THE CHALLENGES OF NEW REPRODUCTIVE TECHNOLOGIES FOR JEWISH ETHICS

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We live in an age of unprecedented medical technologies which raise a range of perplexing problems. Among these are questions about when life begins and ends, about the interrelationships between human sexuality, reproduction, and marriage, about the extent to which people control, or perhaps should be allowed to control, the means of their own reproduction, and ultimately about the very nature of humanness. Many people also live in a cultural world informed by religious beliefs and values whose origins lie in far distant times and places. These people want to preserve that religious, cultural world and believe that what it says about life and love, about sexuality and family and humanness, can still be relevant today. Thus, the question arises: Can an ancient religious tradition respond to ethical problems arising from radically new reproductive technologies; and if so, how? As a Jew and as an historian of this tradition, it is not self-evident to this writer that Judaism can effectively address moral questions about artificial insemination, in vitro fertilization, or surrogacy. And if it can, it is far from clear just how this should be done.

This essay examines the challenges to Jewish tradition of these new technologies. While focusing on Jewish discussions of the ethics of reproductive technologies, this essay will not attempt to provide authoritative Jewish positions on these problems, or even to summarize the spectrum of opinions. Rather, it will explore some methodological problems that arise when attempting to construct Jewish moral positions on these issues of assisted reproduction. In many respects, the challenges these technologies pose for Jews are not unique. In other respects, Jewish ethicists face quite distinctive challenges. Thus, the first goal of this essay is to highlight both the commonalities and differences discernable between Jewish and other approaches to the ethics of reproductive technology. More importantly though, this essay will explore the problems of attempting to derive moral guidance from a textual tradition. In examining these problems the specifics of reproductive technologies will fade into the background as this essay explores the problem of determining what

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tradition in fact is, and what is entailed in interpreting it. In conclusion, this essay will offer some observations on the extent to which a religious tradition such as Judaism can and cannot provide guidance for dealing with modern moral dilemmas.

At the outset a few very general observations about the nature of Jewish ethics should be considered. Jewish ethics, as the term is used here, is inescapably religious in nature. It presupposes that Jews, both individually and communally, stand in relationship to God and derive their moral orientation from that relationship. Thus, modern Jewish ethicists affirm a transcendent source of morality. Moreover, Jewish ethicists locate the source of transcendent moral truths in Torah, understood in the broadest sense as encompassing both sacred scripture and the rabbinic tradition that builds upon it. It follows that all Jewish ethicists could rightly claim to derive moral guidance by reading and interpreting texts. And, given the centrality of the written word in Judaism as a whole, it is hardly surprising that this should be so. With this basic understanding of the thrust of Jewish ethics in hand, an examination of the methods that characterize contemporary Jewish bioethics in order.

I. METHODS IN CONTEMPORARY JEWISH BIOETHICS

The vast majority of the literature in contemporary Jewish bioethics works out of what might be called a legal model. Questions in Jewish ethics are approached as matters for legal analysis in the light of precedents found in traditional legal sources. Though other approaches to Jewish ethics are evident in the work of some less traditional Jewish scholars, to date no liberals have attempted to examine systematically the full range of issues in Jewish bioethics. In any case, the scope of this essay is restricted to the contributions of these traditionally-oriented scholars.

The basic presuppositions of this legal approach have been stated succinctly by J. David Bleich, whose work in Jewish medical ethics is widely read and highly regarded.

To be sure not all bioethical problems are questions of black and white, there are many gradations of gray. A person who seeks to find the answers within the Jewish tradition can deal with such questions in only one way. He must examine them through the prism of Halakhah [that is Jewish law], for it is in the corpus of Jewish law as elucidated and transmitted from generation to generation that God has made his will known to man.¹

This theological premise, that God has given the Jewish people a

¹ J.D. Bleich, “The A Priori Component of Bioethics,” Introduction to Fred
unique source of moral and religious truths and that these are embodied in the law, is firmly rooted in traditional Jewish life and thought. Working within that framework, Bleich and most other contemporary Jewish bioethicists can only approach ethical issues as exercises in legal halakhic adjudication. Given a moral problem, legalists will cite classical Jewish legal sources and, through analogical reasoning and other means, attempt to distill the principles behind this line of precedents and apply them to the question at hand.

