

WHO'S THE "REAL" FATHER? PATERNITY AND MATERNITY IN THE CASE OF AN INFERTILE MARRIED COUPLE WHO BECOME PARENTS THROUGH DONOR GAMETES OR DONOR EMBRYOS

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The present paper is an exploration of the emotional implications of Jewish law regarding paternity, maternity and parenthood in the case of a child conceived through donated gametes. The present paper came from a desire to explore the option of embryo donation for the purposes of reproduction through a Jewish lens. This topic is important to me because my husband and I achieved our dream of becoming parents through the gift of an open embryo donation. Thus, what Jewish Law has to say about this method of achieving parenthood is of extreme importance to me.

The problem I address here is the problem of gender inequality in the Conservative stance towards third party reproduction. In particular, according to the Conservative movement, a sperm donor is the Jewish father of a child conceived through donated gametes, while the bearing mother is the Jewish mother of a child conceived through donated gametes. I explore briefly how this is the case, and I highlight the emotional difficulties that this approach entails. In the end I advocate for upgrading Jewish Law to match current ethics and morality.

Throughout this paper, I devote much attention to Rabbi Elliot N. Dorff's paper, "Artificial Insemination: The Use of a Donor's Sperm,"¹ which is part of Dorff's lengthy work which was approved

¹ Elliot N. Dorff, "Artificial Insemination: The Use of a Donor's Sperm," in Aaron Mackler (ed.) *Life & Death Responsibilities in Jewish Biomedical Ethics* (New York: Louis Finkelstein Institute, The Jewish Theological Seminary of America, 2000), pp. 37–74.

by the Rabbinical Assembly Committee on Jewish Law and Standards in March 1994.

According to Rabbi Elliot N. Dorff, "when the husband cannot provide sperm capable of impregnating his wife ... the obligation to procreate ceases to apply to the man, for one cannot be legally obligated to do that which one cannot do."² Thus, according to Dorff, donor insemination is permissible according to Jewish Law, though by no means required. From the first few pages of Dorff's second paper addressing the issue of artificial insemination, "Artificial Insemination: The Use of a Donor's Sperm,"³ it is evident that he believes in human worth and dignity. According to Dorff, "divine worth ... comes from being created in God's image, which is true of each of us from the moment of birth to the moment of death, whether or not we manage to have children in between."⁴ These two principles taken together (that no one is obligated to do that which one cannot do – combined with that each of us is intrinsically worthy irrespective of our ability to procreate) can be potentially helpful from a spiritual or emotional perspective when a man faces infertility. While I'm not sure that these principles can assuage a man's potential feelings of failure, at least Jewish law does not condemn the victim.

However, the fact that one is not obligated to have children in the case in which one cannot have them does not address the issue of the desire to have children and the frustration felt when one is not able to do so. In the face of this desire and this frustration, there is the prescription that "the couple ... *should* investigate alternatives

² Elliot N. Dorff, *ibid.*, p. 37.

³ In Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, Dorff's lengthy work addressing issues of artificial insemination is divided into three papers/chapters (Aaron Mackler (ed.), *ibid.*, p. 15). Dorff's paper was approved by the Rabbinical Assembly Committee on Jewish Law and Standards in March 1994 (Aaron Mackler (ed.), *ibid.*, p. 47).

⁴ Elliot N. Dorff, "Artificial Insemination: The Use of a Donor's Sperm," in Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 38.

such as adoption before trying [to have children through donated gametes].”⁵

Dorff does a good job of setting aside the worries of adultery, illegitimate children, and unintentional incest raised by some rabbis. By addressing all these worries he is able to allow the use of donated gametes for the purpose of reproduction,⁶ while urging “that the identity of the donor, or at least, substantial parts of his [and/or her] medical history, be known.”⁷

There is a problem, however, when it comes to Dorff’s opinion regarding the personal status of the child conceived through donated gametes. As Dorff explains:

if an orphan child is the child of a kohen but his adoptive father is a yisra’el [a Jew who is not—traditionally patrilineally—descended from supposed ‘priestly’ or levitical lineage], the father retains his natural father’s status at birth, [and] the same would presumably be true for the child born through [donated semen].⁸

Dorff writes that, “if the donor’s status as a kohein, levi, or yisra’el is known, the child inherits that.”⁹ On the other hand, “Jewish law

5 Elliot N. Dorff, “Artificial Insemination: The Use of a Donor’s Sperm,” in Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 38. (My emphasis).

