to the ethical problems engendered by assisted reproductive technologies, some states have taken a more protectionist stance, expanding both civil and criminal liability. Louisiana appears to flatly prohibit the discarding of preembryos, and this may be true for Illinois and Minnesota as well.[230] While no woman can be compelled to have them implanted, unwanted embryos must apparently be donated

226 See the cases cited in Dobbs, n. 221 above, 782–783.

227 See, e.g., *Wiersma v. Maple Leaf Farms*, 543 N.W. 2d 787 (S.D. 1996); *Farley v. Sartin*, 466 S.E. 2d 522 (W.Va. 1995) (emphasizing that the decision did not necessarily apply to embryos fertilized outside the womb); *Torigian v. Watertown News Co.*, 225 N.E. 2d 926 (Mass. 1967). It might be argued that these cases are inconsistent with the fundamental premise of *Roe v. Wade*. (*Torigian*, of course, was decided before *Roe*). How can even third parties be liable for the negligent death of a nonviable fetus, if the mother has a constitutional right to terminate its existence? If there is no "life" until viability, how can "wrongful death" occur, at least from the perspective of the fetus?

228 But see text at nn. 261–265 below (*Roe* does not exclude a greater degree of state intervention).

229 *Farley v. Sartin*, 466 S.E. 2d 522 (W.Va. 1995).

230 See n. 218 above.

for the benefit of infertile couples. Whether a "mandatory donation" statute can survive *Roe v. Wade* is discussed below.[231]

Second, although the preembryo as such may possess no legal rights, its unwarranted destruction will often give the gamete providers an independent cause of action for a tort that constitutes an invasion of **their** interests. That is, the action is based not on what was done to the embryo, but on what was done to its parents.[232] Some courts treat the gamete providers as having a "property right" in their cells, which are a "mere bailment" in the hands of the IVF clinic; this would give the gamete providers a conversion claim if their "property" is wrongfully taken or destroyed.[233] Other courts have eschewed the

231 See text at nn. 261–267 below.

232 Dobbs, n. 221 above, 784–785, points out that this is equally true, or more so, in cases of a woman carrying a child, where even under the "born alive" rule that would preclude a wrongful death action, the woman may recover for battery to her person or intentional infliction of emotional distress. This could apply in cases of IVF embryos as well.

233 See, e.g., *York v. Jones*, 717 F.Supp. 421 (E.D. Va. 1989). A doctor and his wife living in New Jersey were infertile due to problems in the wife's fallopian tubes. They originally sought IVF treatment at the Jones Institute in Norfolk (the first and probably most successful IVF clinic in the United States). They later moved to California and eventually wanted to take the frozen embryos from the Virginia clinic to a program in Los Angeles. The Norfolk clinic refused to release them, and the couple brought suit in federal district court in Norfolk. In denying the clinic's motion to dismiss, the court noted the absolute obligation of the clinic to "return the subject matter of the bailment to the bailors when the purpose of the bailment has been terminated." (The case was eventually settled out of court.) Cf. *Davis v. Davis*, n. 3 above, which also recognized that the gamete providers have ultimate decisional authority over the disposition of preembryos, but predicated that authority on the constitutionally-protected right of privacy, which includes both the right to procreate and the right not to.

(*York* was a relatively easy case, because the consent form the Yorks signed made no mention of their giving up dispositional authority to the clinic. What would be the result if such authority were ceded? *York* is silent, but its "property-bailment" analysis suggests that agreements ceding authority to the clinic would be binding and preclusive. *Davis v. Davis*, on the other hand, perhaps because of its constitutional underpinnings, strongly intimates that even an express agreement with the clinic could not override a present mutual consent of the husband and wife to the contrary. *Davis* looks at advance directives for guidance only where the gamete providers are deadlocked, not where they are in agreement.)

property rights analysis, holding that human tissues and cells are not "things" that can be owned.[234] Even without utilizing concepts from property law, courts have been able to protect the rights of gamete providers through alternative theories of tort law, particularly by recognizing actions based on the intentional infliction of emotional distress.[235]

The recognition of such tort actions, however, should not be construed as protection of the rights of the preembryo; it is exclusively for the benefit of the gamete providers.