How does this legal approach work in connection with the sorts of ethical issues involved with modern reproductive technologies? Jewish discussions of artificial insemination using the donor sperm provide a good case in point. Because artificial insemination by donor ("AID") obviously was not practiced until fairly recent times, Jewish legalists must look for the closest precedents available within traditional sources. As Immanuel Jakobovits, another very prominent Jewish ethicist put it, "Since Jewish law is based entirely on ancient authority and precedent, its treatment of such an altogether novel subject as artificial insemination may well serve as a classic example for the rabbinic method of applying old principles to new circumstances." Important precedents in this particular case include the Talmudic discussion of a woman who has ostensibly become pregnant by bathing in a pool into which a man had previously discharged his semen. The question arises whether such a woman who is pregnant, but has not had intercourse, is still technically a virgin.

Another source from the thirteenth century rules that a woman must be careful not to lie on the sheets of a man other than her husband lest he has previously lain there and she becomes pregnant from his semen. Leaving aside for a moment whether such pregnancies are possible (something which even medieval Jewish authorities questioned), these cases appear to offer structural parallels to artificial insemination by donors because they involve conception without sexual intercourse. The rabbis' main concern with these unnatural pregnancies are 1) that the child produced in this way will not know the identity of his father and so may one day unwittingly marry a blood relative; 2) that they raise complex questions of paternity and inheritance because the child may be entitled to inherit property from its biological father or the husband of its mother, or both; and 3) that impregnating a married women with the sperm of another man may constitute a form of adultery, and if so, then the woman's husband would be free to divorce her.

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All of these issues of course can be transferred to AID, even though the cases are not quite parallel. After all, artificial insemination, unlike the Talmudic precedents cited in these discussions, is entirely planned and intentional. By using the donor's genealogical information, it would be possible to identify his relatives and thus avoid the problem of forbidden marriages. The question of inheritance can be avoided so long as the donor relinquishes all claims of paternity. However, as some rabbis have noted, the very intentional quality of donor insemination creates more problems than it solves. In particular many rabbis have argued that it undermines the sanctity of family life, that it could lead to promiscuity, or that it is simply morally repugnant. In Jakobovits's words:

By reducing human generation to stud-farming methods, AID severs the link between procreation of children and marriage, indispensable to the maintenance of the family, as the most basic and sacred unit of human society. The generation of children would become arbitrary and mechanical, robbed of those mystic and intimately human qualities which make man a partner with God in the creative propagation of the race.  

Addressing problems like artificial insemination in its legal framework is a formidable task. In the first place, there is a vast legal literature, beginning with Scripture and continuing through the Babylonian and Palestinian Talmuds, medieval codes of Jewish law, multiple commentaries to these sources, and, finally, numerous collections of answers written by rabbis over the centuries in response to specific questions.

Apart from the sheer volume of literature to be mastered, there is the further problem that this tradition encompasses many conflicting points of view. From ancient times onward, rabbinical authorities disputed many points of law. Over the centuries, these disputes have become more complex and subtle as successive generations of rabbis have added their commentaries to the disputes of earlier authorities. Dr. Rosner, in an article on the subject of artificial insemination, notes that authorities disagree forcefully on whether AID really is tantamount to adultery, and on whether the donor is regarded in all aspects as the child's father. So when modern Jewish ethicists come to this tradition in search of precedents for issues, for example surrogate motherhood or in vitro fertilization, they do not find a unified, internally consistent point of view.

3. *Id.* at 548-49.

Matters are further complicated by the fact that contemporary authorities disagree about just how to make use of these sources. When there are conflicting precedents within the legal tradition, a contemporary rabbi will have to choose among them. A majority opinion will clearly carry more weight, as will an opinion held by an especially renowned scholar, even if it is a minority view.

