

HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

14 - SURROGACY AND OVUM DONATION

OU ISRAEL CENTER - SUMMER 2016

A] HASHKAFIC UNDERPINNINGS - IS THERE A CONCERN OF 'PLAYING GOD'

1. וזו שאלה שאל טורנוסרופוס הרשע את ר"ע: אם אלקיכם אוהב עניים הוא, מפני מה אינו מפרנסם? א"ל: כדי שניצול אנו בהן מדינה של גיהנם. א"ל: אדרבה, זו שמחייבתן לגיהנם! אמשול לך משל, למה הדבר דומה? למלך בשר ודם שכעס על עבדו וחבשו בבית האסורין, וצוה עליו שלא להאכילו ושלא להשקותו, והלך אדם אחד והאכילו והשקהו, כששמע המלך לא כועס עליו: ואתם קרוין עבדים, שנאמר: (ויקרא כ"ה) **כי לי בני ישראל עבדים!** אמר לו ר"ע: אמשול לך משל, למה הדבר דומה? למלך בשר ודם שכעס על בנו וחבשו בבית האסורין, וצוה עליו שלא להאכילו ושלא להשקותו, והלך אדם אחד והאכילו והשקהו, כששמע המלך לא דורון משגר לו: ואנן קרוין בניס, דכתיב: (דברים י"ד) **בניס אתם לה' אלהיכם**

בבא בתרא י'

R. Akiva and the Roman, Turnus Rufus are debating here a major philosophical issue: if God has decreed that a person be poor, who are we to interfere and give them tzeddakah!! Similarly, if people are ill or unable to have children, who are we to intervene and enable them to have children?! R. Akiva answers that, as His children, God wants us to be actively involved in helping one another

2. פילוסופוס אחד שאל את רבי הושעיה, א"ל אם חביבה היא המילה מפני מה לא נתנה לאדם הראשון, א"ל ... כל מה שנברא בששת ימי בראשית צריכין עשייה, כגון החרדל צריך למתוק, התורמוסים צריך למתוק, החיטין צריכין להטחון, אפילו אדם צריך תיקון.

בראשית רבה פרשה י"א:

More fundamentally, God put us in this world for the purposes of 'tikun olam' - perfecting His creation. Thus He left us to carry out brit mila. So too, we are required to be involved in helping to cure infertility

B] DEFINING THE ISSUES

B1] TYPES OF FERTILITY TREATMENT

1. Internal medical intervention - e.g. hormonal treatment.
2. AI - Artificial insemination - Sperm is obtained from the husband and the wife is artificially inseminated.
3. IVF - In Vitro Fertilization - An ovum/ova are removed from the wife and sperm from the husband. Fertilization takes place in lab conditions and a fertilized embryo is implanted into the wife.
4. Surrogacy - following IVF, the embryo is implanted into a surrogate mother. This is often the only current answer to women with Mayer-Rokitansky-Küster-Hauser (MRKH) syndrome - where the ovaries are fully functional but the uterus is not.
5. Artificial Insemination by Donor (AID)/Egg Donation (ED) - any of the above using the ova or sperm of a donor.
6. Organ transplant - e.g. ovaries, uterus?
7. Genetic screening of embryos.
8. Cloning?

B2] ETHICAL ISSUES INVOLVED IN FERTILITY TREATMENT

1. The introduction of a 'third party' into the marriage - e.g. an egg/sperm donor or surrogate mother.
2. The commercialization of reproduction - charging money for eggs, 'rent-a-womb'.
3. Exploitation of women in 'baby-farms' - kept in effective slavery to produce babies for third parties.
4. Limited access to technology by the poor.
5. Severing the biological and psychological bond between mother and child - e.g. surrogacy.
6. Severing the link between marriage and childbirth.
7. Cheapening life by producing babies mechanically, not through love and devotion.
8. 'Playing God' by deciding how/when to create and destroy life - e.g. destruction of embryos.