The concept that a person has ownership, i.e., dispositional control, over his body parts and cells, has been recognized by the Uniform Anatomical Gift Act, adopted in all fifty US states, allowing an adult to make a gift of all or part of his/her human body after death for specified purposes, such as transplant, education and research. Note, however, that at least ten states prohibit the purchase or sale of human body parts, with the exception of blood, hair or semen. These states include California, Georgia, Louisiana, Michigan, New Mexico, New York, Pennsylvania, Texas, Virginia and West Virginia. See the references and discussion in Boulier, "Sperm, spleen, and other valuables: the need to recognize property rights in human body parts," 23 *Hofstra Law Review* 693, 713, nn. 144–146 (1995).

234 See, e.g., *Moore v. Regents*, 51 Cal. 3d 120, 739 P. 2d 479 (Cal. 1990). The plaintiff was suffering from leukemia, and had a diseased spleen surgically removed. The doctor noticed unique cellular structures in the spleen. He modified the cells through genetic engineering and was eventually able to create a valuable medical product. The plaintiff brought an action alleging the conversion of his personal property, i.e., severed or removed body parts. In reversing the trial court and dismissing the case, the California Supreme Court ruled that while the plaintiff may have privacy or dignity interests, human cell lines are not "things" that are subject to the laws of property.

Moore has had its share of criticism. See Fischer, "Walling claims in or out: misappropriation of human gametic material and the tort of conversion," 8 *Tex. J. Women & Law* 143 (1999). If it is true, however, that "ownership" cannot be applied to human cells, a fortiori ownership concepts cannot be applied to preembryos. Whatever one's view about the origins of life, a preembryo with its capacity for full human development has a greater degree of autonomous personhood than a removed spleen. This being so, the property analogue is even less apt.

235 See, e.g., *Del Zio v. Columbia Presbyterian Hospital*, n. 159 above (unauthorized destruction of preembryos constitutes intentional infliction of emotional distress).

c Regulation of Experimentation

Starting in the 1970s, a number of states passed laws imposing restrictions on preembryo experimentation.[236] The American Society for Reproductive Medicine (formerly, American Fertility Society) has noted that many of these statutes are disappointingly vague, leaving many questions unanswered.[237] In over three-quarters of the states, there are virtually no restrictions on fetal or embryonic experimentation, though at least some experimentation might be covered by fetal homicide statutes or general tort law. In fact, the only aspects of assisted reproductive technologies (ART) that have received widespread legislative attention are those involving surrogacy or egg or sperm donation.[238]

236 See, for example, Arizona Rev. Stat. Ann. §36-2302; Arkansas Stat. Ann. §82-436; California Health & Safety Code §25956; ILCS 5/9-1.2 (Illinois 2000); Louisiana Rev. Stat. Ann. §9:122; Maine Rev. Stat. Ann, title 22 §1593; Mass. Ann. Laws, Ch. 112 §12J; Mich. Comp. Laws §333.2685-2692; Minn. Stat. Ann. § 145.421-422 and §609.266-2661; North Dakota Cent. Code §14-02.2 -01 to -02; Penn. Cons. Statutes §32163; Rhode Island General Laws §11-54-1; Utah Code Ann. §76-7-310. See also *Margaret S. v. Edwards*, 494 F.2d 494 (5th ca. 1986); *Lifchez v. Hartigan*, 735 F.Supp. 1361 (ND Ill. 1990) aff'd without opinion 914 F.2d 260 (7th ca. 1990) (Illinois ban on nontherapeutic fetal experimentation held an unconstitutional invasion of privacy rights).