In addition, the contemporary legalist will have to determine which of the many sources provides the best precedent for the problem at hand. Of course, this problem is especially acute in the area of biomedical ethics because new technologies have created situations for which there simply are no precise precedents. In discussions of surrogate motherhood, for example, some Jewish writers have suggested that the biblical story of Abraham fathering a child by his handmaid, Hagar, provides a precedent for surrogacy. Others have correctly responded that there is little real correspondence between the situations. Hagar and Sarah both lived with Abraham, Hagar was not paid for her services, and the institution of marriage in the ancient world was very different than it is today, to name only a few of the obvious dissimilarities.

Finally, legalists must determine how to adduce general principles from these specific rulings. Especially when there is no earlier case directly on point, modern rabbis will attempt to articulate a principle which carries forward the reasoning of earlier authorities on related matters, but how one does this is always a matter of legal judgment. In the context of in vitro fertilization, the moral implications of destroying fertilized eggs present themselves. Does the fertilized ovum constitute a person? Does it have rights? Must it be treated with special dignity, or can it simply be discarded once it is not needed? In his discussion of these issues, Dr. Rosner notes that Jewish law requires violating the laws of the Sabbath in order to preserve the life of an embryo in the mother’s womb, even if it is less than forty days old. But as soon as an attempt is made to move from this rule to a general principle, difficulties are encountered. Does this apply to fertilized eggs in a test tube as well as in the mother’s uterus? Does it apply immediately after fertilization, or only after some time has passed?

Of course, different authorities will adduce a different general principle from the same case, and this too can lead to very different conclusions. Some of these methodological problems are unique to the halakhic system. Specifically, the sources from which modern rabbis draw are extremely old. In this country, a legal precedent is

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thought to be old if it dates from the 19th century. Imagine then the
difficulties entailed in attempting to tackle complex moral problems
using ancient and medieval sources. In addition, Jewish sources are
notoriously cryptic and ambiguous. Because many sources do not rec-
ord much information about the case, or about the judicial reasoning
which leads to a particular decision, the same sources can often be in-
voked by different ethicists to support contradictory conclusions.

Nonetheless, it seems that most of the methodological problems
encountered by Jewish ethicists are shared by legalists in other tradi-
tions. Applying precedents to new situations entails an exercise in
analogical reasoning. But just how similar must two cases be to war-
rant applying the rule from one to the other? Just when is the dif-
ference morally or legally relevant? For example, recall that Jewish
tradition can supply the modern ethicist with precedents involving
conception without intercourse, but not for artificial insemination as
it is practiced today. Moreover, even when a clear precedent exists, it
is often unclear just how to apply it. As Karl Llewellyn once ob-
served: "Every legal precedent has not one value, but two. It can be
interpreted either broadly, so as to encompass many new cases, or
narrowly, thus restricting its impact on a future decisions. Both op-
tions are always open, both are equally valid."6

Finally, there are times when two very different sorts of prece-
dents could be applied equally to the case at hand. For example, in
the celebrated "Baby M" case the New Jersey courts had to decide
whether to resolve that surrogacy dispute using the precedents from
contract law or from family law, or indeed some combination of the
two. And, of course, a decision either way does not preclude other
judges from deciding differently. All of these methodological issues
will arise within every legal system. In this sense, at least, Jewish
ethicists may take heart from the fact that they are not alone.

II. THE INTERPRETATION OF TEXTS IN A LEGAL
TRADITION

Thus far, this essay has attempted to illustrate the problems in-
erent in applying traditional texts, and the principles which they
embody, to contemporary moral problems such as artificial insemina-
tion and surrogate motherhood. Contemporary Jewish authorities
have cited traditional texts to support a variety of positions on these
questions. However, the point of this paper in exploring the interpr-
etive process is not primarily to note the fact that contemporary au-
thorities disagree about the meaning of specific texts, but rather to

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stress that these differences arise within a framework of shared assumptions about the nature of the entire interpretive enterprise.

There are two working assumptions that govern the work of most all Jewish bioethicists. First, the source of contemporary Jewish values lies in the texts. And second, the job of the modern ethicist is to extract this meaning from the texts and apply it to moral problems. The texts themselves contain meanings, and the interpreter merely retrieves this meaning and draws attention to the connection between the texts and contemporary situation. According to this view, the interpreter's role appears to be rather limited for it is really the texts themselves which provide moral guidance. It is precisely because virtually all contemporary Jewish bioethicists understand interpretation in this way that they encounter similar problems, though, of course, they address these problems differently.