B3] HALACHIC ISSUES INVOLVED IN FERTILITY TREATMENT

1. The familial connection between (i) parents (i.e. birth mother and/or genetic parents) and children - inheritance, kibbud av v'em, consanguinity¹, mourning, kehuna, mamzerut; and (ii) siblings.
2. Fulfillment of the mitzva of p'ru u'rvu without a sexual act.
3. Obtaining sperm.
4. Permissibility of insemination of a woman who is niddah.
5. Permissibility of a married women acting as a surrogate for another man's child.
6. Whether insemination by donor sperm is adultery and results in mamzerut.
7. Status of child if the ovum/sperm donor is a mamzer.
8. Use of sperm from Cohen with a divorcee etc.
9. Use of ova/sperm from a non-Jew or donor.

Case 1

The wife has no ovaries and cannot have children. Her friend agrees to be fertilized by the husband's sperm, carry the baby and give it to the couple following the birth. In this case, the friend is the genetic, birth and halachic mother. The wife has the status of an adopting mother.

Case 2

The wife has no ovaries and cannot have children. He friend donates an ovary which is transplanted into the wife, who then conceives and gives birth normally. In this case, the friend is the genetic mother and the wife is the birth and halachic mother.

Case 3

The wife does produce ova but cannot carry an embryo. The husband's sperm and the wife's ova are fertilized by IVF and the embryos are then implanted in a gestational (surrogate) mother. In this case, the wife is the genetic mother but the surrogate is the birth mother. Who is the halachic mother?

Note that recent medical research indicates much more maternal-fetal cell transfer than previously thought. Thus, rather than simply functioning as an 'incubator', the surrogate mother actually interfaces significantly with the embryo. Maternal stem cells cross the placenta and implant into the fetus. Similarly, fetal stem cells implant into many of the mother's organs and remain there for life. These have been found to have importance both during the pregnancy and after in the ongoing health of the mother.²

1. More of a concern with ED (where the donors may be harder to keep track of) than with Surrogacy (where there is more control).

2. See *Gestational Surrogacy*, Dr. John Loike and Rabbi Dr. Moshe Tendler, Hakira Journal Vol 13 p 113. Available at <http://www.hakirah.org/Vol%2016%20LoikeTendler.pdf>

C] HALACHIC STATUS AND GENETICS

3. רבי יוסי אומר: גר שנתגייר כקטן שנולד דמי

יבמות מח.

The halacha regards a convert as equivalent to a new-born child - an entirely new creation

4. א דין תורה שמותר לגר שישא אמו, או אחותו מאמו, שנתגיירו. אבל חכמים אסרו דבר זה, כדי שלא יאמרו: באנו מקדושה חמורה לקדושה קלה ...

שולחן ערוך יורה דעה סימן רסט סעיף א

This results in a total severing of halachic familial relationship between a ger and his former non-Jewish family. Even though they are genetically related, if the ger's mother or sister also converted, the ger could marry them according to Torah law! The Rabbis prohibited such marriages on the grounds that the converts would not feel that they had descended in kedusha by becoming Jewish.

D] BIRTH MAY DETERMINE MATERNITY - AGGADIC SOURCES

5. וְאַחַר יְלֵדָה בֵּית וְתִקְרָא אֶת־שְׁמָהּ דִּינָה

בראשית ל"ב

6. מאי ואחר? אמר רב: לאחר שדנה לאה דין בעצמה ואמרה: שנים עשר שבטים עתידין לצאת מיעקב, ששה יצאו ממני, וארבעה מן השפחות - הרי עשרה, אם זה זכר - לא תהא אחותי רחל כאחת השפחות! מיד נהפכה לבת, שנאמר ותקרא את שמה דינה!

ברכות ט.

The Gemara includes an aggadic explanation of Dina's name. Leah was originally pregnant with another boy but prayed that she should instead bear a girl, so that Rachel should have at least 2 boys out of the 12 tribes. As a result of Leah's prayers, the gender of her embryo was changed and she had a girl.

