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FAMILY PLANNING AND GOVERNMENT REGULATION: JEWISH LAW PERSPECTIVES

*Steven H. Resnicoff**

“Family planning” includes a wide range of related subjects, including abortion, contraception, cloning, genetic engineering, and other alternative reproductive technologies. Each topic raises not only myriads of fascinating legal and ethical issues, but also countless Jewish law complexities. This article cannot comprehensively explore these matters in the limited space allotted to it. Instead, it identifies the underlying Jewish law principles that apply, describes some of the major controversies that have arisen, explains how government regulations may affect such matters, and provides references to more extensive discussions of particular details.

As explained in part I, Jewish law highly prizes human life. It strongly promotes human reproduction and the protection of human health. For these reasons, Jewish law generally opposes abortion. Governmental measures that would require Jews or Jewish organizations to assist or enable conduct that violates Jewish law, such as religiously impermissible abortions,¹ would impinge on their religious freedom. In addition, as explained in part II, Jewish law usually encourages humankind’s creative use of intellect and technology to accomplish desired objectives, such as curing and preventing physical infirmities and even more so with respect to saving human life.

Jewish law authorities have manifested a much more ambivalent attitude regarding the use of modern reproductive technologies. There is a consensus that Jewish law does not *require* extraordinary measures be used *to create* human life.² However, authorities are acutely sensitive to

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1. As discussed in notes 34, 37 and 38, and the associated text, not all abortions are forbidden under Jewish law.

2. See J. David Bleich, *Survey of Recent Halakhic Periodical Literature: Surrogate Motherhood*, 32:2 TRADITION 146, 147 (Winter 1998) (hereinafter, “Surrogate Motherhood”); J. DAVID BLEICH, BIOETHICAL DILEMMAS 207 (Hoboken, N.J.: Ktav Publishing House Inc., 1998). See also ELIYAHU BAKSHI-DORON, II BINYAN AV no. 60 (Hebrew) (although many responsa have permitted artificial in-vitro insemination (“AIV”), none has ever hinted that a person who could not otherwise have children was obligated to use AIV).

the fact that many people unable to reproduce in the traditional manner yearn to have children.³ Moreover, some Jewish law authorities believe that by using certain modern reproductive technologies, a person may fulfill a religious duty to procreate.⁴ Nevertheless, other authorities argue that some such technologies actually violate Jewish law.⁵ Part III examines these issues. Furthermore, even if the use of particular technologies is permitted, their use, or their possible misuse, could cause considerable societal harm. Part IV briefly touches on these concerns.

Before focusing on Jewish law's emphasis on the value of human life, it is important to describe what the phrase "Jewish law perspectives" means. "Jewish law" refers to the religious jurisprudential system of the Jewish people as it operated throughout the millenia. Thus, "Jewish law" should not be confused with the secular law of the country of Israel. Nor does "Jewish law" necessarily reflect the personal opinions of a majority of people of the Jewish faith. Many contemporary Jews, especially those who do not affiliate with any of the major Jewish religious movements, do not consider themselves governed by "Jewish law."

3. As J. David Bleich explains:

There can be no question that lack of children leaves a painful void. Paternal and maternal inclinations are deeply ingrained in the human psyche and cry out for expression. Such needs should neither be decried nor minimized. Rachel of old cried out in deep anguish, "Give me children, or else I die" (Genesis 30:1).

Bleich, *Surrogate Motherhood*, *supra* note 2. Yoel Jakobovits similarly signals the emphasis Judaism places on fertility:

Judaism regards the gift of children as one of life's preeminent endowments – and challenges. Fecundity is among the most cherished of blessings, an attitude graphically amplified in Psalm 128 which speaks of "a wife as fruitful as a vine", whose "children are as olive plants around the table" leading to the ultimate joy of seeing "children to thy children."

See Yoel Jakobovits, *Male Infertility: Halakhic Issues in Investigation and Management*, JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES 116 (Emanuel Feldman and Joel B. Wolowelsky, eds.) (Hoboken, N.J.: Ktav Publishing House, Inc., 1997).

4. In Judaism, there are situations in which one may not be required to perform a particular act, but if one does so, that performance is deemed to have been the fulfillment of a religious "obligation" (a *Mitzvah*). For example, women are exempt from certain affirmative religious obligations that require acts to be performed within specific time periods. Nevertheless, according to many rabbinic authorities, should a woman choose to perform such an act at its proper time, not only is she credited with having fulfilled the *Mitzvah*, but she may recite a blessing that praises God who "commanded" her to perform the act. See, e.g., ARYEH KAPLAN, II HANDBOOK OF JEWISH LAW 104-105, para. 10:35 (New York: Moznaim Publishing Corporation, 1992) (citing various views).

5. See, e.g., J. DAVID BLEICH, JUDAISM AND HEALING 80-83 (New York: Ktav Publishing House, Inc., 1981) (discussing, among other possible problems, the fact that some rabbinic authorities consider the artificial insemination of a married woman with a donor's sperm to constitute adultery).

Furthermore, even those Jews who are deeply committed to Jewish law often disagree as to what Jewish law prescribes. Jewish law is predicated upon the assumption that biblical law was divinely transmitted to the Jewish people in two interrelated parts.⁶ One part, the Five Books of Moses, was intended to be written and is therefore referred to as the "Written Law." The Written Law is not interpreted literally. In fact, Jewish authorities acknowledge that the Written Law, taken by itself, is incomplete, unclear and even ostensibly self-contradictory.⁷ The second part of the divine transmission, which supplemented, explained and reconciled the Written Law, was intended *not* to be committed to writing. Known as the "Oral Law," these teachings were to be passed down from teacher to student, from generation to generation.⁸ However, because non-Jewish oppressors forbade the teaching of Jewish law, it was feared that the Oral Law might be forgotten. Consequently, the sages allowed much of the Oral law, along with various rabbinic decrees and communal customs, to be written.⁹ This writing, known as the Talmud, was ultimately redacted circa 550 and continues to constitute the foremost literary source of Jewish law.¹⁰

Although the Talmud is a multi-volume work, it could not possibly address all of the fact patterns that might have arisen at the time of its redaction. *A fortiori*, it could not discuss the multitude of subsequent sociological and scientific innovations. Instead, the Jewish law process importantly relies upon distilling refined conceptual principles from

6. STEVEN H. RESNICOFF, UNDERSTANDING JEWISH LAW 7-11 (New Providence, N.J. LexisNexis, 2012)

7. *Ibid.*, at 58-59. As Zevi Hirsch Chajes explains:

The Torah [i.e., Jewish biblical law] is divided into two parts, the written and the unwritten law. The former consists of the Pentateuch which was divinely revealed to Moses at Sinai. the latter comprises expositions and interpretations which were communicated to Moses orally as a supplement to the former. Without them the scriptural texts would often be unintelligible since many of them seem to contradict others, and it is only by the aid of oral elucidation that their contradictions can be straightened out.

