

HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

SERIES 2: 3 - SURROGACY

OU ISRAEL CENTER - FALL 2021

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 בנים, דכתיב: (דברים י"ד) בנים אתם לה' אלהיכם.

בבא בתרא י.

R' Akiva and the Roman, Turnus Rufus are presented as debating a major philosophical issue: if God has decreed that a person be poor, who are we to interfere and give them tzedaka!! 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 יא:

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 improve the lives of others.

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. ovary and uterus transplants are now possible¹.
7. Genetic screening of embryos.
8. Cloning²?

1. In such cases, although the genetic material is from the donor, the halachic mother will be the recipient of the transplant who conceived and carried the fetus. In fact, one of the earliest analyses of these halachic issues dates back to the late 1800's when a medical report was published by a physician claiming that he had successfully performed an ovary implantation that resulted in pregnancy and live birth. This publication prompted R. Yekutiel Aryeh Kamelhar (19C Poland) to respond. He attributed the legal status of motherhood to the gestational mother alone based on an analogy to the mitzva of orla. He suggested that, just as the fruit of a two year old branch that was grafted onto a six year old tree is considered permissible to consume because it has become part of the older tree, the same is true of a body part grafted into a person. It becomes part of the body into which it has been grafted and any offspring of the ovary is the product of the body. Clearly, in this case, nurturing and birth, rather the origin of the ovum, was considered to be the determinant of maternal status. The same logic may perhaps be applied to case of surrogacy, although it is less clear that an implanted embryo is as much part of the body of the host mother as a transplanted ovary. Crucially, it was not known at that time that the ovum carried the genetic code, and thus is one of the most critical contributions to the formations of the fetus.

2. For shiurim on Genetic Modification, Cloning and other medical issues see <https://rabbimanning.com/index.php/audio-shiurim/cji/medical-ethical/>

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 parties³.
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, consanguinity⁴, 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 nidda.
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.

B4] THE CLASSIC CASE OF SURROGACY

- The wife produces viable ova but cannot carry an embryo⁵.
- 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?
- In early days of surrogacy procedures, it was often thought that the surrogate mother essentially acted simply as an organic incubator, and the ultimate development of the fetus was entirely determined by genetics, which are wholly from the genetic mother⁶.
- However, more recent medical research indicates there is far greater 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.⁷
- Also, recent research into epigenetics has shown that the genetic code does not alone determine the characteristic of the fetus. Genes may be activated (or not) by the presence of certain proteins. As such, even where the genetic material is taken entirely from the genetic mother, the process of gestation within the surrogate mother (and the chemical environment of the developing embryo) may influence the ultimate genetic development of the child⁸.

3. R. Yuval Sherlow has publicly commented on the scandal of surrogacy abuses in the Far East calling it "unethical and illegal, and akin to enslavement". See <https://news.walla.co.il/item/2849034>

4. This is more of a concern with ED, where the donors may be harder to keep track of, than with surrogacy where there is more control.

5. Classically, surrogacy has been used where a woman is medically unable to carry a child, for instance where she has undergone a hysterectomy or has a congenital uterine abnormality which makes pregnancy or birth impossible. However, today there are many other reasons why people are turning to surrogacy. These include other forms of infertility, age limitations, medication which prevents pregnancy or as a faster alternative than adoption. Single individuals and same-sex couples also often turn to surrogacy. Clearly, the latter scenarios present many more halachic and hashkafic concerns than a married couple who turns to surrogacy in order to create a family.

6. We will not deal in this shiur with the case of mitochondrial donation, which involves removing the nuclear DNA from a patient's egg containing faulty mitochondria and inserting it into a healthy donor egg, which has had its nuclear DNA removed. This can be done before the egg is fertilized or post fertilization (pronuclear transfer). The fertilized egg is then transferred into the mother in accordance with normal IVF practice. Since the nuclear DNA is retained, the unique genetic information passed on from mother to child, but the mitochondrial defects are not.