7. ומן בתר כדין ילידת ברת וקרת ית שמה דינה ארום אמרת דין הוא מן קדם יי דיהון מני פלגות שבטיא ברם מן רחל אחתי יפקון תרין שבטין היכמא דנפקו מן חדא מן אמהתא ושמייע מן קדם יי צלותא דלאה ואיתחלפו עובריא במעיהון והוה יהיב יוסף במעיה דרחל ודינא במעיה דלאה:

תרגום יונתן שם

However, the version of this midrash in the Targum Yonatan is critically different. TY understands that Yosef was originally in Leah's womb and Dina was in Rachel's womb and the embryos were switched in utero! There appears to be³ no question that Rachel is subsequently considered Yosef's mother for all purposes. This source is therefore suggested as a proof that the halachic mother is determined by birth and not conception.

8. וַיְהִי אִמּוֹן אֶת־הַדֹּשָׁה הִיא אֶסְתֵּר בֵּית־דָּדוֹ כִּי אֵין לָהּ אָב וְאִם וְהַנְּעֻרָה יָפֶת־תַּאֲרֹ וְטוֹבֶת מְרָאָה וּבְמוֹת אֲבִיָּהּ וְאִמָּהּ לְקַחָהּ מִרְדְּכָי לִן לְבַת

אסתר ב'ז

9. כי אין לה אב ואם - 'ובמות אביה ואמה' למה ליי? אמר רב אחא: עיברתה - מת אביה, ילדתה - מתה אמה (רש"י - וכשילדתה אמה מטה - ולא נראית לקרות אס)

מגילה יג.

Esther had no father or mother. Chazal explain that her mother died in childbirth. Rashi understands from this that she was never able to be called a 'mother'. Hence, motherhood begins at birth

3. In fact, the position is not so straightforward! The idea that Dina was originally Rachel's child is used by some commentators to explain the tradition in Chazal that Shimon married Dina. If indeed Dina was really Rachel's child, this would make her Shimon's paternal half-sister and permitted as a Noachide (see Moshav Zekeinim and Perush HaTur Ha'Aruch to Bereishit 46:10). This in turn opens up the significant question as to whether the Avot were 'Jewish' or Noachides!

E] BIRTH MAY DETERMINE MATERNITY - A HALACHIC SOURCE

16. ת"ש: שני אחים תאומים גרים, וכן משוחררים - לא חולצין ולא מייבמין, ואין חייבין משום אשת אח; היתה הורתן שלא בקדושה ולידתן בקדושה - לא חולצין ולא מייבמין, אבל חייבין משום אשת אח; היתה הורתן ולידתן בקדושה - הרי הן כישראל לכל דבריהן

יבמות צו:

The gemara deals with a woman who converts whilst she is pregnant with twin brothers. There are three cases discussed: (i) where the twins were born and then mother and brothers converted, the brothers are not related in any way and are not considered brothers for the mitzva of yibum or the prohibition of incest; (ii) where the twins were conceived as non-Jews yet born as Jews (i.e. their pregnant mother converted), they are considered brothers for the purposes of incest but not for yibum. Finally, (iii) if they were conceived and born as Jews, they are brothers for all halachic purposes.

17. אבל חייבין - כרת משום אשה אח מן האם שהרי היא ישראלית שילדה זנים

רש"י שם

Rashi stresses that the brothers conceived as non-Jews but born as Jews may not marry each others' wives and are considered maternal brothers since they are born of a Jewish mother. (Their ineligibility to perform yibum is due to them having no paternal connection).

F] CONCEPTION (GENETICS) MAY DETERMINE MATERNITY

18. תנו רבנן: שלשה שותפין יש באדם, הקדוש ברוך הוא ואביו ואמו

נדה לא.

There are 3 partners in the creation of a child - God, father and mother. Rav Goren understood that this indicates that halachic paternity and maternity are fixed at conception

19. נכרית מעוברת שנתגיירה - בנה אין צריך טבילה. אמאי אין צריך טבילה? וכי תימא משום רובו שאינו מקפיד עליו אינו חוצץ, והא אמר רב כהנא: לא שנו אלא רובו, אבל כולו - חוצץ! שאני עובר, דהיינו רביתיה (שיעורי ר' דוד פוורסקי - דכס גוף אחד)

יבמות עה.