But in the view of many contemporary legal and literary theorists, this represents a serious misunderstanding of the interpretive process, the meaning of text and of the role of the interpreter in creating that meaning. To illustrate this alternative theory of exegesis and its application to Jewish ethics, it is useful to consider recent discussions of the nature of textual, and especially constitutional, interpretation. Many legal and literary theorists have argued that meaning is a product of the interaction between text and reader. James Boyd White, in an insightful comparison of legal and literary interpretation writes:

> Reading literature is an interaction between mind and text that is like an interaction between people . . . and the expectations we bring to a text should be similar to those we bring to people we know in our lives . . . . The reader, both of texts and of people changes as he or she reads: one is always learning to see more clearly what is there and to respond to it more fully or . . . and in the process one is always changing in relation to text or to friend. It is in this process of learning and changing that much of the meaning of the text or of a friendship resides. The text is in fact partly about the ways in which its reader will change in reading it.7

White views both law and literature as sharing the common goal of challenging the reader to become a different person, to respond to the ideals and expectations which the text articulates. The meaning of a text then is a function of the reaction of a reader to this challenge at a given moment. In sum, White argues that interpreting a text is a dialectical process wherein the reader plays a vital role in creating the meaning found in the text.

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This view of interpretation challenges Jewish ethicists to look at textual study and exegesis in a new light. Many of those engaged in contemporary Jewish ethics are inclined to treat the provisions of Talmudic and medieval texts as if they were less open-textured than in fact they are. The Jewish legal tradition does not really constitute a body of views and precedents which speak for themselves to contemporary issues. Rather, it offers concepts of life, of family, of personhood, as well as ideas about the relationships that obtain among moral agents. It provides a rich resource of values and principles which Jewish ethicists will utilize if they are committed to remaining within the tradition. But the texts do not, either individually or collectively, dictate how to use or apply those resources. That is up to the interpreters, whose knowledge of the texts, of the culture which produced them, and of the history of previous exegesis, enable them to respond most fully and authentically to the textual tradition.

This account of the nature of interpretation demands that contemporary Jewish ethicists reexamine the sort of enterprise in which they are engaged. For if “Judaism” means that body of traditional Jewish literature which Jews cite in discussions of this sort, then it must be acknowledged that Judaism says nothing at all directly about artificial insemination, \textit{in vitro} fertilization, surrogacy, or any of the other problems which contemporary medical science has thrust upon society. When given a properly selected set of interpretative assumptions, the texts can be invoked to support a whole range of positions on such questions. One should be wary then of exegetes who announce that they merely discover and report what the texts say. The very process of interpretation necessitates acts of judgment on the part of the interpreter. Decisions about which cases constitute precedents, what the principles of those cases are, and how they should be applied to the case at hand can be made responsively and authentically in a variety of ways. It follows that the interpretative assumptions that readers bring to literature play a decisive role in creating the very meaning which they attribute to the texts.

But it will be objected, if we view the interpretive process in this way, that we undermine the entire enterprise of contemporary Jewish ethics. If eisegesis replaces exegesis, what then is the point of doing Jewish ethics at all, and what makes Jewish ethics different from the simple subjective judgment of an individual reader?

In answering that question one may draw on the jurisprudence of Ronald Dworkin. He addresses this very question of the interplay between the constraints composed by textual tradition and the freedom inherent in the personal judgment of the interpreter. Dworkin suggests that judges who interpret a legal tradition are doing much
the same thing as authors who interpret the literary creativity of
their predecessors. Indeed, he asks us to imagine a series of authors
who collaborate in the writing of a novel. They do this in serial fash-
ion, each author contributing one chapter at a time. Each author
then after the first inherits the work of the earlier authors in the se-
ries and so is given a kind of limited creative license. The need to
preserve a sense of coherence within the novel will provide a general
framework within which successive novelists will do their work.
Building upon this example, Dworkin proceeds to argue:

