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FAMILY VALUES IN THE JEWISH TRADITION

*J. David Bleich*¹

I. HUMAN LAW AND DIVINE LAW

The nature and purpose of human legal systems is to enshrine values in rules, thereby making conformity with those values mandatory at least to the extent commanded by law. By virtue of law's emphasis upon precise delineation of *nomoi*, the underlying and, indeed, antecedent values are only infrequently explicitly declared. Nevertheless, the values reflected in such law, if not immediately discernible, can be gleaned from legislative history, signing statements, and extra-legal pronouncements of legislators.

Divinely revealed law is of an entirely different nature. One may speculate as to the rationale reflected in a statute, but absent dogmatic revelation, certainty is unobtainable. That is all the more so because it may well be the case that no single rationale is exhaustive as well as because human intellect is far too limited to apprehend the totality of divine purpose.

Divine law differs from human law in one fundamental aspect. Human legislators begin with goals, principles, and values accepted by their society and seek to promulgate legislation that will promote such ends. Indeed ethics, morality, and values precede and, in an important sense, are the authors of the law. The ethical system, whatever its basis may be, is the mother of the law.

Judaism is a religion of law. Judaism accepts the premise that not only was the Sinaitic Code revealed by the Deity but also that its value system is the product of revelation. That is not to say that ethics and law are coextensive. To a significant extent divine ethics are not codified in law. Nevertheless, the underlying value system may often be deduced from the law itself. Since the

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existence of an independently valid value system cannot be presumed, values not grounded in revelation occupy a position comparable to aesthetic preferences.

II. FAMILY VALUES

The notion of family values is a case in point. A Norman Rockwell depiction of a family arouses universal approbation. But what are those values and from which provisions of the Sinaitic Code can they be gleaned? Promotion of values identifiably reflected in a legal corpus and the projections of those values in areas not expressly governed by legislation constitutes furtherance of divine values; promotion of values not identifiably related to provisions of the Sinaitic Code is the promotion of human preference.

A value is commonly regarded as a *bonum per se*, but some principles that are regarded as values may be instrumental values rather than intrinsic ones; i.e., values not espoused for what they represent in and of themselves, but accepted as means to achieving an end. For example, is obedience to law an intrinsic value or is it a value because it is the necessary condition of a well-ordered, civilized society? This same question can be asked with regard to what we generally refer to as “family values.” Which of those values are values in themselves and which are accepted as values because they serve to promote other, more fundamental values?

The family, both as a social unit and as a legal institution, serves to provide a unique type of comfort, companionship, and stability that is otherwise not readily available. The family also facilitates, limits, and promotes both conjugality and procreation. It also serves to constrain consanguineous liaisons.

Determination of which of those values is/are primary and which is/are ancillary will have a significant effect upon legal provisions governing artificial insemination, assisted procreation, homosexuality, surrogate motherhood, etc. In analyzing family values from a Jewish law perspective it is necessary first to examine Jewish law as applied to issues regarding which the concept of a family is germane and then to extrapolate the matrix of family values that inform those *nomoi*.

“To be or not to be”—that is the quintessential question. The unequivocal answer of Jewish tradition was announced by the prophet Isaiah long before Shakespeare formulated the question. The Gemara, *Pesahim* 88b, declares, “For indeed the universe was created solely for procreation, as it is said ‘He

created it not a waste. He formed it to be inhabited” (Isaiah 45:18).² The divine scheme provides for natural increase in the population of the world because the telos of creation cannot be fulfilled other than through God’s creatures. Moreover, talmudic sources indicate that the coming of the Messiah and the redemption of mankind will not occur until the full complement of human souls brought into existence at the beginning of creation becomes incarnated and the created world has been fully populated in accordance with the divine plan.³ Failure to procreate is seen not merely as a violation of divine law but as an impediment to the coming of the Messiah. Accordingly, the Gemara, *Niddah* 13b, teaches that the redemption will not occur until there remain no unborn souls; i.e., until all potential human life becomes actual.

Concomitantly, belief in divine providence leads to the assumption that earth’s natural resources, coupled with innovative human technology, can support the world population. From this perspective, the problem which humanity is morally bound to address itself is not the problem of overpopulation but the problem of maldistribution of resources. The oft-quoted rabbinic aphorism, “He who gives life gives sustenance,” based upon a statement of the Gemara, *Ta’anit* 8b, is an affirmation of faith in the divine commitment to the human race. He who bestows the gift of life undertakes to provide the necessities of existence.

While the Talmud advises abstinence during periods of famine, this counsel is not designed primarily as a means of containing population growth but is predicated upon the unseemliness of engaging in acts of physical gratification at a time when the populace is in distress. Indeed, specific exception is made for the night of the wife’s ritual immersion following her monthly menstrual period, a time regarded by the Sages of the Talmud as most likely to lead to conception.

The question of whether or not non-Jews as well as Jews are bound by the commandment to “be fruitful and multiply” (Genesis 1:28) or by the more general injunction to “inhabit” the world as recorded by the prophet Isaiah is a subject of controversy among rabbinic authorities. Procreation is not enumerated among the seven commandments of the Noachide Code, which Judaism views as binding upon non-Jews. Nevertheless, a leading eighth-century authority, Rav Hai Gaon,⁴ affirms the universal applicability of this

²All talmudic references are to the Babylonian Talmud. Translations of Hebrew and Aramaic sources are those of the author.

³See, for example, *Yevamot* 62a.