If a non-Jewish woman converts while pregnant, the tevila is also effective for the embryo, indicating that it has a non-Jewish status as child of that mother, even before birth

20. הדביק שני רחמים, ויצא מזה ונכנס לזה, מהו? דידיה פטר, דלאו דידיה לא פטר, או דלמא דלאו דידיה נמי פטר? תיקו

חולין ע.

Chazal discuss an unlikely case of two animals backed-up against each other, where the first-born fetus emerged from animal 1 and entered animal 2. The Gemara takes for granted that the fetus exempts animal 1 as a bechor. The only question is whether it also exempts animal 2. The key relationship is clearly that with the conception/gestational mother, not with the birth mother.

This would be particularly applicable if Rachel was impregnated internally and the embryo first implanted inside her and then was transferred to Leah. This view would certainly regard Rachel alone as the halachic mother. If it became possible to transfer an embryo from one womb to another it seems very likely that the first mother from whom the embryo was taken would be the halachic mother and the final 'birth' mother would be irrelevant. The removal of the embryo from the first mother (certainly after 40 days - see below) could constitute a 'birth' in its own right. How would this apply however in the classic case of Surrogacy/IVF where fertilization does not take place inside a body but in lab conditions?

G] COULD THERE BE TWO HALACHIC MOTHERS

21. שיבולת שהביאה שליש קודם לעומר, ועקרה ושתלה לאחר העומר והוסיפה, מהו? בתר עיקר אזלינן ושרייה עומר, או דלמא בתר תוספת אזלינן ועד שיבא עומר הבא? תפשוט ליה מהא, דאמר ר' אבהו אמר רבי יוחנן: ילדה שסבכה בזקנה ובה פירות, אפילו הוסיף במאתים - אסור! היא גופה קא מיבעיא ליה: מפשט פשיטא להו לרבנן דבתר עיקר אזלינן, לא שנא לקולא ולא שנא לחומרא, או דלמא ספוקי מספקא להו, ולחומרא אמרינן, לקולא לא אמרינן? תיקו

מנחות סט:

Grain that grows before Pesach is assur to eat until 16 Nissan, when the bringing of the korban Omer (today the start of the Omer period) renders it permitted. Grain that matures after Pesach must wait for next year to become permitted. This Gemara deals with the case of a stalk of wheat that grew partially before Pesach, was uprooted and replanted after Pesach. The Gemara asks if we rule according to the earlier growth (which will result in a leniency - it can be eaten immediately) or the later growth (which will be a stringency). It brings a proof from the case of a young orla fruit which is grafted onto an older tree. In that case, the gemara says that we follow the earlier growth (which in this case is a stringency!). The gemara concludes that we may well have to be machmir for earlier and later growth, which ever is the more stringent.

The possible analogy to surrogacy will result in us holding that the baby has two halachic mothers, at least lechumra - the genetic mother and the birth mother. Consider the case of a mix of Jewish and non-Jewish donor/surrogate. Will the baby be half Jewish and half non-Jewish?

22. Rabbi Shlomo Zalman Auerbach is famously quoted⁷ as saying that he found a source in the voluminous rabbinic literature for every question that was posed to him, including all medical and technological advances, barring one: namely, the question of determining motherhood in a surrogacy case. Therefore, Rabbi Auerbach stated that we must be strict in both directions: when the egg donor is not Jewish, the child would require a conversion; and when the gestational carrier is not Jewish, the child would also require a conversion

Rabbi Gideon Weitzman, Egg Donation and Gestational Carriers - a View from the Field, B'or HaTorah Vol 24 pp68-78

H] IS WHAT HAPPENS BEFORE DAY 40 RELEVANT?

23. ואי מיעברא - עד ארבעים מיה בעלמא היא

יבמות סט:

Halacha regards the developing embryo as 'mere water' until day 40 of its gestation. There is considerable debate about the extent of application of this halacha e.g. tumat yoledet, abortion⁸, maternity. For our purposes, some have argued that the status of a fetus is fixed at 40 days. Thus, the genetic/conception mother would be entirely irrelevant. All that matters is where the fetus is at 40 days when it becomes a fetus!