237 ECART, n. 1 above, 9S–10S.

238 Even here, the concerns are primarily economic, not moral. Over thirty states have provided, by statute or court decision, that a sperm donor is not financially liable for the support of the child, and has no parental rights. See Eggen, "The Orwellian nightmare reconsidered: a proposed regulatory framework for the advanced reproductive technologies," 25 *Ga. Law Rev.* 625, 681–683, nn. 242–243 (1991). All paternal rights belong to the consenting husband. The situation is less clear where a single woman uses donor sperm. Even an explicit agreement relieving the donor of liability may be unenforceable. See *Jhordan C. v. Mary K.*, No. A27810 (Cal. Ct. of App. 1986). Five states — Florida, North Dakota, Oklahoma, Texas, and Virginia — have parallel legislation covering egg donors; Texas and Florida cover donated preembryos. See the discussion in New York State Task Force on Life and the Law, *Assisted Reproductive Technologies* (1998), henceforth ART, 339–340.

The area that has generated the most controversy, and the most activity, is the "surrogate mother" or "rent-a-womb" problem, particularly in the aftermath of notorious cases such as *Baby M.* See 109 N.J. 396, 537 A.2d 1227 (1988). The states' response to surrogacy

d Nongovernmental Policy Statements

The relative inaction of state governments does not mean that the status of the preembryo has been ignored. The Catholic Church issued a detailed pronouncement stating that human life begins from the moment of fertilization, and no moral distinctions can be drawn between a zygote, a preembryo, an embryo or a person.[239] This position would, of course, prohibit any preembryo disposal or experimentation. However, it would be an immoral practice even to generate an externalized preembryo, since the Church also condemns AIH, IVF, and quite obviously, the use of third party gamete donors or surrogates. In a conclusion that even many of those who subscribed to its premises found disturbing, the statement called upon governments to pass laws that would criminalize utilization of these fertility therapies (even AIH).

The mainstream medical consensus can be found in the pronouncements of two authoritative bodies, the American Society for Reproductive Medicine (formerly, American Fertility Society)[240] and the American College of Obstetrics and Gynecology (ACOG).[241] In 1986, the ASRM (under its prior name) issued a document entitled "Ethical Considerations of Assisted Reproductive Technologies." This document was updated in 1988, 1990, and 1994. Broadly, it: approves the use of ART, in most of its variants — AIH, AID, IVF, GIFT, ZIFT and ovum donations (expressing reservations only with regard to surrogate

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has been varied, ranging from outright prohibition to enforcement, with several positions in between. See ART, 334–339, and an earlier report by the same commission, *Surrogate Parenting: Analysis and Recommendations* (1988).

239 *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation* (1987), issued by the Congregation for the Doctrine of the Faith. A detailed critique of the position appears as an Appendix to ECART, n. 1 above.

240 The American Fertility Society changed its name in 1997. See 67 *Fertility and Sterility*, iii (1997).

241 The ASRM has been a very influential voice in ART. Although not legally binding, its ethical standards have been cited with approval by courts. See *Davis*, n. 3 above. Indeed, at least one state has provided that all IVF clinics within the state must comply with ASRM/ACOG standards as a condition of licensure. See Louisiana Rev. Stat. Ann. §9:128. In 1992, the two organizations jointly established the National Advisory Board on Ethics in Reproduction (NABER).

motherhood arrangements and uterine lavage)[242]; recommends that, optimally, third party gamete or embryo providers receive no compensation (beyond time and expenses)[243] for their donations; asserts that preembryos are not the same as human life, but are nonetheless entitled to "special respect" (without spelling out what "special respect" entails)[244]; recognizes that the gamete providers should have ultimate decisional authority over the disposition of their sperm, egg or preembryo; would give effect to any advance agreements the parties would make; and essentially, validates whatever decision the parties come to — implantation, destruction, thawing, donation or research.[245]

242 ECART, n. 1 above, 90S–93S.

243 Ibid., 45S, 49S, 70S.

244 Ibid. ECART noted that some deem preembryos fully human, while others argue that preembryos should be treated no differently than any other severed human tissue. Rejecting both these extremes, the ASRM stated that the "preembryo deserves respect greater than that accorded human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet it should not be treated as a person because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential" (33S). The Report concludes that because the preembryo does not have differentiated organs, having no brain, no nervous system, no capacity for sentience, and given the fact that under present US law even fetuses in the first two trimesters of pregnancy may be aborted at will, it would be a logical anomaly to accord the full rights of personhood to the preembryo, see 32S–34S.