ZEVI HIRSCH CHAJES, THE STUDENTS' GUIDE THROUGH THE TALMUD 1 (Jacob Shachter ed. & trans.; New York: Yashar Books, 2005). See also H. CHAIM SCHIMMEL, THE ORAL LAW 22-25 (Jerusalem, Israel: Feldheim Publishers, 1996).

8. Several reasons have been advanced as to why an Oral Law was necessary. See RESNICOFF, *supra* note 6, at 60 (identifying such reasons).

9. *Id.*, at 64-65.

10. There are actually two works known as the Talmud. The first of these, redacted circa 350, comprises the teachings in rabbinical academies in Jerusalem and is known as the Jerusalem Talmud.

The second, redacted circa 550, contains the teachings in the larger rabbinical academies in Babylon, and is known as the Babylonian Talmud. For various reasons, the authority of the Babylonian Talmud far surpassed that of the Jerusalem Talmud. Indeed, when a scholar refers simply to "the Talmud," it is understood that reference is to the Babylonian Talmud. RESNICOFF, *supra* note 6, at 68-70. One of several available English translations of the Babylonian Talmud can be found online at <http://www.halakhah.com/>.

Talmudic paradigms and applying these principles to cases with different circumstances. Slight nuances as to the conceptualizations so derived, or as to the characterizations of modern circumstances, can lead to quite different legal conclusions. In early times, Jewish law institutions, including a Supreme Council, existed that could issue definitive rulings and enact binding legislation.¹¹ However, anti-Semitic persecution destroyed many of these institutions long ago and, for a variety of technical reasons, they have not been – and perhaps cannot be – reestablished.¹² As a result, no easy mechanism exists for resolving differences of opinions among leading Jewish law scholars. Although almost all such authorities agree on some of the relevant family law issues, there is important disagreement on others, as will be addressed in part II.

PART I: JEWISH LAW PRIZES HUMAN LIFE AND HUMAN HEALTH

Human life enjoys a privileged place in Jewish law's hierarchy of values. With very few exceptions, saving life trumps all other rules.¹³ For example, notwithstanding the central importance of the Sabbath in Jewish law and Jewish life,¹⁴ one is not merely permitted, but is actually required, to violate an otherwise applicable Sabbath law in an effort to save a life.¹⁵ In fact, one is obligated to do this even to extend a person's life for only a matter of minutes.¹⁶

11. RESNICOFF, *supra* note 6, at 43-53 (identifying the basic institutions of Jewish law and explaining how many of them are in desuetude).

12. *Id.*

13. All steps to save life are required unless they involve the commission of idolatry, incest or murder. See, FRED ROSNER, BIOMEDICAL ETHICS AND JEWISH LAW 10 (Hoboken, N.J.: Ktav Publishing House, Inc., 2001); YOSEF KARO, SHULHAN ARUKH (THE CODE OF JEWISH LAW), *Yoreh De'ah* 157:1 (Hebrew). The Shulhan Arukh, first published in the sixteenth century, is one of only a handful of centrally important Jewish legal codes and, in fact, may be the most influential of such codes. See RESNICOFF, *supra* note 6, at 72-73, 277 (describing the Shulhan Arukh).

14. See, generally, ABRAHAM JOSHUA, THE SABBATH: ITS MEANING FOR MODERN MAN (New York: Farrar, Straus and Young, 1951); DAYAN DR. GRUNFELD, THE SABBATH: A GUIDE TO ITS UNDERSTANDING AND OBSERVANCE (New York: Feldheim, 1959).

15. ROSNER, *supra* note 13; SHULHAN ARUKH, *Orah Hayyim* 329:4 (Hebrew).

16. As R. J. David Bleich points out:

Jewish teaching with regard to these questions is shaped by the principle that, not only is human life in general of infinite and inestimable value, but that every moment of life is of infinite value as well. Accordingly, obligations with regard to treatment and cure are one and the same regardless of whether the person's life is likely to be prolonged for a matter of years or merely for a few seconds. [Endnotes omitted]

J. David Bleich, *Treatment of the Terminally Ill*, 30:3 TRADITION 51, 52 (1996).

Correspondingly, Jewish law places great importance on the creation of human life. God instructs Adam and Eve, representing all of humankind, to “be fruitful and multiply.”¹⁷ After the flood, which consumed almost all humankind, this commandment was repeated to Noah and his sons when they exited the Ark.¹⁸ When Jacob entered the land of Israel, it was repeated again, when God told him, “I am the Almighty God; be fruitful and multiply.”¹⁹ The Talmud underscores the importance of this commandment by comparing the failure to fulfill it to the commission of murder:

Rabbi Eliezer stated: He who does not engage in propagation of the race is as though he sheds blood: for it is said, *Whoso sheddeth man's blood by man shall his blood be shed* [Genesis 9:6]; and this is immediately followed by the text *And you, be ye fruitful and multiply* [Genesis 9:7]. Rabbi Jacob said: As though he has diminished the Divine Image; since it is said, *For in the image of God made He man*, [Genesis 9:6], and this is immediately followed by *And you, be ye fruitful and multiply* [Genesis 9:7]. Ben Azzai said: As though he sheds blood and diminishes the Divine Image.²⁰

The Talmud debates details of this commandment, including how many children a person must have in order to satisfy this obligation. Nevertheless, even after a person fulfills the biblical requirement, rabbinic law continues to require that he endeavor to have additional children.²¹

One reason for this continued duty is the perceived purpose of the biblical rule.²² As one thirteenth-century Jewish scholar explains, “[T]he

17. Genesis 1:28, as understood by many commentators. See, e.g., AARON HALEVI, I SEFER HAHINNUKH, Commandment 1, at 83 (New York: Feldheim Publishers, 1992) (Some authorities, however, interpret this verse as conferring a blessing rather than as enunciating a commandment). Cf. DAVID M. FELDMAN, MARITAL RELATIONS, BIRTH CONTROL AND ABORTION IN JEWISH LAW 17 (New York: Schocken Books, 1975) (asserting that “most commentators” interpret this verse as a blessing).