Deciding hard cases at law is rather like this strange literary
exercise. The similarity is most evident when judges con-
sider and decide common-law cases. Each judge then is like
a novelist in the chain. He or she must read through what
other judges have written in the past, not only to discover
what these judges have said or their state of mind when they
said it, but to reach an opinion about what these judges have
collectively done in the way that each of our novelists
formed an opinion about the collective novel so far written.
Any judge forced to decide a lawsuit will find, if he looks in
the appropriate book, records of many arguably similar cases
decided over decades or even centuries past by other judges
of different styles and judicial and political philosophies.
Each judge must regard himself in deciding the case before
him as a partner in a complex chain enterprise of which
these enumerable decisions, structures, conventions, and
practices have a history. It is his job to continue that history
into the future through what he does on that day. He must
interpret what has gone before because he has a responsibil-
ity to advance the enterprise at hand, rather than strike out
in some new direction of his own. So he must determine ac-
cording to his own judgment, what the earlier decisions
come to, what the point or theme of the practice so far taken
as a whole really is.8

According to Dworkin then, one might say that the function of
the judge, or of the contemporary Jewish ethicist, is not to filter out
his or her own interpretive framework, but rather to use that frame-
work to create a coherent tradition, encompassing both the body of

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distinction between advancing the current enterprise and striking out in a new direc-
tion has been challenged by Fisk who regards meaning as wholly a function of the
reader's activity ("Working on the Chain Gang: Interpretation in the Law and in Lit-
erary Criticism," Critical Inquiry, 9:207-08 (Sept. 1982)). Dworkin has responded to
these criticisms, much as Fisk has, in terms of a limited notion of objectivity (A Matter
of Principle, 167-77).

For a critical review of the Fisk/Dworkin controversy, see R.V. Young, "Constitu-
legal precedents and the case at hand. It follows that when contemporary Jewish authorities, armed with the body of traditional Jewish sources, confront a contemporary moral problem, the decision that they reach through interpretation and application of those sources will be guided by a sense of what fits the tradition. And this sense of fit, in turn, will be shaped by a particular way of construing the coherence of a tradition as a whole. This is precisely what makes contemporary Jewish ethics Jewish, the commitment of those engaged in the exercise to render a judgment which accords with their own sense of the thrust of the tradition as it has evolved. Among contemporary Jewish ethicists, of course, there are many diverse conceptions of the coherence of the tradition as a whole, and it would take too much time to sketch them here and trace their implications. Nonetheless, Dworkin's discussion enables one to see more clearly what interpreting a tradition entails and how this activity by its nature imposes certain constraints upon the interpreter while necessitating, at the same time, a certain degree of interpretive license.

III. THE CHALLENGES OF REPRODUCTIVE TECHNOLOGIES FOR JEWISH BIOETHICS

Now what has all this discussion of subjectivity and textual interpretation and the nature of literary traditions to do with the real issues raised at the beginning of this essay? It appears that in pursuing these theoretical questions the issue of assisted reproduction has fallen behind. But note that the real issues raised by these technologies are much deeper and more theoretical than modern Jewish ethicists, and perhaps others as well, have wanted to admit. This again raises the question with which this essay began, "Can an ancient religious tradition respond to ethical problems arising from radically new reproductive technologies; and if so, how?" In one sense of course, the answer to the first part of the question is clearly yes. There is a growing literature in Jewish bioethics attesting to the creativity and erudition of those scholars who are experts in using the legal sources of previous generations to address these unprecedented medical technologies. The second part of the question, however, is more difficult to answer. It was suggested earlier that this enterprise, based on the interpretation and application of ancient text, is more complex and problematic than we typically imagine. The implications of this fact must be examined closely in order to confront honestly the challenges of new technologies for religious traditions.