⁴*She’iltot de-Rav Hai Ga’on* (Jerusalem, 1961), *she’ilta* 165.

commandment. This is also the view of the thirteenth-century provençal talmudic scholar, R. Menachem ben Solomon ha-Me'iri,⁵ and of some of the medieval French Tosafists⁶ as well.⁷ In modern times, this position was endorsed by R. Naftali Berlin, nineteenth-century head of the famed rabbinical academy of Volozhin.⁸

R. Yechiel Michel Epstein, *Arukh ha-Shulhan*, a frequently consulted nineteenth-century compendium of Jewish law, *Even ha-Ezer* 1:5, expresses a more nuanced position. According to this source, insofar as non-Jews are concerned, the commandment concerning procreation does not constitute a personal obligation but is directed to mankind in general. The human species, rather than each individual being, is bidden to “be fruitful and multiply.” According to this latter view, population expansion for non-Jews is in the nature of a theological desideratum rather than an obligation binding upon the individual. It is of more than cursory interest that this position is virtually identical with the view concerning procreation formulated by the prominent Catholic philosopher and theologian, Thomas Aquinas. To be sure, Aquinas’ exposition of this view is based upon natural law doctrine rather than upon rabbinic sources. It is, nevertheless, one of many instances in which Catholic teaching differs from Jewish teaching as the latter pertains to members of the Jewish faith but is in conformity with Jewish tradition regarding the obligations of non-Jews who are bound by the provisions of the Noachide Code. It may well be argued that these similarities reflect the persistence of a “Noachide tradition” among adherents of Christianity long after the origin of that tradition was forgotten.

Scripture does not disclose the motive of the Deity in commanding that the universe be populated. Nor, for that matter, does it reveal God’s reason for creating the universe. Anthropomorphic projection from the human to the Divine is speculative at best. Nevertheless, parallels drawn from human experience serve, at least on a rudimentary level, to slake the thirst for understanding that is endemic to the human psyche.

In *Hales v. Petit*, a classic sixteenth-century case in which the interest of the state in prevention of suicide was first articulated, Justice Dyer wrote that suicide is an offense “against the king in that hereby he has lost a subject, and

⁵*Bet ha-Behirah*, Yevamot 62a. See, however, *Bet ha-Behirah*, Sanhedrin 59b.

⁶*Hagigah* 2b, s.v. *lo tohu*; cf., *Mishneh le-Melekh*, *Hilkhot Melakhim* 10:7. Cf. also, *Tosafot*, *Sanhedrin* 59b, s.v. *ve-ha*; *Yevamot* 22a, s.v. *bnei* and 62a, s.v. *bnei piryah ve-reivyah*.

⁷See also Rashi, *Yevamot* 62a, s.v. *bnei Noah*.

⁸*Ha’amek She’elah*, Commentary on *She’iltot de-Rav Hai Ga’on* 165:2.

... he being the head has lost one of his mystical members.”⁹ Suicide may be prevented—and punished—by the king because it constitutes interference with his rights as monarch. In human terms, honor and glory are often found in sheer magnitude. Royal majesty is perceived as a correlate of the number of subjects over whom the monarch reigns. The more citizens in his domain, the greater the king. Thus, to deprive the king of a subject is to diminish his grandeur; to willfully cause the death of a subject of the king is to be guilty of *lèse majesté*.

Anthropomorphic analogies, by very their nature, can never be completely accurate. Although, this too, is a mystery beyond our ken, God is the supreme king, whose dominion extends over all of mankind. The more numerous the populace, the greater is his grandeur. The loss of even a single life represents a diminution of his kingship. One of the most solemn prayers in the Jewish liturgy is the *Kaddish*, the mourner’s prayer. Although recited as memorialization of a loved one, the *Kaddish* contains no reference to the deceased, no hint of reward or punishment, no mention of everlasting life, and no prayer for the repose of the soul of the departed. Its opening phrase, “May His great Name be magnified and sanctified,” sets the tenor of the entire prayer as a paean celebrating ultimate universal acceptance of divine sovereignty. A twentieth-century rabbinic personality, Rabbi Meir Shapiro of Lublin, explained that the loss of even a single human life represents a diminution of divine sovereignty and hence evokes a prayer expressing the supplicant’s yearning for the restoration and enhancement of God’s glory.¹⁰

It is difficult enough for us to comprehend any sense in which mere human existence serves to enhance the glory of the Deity. In anthropomorphic terms, we can readily understand that a monarch’s power and glory, both real and perceived, are directly commensurate with the number of able-bodied, healthy, productive subjects over whom he rules. But incremental numbers of aged, nonproductive, ailing subjects hardly enhance royal power or grandeur. Nevertheless, to the extent that the mind can fathom the mystery of human existence, mankind must be perceived as constituting a vast orchestra engaged in a continuous performance in praise of the Creator. In an orchestra, each musician has an assigned role, and those assigned identical or similar roles are arranged in groups. There are separate sections for musicians playing wind, string, and percussion instruments. Not all the musicians and not all sections play at once. Effective rendition of the musical arrangement requires that, at times, some of the musicians remain silent. Yet even when

⁹ Hales v. Petit, (1562) 75 Eng. Rep. 370, 400 (Q.B.).

¹⁰ *Be-Mishnah be-Omer u-be-Ma’as* (Bnei Brak, 1967), ed. Aaron Soraski, II, 122.

not actually engaged in playing his or her instrument, every member remains seated with the orchestra and contributes to the visual magnificence of the performance. Similarly, each and every individual has an assigned role in the divine orchestration of mankind. Not every member is called upon to extol the Deity by fulfilling his assigned role continuously. Some, by virtue of their physical condition, may be quiescent; they are silent members of an orchestra that is nevertheless more majestic by virtue of their presence. Even though an individual in a precarious physical condition may not have the capacity to serve God in an active sense; nevertheless, his very existence constitutes an act of divine service.

Scripture commands not simply procreation of the species but procreation within the context of a family. Scripture informs us, "Therefore shall a man leave his father and his mother and cleave unto his wife and they shall be one flesh" (Genesis 2:24). The meaning of the term "one flesh" is not immediately obvious. It might well be understood in a figurative manner as referring to the coital union of male and female. Rashi, the classical eleventh-century biblical exegete, understands the term as a quite literal reference to a "single flesh"; that is, the child born of the union of man and wife. Thus he comments, "The child is created by both and [in the child] their flesh becomes one."