18. Genesis 9:1, 7.

19. Genesis 35:11. BABYLONIAN TALMUD, *Yevamot* 65b (Hebrew).

20. ROSNER, *supra* note 13, at 114-115.

21. See MOSES MAIMONIDES (1135-1204), MISHNEH TORAH, *Hilkhot Ishut* 15:16 (“Although a man has fulfilled the mitzvah of be fruitful and multiply – he is commanded by the rabbis not to desist from procreation while he yet has strength, for whoever adds even one Jewish soul is considered as having created an entire world.”).

22. See, generally, Alexander Altmann, Gershom Scholem & Gerald Y. Blistein, *Commandments, Reasons for*, in 5 ENCYCLOPAEDIA JUDAICA 85-90 (Michael Berenbaum & Fred Skolnik, eds, Detroit: Macmillan Reference USA, 2nd ed., 2007) (describing the history of rabbinic efforts to discern the rationales of various commandments, although these same authorities acknowledged that the complete reasons for most, if not all commandments, were not divinely disclosed).

root purpose of this [biblical] precept is in order that the world should be settled, inhabited. For the Eternal Lo-d,²³ blessed is He, desires its settlement, as it is written 'He did not create it a chaos; He formed it to be inhabited.' (Isaiah 45:18)"²⁴ The more children one produces, the more one contributes to such habitation.

Another reason is that having more children is believed to hasten the arrival of the Messiah. The Talmud states that a certain, but unknown, number of souls is stored in Heaven, and that the Messiah will only come after all of those souls have been born.²⁵

The Talmud underscores the importance of reproductive activity by stating that when a man dies and appears before the Heavenly Tribunal to be judged, one of the six questions he is asked is "Were you busy with being fruitful and multiplying?"²⁶

While these reasons all militate against abortion, which interferes with habitation of the world, special considerations, some even more serious, may arise at particular stages in the birthing process. For example, once a fetus's head or the majority of a fetus's body has emerged from the womb, Jewish law considers the fetus to have been fully born.²⁷ Consequently, killing such a newborn constitutes murder and is forbidden even if doing so is the only way to save its mother's life.²⁸ Thus, Jewish law regards the procedure commonly known as "partial-birth abortion," in

23. HALEVI, *supra* note 17.

24. In explaining the rabbinically imposed obligation to continue to engage in reproductive activity, the Talmud also cites a second Scriptural verse: "In the morning, sow thy seed, and in the evening do not withhold your hand." (Ecclesiastes 11:6) See BABYLONIAN TALMUD, *Yevamot* 62b.

25. BABYLONIAN TALMUD, *Yevamot* 62a, 63b, *Avoda Zara* 5b, *Nidda* 13b.

26. BABYLONIAN TALMUD *Shabbat* 31a.

27. MISHNAH, *Ohalot* 7:6. See Fred Rosner, *The Jewish Attitude Toward Abortion*, 10:2 TRADITION 48, 58 (Winter, 1968) (citing this Mishnaic teaching). The Mishnah, redacted circa 188, was one of the first publicly available writings that contained portions of the Oral Law. The Talmud is organized as discussions of, and amplifications upon, the Mishnah. See RESNICOFF, *supra* note 6, at 64-65. One of several available English translations of the Mishnah can be found at <http://www.oldinthenew.org/?p=210>.

28. See MAIMONIDES, MISHNEH TORAH, *Hilkhot Rotzeach* 1:9; SHULHAN ARUKH, *Hoshen Mishpat* 425:2. See also MISHNAH, *Ohalot* 7:6 ("If a woman in labor is experiencing [life-threatening] travail, one dismembers the embryo within her, removing it limb by limb, because her life takes precedence over its life. But once its greater part has emerged, it may not be harmed, for we do not set aside one life for another.").

However, if inaction will cause both the mother and the newborn baby to die, some authorities, but not all, seem to allow the fetus to be killed in order to save the mother's life. Compare MOSHE SCHICK, RESPONSA MAHARAM SCHICK, *Yoreh Deah* 155 (Hebrew) (permitting this action), DAVID HOFFMAN, II RESPONSA MELAMED LEHO'IL, *Yoreh Deah* no. 69 (Hebrew) (same), DAVID MEISLICH, I RESPONSA BINYAN DAVID no. 47 (Hebrew) (same), and ISAAC OELBAUM, SHE'ELAT YITZHAK 64 (Hebrew) (same) to HAYYIM SOFER, RESPONSA MAHNEI HAYYIM, *Hoshen Mishpat* no. 50 (Hebrew)(forbidding this action) and MEIR ASHKENAZI EISENSTADT, III RESPONSA PANIM ME'IROT no. 8 (Hebrew) (same). See also BLEICH, BIOETHICAL DILEMMAS, *supra* note 2, at 99-100 (discussing various nuances in some of these responsa cited in this note); Fred Rosner, *supra* note 27, at 60-61 (Winter 1968) (citing various views).

which such newborns are "aborted," as murder.²⁹

The status under Jewish law of a fetus before its head or the majority of its body has emerged from the womb is less clear. Although Jewish law clearly forbids the abortion of a fetus after the first forty days after its conception, the nature of this prohibition is subject to significant debate.³⁰ According to some authorities, aborting a fetus falls under the general biblical category of "murder."³¹ Nevertheless, even according to this approach, because an unborn fetus lacks the full status of a human being,³² abortion, unlike murder of full human beings, is not a capital offense.³³ In fact, this view even permits abortion, but only for the purpose of preventing the fetus's presence from causing the mother's death.³⁴

Other authorities, while also regarding abortion as a violation of Jewish law, consider it a much lesser offense than murder.³⁵ Some even believe the offense violates rabbinic, rather than biblical law.³⁶ Many of

29. MAIMONIDES, *supra* note 28.

30. See, e.g. Aharon Lichtenstein, *Abortion: A Halakkhic Perspective*, 25:4 TRADITION 3, 8-11 (Summer 1991) (discussing various theories).