7. 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>

8. In the words of Chaya Spiegelman PA - 'The field of epigenetics that explores "chemical reactions that control which proteins a specific cell type produces by switching genes off and on at strategic times during a person's lifetime" has revealed the phenomenon of horizontal gene transfer, bidirectional cellular exchange between the gestational mother and the fetus. What this means is that stem cells, both of the fetus and the gestational mother, travel between these individuals in both directions via the placenta and implant in the tissue of the other party during the process of pregnancy. This phenomenon has many varied implications and values. Clinically, it allows the gestational mother's immune system to tolerate the fetus which is technically a foreign body, and cells of the fetus remain within the gestational mother's tissue even following the birth of the child. While genetic information in the form of DNA is encoded within the haploid gamete that is the ovum and informs the genotype of the fetus, the phenotypic expression of the genetic code is

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 שמוותר לגר שישא אמו, או אחותו מאמו, שנתגירו. 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**D1] RACHEL AND LEAH**

5. ואחר ילדה בת ותקרא את שמה דינה.

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 and carrying 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 ושמיע מן קדם יי צלותא דלאה ואיתחלפו עובריא במעיהון והוה יהיב יוסף במעהא דרחל ודינא במעהא 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 utero¹⁰! There appears to be 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. (ו) ובני שמעון ימואל וימין ואהד ויכין ואחר ושאול בן הכנענית.

בראשית מ"ו

The Torah lists one of the sons of Shimon as 'Shaul son of the Canaanite'.

regulated by epigenetics. This implies that the chemical reactions taking place as a result of the fetal environment affects which alleles of certain genes are expressed and which are not. In other words, attributes such as the dietary habits and medical history of the gestational mother may affect the expression of genes encoded in the ovum and thereby inform certain characteristics of the fetus.' For the full article, see:

<https://www.yutorah.org/lectures/lecture.cfm/813267/chaya-spigelman/%E2%80%99Care-you-my-mother%E2%80%9D-an-exploration-of-legal-motherhood-with-regard-to-surrogacy/>

9. Although all embryos are coded XX (female) or XY (male) from conception, at the start of development both female and male embryos have identical genital formation, The ultimate anatomical sex of the child is determined only between week 7 and 12 of pregnancy and depends on the release of high levels of the testosterone which will cause the embryo to develop male genitalia. In the absence of this hormonal release, an XY embryo may develop as an anatomical female. As such, there women who discover that they have XY chromosomes - for example, when a girl has androgen insensitivity syndrome or with Swyer syndrome. There are also boys and men who discover that they have XX chromosomes - for example, when a gene on the Y chromosome ends up on an X chromosome, causing that X chromosome to function more like a Y. According to this source, Leah prayed for during pregnancy for her male fetus to develop as a female, and for Rachel's female fetus to develop as a male. This has fascinating implications for the analysis of the characters of Dina and Yosef and the extent to which Dina manifests male characteristics and Yosef female.

10. Note that the verse dealing with Dina's birth does NOT state that Leah was pregnant, simply that she bore a child. This also hints to a 'different' type of gestation!

9. (וי) בן הכנענית - בן דינה שנצטלה לכנעני. כשהרגו את שכם לא היתה דינה רוצה לזאת עד שנצטע לה שמעון שישאנה.

רש"י שם

Rashi brings a Rabbinic tradition that the 'Canaanite' was none other than Shimon's full sister, Dina!

10. ותימא! איך נשא שמעון אחרת מן האס? ולפי המדרש אתי שפיר שטיקר הריון של דינה היה צצטן רחל.

פירוש הטור על התורה שם

The Tur explains that Dina was in fact, halachically, the child of Rachel. This would of course indicate that conception, and not birth, determines motherhood.¹¹

D2] ESTHER

11. ויהי אמן את הדין היא אסתר בת דודו כי אין לה אב ואם והנערה פת תאר וטובת מראיה ובמות אביה ואמה לקחה מרדכי לו לבת.

אסתר ב:ז

12. כי אין לה אב ואם - ובמות אביה ואמה' למה לוי אמר רב אחא: עיברתה - מת אביה, ילדתה - מתה אמה (רש"י - ונשילדתה אמה מתה - 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.