The scriptural reference in question is not to the simple mating of male and female for purposes of conception. That could readily be accomplished without either party leaving his or her parental domicile. "Therefore shall a man leave his father and his mother" depicts a man's permanent abandonment of the parental abode in anticipation of establishing a new marital domicile with the wife to whom he cleaves. The reference to family is quite obvious. Not only is there a reference to establishment of a new family for the purpose of conceiving and nurturing a child, but there is a concomitant reference to leaving father and mother; i.e., the parental *res* in which the presence of the son signifies the existence of a family unity.

Thus, Scripture explicitly portrays propagation of the species as the telos of, and hence the value reflected in, the family as an institution. But by demanding that procreation take place within a family context Scripture implies that there are ancillary values that can be promoted only by means of establishing a family unit but does not explicitly spell out what those values might be. Indeed, such specification would be superfluous; once informed that procreation is a divine command, and certainly when also informed that it should take place within the marital relationship, the human intellect is quite capable of recognizing the myriad benefits that a child will find only within a stable, nurturing family environment.

At least one of those values is reflected in the codes as a matter of law. As provided by the Gemara, *Ketubot* 64a, a woman who has not succeeded in bearing children is entitled to demand a divorce on the plea that she requires “a staff for her hand and a spade for a grave.” The wife’s contention is that childlessness may be the result of her husband’s infertility and that she ought not to be deprived on that account of the opportunity for normal family life. The identified consideration is that if her husband predeceases her she will be left destitute in her widowhood, whereas biological children would provide for their aged mother and accord her remains a dignified burial. Assurance that such needs will be met is forthcoming only within the context of a stable family relationship. The family not only serves to provide for its aged members in a dignified manner but also assures that such individuals do not become a burden on society. In antiquity those concerns were serious in nature; they remain cogent even in the age of the modern welfare state.

As an imperative, the commandment to “be fruitful and multiply” is limited to procreation by natural means. The command, addressed to the male of the species, certainly cannot serve as a directive commanding him to have children. Scripture can command only that which is within the natural capacity of man. Thus, Maimonides, in his codification of the commandment regarding propagation of the species, *Hilkhot Ishut* 15:1, defines the biblical commandment as requiring marital intercourse at regular intervals and as making such cohabitation mandatory until crowned with success in the birth of progeny. The divine archetype provides for population of the universe by means of the sexual union of male and female within a familial framework. Although such an understanding of the nature of the divine plan is derived from provisions of the Oral Law, it is apparent, at least by way of allusion, in the words of Scripture as well: “Therefore shall man leave his mother and his father and cleave to his wife whom he has taken and they shall become one flesh” (Genesis 2:24). As previously noted, the phrase “one flesh” connotes the child born of the union; the phrase “his wife whom he has taken” encapsulates the later admonition “When a man takes a woman” (Deuteronomy 24:1) in which “taking,” according to rabbinic exegesis, denotes matrimony. However, the verb *ve-davak*, translated as “and he shall cleave,” seems to constitute but a literary flourish that does not contribute to a fuller understanding of the passage. Jewish tradition teaches that every word of the Pentateuch is designed to connote a matter of significance.

R. Moses Sofer, who during the early half of the nineteenth century served as chief rabbi of Bratislava—then known as Pressburg—offered a comment that may be borrowed in illuminating this phrase. In one of his responsa, *Teshuvot Hatam Sofer, Orach Hayyim* (Pressburg, 1756), no. 54, Rabbi Sofer

offers an etymological insight into the derivation of the Hebrew term *ervah*, which denotes both sexual organs and a forbidden consort. *Hatam Sofer* opines that the root of the word is a verb connoting *dilbuk basar*, or “cleaving of the flesh.” If that understanding is applied to Genesis 24:1, the phrase and *ve-davak be-ishto*—“and he shall cleave to his wife”—acquires the explicit meaning of a sexual act. Understood in this manner, the verse describes the purpose of the marital relationship not simply as procreation but as procreation by means of the sexual union of man and wife.

Thus the primary value of marriage is natural procreation. That, however, is not necessarily the sole value reflected in the institution of marriage. Prevention of promiscuity and promotion of life-long companionship are but the most obvious of such values and are attendant even upon non-fertile relationships. Assisted procreation in which conception is achieved other than by means of sexual union, so long as it involves no infraction of other commandments or moral principles, is estimable. The primary value, however, remains procreation by means of the marital union of husband and wife.

Since the primary purpose of the family is propagation of the species, it is quite understandable that Jewish law discourages, and, in many circumstances actually proscribes, knowingly embarking upon a marital relationship doomed to be infertile. Divine purpose in commanding any area of human conduct remains a mystery. Nevertheless, science has discovered that offspring of incestuous relationships often suffer serious anomalies. It may well be the case that consanguineous relationships are banned not simply because of genetic considerations likely to result in serious physical and mental congenital defects but also because, as science has demonstrated, an inordinate percentage of such unions prove to be infertile.

That concern serves to explain a host of other provisions of Jewish law, most obviously the prohibitions against onanism and mutilation of organs of reproduction. Leviticus 18:6–19 presents a list of forbidden sexual partners. In each case the prohibition is couched in the term “the sexual organ of [*ervat*: euphemistically rendered in standard translations as ‘nakedness’] ... shall you not uncover.” The very next verse, Leviticus 18:20, contains the prohibition against adultery which literally translated reads: “And you shall not give your semen to your neighbor’s wife for seed for defilement in her.” In his *Commentary on the Bible, ad locum*, Nahmanides, a thirteenth-century commentator and exegete, points to the variance in nomenclature. In describing incest, Scripture dwells upon the carnal act itself. Jurists are aware that, in virtually all systems of law, the sexual act, whether in the context of rape, incest, or the consummation of marriage, is defined as penetration rather

than ejaculation. That is true in Jewish law as well and remains true even with regard to the prohibition against adultery. But, surprisingly, the language employed in Leviticus 18:20 (which is mistranslated in the standard English translations of the Bible) in the formulation of the prohibition against adultery speaks specifically of the deposit of semen in the genital tract of a married woman.