31. This is the view, for example, of relatively contemporary scholars Rabbi I. Y. Unterman, a former Chief Rabbi of the State of Israel, see, e.g., I. Y. UNTERMAN, I RESPONSA SHEVET MI-YEHUDAH, 29 *et seq.* (Jerusalem, 1955), and Rabbi Moses Feinstein, see MOSES FEINSTEIN, II IGGEROT MOSHE, *Hoshen Mishpat* no. 69. A number of authorities argue that this was also the view of the classical authority, Maimonides. See BASIL F. HERRING, JEWISH ETHICS AND HALAKHAH FOR OUR TIME 32 (New York: Ktav Publishing House, Inc., 1984) (citing the writings of R. Ezekiel Landau and R. Hayyim Soloveitchik). *But see* R. Yehiel Weinberg, III RESPONSA SERIDEI ESH no. 127 (Jerusalem, 1966) (Hebrew).

32. Some authorities seem to consider it a "partial being." See, e.g., YOSEF ROSEN (1858-1936), I RESPONSA TZOFNAT PANEAH no. 49 (Hebrew). Others attribute to it only the status of a "potential or questionable being." See, e.g., I.Y. Unterman, *Be'Inyan Pikuah Nefesh Shel Ubar*, 6 NOAM 1 (1963) (Hebrew).

33. Most authorities believe that the Jewish abortionist is not at all punished by a human court. Instead, they contend that he is liable to "death at the hands of heaven" and is divinely punished. MEIR SIMHAH, MESHEKH HOKHMAH, *Exodus* 35:2 (Hebrew).

34. See DAVID M. FELDMAN, MARITAL RELATIONS, BIRTH CONTROL AND ABORTION IN JEWISH LAW, 275-84 (New York: Schocken Books, 1975) (enumerating alternative conceptual explanations as to why it might be permitted to abort a fetus in order to save the mother's life). There is considerable debate as to whether certain forms of psychiatric consequences may qualify as "death" for purposes of permitting an abortion. See, e.g., BLEICH, BIOETHICAL DILEMMAS, *supra* note 2, at 101-2.

35. Many authorities regard the violation as biblical. See, e.g., YAIR BACHRACH, HAVVOT YAIR no. 31 (Hebrew) (arguing that abortion violates a biblical rule against destroying semen); R. JACOB EMDEN, SHE'ELAT YA'AVITZ no. 43 (Hebrew) (same); YOSEPH TRANI, RESPONSA MAHARIT nos. 97, 99 (Hebrew) (stating that abortion violates the biblical rule against wounding a person). See also CHAIM OZER GRODZINSKI, III TESHUVOT ACHI'EZER 65:14 (Hebrew) (stating that the prohibition is Biblical); MEIR SIMHAH, MESHEKH HOKHMAH, *Exodus* 35:2 (Hebrew) (same). Others rule that the violation is rabbinic, not biblical. See AARON SAMUEL KAIDANOWER, EMUNAT SHMUEL (Hebrew) (arguing that the violation is rabbinic, not biblical); CHAIM PILAGGI, I TESHUVOT CHAIM VE-SHOLOM no. 40 (Hebrew) (same). Still others regard abortions involving the direct physical removal of the fetus to be biblical violations while abortions accomplished indirectly, such as by ingesting drugs to induce expulsion of the fetus, as rabbinic infractions. See, e.g., YEHUDAH EYUSH, TESHUVOT BET YEHUDAH, *Even HaEzer* no. 14 (Hebrew). See, generally, BLEICH, BIOETHICAL DILEMMAS, *supra* note 2, at 74-82 (discussing these responsa); Lichtenstein, *supra* note 30, at 3-5.

36. See, generally, RESNICOFF, *supra* note 6, at 35-38 (describing the differences between biblical and rabbinic laws).

those who regard it as less than murder would authorize abortions in some cases in order to accomplish goals not as urgent as saving the mother's life.³⁷

A further debate exists as to abortions within the first forty days of conception.³⁸ For various reasons, a few rabbinic authorities contend that within the first forty days of conception, a fetus has no legal status³⁹ and may presumably be aborted without much reason at all.⁴⁰ Most authorities, however, reject this view.⁴¹

The verse, "Do not place a stumbling block before the blind,"⁴² is construed as prohibiting Jews from enabling others to violate Jewish law. Therefore, if a person could not perform an impermissible abortion without a Jew's help, providing that help would be a biblical offense.⁴³ In addition, even if the offense could be accomplished without any help, providing assistance to someone performing the offense could violate a

37. See Rosner, *supra* note 27, at 62-63 (discussing views regarding therapeutic abortions).

38. Some rabbinic authorities also differentiate as to other stages of fetal development. See, generally, Lichtenstein, *supra* note 30, at 6-7 (citing different opinions). See also BLEICH, BIOETHICAL DILEMMAS, *supra* note 2, at 210-211 (1998) (arguing that Jewish law may permit abortions of a fetus while it is still of a sub-visual size); MENACHEM ELON et al., JEWISH LAW (MISHPAT IVRI): CASES AND MATERIALS 612-13 (New York: Matthew-Bender & Company, 1999) (translating a responsum by R. Eliezer Waldenberg in which he permits an abortion, under the particular circumstances of that case, but only prior to the seventh month of pregnancy).