D3] USING AGGADATA AS A SOURCE FOR HALACHA?

13. ר' זעירה בשם שמואל אין מורין לא מן ההלכות ולא מן האגדות ולא מן התוספות אלא מן התלמוד.

תלמוד ירושלמי (וילנא) מסכת חגיגה פרק א

Chazal state that one may only learn halacha from the Talmud and not from Midrashim.

14. אך עתה שצתי וראיתי שאין למדין הלכה ממדרש רבות.

תוספות יום טוב מסכת ברכות פרק ה משנה ד'

15. המדרשים והאגדות עיקר כוונתם על המוסר ועל הרמיזים ועל המשלים שבהם והכל עיקר הדת, אבל אין עיקר כוונתם על פסקי הלכות. לכן אין למדים מהם לפסק הלכה כלל, ויפה כתב תוי"ט שם.

שו"ת נודע ביהודה מהדורא תניינא - יורה דעה סימן קסא

This position is quoted by many later commentators.

16. שאין למדין הלכה ממדרש רבות: הפר"ח צ"ס מים חיים השיג על זה דהך כלל רק לענין פסק הלכה כדברי מי היכא דלא מפרש צ"ס'ם ההלכות. אבל דינה דלא התפריש צ"ס'ם מלינו כמה פעמים דלמדין ממדרשות.

תוספות ר' עקיבה איגר שם

R' Akiva Eiger quotes this approach, but qualifies it. We do not rule in a known halachic issue according to the view of the Aggadata BUT in areas which the classic Talmudic sources do not define, we may turn to Midrashic sources.

17. (ח) איברא דאמרינן בירושלמי (פ"ב דפאה ה"ד) אין למדין לא מן ההגדות ולא מן התוספות אלא מן התלמוד. אכן כבר העלו בזה האחרונים, דלא אמרינן הכי אלא כשיש סתירה לזה מן הש"ס. ודלא כהתוס' יום טוב (שם). וכמ"ש הפר"ח (סי' קכח ס"ק כ), דמי יוכל לחלוק על המדרש בלא ראיה מהש"ס. ע"ש. וכ"כ בס' מים חיים (ברכות שם), והשיג על התני"ט, והובא ג"כ בתוס' רעק"א. וכן מבואר בס' הישר לר"ת, שיש ללמוד מן המדרשים כשאין מכחישים את התלמוד, שהרבה מנהגים בדינו על פיהם. ע"ש.

שו"ת יביע אומר חלק א - יורה דעה סימן ד

R' Ovadia Yosef lists many other commentators who DO learn halachic issues from Midrashim.

11. 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!

18. וכן מוכיח צסוטה ... דאמר ליה יוסף לפרעה אזי השציעני, ואמר ליה זיל איתשיל השצועתך. אלמא היה יכול להתיר שלא צפני יעקב. ואי לאו הלכתא לא הוה קצט ליה צהש"ס.

רא"ש מסכת נדרים פרק ט סימן ב

Here, the Rosh is commenting on the question of releasing a vow not in the presence of the person to whom it was made. He quotes a Midrash in Gemara Sota dealing with Yosef and Paro, and insists that, since it is included in the Shas¹², it must have halachic relevance.¹³

E] BIRTH MAY DETERMINE MATERNITY - HALACHIC SOURCES

E1] YIBUM TWINS

19. 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 צז:

The Gemara deals with a woman who converts while she is pregnant with twin brothers. Three cases are 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.

20. אבל חייבין - כרת משום אשת אח מן האם שהרי היא כישראלית שילדה צנים

רש"י שם

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

- R. Zalman Nechemia Goldberg reads this a source as demonstrating that birth establishes maternity.
- R. Avraham Yitzchak Kalav¹⁴ reaches the same conclusion, but limits this to a when the ovum source and surrogate are both Jewish.
- R. Yaakov Ariel¹⁵ rules that, despite this source, we cannot deny the reality that the genetic mother has an inviolable tie to the child.

E2] A CONVERTED FETUS

21. 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 פורסקי - דבס גוף אחד).

יבמות עח.