The intermediate characterization of the preembryo as entitled to "special respect" echoed earlier reports issued by the Ethics Advisory Board of the Department of Health, Education, and Welfare (1979); the 1984 Warnock Committee in Great Britain; and the 1985 report of the Ontario Law Reform Commission. In articulating the meaning of "special respect," the ASRM guidelines are disappointingly vague. The only definitive position taken is that if the preembryo is to be transferred to a uterus in an attempt to bring it to term, there is a duty not to engage in research or any other intervention that might injure the offspring who might be born after the transfer; see 33S–34S.

245 Ibid., 34S. The guidelines essentially endorse the approach of *Davis*, n. 3 above, recognizing the dispositional authority of the gamete providers and the enforceablility of prior advance directives in the event of divorce, death or other dispute. It is important to note, however, two major issues

Citing a 1979 report of the Ethics Advisory Board of the Department of Health, Education and Welfare (as HHS was then called) the ASRM also concluded that "it is acceptable from an ethical standpoint" to undertake research on preembryos if the gamete providers have given their informed consent, the information is not reasonably obtainable by other means (presumably, including genetic testing), the project is designed to improve the safety and efficacy of embryo transfer or IVF, and the preembryo will not be sustained in vitro beyond the development stage in which it would be ready to implant (14 days after fertilization).[246] Note that there is no requirement that the experimentation be potentially therapeutic to the development of this particular preembryo; indeed, if this preembryo is not to be implanted, by definition the experimentation cannot be therapeutic. Rather, the moral permissibility of experimentation hinges on the potential benefits for other embryos that may be generated in the future. Note too that the ASRM not only validates preembryo experimentation where the gametes were initially extracted for procreative purposes, but would apparently support the creation of preembryos for the specific purpose of such experimentation, provided informed consent was obtained. The guidelines of ACOG are a bit more cautious on this last point, noting that it is ordinarily "preferable" to use "spare" preembryos rather than generate them specifically for research, fearing that the latter step creates a process vulnerable to trafficking in gametes.[247] The ACOG also prohibits the purchase or sale of embryos. Both the ASRM and ACOG wisely provide that preembryos that have been the subject of nontherapeutic experimentation should normally not be transferred.[248]

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that the guidelines do not address: (1) the standing of an IVF clinic to enforce the terms of the agreement over the objections of the couple; (2) the default rules in the absence of an agreement, which was the issue addressed in *Davis*. See also n. 146 (*Nahmani*).

246 ECART, n. 1 above, 79S–80S.

247 See ACOG Committee on Ethics, Ethical Issues in Human In-Vitro Fertilization and Embryo Placement (1986), reprinted in *American Medical News*, August 28, 1987.

248 There may be a subtle, but significant, difference between the different standards. The ASRM states that its guidelines for experimentation apply to preembryos **not destined for transfer**. This implies that nontherapeutic research can never be performed if the preembryos are to be transferred. Presumably, this is so because any experimentation might create

e The Federal Moratorium on Human Embryo Research: A History of Vacillation

The federal restrictions on fetal and embryonic research do not directly prohibit or mandate action, but merely specify the conditions allowing the use of federal funds.[249] Given the overwhelming need for such funds in many areas of scientific research, barring the use of federal money for certain activities can often be tantamount to outright interdiction (though in potentially lucrative areas of hi-tech research, the private sector may be more than willing to take up the slack).