39. These authorities principally cite three proofs. The first involves emerges from the laws of ritual purity. A woman who gives birth is deemed to be ritually "impure" for a certain period of days. Although this same rule applies to a woman who miscarries after the fortieth day of conception, it does not apply to a woman who miscarries within the first forty days. SHULHAN ARUKH, *Yore De'ah* 194:2. The second proof comes from the laws regarding first-born male children. If a man and woman's first-born child is a male, then certain special Jewish laws apply to him. Suppose, however, that the woman had a previous pregnancy that resulted in a miscarriage. If the miscarriage occurred after the fortieth day of conception, then the subsequently born male child is not regarded as a "first-born." If the miscarriage occurred within the first forty days, the subsequently born male child is regarded as a "first-born." SHULHAN ARUKH, *Yoreh De'ah* 305:23. The third proof arises from the laws regarding the special rights of priests (Kohanim) and their families. The daughter of a priest is entitled to eat certain consecrated foodstuffs so long as she is single, married to another priest, or a childless widow of a non-priest. Nevertheless, a Talmudic sage, Rav Chisda, considered a case of a priest's daughter who married a non-priest, became pregnant from her husband, and became a widow within forty days of the pregnancy. Rav Chisda ruled that she could continue to eat the consecrated food for the full forty days since conception because during that time the fetal material is "mere water." See BABYLONIAN TALMUD, *Yevamot* 69b. Other authorities challenge each of these supposed proofs, but a full exploration of this debate falls beyond the purview of this article.

40. See, e.g., Kenneth Brander, *Sex Selection and Halakhic Ethics: A Contemporary Discussion*, 40:1 TRADITION 54 (Spring 2007). See, generally, J. David Bleich, *Abortion in Halakhic Literature*, 10:2 TRADITION 82, 82-7 (Winter 1968) (discussing the views of various authorities).

41. See Rosner, *supra* note 27, at 55, 57 ("A small minority of Rabbinic Responsa are of the opinion that prior to forty days after conception, the fetus has no status at all and is not a *nefesh* and abortion at this stage might be permissible for the slightest reason.") See, generally, Bleich, *supra* note 40, at 83-7 (discussing these views)

42. Leviticus 19:14.

43. See Steven H. Resnicoff, *The Attorney-Client Relationship: A Jewish Law Perspective*, 14 NOTRE DAME J.L. ETHICS & PUB POL'Y 349, 352-9 (2000) (describing the origin and parameters of the biblical rule against enabling others to violate Jewish law).

rabbinic prohibition against “strengthening the hands of a wrongdoer.”⁴⁴ Indeed, in many cases, there is a rabbinic obligation to attempt to prevent a person from violating Jewish law.⁴⁵ Consequently, any government law or regulation that would prevent Jews from discouraging or require them to assist or enable prohibited abortions would very heavily impede the practice of Judaism. On this basis, a health care law that would require Jews to fund such abortions would be problematic. On the contrary, it would be appropriate for the government to legislate protections for persons, including healthcare personnel, who refuse to participate in such abortions on religious grounds, and some states have adopted such legislation.⁴⁶

Disturbingly, however, legislation intended to provide such protection has not always been effective. For example, in response to the *Roe v. Wade* decision⁴⁷ that legalized certain abortion procedures, Congress enacted what is known as the “Church Amendment.”⁴⁸ This statute states that

[n]o entity which receives a grant, contract, loan or loan guarantee under [certain statutory schemes governing federal health funding] . . . may discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel . . . because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the

44. *Id.* at 360-2.

45. *Id.* at 362-4.

46. *See, e.g.*, the Illinois Health Care Right of Conscience Act, which provides, in part:

Findings and policy. The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.

745 ILL. COMP. STAT. ANN. 70/2 (West 2010).

47. *Roe v. Wade*, 410 U.S. 113 (1973).

48. 42 U.S.C. § 300a-7(c), passed as part of Pub.L. 93-948.

procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.⁴⁹

Nevertheless, the Second Circuit Court of Appeals has ruled that this law provides no remedy to an individual who is so discriminated against. Thus, a young nurse who was allegedly threatened with dismissal if she failed to assist in a particular abortion and allegedly suffered retaliation for not signing a statement that she was prospectively willing to participate in such abortions had no cause of action under this legislation.⁵⁰

In addition, some professional or disciplinary bodies have issued ethics opinions that would, or at least could, significantly restrict the rights of certain health care personnel from declining to “assist” in what they believe to be religiously prohibited practices. For example, in November 2007 the Committee on Ethics of the American College of Obstetricians and Gynecologists issued Opinion number 385, which it reaffirmed in 2010.⁵¹ In part, that opinion states, “Where conscience implores physicians to deviate from standard practices, they must provide potential patients with accurate and prior notice of their personal moral commitments.”⁵² This “prior notice” requirement is unclear. Assume, for instance, that a woman goes to an obstetrician to determine whether she is pregnant, and is informed that she is two months pregnant. She then asks if the doctor will terminate the pregnancy and the doctor, on religious grounds, refuses. Was the doctor obligated to provide notice that s/he would not terminate the pregnancy before s/he was even asked to do so?⁵³

49. *Id.*

50. *Cenzon-DeCarlo v. Mount Sinai Hospital*, 626 F.3d 695 (2nd Cir. 2010). See generally, Luke W. Goodrich, *The Health Care and Conscience Debate*, 12 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 121 (2011); Michael A. Fragoso, note, *Taking Conscience Seriously or Seriously Taking Conscience?: Obstetricians, Specialty Boards, and the Takings Clause*, 86 NOTRE DAME L. REV. 1687 (2011).

51. Committee on Ethics, *The Limits of Conscientious Refusal in Reproductive Medicine*, AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, available at http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Ethics/The_Limits_of_Conscientious_Refusal_in_Reproductive_Medicine (last visited 10/29/2012) (hereinafter, “ACOG Opinion 385”).