If a non-Jewish woman converts while pregnant, the tevila is also effective for the embryo since they are 'one body'.

- Does this indicate that, before its conversion, the fetus has a non-Jewish status as child of that mother, even before birth?
- Many commentators ask how a male fetus could be converted without mila, which comes before tevila? What is the function of the mila on their eighth day?
- One approach¹⁶ is that the converted baby is born from a Jewish mother and do not require further conversion. The mila on the eighth day is a regular brit mila for a Jewish baby.
- Another approach¹⁷ is that, even though the mother IS Jewish when the child is born, the child is NOT yet Jewish since it was conceived by a non-Jewish mother. The tevila in utero does work for the fetus, but he still requires a mila for conversion (which occurs on the 8th day). Bedieved, the mila can take place after the tevila. This may indicate that conception, not birth, defines motherhood.¹⁸

12. This introduces a distinction between the Aggadic Midrash included in the Gemarot and those only found in other Midrashic sources (eg Midrash Rabba). Such a distinction is found previously in the Geonim. Rav Hai Gaon states כל מה שנקבע בתלמוד מחורר הוא ממה שלא נקבע בו - see (אוצר גאונים לד"ר ב"מ לויין חגיגה י"ד ס' ס"ח ט"ט)

13. For a broader discussion of the use of Midrashic sources in halacha see Rabbi Immanuel Bernstein, *Learning Halacha from Aggadah*, The Journal of Halacha and Contemporary Society Number LXX (Fall 2015) p47. For a full shiur on this see <http://rabbimanning.com/wp-content/uploads/2019/01/Learning-Halacha-From-Midrash.pdf> and more on <https://rabbimanning.com/index.php/audio-shiurim/cji/>.

14. R. Goldberg and R. Kalav discuss the matter in Techumin 5.

15. Techumin 16.

16. See Tosafot Ketubot 11a s.v. matbilin.

17. See Ramban Yevamot 47b s.v. nitrape.

18. R. Eli Belizon (YU Torah To Go Shavuot 5777 p28) cites a potential harmonization between this Gemara and the case of the Yibum twins (above) in the name of Rav Naftalli Trop

E3] 'UBER YERECH IMO'

22. עובר ירך אמו הוא

גיטין כג:

Chazal state in a number of places that a fetus is halachically considered to be a limb of the mother.

- Based on this, some mefarshim¹⁹ explain that a woman cannot be considered the 'mother' of something which is part of her own body! Motherhood can only begin when the fetus begins to separate - at birth.

E4] HEFKER ZERA

- Some commentators discuss whether the principle of 'hefker zera' may be applied to surrogacy. Where a sperm donor is 'mafkir zaro' - declares his sperm ownerless, he waives his right to claim paternity to any offspring. If this concept applies to a surrogate, a genetic mother who gives away her ovum may be seen to waive her right to claim maternity. If so, the legal mother will be the gestational mother²⁰. Nevertheless, most poskim do not regard this position as persuasive.

F] CONCEPTION (GENETICS) MAY DETERMINE MATERNITY

23. תנו רבנן: שלשה שותפין יש באדם, הקדוש ברוך הוא ואביו ואמו. אביו מזריע הלובר, שממנו עצמות וגידים וצפרנים, ומוח שבראשו, ולוברן שבעין. אמו מזרעת אודם, שממנו עור ובשר ושערות, ושחור שבעין. והקב"ה נותן בו רוח ונשמה וקלסתר פנים, וראיית העין, ושמיעת האוזן, ודבור פה, והלך רגלים, ובינה והשכל.

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.

- Another possible precedent relates to the case of a non-Jewish couple converting to Judaism. The Gemara²¹ rules that the husband and wife must observe a three month separation period in which they do not engage in marital relations following their conversion. This is in order to ensure that any child born subsequent to their conversion is a Jewish child conceived after the husband and wife converted. This suggests that it is conception that establishes legal motherhood rather than gestation and birth. If the key criterion were birth, any a child born after the conversion would be born to a Jewish mother, irrespective of their status at conception.