24. ואמר לו אנטונינוס לרבי: נשמה מאימתי ניתנה באדם, משעת פקידה (רש"י) - משעה שהמלאך פוקד הטיפה ומציאה לפני המקום מה תהא עליה, כדאמרין צפרק כל ביד צמסכת נדה (פ"ג), מיד נזרקת צו נשמה וחיות) או משעת יצירה (רש"י) - שנקרס כולו בצצר וגידין ועלמות)? - אמר לו: משעת יצירה

סנהדרין צ"א:

The soul is placed in the embryo at the moment of 'yetzira'. Rashi indicated that this is at formation of the embryo, which is 40 days into the gestation? Does this 'ensoulment' impact upon parenthood? If so, it does not appear to relate to birth, but could be more connected with gestation or perhaps conception.

I] DOES IVF CREATE PARENTHOOD?

The Tzitz Eliezer zt'l (Rav Eliezer Waldenburg) rejects the genetic relationship of egg and sperm providers to the extent that he rules that, even in a standard case of IVF (father's sperm and mother's egg), the baby produced in vitro has no halachic relationship with the providers of the sperm and egg - the child is halachically parentless (as in the case of a convert). This is NOT the view of almost all poskim, who rule that IVF children ARE the halachic children of their genetic parents.

7. Rabbi Weitzman references Nishmat Avraham (Rabbi Abraham S. Abraham), Even Haezer, Artscroll 2004, 1:6 note 11.

8. The embryo is certainly a potential life and cannot be aborted 'at will'. This will hopefully be the topic of a future shiur.

J] SUMMARY OF HALACHIC OPINIONS

Birth determines halachic status

- R' Mordechai Eliyahu
- R' J. David Bleich
- R' Eliashiv⁹
- R' Eliezer Waldenberg (Tzitz Eliezer)
- R' Moshe Tendler¹⁰

Genetics determines halachic status¹¹

- R' Yaakov Ariel
- R' Ovadia Yosef
- R' Nissim Karelitz¹²

Both Birth and Genetics each separately determine halachic status

- R' Shlomo Zalman Auerbach

K] WHERE SHOULD WE BE LOOKING FOR THE ANSWERS?

25. In a recent review of the halakhic literature on this subject! Rabbi J. David Bleich comes to the conclusion that "the preponderance of evidence adduced from rabbinic sources demonstrates that parturition, in and of itself, serves to establish a maternal relationship." He concedes that there are other opinions, and suggests that indeed there might be room to rule that the genetic mother is also the halachic mother. While I do not necessarily take issue with all of his specific conclusions, I believe that the whole issue demands a different conceptual approach. Essentially, this question is not susceptible to the classical halakhic approach of analogy with an existent halakhic ruling. Not only does a "preponderance" of halachic sources not exist in favor of parturition as the maternal determinant, practically speaking, no halachic sources exist for this or any competing candidate for the determinant. A different approach must therefore be attempted¹³. Before showing how that might be done, I must, however, first explain why the methodology exhibited by R. Bleich fails to adequately solve the problem

Rabbi Ezra Bick, "Ovum Donations: A Rabbinic Conceptual Model of Maternity," Tradition 28:1 (1993) pp. 28-45: Part A

-
9. Rav Weitzman in his article discusses whether Rav Eliashiv changed this psak later in life. Note that Rabbis Eliashiv and Waldenberg had significant reservations as to whether surrogacy was halachically permitted at all!
 10. In part based on the scientific findings in his 2012 article (see above). Rav Tendler recommends that a non-Jewish surrogate should be used. The child will then be non-Jewish at birth and require conversion. Upon marriage of the child there should be genetic testing to determine that they are not genetically related to the proposed spouse. Rabbi Weitzman questions Rav Tendler's willingness to base halachic conclusions (at least partially) on current scientific evidence.
 11. There has been something of a turn-around of halachic opinion on this. In early thinking, many poskim understood that the birth-mother was the halachic mother. More recently poskim have become more inclined towards regarding the genetic mother as the halachic mother see <http://www.vosizneias.com/46461/2010/01/07/israel-rabbis-change-views-on-whos-the-mother-of-ivf-children/>
 12. The opinions of Rav Yosef and Rav Karelitz are reported orally.
 13. Rabbi Weitzman writes that, 'One respected rosh yeshivah did tell me that in his opinion one does not need a halachic source to determine motherhood, since it is intuitive that the genetic mother is the mother. On relating this opinion to a couple who was preparing to undergo an egg donation cycle, the husband claimed that his intuition is that the birth mother is the mother. Once intuition becomes the basis of our arguments, then it ceases to be halakhah and reverts to secular ethics.