6 Elliot N. Dorff, “Artificial Insemination: The Use of a Donor’s Sperm,” in Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, pp. 15–16 and 37–63.

7 Elliot N. Dorff, *ibid.*, p. 41 (and the same would be true for an adopted child).

8 *Ibid.*, p. 42.

9 *Ibid.*, p. 43. Conservative and Orthodox Jews still, in varying ways, acknowledge the threefold division of ancient Israel into *Kohanim* (descendants of Israelite priests), *Leviyyim* (non-priestly-descendants of the tribe of Levi) and *Yisre’elim*. Reform Jews do not believe any congregant should have a different status than another, and therefore do not acknowledge these divisions. (See, e.g., CCAR Responsa Committee, “Priestly and Levitical Status in Reform Judaism” [5771.4; from circa 2011] accessed online at <https://www.ccarnet.org/ccar->

determines a person's Jewish identity according to the bearing mother"¹⁰ and not according to the egg donor.

Thus, according to Mackler, "the sperm donor... should be viewed as the father... with regard to technical issues of Jewish identity."¹¹ Yet, when it comes to egg or embryo donation, "the woman who gestates and gives birth to the child is to be treated as the child's mother for purposes of Jewish law, including the determination of Jewish identity."¹²

This discrepancy carries tremendous psychological and emotional implications. In my personal case, my husband had an extremely difficult time wrapping his head around the idea of raising someone else's child (the donor's) as his own. The fact that he would not experience the prenatal bonding that I would experience through pregnancy made it even more difficult for him. And now it turns out that the personal status of our known donor will be passed down to our child, yet if we would have chosen a non-

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These groupings began with the division of the Jewish nation among the twelve children of Jacob, one of whom was Levi and the *Kohen* subgroup of Levi. Levi and *Kohen* were singled out to be the ones to work in the Temple. There are special laws relating to them. The main difference nowadays in traditional synagogue practice is that the first person called to the Torah is always a *Kohen*, and the second a *Levi* (unless there are none in the Synagogue, in which case anyone may be called up). Tribal affiliation is passed down through the father; therefore, someone is a *Kohen* or *Levi* if their father was. Otherwise they are called *Yisra'el*, which is the generic name for everyone else. Heterosexual married women traditionally take on the tribal affiliation of their husband. If a woman marries a *Kohen* or a *Levi*, she (and her children) will become part of her husband's 'tribe.' Until the Temple is rebuilt this doesn't make much practical difference.

¹⁰ *Ibid.*.

¹¹ Aaron L. Mackler, "In Vitro Fertilization," in Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 108.

¹² Aaron L. Mackler, *ibid.*, p. 109. Mackler's paper was approved by the Rabbinical Assembly's Committee on Jewish Law and Standards in December 1995. Aaron Mackler (ed.) *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 97.

Jewish couple, I would have passed down to the child his or her Jewish identity! One can see how, in this respect, Jewish law, as rendered by Dorff and Mackler, is not only unhelpful but can be potentially detrimental for the already difficult situation that my husband and I were facing when trying to conceive through an open embryo donation. While we were dealing with all of the feelings around third-party reproduction through donor embryos—including the grieving of our dream to have genetic children, as well as wrapping our heads around the fact that our donor is known and our potential child(ren) would have a known genetic siblings—issues of personal status in Jewish law added to the emotional tumult and even caused us to feel resentful against *halakhah* and Judaism as a whole.

But Dorff goes even further in removing the parent-child connection between what he calls the “social father” (in my case—my husband) and the child.¹³ According to Dorff, the semen donor is the father of the child for the purposes of the commandment of propagation.¹⁴ By regarding the semen donor to be the father for the purposes of the commandment of propagation, Dorff unwittingly undermines one of his own main values that he uses to support third-party reproduction: the very continuation of the Jewish people. If the commandment to procreate was intended to guarantee the continuation of the Jewish people, how can a Jew who merely ejaculates in a cup and doesn’t want to know if any children came out of such action be the father for the purposes of the commandment of propagation?¹⁵ Does a Jew who merely ejaculates

¹³ It must be noted that in the United States and in Canada, what Dorff calls the “social father” of the child is deemed the “legal father” of the child in every respect. See below.