52. *Id.*

53. Suppose the doctor’s religious scruples would have permitted her to perform an abortion within the first forty days of conception but not thereafter and it was only after examining the patient that the doctor could tell the approximate length of the pregnancy. Was the doctor required to provide notice of this practice to the patient before she conducted the examination? See Michael A. Fragoso, note, *Taking Conscience Seriously or Seriously Taking Conscience?: Obstetricians, Specialty Boards, and the Takings Clause*, 86 NOTRE DAME L. REV. 1687 (2011) (positing a similar, but much more detailed, hypothetical).

In addition, the opinion states that “[p]hysicians and other health care providers have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive services that patients request.”⁵⁴ As already explained, Jewish law forbids assisting someone in a prohibited abortion even if the abortion could be obtained without such assistance. Providing a specific referral to a physician who will perform an abortion may violate this law.

Jewish law not only promotes human reproduction, but it also highly prizes preventative and therapeutic measures to ensure human health. Each person is biblically obligated to take steps to be healthy and to avoid danger. The Pentateuch states, “Only take heed to yourself and be exceedingly watchful of your life,”⁵⁵ as well as, “And you shall be exceedingly watchful of your lives.”⁵⁶ Other sources are also cited.⁵⁷

Similarly, Jewish law imposes a duty to help prevent others from being harmed. Among other things, it commands that a person “not stand idly by while [his or her] . . . fellow bleeds,”⁵⁸ which is construed as obligating a person to rescue another from both physical and financial losses.⁵⁹

The question arises as to whether humankind may use modern technologies to accomplish these goals or whether doing so would somehow constitute a presumptuous incursion into a realm reserved for the Divine. It is to this issue that we now turn.

54. ACOG Opinion 385, *supra* note 51.

55. Deuteronomy 4:9. See, e.g., MAIMONIDES, MISHNEH TORAH, *Hilkhot Rozeah* 11:4 (citing this verse).

56. Deuteronomy 4:15.

57. The Talmud interprets Deuteronomy 20:19, which prohibits the destruction of fruit-bearing trees, as support for a more general rule against wanton destruction (*Bal Tashhit*). See BABYLONIAN TALMUD, *Bava Kama* 91b. It then interprets this as also forbidding a person from neglecting his or her own health. See BABYLONIAN TALMUD, *Sabbath* 140b. Rabbinic authorities differ, however, as to whether this general rule against wanton destruction is biblical or rabbinic in nature. See MENACHEM SLAE, *SMOKING AND DAMAGE TO HEALTH IN THE HALACHAH* 4-6 (Jerusalem, Israel: Acharai Publications, 1990) (discussing views of various early authorities).

58. Leviticus 19:16. Some Jewish law authorities cite Deuteronomy 22:2 as support for this rule. See also Resnicoff, *supra* note 43, at 365 note 62 (citing these authorities).

59. J. DAVID BLEICH, II *CONTEMPORARY HALAKHIC PROBLEMS* 77 (1994); YISROEL Meir HaKohen, HAFETZ HAYIM, *Be'er Mayim Hayyim, Hilkhot Issurei Rekhilus* 9:120 (Hebrew).

PART II: JEWISH LAW ENCOURAGES HUMANKIND'S CREATIVE MEASURES TO ACHIEVE WORTHWHILE GOALS

Jewish law regards each human as a creative partner with God. Humans are made in God's image⁶⁰ and are directed to emulate God's "traits."⁶¹ Thus, as God is creative, humans are to creatively use their knowledge and skill to "subdue the world."⁶² As Rabbi J. David Bleich writes, "[Judaism] rejects the notion that man may not harness nature or that man may not intervene and manipulate the laws of nature for the betterment of the human condition."⁶³ From a Jewish perspective, doing so is not a presumptuous impingement on the purview of the Almighty.

When Jews usher in the Sabbath, they recite a prayer known as "Kiddush" ("Sanctification"). Its last sentence reads, "God blessed the Seventh Day and hallowed it, because on it He had abstained from all His work which God created to make."⁶⁴ The last two words, "to make,"⁶⁵ seem superfluous. However, Jewish scholars explain that God had not created a finished product. God refrained from completing the work of creation. As Rabbi Joseph B. Soloveitchik writes, "When God created the world, He provided an opportunity for the work of His hands – man – to participate in His creation. The Creator, as it were, impaired reality in order that mortal man could repair its flaws and perfect it."⁶⁶ Through such creative activities, humans fulfill and perfect themselves as well.

Ancient Jewish literature adverts to this notion by reporting a conversation between Turnus Rufus, the Roman military leader who in the second century before the Common Era⁶⁷ plowed the site on which the Jewish Temple had stood, and the Jewish sage Rabbi Akiva.⁶⁸ Turnus Rufus argued that God's acts must be more beautiful than man's and

60. Genesis 1:27.

61. See Warren Zev Harvey, *Holiness: A Command to Imitatio Dei*, 16:3 TRADITION 7 (Fall 1977).

62. Genesis 1:26. See also RAMBAN (Nachmanides), COMMENTARY ON THE TORAH, GENESIS (C. Chavel, transl. and ed.) 53, 55.

63. BLEICH, BIOETHICAL DILEMMAS, *supra* note 2, at 206 (stating that "[i]n rabbinic thought dispensation for such intervention is derived from Genesis 1:28).

64. DOVID WEINBERGER (ed.), OHEL SARAH WOMEN'S SIDDUR 345 (Brooklyn, NY: Mesorah Publications, Ltd., 2005).

65. *Id.* (translating the Hebrew infinitive, *la'asot*, as "to make").

66. JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 101 (Philadelphia: Jewish Publication Society of America, 1983).

67. Jewish literature uses the phrase, "the common era," to denote what secular literature refers to as "A.D." For a description and comparison of the Jewish and secular systems of dating, see RESNICOFF, *supra* note 6, at 279-280.