Nahmanides recognizes that Scripture is silent with regard to the rationale underlying prohibitions against incest. However, in shifting emphasis from the sexual act, halakhically defined as penetration, to deposit of semen, contends Nahmanides, Scripture is spelling out the rationale underlying the prohibition, a consideration not germane with regard to other forbidden unions. Adultery is forbidden, not because it results in infertility or even in congenital defects, but because it results in precisely the opposite: the semen is given “for seed” and it is such pregnancy that must be prevented. The reason, asserts Nahmanides, is that if a woman commits adultery it becomes impossible to determine paternal identity. A woman who has multiple sexual partners will perforce not be able to ascertain the father of her child with certainty. In turn, inability to determine paternal identity is likely to lead to inadvertent contracting of consanguineous relationships. The prohibition against adultery is founded upon a concern that paternal identity be certain and unambiguous, lest progeny unknowingly find themselves engaged in incestuous relationships. Thus, obviation of consanguineous relationships is established as a value inherent in a monogamous family relationship.

Recognition of the preservation of the family unit and proscription of sexual relationships outside of marriage as reflective of the value inherent in the concern for the acknowledgement of paternal identity has profound implications in determination of the stance of Jewish tradition *vis-à-vis* a host of contemporary issues. A.I.D. (artificial insemination utilizing donor semen) is a striking example of such an issue.

III. ARTIFICIAL INSEMINATION

According to some latter-day rabbinic authorities, the deposit of the semen of a male other than the husband in the genital tract of a married woman; i.e., artificial insemination with the semen of a donor, constitutes adultery pure and simple;¹¹ others maintain that, absent a sexual act, there can be no

¹¹See, for example, R. Meshulam Horowitz, *Teshuvot Bar Leva'i*, II (Lvov, 1872), no. 1; R. Alter Yechiel Nebenzahl, *Teshuvot Minhag Yehi'el* (Bilgoraj, 1939), no. 7, cited in *Ozar ha-Poskim, Even ha-Ezer*, I (Jerusalem, 1947), 1:42; R. Judah Leib Zirelson,

culpable infraction.¹² But even those authorities would agree that artificial insemination with the semen of a donor infringes upon the spirit of the law and hence, *de minimis*, is to be regarded as a form of quasi-adultery¹³ or prostitution.¹⁴ 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.

It is recognized by all rabbinic authorities that there are no religious or ethical grounds that augur in favor of encouraging the practice of artificial insemination utilizing donor semen. The most usual reason for employment of A.I.D. is infertility of the husband and his consequent inability to impregnate his wife. Jewish law recognizes no relationship whatsoever between the husband of a woman so impregnated and the child born as a result of A.I.D. Quite obviously, a husband incapable of siring a child cannot fulfill the commandment to “be fruitful and multiply.” The husband fulfills no *mizvah* when his wife gives birth as a result of A.I.D. Nor is there a religious imperative that would require the wife to become pregnant by artificial means, since Jewish law does not consider women to be *bound* by the commandment to “be fruitful and multiply.” Thus the only significant considerations prompting use of artificial insemination are those of personal desire and preference.

The crucial question, then, is whether or not artificial insemination constitutes an act of adultery. While both the donor and the physician may be guilty of an odious offense, it is only the woman who may conceivably be deemed guilty of adultery. The questions of the legitimacy of the child and the permissibility of continued conjugal relations go hand in hand with the question of adultery. If the act of insemination is not adjudged to be an act of adultery there is no reason for the child to be considered illegitimate; if the act *is* an act of adultery, it follows that the child must be considered a *mamzer*

Ma'arkhei Lev (Kishenov, 1932), no. 23; R. Abraham Luria, *Ha-Posek*, Heshvan-Kislev 1950; R. Ovadiah Hadaya, “Hazra’ah Melakhutit,” *No’am*, I (1958), 130–137; and R. Eliyahu Meir Bloch, *Ha-Pardes*, Sivan 1953, pp.1–3.

¹²See, for example, R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer*, I (New York, 1961), no. 10; R. Ben Zion Uziel, *Mishpetei Uzi’el* (Tel Aviv, 1938), *Even ha-Ezer*, no. 19; R. Joseph Saul Nathanson, *Teshuvot Sho’el u-Meshiv, Mahadurah Telita’ah* (Lvov, 1976), no. 132; R. Shalom Mordechai Schwadron, *Teshuvot Maharsham*, III (Jerusalem, 1902), no. 268; R. Joshua Baumol, *Teshuvot Emek Halakhah* (New York, 1934), no. 68; and R. Aaron Walkin, *Teshuvot Zekan Aharon*, II (New York, 1958), *Even ha-Ezer*, no. 97.

¹³See R. Eliezer Waldenberg, *Ziz Eli’ezer*, IX (Jerusalem, 1965), no. 51, sec. 4.

¹⁴See R. Yosef Eliyahu Henkin, *Ha-Ma’or*, Tishrei-Heshvan 1965, pp. 9–11, reprinted in *idem*, *Kol Kitvei ha-Grya Henkin* (New York, 1986), II, 100–101.

(bastard). However, even if insemination is not equated with adultery and the child is not considered to be illegitimate, the act may be forbidden for other reasons.