¹⁴ Elliot N. Dorff, “Artificial Insemination: The Use of a Donor’s Sperm,” in Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 46.

¹⁵ This is, of course, not at all the case in the case study that I am using for this paper: my personal situation. However, this would be one of the cases that Dorff is including on his paper about artificial insemination with the use of a donor’s sperm, for he is proposing “that the identity of the donor, or at least, substantial parts of his [and/or her] medical history, be known,” thus allowing for the possibility of anonymous donation. *Ibid.*, p. 41.

in a cup and his semen produces a child that is not Jewish fulfil the commandment of propagation? Can a Jew just go to a sperm bank and donate anonymously in order to fulfil the commandment of propagation not knowing whether a child would come out of it or whether the child will have a Jewish identity at all? All of these questions are ludicrous. Of course a donor cannot fulfill the commandment of procreation by purely ejaculating into a cup and hoping for the best. Even the dated Orthodox *posekim* ('decisors' – those who decide in matters of Jewish law) who considered a child resulting from donor semen insemination to be the offspring of the donor in all respects (inheritance, support, custody, incest, living in a specific area, etc.) do not consider that the semen donor has fulfilled the commandment of procreation.¹⁶

This is problematic also from a psychological perspective. In the case of my husband, he feels alienated and even angry by being first of all called the "social father" and, even more, to be told that "for the purposes of the commandment of propagation, we must see the semen donor as the father of the child."¹⁷ It is hard enough to know that his own child is not genetically related to him, and that his child will know his genetic family. If, on top of that, one adds that the genetic father is "the father for the purposes of propagation,"¹⁸ we are simply adding more layers of difficulty to this already complex relationship.

Moreover, the already existing biological discrepancy between the ability of the mother and the father to bond with an unborn child is made even worse when we tell the father that "the semen donor" is "the father for the purposes of the commandment of propagation."¹⁹ Dorff's opinion, in a way, would mean that I would be the Jewish mother of our child conceived through embryo donation, but the embryo donor would be the Jewish father of said child! We begin to see here the consequences of gender inequality

¹⁶ In Fred Rosner and J. David Bleich (eds.), *Jewish Bioethics* (Hoboken, NJ: 1979 and 2000), see Fred Rosner's Chapter 9, "Artificial Insemination in Jewish Law."

¹⁷ Elliot N. Dorff, "Artificial Insemination: The Use of a Donor's Sperm," in Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 46.

¹⁸ *Ibid.*.

¹⁹ *Ibid.*.

in the issue of parenthood: Dorff's opinion could potentially help me, in theory, to feel that I would be the mother of a child conceived through embryo donation, but it just makes things a lot worse for my husband.

The official language of the Reform Movement in this respect is diametrically different. Reform Judaism does not hold that procreation is a duty more incumbent upon males than upon females.²⁰ Thanks to the Reform movement's egalitarian approach to reproduction, the Reform movement is able to maintain that a child conceived through embryo donation would be the biological offspring of the man and woman who donated the sperm and the egg, but those who raise the child are his or her "ultimate" and "real" parents. *The child has no legal or religious relationship to the donors of the egg and sperm*, although for personal, medical, and genetic reasons the child or his/her guardian should be permitted to discover the identity of the biological parents at an appropriate time.²¹

Dorff's ruling that, for the purposes of the commandment of propagation, the semen donor is the father of the child is motivated by the fact that the child's genetic heritage is that of the semen donor. However, basing a ruling on genetics complicates the issues halakhically because the genetic contribution of both biological parents would have to be accounted for.²² Mackler's paper, approved by the Rabbinical Assembly Committee on Jewish Law and Standards on December 1995,²³ claims that recognizing "both the genetic and birth mothers as having maternal status... would

²⁰ Ruth Landau and Eric Blyth (eds.) *Faith and Fertility: Attitudes Towards Reproductive Practices in Different Religions from Ancient to Modern Times*, p. 30.

²¹ Central Conference of American Rabbis, "In Vitro Fertilization and the Status of the Embryo" (5757.2: circa 1997), in Mark Washofsky (ed.), *Reform Responsa for the Twenty-First Century: Sh'eilot Ut'shuvot*, vol. 1 (Central Conference of American Rabbis 2010), pp. 159–168.