The federal government's attitude toward the proliferation of assisted reproductive technologies and embryonic research can best be described as ambivalent, vacillating between extreme caution and generous encouragement. Indeed, at times the two attitudes are evinced simultaneously. It is fair to say, however, that for a variety of reasons (many connected to the politics of the abortion debate), federal funding is quite limited. Some history may be useful.[250]

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unfair and unreasonable risks to the health and welfare of any offspring born. Nor could these risks be assumed by informed consent, since it is the welfare of the child, not the parents, that is at stake.

The ACOG guidelines are a little less clear. Standard #7 provides that "any preembryo that has undergone research will be transferred to a uterus only if: [1] the research was related to the preembryo's preparation for placement; and [2] there is reasonable scientific confidence in its normal development." This seems to allow a certain degree of "safe" experimentation, provided the risks to the embryo are truly regarded as minimal. Of course, it may turn out that this confidence was misplaced. (I am assuming that confidence merely means belief that the experiment will not impair normal development, but not that in fact there will be normal development, since only a small percentage of IVF's result in a baby.) In any event, it is not clear what type of research the first criterion was designed to exclude.

(It is also possible, though unlikely, that the first prong of Standard #7 requires that the experimentation be potentially beneficial to **this** embryo. If so, it is not clear why implantation would be contraindicated by risks. After all, would not the parents be entitled to make such a medical decision in the case of an in utero pregnancy?)

249 One notable exception to the statement in the text is reproductive cloning. A bill was recently approved by the House of Representatives to criminalize human cloning, and it is likely that the bill will be passed by the Senate and become law. See n. 260 below.

250 This history is described in detail in ART, n. 238 above; the next few paragraphs are based on this report, unless otherwise indicated.

Throughout the 1970s and 1980s, federal funding of IVF and fetal research, including vital research into infertility and the genetic basis of disease, was virtually non-existent.[251] By 1993, Congress, at the urging of the Clinton Administration, evinced a greater willingness to provide funding for much of this research, and directed the National Institutes of Health (NIH) to develop appropriate federal guidelines.[252] The NIH in turn appointed a Human Embryo Research Panel, which issued a final report in 1994.[253] This report essentially validated the conclusions stated in the ASRM and ACOG guidelines, upholding a wide variety of non-therapeutic interventions, provided the embryos experimented upon would not be implanted, and did not progress beyond the 14-day stage of development.[254] Most significantly, the panel, with some dissent, specifically legitimized the deliberate creation of embryos for research purposes, at least where necessary for the validity of a study that is potentially "of outstanding scientific and therapeutic value," and the gamete providers have given their informed consent.[255] The report was approved by the Director's Advisory Committee in December 1994, and in theory should have greatly expanded the use of federal funds in IVF and embryonic research.

Once again, however, the political pendulum swung the other way. Shortly after the Report was issued, President Clinton announced that he would not approve any federal funds for the creation of human embryos solely for research, effectively negating the Panel's most

251 This was largely due to a 1975 regulation promulgated by the Department of Health, Education and Welfare (HEW) that no IVF or embryo experimentation would be federally funded unless the proposal was approved by an Ethics Advisory Board (EAB). The terms of existing EAB members expired in 1980, and no new appointments were ever made.

252 Upset with the failure of five successive secretaries of HEW and (later) HHS to appoint an EAB, and concerned that vital research was not being undertaken, Congress enacted the 1993 NIH Revitalization Act, which removed the requirement that an EAB approve embryo research proposals.

253 National Institutes of Health, Final Report of the Human Embryo Research Panel (September 22, 1994), henceforth Report.

254 See Report, ibid., 59–60, 88–89. The Report did, however, discourage research that would facilitate sex selection (except to the extent necessary to prevent the transmission of sexually-linked genetic diseases); cross-species fertilization; and cloning.

255 Report, 56–57, but see separate statements by Patricia King and Carol Tauer, 97–100.

controversial recommendation. Congress went even further. Since 1996, it has included language in its annual NIH appropriations that bars the use of federal funds for any research in which human embryos will be destroyed or discarded, no matter how or why they were initially created. Concerned that federal funds not be used to encourage abortions, the ban rejects any distinctions between embryos that were originally created for procreation ("spare embryos") and those deliberately created for research. In effect, only interventions that potentially benefit the actual embryo experimented on could be funded.