It is important to recognize that these problems are separable into categories: (1) the permissibility of the procedure itself; (2) *post-factum* questions which arise with regard to paternity, consanguinity, rights of inheritance, fulfillment of the commandment with regard to procreation insofar as the donor is concerned, etc. The latter do not affect the permissibility of the procedure *per se*; they simply pose questions which must be resolved when A.I.D., whether permissible or not, has occurred. Bearing this distinction in mind, it is readily apparent that the discussion that appears in the Talmud, *Haggigah* 14b, offers little illumination with regard to the permissibility of this procedure. A query was addressed to Ben Zoma with regard to whether or not a High Priest may marry a pregnant virgin. That discussion clearly indicates that at least the theoretical possibility of conception *sine concubito* was recognized by the Sages of the Talmud. The Gemara accepts the possibility that pregnancy might have occurred in a “bathhouse” other than by means of sexual intercourse; i.e., the woman may have been impregnated in the course of bathing in water in which the male had previously ejaculated. However, the question under consideration was not the permissibility of the procedure itself, but the status of the mother *post factum*.

The possibility of conception without actual intercourse is also evident in one midrashic version of the birth of Ben Sira, whose maxims are recorded in the Apocrypha. According to the *Alfa Beta de-Ben Sira*, Ben Sira was the son of the daughter of Jeremiah. The father was Jeremiah himself. Jeremiah did not commit incest but was compelled to emit semen into the waters of a bath. His daughter subsequently visited the same bathhouse, used the same bathwater, and became pregnant.

Contemporary rabbinic authorities diverge with regard to whether or not A.I.D. does, in fact, constitute an act of adultery. Many argue that adultery, by virtue of its very nature, requires a sexual act. In the absence of actual sexual contact with another man, the wife is not forbidden to continue to engage in marital relations with her husband and the child born of such insemination is not illegitimate.¹⁵ Others disagree and view the receiving of

¹⁵See R. Shalom Mordechai Schwadron, *Teshuvot Maharsham*, III, no. 268; R. Aaron Walkin, *Teshuvot Zekan Aharon*, II, no. 97; *Teshuvot Emek Halakhah*, no. 68; R. Ben-Zion Uziel, *Mishpetei Uzi'el, Even ha-Ezer*, I, no. 19; R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer*, I, no. 10; and R. Eliyahu Meir Bloch, *Ha-Pardes*, Sivan 1953.

another man's semen in the genital tract as an adulterous act.¹⁶ As earlier noted, the prohibition against adultery contained in Leviticus 18:20 reads literally, "and to the wife of your fellow you shall not give your semen for seed for defilement." Such phraseology is not employed in the admonitions concerning the various incestuous relations. Hence, they argue, violation of the prohibition against incest is predicated upon a sexual act while adultery is not. Those authorities who do not regard A.I.D. as adultery nevertheless view it as a repugnant violation of the marital relationship which entitles the husband to divorce his wife without being obliged to satisfy the financial obligations specified in the marriage contract.

Even those authorities who do not consider the act of insemination to be an act of adultery find that the circumstances usually attendant upon artificial insemination are grounds for banning A.I.D. Accepted medical procedure requires that the identity of the donor not be disclosed. Concealment of paternal identity is unconscionable according to Jewish law. Halakhah requires a three-month waiting period following divorce or the death of a husband before remarriage is permitted. The Talmud, *Yevamot* 42a, predicates this requirement upon the biblical verse "to be a God unto you and unto your seed after you" (Genesis 17:7). Rashi explains that the divine presence rests only upon those whose genealogy is clearly known. Moreover, the Talmud declares, there is concern lest the child marry a paternal sibling or that, by virtue of mistaken paternity, complications may arise with regard to levirate marriage and *halizah* (the ceremony of "removing the shoe" which abrogates the obligation with regard to levirate marriage). The Talmud also forbids a man to have wives in different cities for precisely the same reasons. Such a practice leads to the possibility that natural brothers and sisters, unaware of a blood relationship, may marry one another.

As A.I.D. is customarily practiced in the United States, the donor is assured of anonymity and, in general, there is no way that the child can discover the identity of his or her father. In surrogate mother arrangements, sealing the records, if permitted, would have the same result. Accordingly, suppression of paternal identity is one of the considerations that led rabbinic decisors to ban A.I.D. Later authorities point out that premarital sexual liaisons carry the same danger of suppression of paternal identity and assert that such was the rationale underlying the prohibition against such activity, as well as the prohibition banning prostitution.

¹⁶See R. Yehuda Leib Zirelson, *Teshuvot Ma'arkhei Lev*, no. 73, and R. Ovadiah Hadaya, *No'am*, I (1958), 130–137. See also R. Eliezer Waldenberg, *Ziz Eli'ezer*, IX, no. 51, sec. 4.

A twentieth-century authority, R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, I, no. 162, and *Even ha-Ezer*, I, no. 7, voices a similar concern in decrying sealed adoptions.¹⁷ At least until recent years, adoption agencies and the American legal system joined forces in an attempt to prevent an adopted child from ever learning the identity of his or her natural parents. It would appear that *Iggerot Mosheh* regards any attempt to suppress parental identity not only as antithetical to Jewish values but also as a violation of a biblical commandment. Although polygamy is biblically permissible, the Gemara, *Yevamot* 37b, declares that a man may not maintain a wife in every port; i.e., he may not maintain multiple families and households whose members do not know of one another's existence. The concern is that, with the passage of time, children of the various households may grow to maturity and contract a marriage without realizing that they share a common father. In prohibiting such arrangements, the Gemara adduces the verse "lest the earth be filled with licentiousness" (Leviticus 19:29) as the consideration upon which the ban is predicated. *Iggerot Mosheh* apparently asserts that the prohibition is not merely rabbinic in nature and simply reflective of the concern expressed in the cited scriptural passage; rather, the ban represents the instantiation of an actual biblical prohibition.¹⁸ According to *Iggerot Mosheh*, any act carrying with it the potential for suppression of a family relationship that may possibly lead to a future consanguineous relationship is biblically proscribed. As such, suppression of the identity of natural parents in adoption proceedings, anonymous sperm donations, and surrogate relationships in which the identity of the mother is not disclosed are equally forbidden as a violation of "lest the earth be filled with licentiousness" (Leviticus 19:29).