²² Ezra Bick, "Ovum Donations: A Rabbinic Conceptual Model of Maternity," in *Jewish Law and the New Reproductive Technologies*, edited by Emanuel Feldman and Joel B. Wolowelsky, pp. 83–106 (chapter 4).

²³ Aaron Mackler (ed.) *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 97.

impose unnecessary complications for the use of donated ova."²⁴ Mackler's justification for this discrepancy is that these "complications do not seem to be avoidable with sperm donation, and may be avoided here simply by following the position most clearly suggested by halakhic precedent."²⁵

I don't believe, however, that such discrepancy is halakhically necessary. Dorff himself is willing either to ignore or to amend Jewish law in other instances in the same paper when compliance with the law has worse consequences than non-compliance. For example, according to Dorff, "Jewish law does not govern inheritance in the United States or Canada," and, thus, "the implications of [reproduction through donated gametes] for inheritance within Jewish Law need not concern us."²⁶ Another example:

According to traditional sources, one who raises another person's biological child does not assume the biblical prohibitions associated with one's own child. Thus, intercourse between an adoptive parent and the adopted child is not a violation of the biblical laws of incest, and adopted children raised in the same home may, according to the Talmud, marry each other.²⁷

Here Dorff uses a different halakhic category, the category of secondary relationships, in order to advocate a "stringency over the traditional sources" – thereby prohibiting sexual relations between adopted children and their adoptive parents.

Thus, a re-interpretation of the sources is both possible and also needed in order to uphold current views of ethics and morality. The laws in the United States and Canada uphold current ethics and morality when they deem what Dorff calls the "social father" of the child as the "legal father" of the child in every respect.

²⁴ Aaron L. Mackler, "In Vitro Fertilization," in Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 108.

²⁵ Aaron L. Mackler, *ibid.*, p. 121, n. 55.

²⁶ Dorff, "Artificial Insemination: The Use of a Donor's Sperm," in Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 43.

²⁷ Dorff, *ibid.*, p. 47.

In the United States, the National Conference of Commissioners of Uniform State Laws approved a new Uniform Parentage Act (UPA) in 2002. Although all states have some sort of uniform parentage act, no state has enacted the latest law verbatim.²⁸ Like, in Jewish law, in the United States, the legal mother is the one who carries a child to birth, except in the cases of adoption and gestational surrogacy. In these two exceptional cases, the woman who carried the child to birth is not the legal mother. Article 7 deals with parentage when there is assisted conception and incorporates the earlier Uniform Status of Children of Assisted Conception Act into the 2002 Uniform Parentage Act almost without change. If a man and a woman consent to any sort of assisted conception and the woman gives birth to the resultant child, they are the legal parents. Unlike Dorff's opinion, according to the Uniform Parentage Act (UPA), a donor of either sperm or eggs used in an assisted conception may not be a legal parent *under any circumstances*.²⁹

Therefore, Jewish law must catch up to the morals and the ethics of our times and end the halakhic uncertainty regarding who are the parents of children conceived through donated gametes.

It is absolutely necessary for Jewish law to be in alignment with present ethics and morality. For, as Dorff himself claims:

²⁸ Drafted in 1973 by the National Conference of Commissioners on Uniform State Laws and approved by the House of Delegates of the American Bar Association in 1974, the Uniform Parentage Act, 9A U.L.A. 592 (1979), has been passed in whole or in part by the following states: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington and Wyoming. Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 66, note 13.

²⁹ The National Conference of Commissioners on Uniform State Laws, 2015, <http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act>. Moreover, as early as 1968, the California Supreme Court held that the sperm donor had no more responsibility for the use of his sperm than a blood donor had for the use of his or her blood. Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 66, note 13).

positive law and morality are one undifferentiated web, where each can and should influence the other. That is especially true in a religious legal system like the Jewish one, where a fundamental assumption is that the law must express the will of a moral—indeed, a benevolent—God. Thus, the moral concerns that donor insemination raises are not... "merely" moral, but fully legal.³⁰

If, as Dorff asserts, we "want to acknowledge the importance of fathers in the rearing of children," as well as "to preserve the tie between children and loving families,"³¹ then halakhah should find a way to strengthen such tie by following the same principles of the law in the United States and Canada. After all,