With the startling advances in stem cell research, attacks on this federal ban greatly increased in the late 1990s.[256] Many of the undifferentiated stem cells are obtained from unimplanted embryos, and in the process of obtaining the cells, the embryos are destroyed. An overly rigorous application of the federal ban would greatly inhibit this medical research. Basing itself on a legal opinion from the Department of Health and Human Services, the NIH tried to circumvent these restrictions by allowing federally-funded research on stem cells as long as the cells were obtained from unfunded sources in the private sector, and only if the embryos were initially created for fertility purposes ("spare embryos"), and not deliberately generated for stem cell retrieval.[257] These guidelines were quite controversial, and were bitterly opposed by prolife members of Congress, who felt that the guidelines encouraged destruction of embryos and trafficking in human life.

In August, 2001, President Bush resolved the issue by way of a compromise that fully satisfied neither side.[258] Declaring that federal

256 Stem cells are undifferentiated cells that can be cultured indefinitely and "directed" to produce virtually any type of specialized cell, e.g., heart, liver, kidney, brain. The use of stem cells offers great promise in treatment of heart disease, Alzheimer's, and spinal cord injuries. Stem cells can be obtained from placentas and even from the bloodstream of mature adults, but many researchers have concluded that embryonic stem cells obtained from preembryos shortly after fertilization are "more flexible," and best suited for therapeutic use. See http://www.nih.gov/news/stemcell, henceforth, stemcell website.

257 See National Institutes of Health, *Guidelines for Stem Cell Research* (August 25, 2000) available at stemcell website, n. 256 above. These guidelines were rescinded in August 2001.

258 The President initially gave a national address on television the evening of August 9, 2001. The text of his talk and follow-up statements are available at stemcell website.

money should not provide sanction or encouragement for the further destruction of embryonic life, he directed the NIH to provide funding only for research on stem cells obtained prior to 9 p.m., August 9, 2001, that is, cells from embryos that had already been destroyed prior to the date of his funding decision.[259] In contradistinction to NIH's earlier position that funding would be available even for newly created stem cell lines, as long as federal money was not used in the actual process of destruction, and the embryo was initially created for procreation ("spare"), the President's directive precluded any funding even indirectly connected with new destruction of embryonic life. The NIH has withdrawn its prior guidelines, and issued new guidelines incorporating the President's directives.

As of this writing, therefore, the use of federal funds for non-therapeutic embryonic research is severely restricted. In this volatile area, however, change is always possible.[260]

f The Impact of *Roe v. Wade* on Governmental Attempts to Protect Embryonic Life

In *Roe v. Wade*,[261] the Supreme Court recognized a woman's constitutional right to terminate at least a first and second trimester pregnancy at will. It has been convincingly argued that if a woman has the absolute right to abort a fetus, she certainly has the right to dispose of a surplus preembryo; hence, any laws mandating that embryos either be implanted or donated would be unconstitutional. Thus, until *Roe v. Wade* is overturned, state bans on destruction would simply be invalid.[262] One scholar has argued, however, that *Roe v. Wade* does not

259 The Bush directive also incorporated three other requirements: (1) the embryos from which the cells were derived must have been created for reproductive purposes and not for research; (2) the gamete providers gave informed consent without financial inducement; (3) the stemcells will not be used for embryo cloning. These requirements already existed in the superseded NIH Guidelines.

260 It should also be noted that at least one type of embryonic research — cloning — might even be criminalized and not merely defunded. See Annas, "Cloning and U.S. Congress," *N. Eng. J. Med.* 346:20 (May 2002), 1599.

261 410 U.S. 113 (1973).