68. TANHUMA, *Tazria* 5 (Hebrew). See Mordechai Silverstein, *Two Minute Podcast*, at <http://www.uscj.org/koach/podcasts/twomintorah/5770/tazria-metzora.html> (describing this exchange in English).

contended that if God wanted a person to be circumcised, an infant male would emerge from his mother's womb already circumcised. Rabbi Akiva replied that man's acts are more beautiful than God's, rhetorically asking whether raw ears of grain or baked rolls are more beautiful. As to circumcision, Rabbi Akiva responded, "God gave the commandments [including that of circumcision] to Israel only to purify [the Jewish people] through them."⁶⁹

That Jewish law allows and perhaps requires the creative use of science and technology is clear from the Pentateuch's approach to healing. The Medrash makes this point through a story:

Rabbi Ishmael and Rabbi Akiva were walking through the streets of Jerusalem and met a sick man who asked them: "How can I be cured?" They answered: "Do thus and so until you are cured." He said to them: "But who afflicted me?" "The Holy One, blessed be He," they answered. "So how can you interfere in a matter which is not your concern? God afflicted me and you wish to heal?" The rabbis then asked: "What is your vocation?" "I am a tiller of the soil. Here is the vine-cutter in my hand." They asked: "But who created the vineyard?" "The Holy One, blessed be He." "Well, you interfered in the vineyard which is not yours. He created it and you cut away its fruits?" they asked. "But were I not to plow and till and fertilize and weed, the vineyard would not produce any fruit," he explained. "So," they responded, "From your own work have you not learned what is written (Ps. 103:15): 'As for man, his days are as grass.' Just as the tree, if not weeded, fertilized, and plowed, will not grow and bring forth its fruits, so with the human body. The fertilizer is the medicine and the means of healing, and the tiller of the earth is the physician."⁷⁰

The biblical source for the license to heal is discerned from a verse directing a person who has injured another to "surely cure" (or "thoroughly cure") the person who was injured.⁷¹ The Talmud explains

69. TANHUMA, *Tazria* 5. See PAYSACH KROHN, BRIS MILAH: CIRCUMCISION – THE COVENANT OF ABRAHAM 21 (Brooklyn, NY: Mesorah Publications, Ltd., 1985) (translating this excerpt from the Tanhuma).

70. *Midrash Temurah* in J. D. EISENSTEIN, II OTZAR MIDRASHIM, at 580-81 (Heb.), translated in DAVID M. FELDMAN, HEALTH AND MEDICINE IN THE JEWISH TRADITION 15-16 (New York: The Crossroad Publishing Company, 1986).

71. Exodus 21:19.

that this means that he must pay for his victim's medical expenses.⁷² In turn, this verse serves as the source that permits doctors to treat, rather than requiring them to leave the matter solely to prayer.⁷³ Some Jewish authorities believe that "it was the prerogative and duty of man to harness his intellect and the resources of nature in his conquest of disease as in his striving for prosperity."⁷⁴ Others, while acknowledging that illness may be a divine judgment, nevertheless affirm the biblical license to cure afflictions through medical treatment.⁷⁵ The sixteenth century Code of Jewish Law,⁷⁶ which together with centuries of subsequent glosses upon it remains the most authoritative Jewish law codex, declares that, "One who withholds medical treatment is a spiller of blood [i.e., a murderer]."⁷⁷

Consequently, throughout Jewish history, technological advances in medical treatment – from simple surgeries to modern organ transplants – have been approved by Jewish law authorities. Similarly, modern technology has been widely permitted for diagnostic and preventative purposes. For example, within the Orthodox Jewish community, it is routine for high school seniors to be tested to determine if they are carriers of genetic disorders. The testing is done under the aegis of an organization known as the *Dor Yeshorim*, which translates to the "Upright Generation." Each student is given an anonymous number and is not told of the results of the test. Instead, *Dor Yeshorim* keeps records of the tests. If an Orthodox man and woman are seeing each other and think that the relationship might lead to marriage, they exchange their anonymous numbers and each calls *Dor Yeshorim*, giving it their two numbers. *Dor Yeshorim* checks the two tests and the consequences for their possible offspring. It then calls each of the two people back and lets them know whether the tests show that their progeny is expected to have any of the genetic disorders for which they were tested. If there is an expectation of a disorder, *Dor Yeshorim* does not explain whose genes would be "responsible" for the disorder.

72. FELDMAN, *supra* note 70, at 16.

73. Although some small Jewish sects believed that, at least as to illnesses, one should only resort to prayer, this was never a mainstream Jewish view. See IMMANUEL JAKOBOVITS, *JEWISH MEDICAL ETHICS 2* (New York: Bloch Publishing Company, 1975) (describing this approach as appealing to a few small Jewish sects).

74. *Id.* (stating that this was the view of some Talmudists and that it also seemed to be the view of Maimonides).

75. *Id.*

76. See RESNICOFF, *supra* note 6, at 72-73, 277 (describing the place of the Shulhan Arukh among Jewish law literature).

77. SHULHAN ARUKH, *Yoreh Deah* 336:1.

When this genetic screening process first began, Rabbi Moses Feinstein, the leading Jewish law authority in the United States, was asked whether it might be better for a person to trust in God rather than to try to predict what might happen. The question was based on the verse, “[D]o not attempt to discern the future; rather, accept wholeheartedly whatever befalls you.”⁷⁸ Feinstein endorsed the screening process saying that the failure to undergo this simple and available test would be equivalent to “closing [one’s] eyes to what it is possible to see.”⁷⁹

Most Jewish authorities permit and encourage such screening when the results can be permissibly used to prevent disorders. On the other hand, testing cannot be done if no good can come of it. Thus, many authorities forbid the testing of a pregnant woman’s fetus to see whether it has a genetic disorder because these authorities believe that it would in any event be forbidden to abort.⁸⁰ On the other hand, there are authorities who not only permit the testing but, in some cases, permit the fetus to be aborted.⁸¹

Thus, Jewish law certainly allows, and may require, that modern scientific technologies be used to preserve human life, to provide curative care to human life, and to prevent human disabilities from developing. Many authorities believe that Jewish law does not require the use of modern reproductive technologies to create human life, and some believe that resorting to certain technologies are proscribed or at least discouraged. This is the subject to which we now turn.

PART III: MODERN REPRODUCTIVE TECHNOLOGIES AND “TECHNICAL” JEWISH LAW CONCERNS

Cloning, genetic engineering, and other alternative reproductive technologies can be used to enable people who could not otherwise do so to produce genetic progeny and to produce genetic progeny free from otherwise inheritable, unhealthy genetic conditions.