The law... must be interpreted with full cognizance of the specific context to which it is to be applied, for otherwise it risks... the greater danger—it could be obeyed despite the personal, social, and moral havoc it wreaks on the situation it was meant to guide with sensitivity and wisdom. . . . Jewish law, which tries to delineate the will of God as we understand it, must... pay attention to the welfare of the Jewish community and of the specific people involved as any good God would. Moreover, the Conservative movement, with its commitment to historical analysis, must... take the responsibility to meet the needs of Judaism and the Jewish community in its responsa of the present.³²

The commitment to gender equality must be an essential tenet in the Conservative movement's belief and practice. As such, both the legal mother and the legal father according to the law in the United States and Canada, should also be the legal mother and the legal father according to Jewish law in every single respect. A child

³⁰ Dorff, "Artificial Insemination: The Use of a Donor's Sperm," in Aaron Mackler (ed.), *Life & Death Responsibilities in Jewish Biomedical Ethics*, p. 49.

³¹ *Ibid.*, p. 50.

³² *Ibid.*, p. 60.

conceived through the donation of gametes should not have any legal or religious relationship to the donors of the gametes. And, of course, Dorff's opinion against total anonymity of the donors is not only morally and medically sound, but it is also the tendency of the world; Sweden, Austria, the Australian state of Victoria, Switzerland, the Netherlands, Norway, the United Kingdom, New Zealand, Germany, Ireland, and Finland already have mandates that donors be identifiable to their genetic offspring.³³

Conclusion

As we have seen, according to the Conservative movement, a sperm donor is the Jewish father for the purposes of the personal status of the child conceived through donated gametes and for the purposes of the *mitzvah* of propagation of the father, while the bearing mother is the Jewish mother of said child. This creates unnecessary emotional difficulties for the "social" father. Moreover, the Conservative movement has upgraded, amended, or ignored Jewish law in other areas in order to match current ethical and moral standards.³⁴ It is important that the Conservative movement follows

³³ See Glenn Cohen, Travis Coan, Michelle Ottey, and Christina Boyd, "Sperm donor anonymity and compensation: an experiment with American sperm donors," in *Journal of Law and the Biosciences* 3:3 (December 2016), pp. 468–488 as accessed at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5570712/> on March 13, 2019.

³⁴ Conservative Judaism effectively upgraded its halakhic outlook in its acceptance of women's counting in a minyan. See e.g., David J. Fine, "Women and the Minyan" (Committee on Jewish Law and Standards of the Rabbinical Assembly, 2002), as accessed at www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/oh_55_1_2002.pdf on March 14, 2019. The movement accepted a major altering of previous norms in Jewish law in the Committee on Jewish Law and Standards' permitting the sanctification of same-sex relationships and in ordaining gay clergy – as per the responsa of Elliot N. Dorff, Daniel S. Nevins, and Avram I. Reisner, "Homosexuality, Human Dignity & Halakhah: A Combined Responsum for the Committee on Jewish Law and Standards" (Committee on Jewish Law & Standards, 2005), as accessed at

suit in the case of a child conceived through donated gametes. Jewish law should follow civil law so that the semen donor is not viewed as the father of the child conceived through donated gametes for any purpose whatsoever. The semen donor should be viewed as just that: the semen donor, and nothing else. It may well be that abolishing altogether all traditional tribal distinctions is the only way to catch up with our modern egalitarian values, the way most Reform and Reconstructionist Jews have done.

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www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/20052010/dorff_nevins_reisner_dignity.pdf on March 14, 2019. On Conservative Judaism's *ignoring* Jewish law for the sake of betterment, see: *e.g.*, Elie Spitz regarding the legal precedent of assuring proper lineage prior to marrying two Jews and (refraining from) certifying an absence of *mamzerut* (*i.e.*, improper ancestry):

We render *mamzerut* inoperative, because we will not consider evidence of *mamzerut*. We will give permission to any Jew to marry and will perform the marriage of a Jew regardless of the possible sins of his or her parent. (Elie Spitz, "*Mamzerut*" [NY: Committee on Jewish Law & Standards of the Rabbinical Assembly, 2000], p. 56, as accessed at https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/conservjud_mamzerut_spitz_2018.pdf on March 12, 2018.)