Thus it follows that artificial insemination, even if it does not constitute a technical halakhic violation,¹⁹ is contrary to the spirit of the law. Following Ramban's own explication of the biblical command "You shall be holy" (Leviticus 19:2) as an admonition not to be "a degenerate within the bounds of biblical license,"²⁰ A.I.D., even if it does not constitute actual adultery,

¹⁷See also R. Shlomoh Goren, *Ha-Zofeh*, 7 Adar I, 1984.

¹⁸Cf., however, *Bet Shmu'el*, *Even ha-Ezer* 13:1, who asserts that the ban against remarriage of a woman within three months of divorce or death of her husband, predicated upon the same consideration, is rabbinic.

¹⁹*Teshuvot Ma'arkhei Lev*, no. 73, understands the comments of Nahmanides quite literally in declaring not only that A.I.D. counts as adultery but that the physician performing the insemination, in effect, acts as an agent of the donor in committing adultery.

²⁰See Nahmanides, *Commentary on the Bible*, Leviticus 19:20.

must be regarded as quasi-adulterous in nature and hence a prohibited form of procreation.²¹

Rabbi Yosef Eliyahu Henkin asserts that the act of insemination is prohibited on other grounds.²² The admonition “be fruitful and multiply” occurs twice. In its first occurrence (Genesis 1:28) it is addressed to Adam; the second time (Genesis 9:7) it is addressed to Noah and his sons upon their emergence from the ark. The repetition to Noah, opines Rabbi Henkin, is for the purpose of establishing a limitation upon the parameters of procreation. Addressing Noah, God tells him, “Go forth from the ark, you and your wife and your sons and your sons’ wives with you” (Genesis 8:16). That passage underscores the fact that Noah and his sons each emerged from the ark with his wife, i.e., that the inhabitants of the ark emerged as members of family units. It was in that context; i.e., as members of distinct and identifiable families, that Noah and his sons were commanded to “be fruitful and multiply.”

Accordingly, procreation, declares Rabbi Henkin, is designed to take place only within the family unit in a manner such that genealogy of offspring is known in a determinate manner. Promiscuous relationships are to be eschewed because of the resultant ambiguity regarding parental identity. Artificial insemination with the semen of an anonymous donor similarly renders identification of the father virtually impossible. That consideration, declares Rabbi Henkin, serves to render A.I.D. impermissible for married and unmarried women alike.

Rabbi Henkin similarly points to the terminology employed in the prohibitions “*lo tiheyeh kedeshah*” and “*lo yiheyeh kadesh*” (Deuteronomy 23:18). Those passages are read literally as prohibiting both female and male prostitution. Some rabbinic scholars, including the author of the Aramaic translation of the Pentateuch composed during the Tannaitic period, *Targum Onkelos, ad locum*, interpret the verse as prohibiting sexual liaisons between a slave and a freeman or freewoman.²³ Rabbi Henkin notes that, unlike the terminology employed in the various prohibitions against incestuous unions, there is no direct reference in these passages to the sexual act *per se*. Accordingly, asserts Rabbi Henkin, it must be concluded that the primary

²¹See Ziz Eliezer, IX, 51, sec. 4. Cf., R. Moshe Feinstein, *Iggerot Mosheh, Even ha-Ezer*, II (New York, 1964), no. 11.

²²See R. Yosef Eliyahu Henkin, *Ha-Ma'or*, Tishrei-Heshvan 1965, pp. 9–11, reprinted in *idem*, *Kol Kitvei ha-Grya Henkin* (New York, 1986), II, 100–101.

²³Maimonides, *Sefer ha-Mizvot*, *mizvot lo ta'aseh*, no. 350, understands *lo yiheyeh kadesh* as a reiteration of the prohibition against homosexual acts.

concern is not the sexual act itself but rather the concern is with regard to promiscuity and the resultant absence of halakhically identifiable paternal-filial relationships. Any act, including artificial insemination, argues Rabbi Henkin, that leads to the birth of a child whose father cannot be identified must be abjured as the moral equivalent of prostitution.

A closely related issue is the question of the existence of a halakhically recognized paternal-filial relationship between the semen donor and the child born of artificial insemination. A host of halakhic matters hinge upon recognition or non-recognition of a paternal-filial relationship, including, but not limited to, inheritance; mourning; exemption of the donor's wife, in the absence of other issue, from levirate marriage; priestly and levitical status; and, most ominous of all, consanguinity. Nor should the question of obligations a father owes a child, including the obligation of financial support, be overlooked.

A very brief comment of a thirteenth-century rabbinic scholar, R. Peretz of Corbeil, in his work *Hagahot Semak* (Jerusalem, 2005), cited by *Bah, Yoreh De'ah* 195, *Taz, Yoreh De'ah* 195:5, and *Bet Shmu'el, Even ha-Ezer* 1:10, serves as the primary source for resolution of this question. To be sure, *Hagahot Semak* does not directly address the issue of paternal relationship, but his stance with regard to that question is abundantly clear. *Hagahot Semak* cautions that a woman should not recline upon bed sheets used earlier by a male other than her husband. The concern is expressed in terms of fear that, with the passage of time, "a brother may marry his sister." The concern to which he gives expression is that of a possible consanguineous marriage between a brother and a sister or, to be more precise, between a half-brother and a half-sister. The fear is that a child born *sine concubito* will not know the identity of his or her biological father and hence will be ignorant of a biological relationship with any half-siblings who may exist; i.e., any other children sired by the same man. But, it must be remembered, a fraternal relationship is really epiphenomenal; a fraternal relationship, by definition, is the relationship that exists between two persons who enjoy a common filial relationship with a single father or mother. Thus, if no halakhically recognized relationship exists between a male who produces semen and the child born as a result of insemination of the ejaculate, a child conceived in that manner could not have halakhically recognized paternal siblings and hence there could be no fear that the child might marry a paternal sister or brother. From the fact that *Hagahot Semak* regards such a concern as cogent it must necessarily be deduced that he espouses the view that a paternal-filial relationship arises *sine concubito*. Thus, according to *Hagahot Semak*, although the male who ejaculates in bath water or on bedclothes, or who becomes a sperm donor and