26. Returning to the major question of the halakhic model of conception, is there any halakhic source sufficient to resolve it? The answer is no. I propose instead to attempt to discover the general conceptual framework of the Sages concerning conception The launching point for what I have done is the conclusion that no normal halakhic proof exists for deciding the question of maternity. Having accepted that as a starting point, I posited that it would be valid to use an entirely different method in order to reach a conclusion.

What does one do when there are no sources for a halakhic answer to a pressing question? Our usual answer is "hafokh ba, hafokh ba" - keep looking! There is always a source. But are there not dozens of halakhot and legal principles in the Talmud which have no apparent scriptural source? Are we to assume that there must have been a source, or that the Sages of the Talmud were granted a unique (prophetic?) ability to originate halakha? In numerous other cases, however, the only source of a halakha is Reason, although it does not represent, strictly speaking, the only logical possibility. The Sages have certain conceptions of law and understanding of various concepts which underlay halakhic conclusions.

Halakha is riddled with concepts that reflect the assumed conception of the Talmudic Sages on a particular topic. In our halakhic investigations, we attempt to base all our conclusions on the determination of the Talmudic concepts, because we accept implicitly the legal formulations of the Sages. Rarely does a contemporary halakhic discussion investigate the sources of Talmudic concepts. It is simply accepted that certain basic assumptions underlie many halakhic formulations, and we accept those assumptions if they are evinced in Talmudic halakha.

What then do we do if there is no Talmudic halakha relevant to the assumptions needed for a decision in our question? It appears to me that we are justified in trying to determine the Talmudic assumptions, the base conceptions of the Talmudic world-view, from other sources. This is not the same as the oft-rejected aggadic source for halakhic conclusions. To derive a halakha from a single aggadic source is misleading, as we cannot be sure what the intent or precise factual meaning of the aggada is. To use the aggada to determine a general approach of the Sages to a question, in order to determine what halakha must necessarily arise from that approach, is, although risky and lacking the certitude we are accustomed to expect in halakhic discourse, in principle as valid as what the Sages would have done in the first place had they faced the question we are facing today. Were there to exist absolutely no Talmudic guidance for our question, neither in halakhic or aggadic sources, in principle we would have to formulate for ourselves the proper way to understand the necessary concepts, in the same way that the Talmudic scholars did. I cannot imagine any serious Torah scholar being happy with such a situation; we depend upon direct Talmudic sources as a fish depends on water. Nonetheless, I believe it is a valid way to derive halakha; indeed, it is one of the bases for Talmudic halakha itself.

... If it is fair to derive philosophical concepts from the halakha, it must be because these underlying concepts are basic to the world-view of Torah and not only halakha in the strictly legal sense. There is a stricter level of logical rigor required in halakhic definition than in aggadic definition; hence it is risky going from less-well defined aggada to the strict domain of halakha, but it is not excluded in principle. If the Halakha has a world-view and a conceptual basis, which is the conceptual framework of the Sages, there may be cases where there is no other way to determine that conceptual basis other than to examine the wider framework as expressed in aggada. This is completely different from trying to derive the halakha directly from an aggadic comment or story

One of the basic endeavors of contemporary talmudic research is the attempt to uncover the conceptual models of halakhic conclusions. This consists not only in proposing a svara for a given halakha, but in formulating the second~layer conceptual assumption of the first-level svara. Unless this is a merely intellectual exercise, it implies that the underlying conceptual model has halakhic validity; i.e., that further halakhic conclusions may be derived from it. Students of modern talmudists - especially those of the Rav, Rabbi Joseph B. Soloveitchik - are familiar with this process; it is a daily exercise in advanced talmudic reasoning.

ibid: Part C