262 This would invalidate the mandatory donation requirements of Illinois, Louisiana and Minnesota. See n. 218 above.

represent a constitutional right not to be a genetic or biological parent, but rather a right to protect a woman's bodily integrity by not compelling her to carry a baby to term (which is why fathers are not given equal say).[263] As such, while *Roe* would clearly preclude state laws that would require a woman to **receive** the embryos, it would not prevent the state, if it so desired, from extending its protections to preembryonic life. (As noted earlier, however, historically, the state, even before *Roe*, has not done so.[264]) It should also be noted that to the extent parents are given dispositional authority, there is no particular logic to favoring the mother's decision over the father's where the preembryo is externalized. Thus, the statutes of Louisiana, Minnesota and Illinois,[265] which arguably compel implantation or donation, might well pass constitutional muster.

It is also an open question whether *Roe v. Wade* protects a woman's prenatal conduct that results in harm to a person actually born. While a woman may have an absolute right to terminate a pregnancy, once the child is brought to term she may be held legally responsible for injuries that her negligence generated.[266] This would be highly relevant

263 Robertson, n. 215 above. Robertson's analysis, however, seems to be rejected in *Davis v. Davis*, n. 3 above. In according gamete providers ultimate dispositional authority over preembryos, the court emphasized that the right "not to be a parent" was of constitutional dimension. *Davis*, however, is the opinion of only one state supreme court, and not binding on other jurisdictions.

264 Note too that even if *Roe* is read as giving the "parents" the constitutional authority to destroy the preembryo, a third party acting **without their consent** could be criminally prosecuted — see Cal. Penal Code §187; Washington Rev. Code §1232.060 (feticide punishable as murder unless it is a lawful abortion), as well as civilly liable. See nn. 213–235.

265 See n. 213 above.

266 Cf. *Grodin v. Grodin*, 301 NW 2d 869 (Mich. 1980) (pregnant woman's use of tetracycline during pregnancy caused her child's teeth to be discolored. Notwithstanding *Roe*, mother liable to offspring for prenatal injuries) with *Stillman v. Youngquist*, 531 NE 2d 355 (Ill. 1988) (tortious liability for prenatal conduct that results in postnatal injuries cannot be imposed on the pregnant woman herself). Put differently, the rule of *Bonbrest*, n. 222 above, giving born children a cause of action for prenatal injuries, should arguably be applicable to suits against mothers, notwithstanding their constitutional right to have terminated the pregnancy. The right to prevent a life from coming into being is not equivalent to the right to bring a life into existence burdened with suffering and pain, an invasion that cannot be justified by the mother's privacy interests.

if experimentation was authorized, but was followed by embryo transfer, a practice that is in any event discouraged by ASRM and ACOG guidelines.[267]

Thus, while government regulation and protection of the preembryo may be quite limited, there are no definite constitutional barriers (though there may be political barriers) to legislatures and courts taking a more activist, interventionist role.

Similar issues arise under child abuse statutes — can mothers be prosecuted for child abuse on the basis of behaviors undertaken during pregnancy at a time when under *Roe*, they had a constitutional right to an abortion? Cf. Myers, "Abuse and neglect of the unborn: can the state intervene?" 23 *Duquesne Law Review* 76 (1984) and Note, "Maternal substance abuse: the need to provide legal protection for the fetus," 60 *Southern California Law Review* 1235 (1987) with Note, "Maternal rights and fetal wrongs: the case against the criminalization of fetal abuse," 101 *Harvard Law Review* (1988). See also Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* (London: 1992), 127–163.

(But cf. *Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991), where the Supreme Court struck down an employer policy excluding women from certain positions allegedly hazardous to pregnancy. This was deemed illegal discrimination based on gender under Title VII of the Civil Rights Act. *Johnson* should not be read as giving mothers license to endanger their fetuses; it merely provides that under the employment discrimination laws, the employer is not empowered to assess the risk. If in fact a child is born injured, *Johnson* does not preclude a later action by the child against his mother for that endangerment under the *Bonbrest* rationale. While the Court does suggest that if federal law prohibits the employer from excluding women, the employer may very well be immune from suit, there would be no reason to extend that immunity to the mother who voluntarily and intentionally assumed the risk.)

267 See text at n. 248.