thereby causes a married woman to conceive, has not committed adultery and, despite the fact that the child is not regarded as the bastard issue of an adulterous union, the male is nevertheless regarded as the father of the child.²⁴

Nevertheless, one of the classical commentators on *Even ha-Ezer*, *Helkat Mehokek* 1:8, expresses doubt with regard to whether or not a paternal-filial relationship exists in such instances. Moreover, there is some dispute regarding the actual position of *Hagahot Semak*. The primary expositor of the view denying the existence of a paternal relationship is R. Chaim Joseph David Azulai, *Birkei Yosef* (Livorno, 1774), *Even ha-Ezer* 1:14(25). *Birkei Yosef* cites a variant manuscript reading of the text of *Hagahot Semak*. According to that reading, *Hagahot Semak* cites the concern regarding prevention of a future consanguineous marriage in the context of the ban against the remarriage of a widow or divorcee within three months of the termination of her earlier marriage. That prohibition is expressly predicated upon a concern for certainty in establishing paternal identity and, according to *Birkei Yosef*, is cited solely by way of example or analogy.

According to *Birkei Yosef*, if a child is conceived *sine concubito*, the biological father is not recognized as the halakhic father and *Hagahot Semak* merely expresses the view that the Sages of the Talmud would have decried any act that leaves a child bereft of a halakhically recognized father, just as they legislated against relationships that might give rise to ambiguous paternity.

IV. HOMOSEXUALITY

The Bible specifically prohibits homosexual acts between males and, of all sexual perversions, singles out homosexual activity as an act of *to'evah*—an abomination: “You shall not lie with a man as one lies with a woman; it is an abomination” (Leviticus 18:22). Homosexual acts are among those forms of sexual licentiousness that constitute a cardinal sin for which a Jew must sacrifice his life rather than transgress. Lesbianism is included in the biblical admonition²⁵ against participation in deviant sexual practices associated with the Egyptians and Canaanites of antiquity (Leviticus 18:3), but is not a capital offense. The ultimate crime of the city of Sodom and the transgression upon which its fate was sealed was the attempted homosexual rape of the two

²⁴ See *Bet Shmu'el*, *Even ha-Ezer* 1:6.

²⁵ See *Sifra* 9:8; R. Moshe Trani, *Kiryat Sefer* (Venice, 1551), *Hilkhot Issurei Bi'ah*, chap. 21. See also R. Shlomo Ganzfried, *Kizur Shulhan Arukh* (Leipzig, 1924), *Even ha-Ezer* 20:2.

strangers who, unknown to the townspeople, were angels of God. The entire population of the city surrounded the home of Lot and demanded that he surrender his guests to them “that we may know them” (Genesis 19:5). The verb *to know* is the biblical euphemism for the sexual act. This narrative is the basis for the introduction of the term *sodomy* into the English language as a synonym for male homosexual acts.

Biblical commandments and proscriptions are endowed with eternal validity by virtue of their status as the revealed will of God. It is perhaps for that reason that Scripture seldom reveals the rationale underlying a commandment. Nevertheless, man is permitted, and even encouraged, to endeavor to comprehend, insofar as he is capable, the elements of divine wisdom reflected in God’s commandments. Accordingly, Jewish scholars, over the course of millennia, have endeavored to formulate the values and goals reflected in the various *mizvot*, but always with a clear awareness that, since man cannot plumb the depths of divine wisdom, any humanly perceived rationale cannot be exhaustive in nature. Hence, any such explanation, while enabling us to acquire a philosophical perspective with regard to observance of specific commandments, has no bearing upon the formulation of Jewish law. Reasons offered for understanding the purpose of *mizvot* can in no way modify the halakhah governing actual practice.

The term *to’evah* (lit.: “abomination”) is rendered by talmudic exegesis, *Nedarim* 51a, as “*to’eh attah bah*—you go astray by virtue of it.” The precise nature of “going astray” by virtue of homosexuality is the subject of varying interpretations. The author of the thirteenth-century *Sefer ha-Hinnukh* explains that man is charged with populating the universe. Through procreation man assists in fulfillment of the divine plan of creation. Homosexual activity frustrates fulfillment of this goal.

Tosafot and *Rosh*, in their respective commentaries on *Nedarim* 51a, indicate that the homosexual goes astray in the sense that he abandons his family. According to this interpretation, the abomination associated with such conduct lies in the destruction of the family unit. The homosexual cannot lead a normal family life. Parenthetically, homosexuality was prevalent in ancient civilizations and that fact was well known to the Sages of the Talmud. However, the Talmud, in enumerating the relatively few meritorious practices of pagan societies of old, praises them because “they do not write a marriage contract for a male” (*Hullin* 92b); i.e., they did not attempt to present “homosexual marriage” as an acceptable alternative to heterosexual marriage.

It is necessary to stress the distinction between homosexuality and homosexual conduct. Some individuals are sexually attracted to members of their own sex but feel no similar attraction to members of the opposite sex.