24. הדביק שני רחמים, ויצא מזה ונכנס לזה, מהו? ידידה פטר, דלאו ידידה לא פטר, או דלמא דלאו ידידה 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 therefore seems likely that the first mother from whom the embryo was taken would be the halachic mother and the final 'birth' mother would be irrelevant.

(Chiddushim to Ketuvot 11a #28). He explains that "both conception and delivery are contributing factors to one's Judaism. There are two fundamental elements that give an individual the status of a Jew. There is *shem Yisrael*, Jewish nationality, which is attained by being born to a Jewish mother. The second dimension is *kedushas Yisrael*, Jewish Sanctity, which is attained when one is conceived by a Jewish mother. We take for granted that every child born Jewish has both of these components, but as Rav Trop suggests, these two elements don't always go hand in hand. Perhaps, he suggests, the child born to a woman who converted during pregnancy is considered a member of the Jewish nation for the purpose of determining his relatives, and therefore maintains his relationship with his twin brother for halachic purposes. Since at the time of his birth he was born to a Jewish mother, he has the status of a brother to his twin. Nevertheless, at conception he was the child of a non-Jewish mother and therefore is missing the second element of being Jewish, *kedushas Yisrael*. For that, according to Tosfos, he requires a conversion in-utero and for the Ramban, he still must undergo the conversion process after birth. Thus, the two passages in the Gemara are not necessarily contradictory. They are merely discussing different components of becoming a Jew."

In halachic terms R. Moshe Sternbuch (Be-Sheveilei Harefuah, No 8 (Kislev 5747 - quoted in Contemporary Halakic Problems, R. J David Bleich) Volume 4 page 259 rules that "the maternal relationship is indeed established at the time of parturition. Nevertheless, since the child's genotype is non Jewish, the child requires conversion in order to eliminate 'impurity' associated with the gentile state. Similarly, a child born of in vitro fertilization (from a non-Jewish ovum donor implanted in a Jewish women) would be deemed the child of the Jewish birth mother but would yet require conversion because of its non-Jewish genetic origin.

19. See Maharal Or Chadash p 112.

20. See Berman, S. (2015). Surrogacy. Medical Ethics: Birth and Fertility. Lecture conducted from Yeshiva University, Stern College for Women.

21. Yevamot 42a.

- 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 (OR THREE!) HALACHIC MOTHERS?

25. 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, whichever is the more stringent.

- The possible analogy to surrogacy will result in a ruling 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?
- For this reason, some poskim rule that a non-Jewish surrogate should NOT be used since the child will be a halachic combination of Jewish and non-Jewish²².

26. Rabbi Shlomo Zalman Auerbach is famously quoted²³ 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

- R. Asher Weiss is quoted as ruling that there cannot be a case where a child has two mothers or two fathers.

H] BEFORE DAY 40 GESTATION - HALACHIC RELEVANCE?

27. ואי מיעברא - עד ארבעים מיהא בעלמא היא.

יבמות סט:

Halacha regards the developing embryo as 'mere liquid' until day 40 of its gestation. There is considerable debate about the extent of application of this halacha e.g. tumat yoledet, abortion²⁴, 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!

28. אמר רב יהודה אמר רב: ארבעים יום קודם יצירת הולד, בת קול יוצאת ואומרת: בת פלוני לפלוני בית פלוני לפלוני

סוטה ב.

Chazal refer in a number of places to the key moment '40 days before the formation of the embryo'. Does this refer to the moment of conception?

22. This is the psak of R. Eliyahu Ben Chaim. Other poskim, who held that the birth mother was definitely the halachic mother, ruled that one should specifically look for a non-Jewish surrogate to avoid the possibility of the surrogate mother being the halachic mother to multiple babies in different families.

23. Rabbi Weitzman references Nishmat Avraham (Rabbi Abraham S. Abraham), Even Haezer, Artscroll 2004, 1:6 note 11. See Hebrew Nishmat Avraham Vol 4 Siman 5 p186.

24. The embryo is certainly a potential life and cannot be aborted 'at will'. See <https://rabbimanning.com/index.php/audio-shiurim/cj/medical-ethical/for-shiurim-on-abortion>.