Given Jewish law’s emphasis on reproduction and on health, these are worthy goals. However, two principal types of potential problems arise. The first, discussed in this section, involves the extent to which using any such technology might constitute a technical violation of Jewish law. The

78. Deuteronomy 18:13.

79. MOSES FEINSTEIN, IV IGGEROT MOSHE, *Even HaEzer* no. 10 (Hebrew).

80. See, e.g., MOSES FEINSTEIN, I HALAKHAH U’REFUAH (HALAKHAH AND MEDICINE) 304 (1980) (Heb.). See also ELON, *supra* note 38, at 610-611 (translating part of Feinstein’s ruling).

81. See ELON, *supra* note 38, at 611-613 (translating part of a responsum by Eliezer Waldenberg permitting the abortion of a fetus afflicted by Tay-Sachs until the seventh month).

second type of problem, explored in part IV, concerns possible societal harms from the misuse of these technologies.

Each particular technology raises different, detailed Jewish law questions. Although this article is not the place to survey them all, it may be instructive to consider just a few that arise in connection with artificial insemination. Consider, for example, artificial insemination in a case in which the woman receiving the sperm is married but the sperm is from someone other than her husband. According to a number of Jewish law authorities, this practice would, perhaps surprisingly, violate the biblical prohibition against “adultery.”⁸² To understand this perspective, one needs to carefully examine the relevant biblical language and to consider the possible purposes of the prohibition. Some authorities argue that the standard English renditions of the relevant verse (Leviticus 18:20) are incorrect. They contend that the Hebrew really refers to “the deposit of semen in the genital tract of a married woman”⁸³ and, therefore, applies even if the deposit is made without sexual intercourse. Why would this be prohibited? According to Nahmanides, a leading thirteenth-century rabbinic authority, at least one reason for the biblical prohibition is the critical need that paternal identity be certain. Without such certainty, offspring might unknowingly find themselves in incestuous relationships.⁸⁴ Other authorities disagree and maintain that this specific biblical injunction can only be transgressed through a sexual act.⁸⁵ Nevertheless, even many of these latter authorities believe that inseminating a married woman with the semen of a man other than her husband violates some other Jewish law rule.⁸⁶ As a result, at least one contemporary authority concludes: “Accordingly, no form of artificial procreation which involves the introduction of semen of a male other than the husband into the genital tract of a married woman can receive the imprimatur of Jewish law.”⁸⁷

Complications also exist even when the husband’s semen is used. Although a majority of rabbinic authorities seem to permit this process, they disagree as to which methods of semen procurement are permitted.⁸⁸ Other issues arise if the sperm is not intended for present use, but, instead, to be frozen in a sperm bank for future use. Some authorities may only

82. ROSNER, *supra* note 13, at 132 (discussing the conflicting views of various authorities); BLEICH, *BIOETHICAL DILEMMAS*, *supra* note 2, at 208, 215 (same).

83. BLEICH, *BIOETHICAL DILEMMAS*, *supra* note 2, at 208, 215.

84. *Id.*

85. *Id.*, at 208, 215, note 12 (citing various authorities).

86. *Id.*, at 209, 215, notes 13 and 14.

87. *Id.*, at 209.

88. *Id.* at 220-227 and applicable endnotes (discussing various rabbinic views). See also Jakobovits, *supra* note 3, at 120-126 (discussing various rabbinic views).

permit the procedure if the man can thereby fulfill the religious commandment to “be fruitful and multiply.” Because it is possible that the banked sperm may never ultimately be used, its procurement may not be allowed. In addition, if the man in question is not currently married, it is possible that he is not actually obligated to be fruitful and multiply.⁸⁹ Added to these considerations is the view of some authorities that creating children through artificial insemination with the husband’s sperm (“AIH”) simply does not fulfill the commandment to “be fruitful and multiply.”⁹⁰

Similarly detailed and nuanced Jewish law issues arise with regard to other modern reproductive technologies. The public policy issues arise with respect to accommodating the religious beliefs of healthcare providers to protect their religious right to refuse to participate in these procedures.⁹¹

PART IV: MODERN REPRODUCTIVE TECHNOLOGIES – BROADER JEWISH LAW CONCERNS

Many modern reproductive technologies raise serious policy issues. Genetic engineering, for example, can be positively used to prevent certain physical disabilities. But not everyone will agree on what constitutes a “disability.” Thus, genetic engineering can be used to perpetuate prejudices in favor of certain sexes, eye color, heights, weights, etc., and prejudices against others. In addition, if genetic engineering is available only to the wealthy, it could exacerbate prejudices based on socio-economic class. The social consequences are difficult to predict. Cloning raises the additionally disturbing possibility suggested by the 1978 book, *The Boys from Brazil*, in which ninety-four clones were made of Adolf Hitler.⁹² Surrogate motherhood involves the possibility a remorseful surrogate who will fight for control of their biological⁹³ or gestational⁹⁴ offspring, sometimes causing years of litigation that could significantly interfere with the child’s upbringing and impair the child’s psychological makeup.

89. *Id.*, at 231-232.

90. *Id.*, at 227-231 (discussing various rabbinic views).

91. Those who are not health care practitioners need no special protection because secular law does not require them to use such technologies.

92. See *The Boys from Brazil (film)*, WIKIPEDIA, at [http://en.wikipedia.org/wiki/The_Boys_from_Brazil_\(film\)](http://en.wikipedia.org/wiki/The_Boys_from_Brazil_(film)).

93. This could occur when the surrogate’s own ovum was used.

94. This could occur when an already fertilized egg was implanted in the surrogate.

This paper is not the place to identify all of these possibilities and to assess the plusses and minuses of the various procedures. It is, however, possible that even where a procedure is not technically forbidden by Jewish law, a particular religious Jew may have a sincere “religious” belief that the practice is wrong. To the extent that this is so, the public policy need arises to protect healthcare providers against discrimination based on their refusal to assist in these measures.