This deeply felt attraction may or may not find expression in overt sexual activity. Persons afflicted in this manner are homosexuals even if they remain celibate or engage in heterosexual activity exclusively. Whether such a condition is to be regarded as a pathology or a normal sexual orientation is of little juridical significance. There is indeed strong reason to believe that Judaism regards homosexuality (as distinct from homosexual conduct) as pathological. If homosexuality is an aberration, then, of course, a cure must be attempted. Yet, even if the tendency is not associated with some form of mental illness but is consistent with a well-integrated personality, it must be recognized that this orientation may not be acted upon because homosexual conduct is forbidden. Thus, Jewish teaching would require that the homosexual seek psychiatric help designed to overcome this tendency so that he may be able to lead a healthy and satisfying life as a heterosexual.

The homosexual act is a matter quite distinct from the state of homosexuality. The former is an act governed by free will, while the latter is a state of being. The former can be proscribed; the latter may well be beyond a person's control. It is the act, rather than the psychological state, which is the subject of the Torah's admonitions.

Performance of homosexual acts is not limited to homosexuals. A heterosexual may be prompted to engage in a homosexual act because a partner of the opposite gender is unavailable, because of a desire to enjoy varied and diverse sexual pleasures, or simply out of a desire to partake of forbidden fruits. In its most fundamental sense, the prohibition against homosexual conduct serves to teach that such acts, even when performed by consenting adults, are not morally neutral and hence unobjectionable, but constitute forbidden acts. Given this perspective with regard to the nature of the act, it follows that persons afflicted with homosexual tendencies must be aided in overcoming their desires. Psychiatric treatment, in particular, should be undertaken with a view to enabling the patient to overcome homosexual tendencies rather than for the purpose of confirming and integrating such behavior.

While Judaism regards the homosexual act with repugnance, it has the greatest sympathy for the homosexual as a person, as distinct from the heterosexual who engages in homosexual activity purely for the sake of sexual gratification. The homosexual must be given sympathetic consideration and support in his attempt to overcome his condition. This does not mean that Judaism can be supportive of continued homosexual activity even on the part of a manifestly pathological homosexual. If indeed there are homosexuals who literally cannot control their actions—and this is regarded by most psychiatrists as highly unlikely—their status, insofar as culpability is

concerned, is analogous to that of a person who goes berserk and embarks upon a rampage of crime.²⁶ Such a person is in the category of an *onus* (the Hebrew term for a person acting as a result of a *force majeure*)—an individual deprived of *behirah*, or the ability to exercise free will, by virtue of his pathological condition. No person can be held responsible for an act over which he has no control. However, most, and probably all, homosexuals can curb these actions, albeit at times only with extreme difficulty. Psychiatrists have an obligation not only to correct the underlying pathology but also to assist their patients in refraining from overt acts of a homosexual nature.

Judaism maintains that society has a clear obligation not to bestow a seal of legitimacy upon homosexual activity. Rabbi Isaac Arama, in his philosophical commentary on the Bible, points out that the homosexual conduct of Sodom was punished with much more severity than the homosexuality rampant in other societies. The reason, he explains, is because in Sodom homosexuality was ritualized: “The people of Sodom agreed among themselves that any stranger entering the city would be subjected to homosexual intercourse.” Removal of the odium associated with a transgression is even more serious a matter than the transgression itself.

The question of imposition by the state of penal sanctions for homosexual violations is beyond the scope of this discussion. It may be cogently argued that such penalties are, in practice, not mandated by Jewish law and are indeed counter-productive. However, in codifying the obligation of the Sons of Noah (i.e., gentiles) with regard to the commandment concerning *dinin*, the last of the Seven Noachide commandments, Maimonides, in his *Mishneh Torah*, *Hilkhot Melakhim* 9:14, declares that this commandment imposes two distinct obligations: (1) to establish a judicial system for purposes of meting out punishment for violation of the first six commandments; and (2) the appointment of judges “to admonish the people.” Irrespective of its obligation to punish violators, society has an obligation to admonish; i.e., to enact legislation designed to serve as admonition. The admonition is, in itself, a matter of positive moral value in that, whether or not it is subsequently enforced, it serves to signify society’s disapproval and moral condemnation. Societal admonition and censure are a potent force both in dissemination and in inculcation of values.

²⁶ The possibility of an uncontrollable compulsion with regard to both heterosexual and homosexual acts is recognized by *Tosafot*, *Sanhedrin* 9b, s.v. *le-rezono*.

V. CONCLUDING OBSERVATIONS

One further point with regard to Jewish teaching regarding procreation should be emphasized. The biblical phrase “be fruitful and multiply” occurs twice virtually the identical context. This biblical exhortation was first addressed to Adam upon his creation (Genesis 1:28) and repeated to Noah after the deluge (Genesis 9:1). In rabbinic exegesis it is understood that one occurrence of that phrase is command. The other occurrence is by way of a blessing.²⁷ “Be fruitful and multiply” is at once both a blessing and a command. Procreation is not only the fulfillment of divine command and a divine mandate; it is also the invocation of divine blessing. May we, as members of human society, be granted the wisdom always to harness and utilize the fruits of scientific inquiry in a morally legitimate manner and to employ them in human procreation solely in a manner that is a blessing to mankind.

²⁷See *Tosafot*, *Yevamot* 65b, s.v. *ve-lo ka'amar*; and Nahmanides, *Commentary on the Bible*, Genesis 1:28. Which of the two occurrences is regarded as the command is a matter of dispute between Maimonides, *Mishneh Torah*, *Hilkhot Ishut* 15:1, and *Sefer ha-Hinnukh*, no.1. See also the supercommentary of R. Eliyahu Mizrahi on Rashi, Genesis 9:1; *Maharsha*, *Sanhedrin* 59a; and R. Moses Schick, *Maharam Shik al Taryag Mizvot* (Munkacs, 1895), no. 1.