Perhaps it should first be asked why it is that, when faced with the perplexing moral questions surrounding new medical technologies people often should turn to religious traditions for guidance at
all. Many different motivations may be at work here, but the main
reason that many people look to religion is because it seems to pro-
vide a source of enduring truths. Its values have stood the test of
time. People look to religion, at least in part, because they are in
search of a moral compass as they sail into uncharted waters. And if
this is true generally, then it is especially so in connection with the
biological sciences. Biomedical technology is opening up new pos-
sibilities, not only for human reproduction, but also for altering, by
means of genetic engineering, the very essence of human life. Such
innovations bear directly on values and principles at the heart of reli-
gious teaching about the nature of human beings and the meaning of
human life.

Religion surely has a role to play in addressing bioethical issues.
But what is that role? For Jewish tradition, moral guidance is neces-
sarily derived from reading sacred texts and applying their lessons to
the problems people face. And here as with all textual interpreta-
tion, meaning and guidance emerges not from the words of the text
itself, but from human encounter with those words. This means that
the tradition, its texts and values, are not out there standing apart
from people and pointing the way. The tradition itself is continually
being reshaped through people's on-going efforts to make it speak to
their own age. Religious texts and traditions are in large part what
people make of them and this is no where more true than in the con-
text of biomedical technologies. For how can one suppose that an-
cient sources really have something to say about surrogate
motherhood, in vitro fertilization, or genetic engineering — things
utterly inconceivable to the religious authorities of earlier centuries.
How indeed, except for the fact that religious values are mediated
through one's own interpretation of the ancient words.

Recognizing this, however, in no way implies that religious tradi-
tions should be ignored as these moral dilemmas are faced. The reli-
gious authorities of the past were often extremely wise and insightful
individuals whose moral discernment remains a valuable resource.
Religious traditions, especially if they have developed over many cen-
turies, can expand the range of moral options by opening up the rec-
ord of moral choices that others have made. Reading the ancient
sources will also sensitize people to dimensions of human experience
that might otherwise have been missed. It may also help people ap-
preciate the deep mystery of human life, which in turn can inform
one's moral choices.

But for all this, we ought not lose sight of the fact that the
bridge from the past to the present is one that we ourselves build. As
much as we look to religious tradition to constrain our actions and
expand our vision, we must simultaneously recognize that we are constraining and expanding the meaning of the words that we inherit.

In the final analysis then, the challenge of reproductive technology for Jewish ethics is two-fold. In the first instance, it challenges Jewish ethicists to draw creatively upon their legal tradition as they tackle moral dilemmas unimaginable just a generation ago. This first challenge, though formidable, is by no means unprecedented. Rabbis, after all, have been engaged in just such exercises for many centuries. There is no reason to suppose that some new technique for harvesting eggs or fertilizing them in test tubes will so confound rabbinic authorities as to undermine their time-honored method of deriving moral guidance from their tradition. The issues associated with reproductive technology are indeed perplexing, but the resources of Jewish tradition are vast, and the rabbinic mind is quite ingenious. It can be expected then that contemporary Jewish legalists are fully prepared for this challenge and that their views will continue to be fully convincing to those who accept their authority.

But if the process of textual interpretation and the perpetuation of tradition are viewed more critically, then a second and more difficult challenge emerges. This is the challenge of recognizing the limitations of religious traditions when confronting the innovations of modern medical science. Religions can tutor moral sensibilities, but they cannot provide an independent source of moral truths. They do not offer answers to the problems raised by new medical technologies so much as they deepen our appreciation of the questions we should ask. The voice of religious tradition surely does have something to say about life, love, sexuality, family, and the other issues raised by new technologies of reproduction. But it should not be forgotten that the tradition speaks not with a single voice, but with a multitude of voices. Moreover, the messages they convey belong to the people living today as much as to the authorities of the past. Recognizing this, for Jewish ethicists and others, will be difficult. It means abandoning the illusion that the course through these uncharted waters has already somehow been mapped out by sages of the past. But we can still take consolation in the knowledge that our predecessors likewise faced unprecedented moral dilemmas. If the compass they left us is not fully adequate to the new challenges we face, then it may still inspire us to face those challenges with equal courage.
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Chair, Ethics Section, Upper Midwest Region of American Academy of Religion (1986-90).

Member, Committee on Jewish-Christian Dialogue, Faith and Order Commission of the Minnesota Council of Churches (1987-).

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