29. דדריש ר' חנינא בר פפא: אותו מלאך הממונה על ההריון לילה שמו. ונוטל טפה ומעמידה לפני הקב"ה, ואומר לפניו: רבש"ע, טפה זו מה תהא עליה? גבור או חלש, חכם או טיפש, עשיר או עניי ואילו רשע או צדיק - לא קאמר.

נדה טז:

At another 'stage' in the development of the embryo its future character traits (but not choices) are fixed.

30. ואמר לו אנטונינוס לרבי: נשמה מאימתי ניתנה באדם, משעת פקידה (רש"י) - משעה שהמלאך פוקד הטיפה ומביאה לפני המקום מה תהא עליה, כדאמרינן צפרק כל היד צמסכת נדה (ר"ט), מיד מזרקה זו נשמה וחיות) או משעת יצירה (רש"י) - שנקרס כולו בצער וגידין ועלמות? - אמר לו: משעת יצירה

סנהדרין צא:

The soul is placed in the embryo at the moment of 'yetzira'. Rashi indicated that this is not at the initial formation of the embryo but when the flesh and limbs begin to form. 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 HALACHIC PARENTHOOD?

• R. Eliezer Waldenburg²⁵ 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.

J] SUMMARY OF HALACHIC OPINIONS

BIRTH DETERMINES HALACHIC STATUS

- R. Mordechai Eliyahu
- R. J. David Bleich²⁸
- R. Eliashiv²⁹
- R. Eliezer Waldenberg (Tzitz Eliezer)
- R. Moshe Tendler³²
- R. Aaron Soloveitchik³⁴
- R. Yisrael Meir Lau³⁶
- Nishmat Avraham³⁷

GENETICS DETERMINES HALACHIC STATUS²⁶

- R. Yaakov Ariel²⁷
- R. Ovadia Yosef
- R. Nissim Karelitz³⁰
- R. Ezra Bick³¹
- R. Shlomo Goren and R. Itamar Wahrhaftig³³
- R. Aharon Lichtenstein³⁵

BOTH BIRTH AND GENETICS EACH SEPARATELY DETERMINE HALACHIC STATUS

- R. Shlomo Zalman Auerbach
- R. Moshe Stembuch³⁸
- R. J. David Bleich^{39?}

25. Tzitz Eliezer 15 45:5.

26. 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. Conversely, as epigenetics has indicated more of a role for the gestational mother, some poskim have taken this into consideration in inclining towards to the birth mother as halachic mother, or potentially stringency to consider BOTH mothers. see <http://www.vosizneias.com/46461/2010/01/07/israel-rabbis-change-views-on-whos-the-mother-of-ivf-children/>

27. Techumin 16:177.

28. In Vitro Fertilization: Questions of Maternal Identity and Conversion, Tradition 25:4 (1991)

29. 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! See Nishmat Avraham Vol 4 EH Siman 5 pp184 and 186 who also expresses this concern in the name of R. Auerbach.

30. The opinions of Rav Yosef and Rav Karelitz are reported orally.

31. Techumin 7:266-270,

32. This is based in part 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 and, 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 willingness to base halachic conclusions (at least partially) on current scientific evidence.

33. Techumin 5 268-269.

34. Or HaMizrach 100 122-128.

35. Alon Shevut 14:147.

36. Yachel Yisrael #29

37. Vol 4 EH Siman 5 p 184.

38. Teshuvot veHanhagot 5:318.

39. In Vitro Fertilization: Questions of Maternal Identity and Conversion, Tradition 25:4 (1991)

K] WHERE SHOULD WE LOOK FOR HALACHIC SOLUTIONS?

31. 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 halakhic 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 ruling⁴⁰. 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 attempted⁴¹. 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

32. 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.

40. Rav Bick points out that (to the best of our knowledge) Chazal were not aware of the existence of the ovum, let alone the genetic coding within it, making halachic rulings based on Talmudic principles even more difficult.

41. Rabbi Weitzman writes that, 'One respected rosh yeshivah did tell me that in his opinion one does not need a halakhic 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'.

... 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