

# MATERNAL IDENTITY AND THE RELIGIOUS STATUS OF CHILDREN BORN TO A SURROGATE MOTHER

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*The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.*

## שאלה

How do we determine maternal identity and religious status for a child born to a surrogate mother?

## תשובה

I argue elsewhere that surrogacy cannot be halakhically recommended, and in at least most cases would be forbidden by Jewish law and ethics. Nonetheless, the issue of the status of a child born to a surrogate mother must be addressed for cases where surrogacy does occur. These cases might represent exceptional circumstances that I do not preclude, or people following a more lenient ruling such as that of Rabbi Elie Spitz, or people simply proceeding with surrogacy without necessarily having sought halakhic guidance.<sup>1</sup>

When the surrogate mother is artificially inseminated by the contracting/intended father, it is clear that she is the child's mother in the eyes of halakhah. Her ovum is fertilized in her body, she gestates the child, and she gives birth. I am aware of no halakhic source that claims otherwise. Accordingly, the child's religious status follows that of the (surrogate) mother.

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<sup>1</sup> See Aaron L. Mackler, "Surrogate Parenting," below, pp. 529-535; Elie Kaplan Spitz, "On The Use of Birth Surrogates," below, pp. 536-557.

Things become more complicated in the case of a gestational surrogate. Here, one woman provides an ovum which is fertilized in vitro and could be seen as the genetic mother. Another woman gestates and gives birth to the child and could be seen as gestational/birth mother. While I will conclude that in such cases (as in all others) halakhah recognizes the birth mother as mother, more of an argument is required.

### ***Intuitions on Maternity***

People's gut feelings or intuitions on maternal identity are not halakhically decisive.<sup>2</sup> Still, these can affect the extent to which people are receptive to and convinced by more formal halakhic considerations. More generally, gestation and birth represent powerful experiences of intimacy and nurturing that have great significance. Parents' feelings of attachment at the birth of their children reflect not only awareness of genetic linkage, but also the lived experience of months of physical changes, observations, and care-giving, as well as the intense and miraculous event of birth. The mother's experience has included unique connections of biology, combined with the conscious acceptance of risks and burdens, and emotional and intellectual responses of often surprising power. Perhaps for this reason the Hebrew word for intense and other-regarding love, *רהמים*, is linked to the word for womb, *רחם*.

Such acknowledgment of the importance of gestation and birth has been reflected by non-Jewish as well as Jewish writers. Lawyer George Annas, for example, argues that in cases of dispute the relationship of the gestational mother to the child should be recognized as primary, in part because of the extent of her biological and psychological investment in the child.<sup>3</sup> Rosemarie Tong notes a feminist objection to surrogacy, that "such arrangements privilege a possible relationship over an actual one, an abstract intention over concrete experience." Concerns are also expressed with treating persons and relationships as commodities.<sup>4</sup> As Rabbi Spitz notes, not all feminists agree in rejecting surrogacy, but Tong's feminist claims focusing on relationships and responsibilities resonate importantly with general Jewish values. While some thinkers have speculated that a woman's role of gestation and birth might be replaced by an artificial womb, others have speculated that with developments in genetic engineering the role of sperm and eggs in conveying genetic information might be replaced, strengthening the claims of gestation as primary. Both sets of claims are speculative; the important point is to avoid an unwarranted assumption that genetics are somehow essential and gestation and birth somehow accidental to parental identity.<sup>5</sup>

<sup>2</sup> Some material in this section may be found as well in my companion paper on "Surrogate Parenting."

<sup>3</sup> George J. Annas, "Death Without Dignity for Commercial Surrogacy: The Case of Baby M," *Hastings Center Report* 18, no. 2 (1988): 23-24.

<sup>4</sup> Rosemarie Tong, "The Overdue Death of a Feminist Chameleon: Taking a Stand on Surrogacy Arrangements," Kenneth D. Alpern, ed., *The Ethics of Reproductive Technology* (New York: Oxford University Press, 1992), pp. 291, 285, 289.

<sup>5</sup> Intuitively it might seem to some that gestation is a relatively straightforward process that science will likely develop ways to replace artificially, while the genetic material of the human genome is hopelessly complex and will elude scientists. On the other hand, the understanding of human genetics and the ability to synthesize genetic material have been progressing rapidly and at accelerating rates, while the capacity to nurture the developing human are only very slowly, if at all, moving later than the first week of embryonic development in vitro, and earlier than about week 23-24 of development for extremely premature infants (New York State Task Force on Life and the Law, *Fetal Extraterine Survivability* [New York: New York State Task Force on Life and the Law, 1988]). More generally, speculation on future scientific progress is uncertain at best. Writing in 1957, Isaac Asimov was able to envision a world of interstellar space travel and human-like robots, in which most of the process of gestation and human development could be managed artificially, but in vitro fertilization remained elusive and fertilization itself could only take place in the body (*The Naked Sun* [New

## *The Precedent of a Woman who Converts while Pregnant*

A number of halakhic authorities have addressed the issue of maternal identity in cases in which one woman gestates and gives birth to a child deriving in part from the ovum of another. Many of these statements have been summarized in a review article by Rabbi J. David Bleich. These sources suggest that maternal identity is to be determined primarily by gestation and birth.<sup>6</sup>

A central precedent in the discussion is the case of a pregnant woman who converts: even if conception is by a non-Jew, even from an ovum of a non-Jew; and even if the fetus is gestated by a non-Jew and then by a Jew; and a woman who is Jewish gives birth. Halakhah is clear that the child is Jewish. As stated by the Shulhan Arukh (Yoreh De'ah 268:6):

כותית שנתגיירה והיא מעוברת בנה אין צריך טבילה.

If a non-Jewish woman converts when she is pregnant, her child does not require immersion.

The rationale for this ruling is less clear. For some later authorities, such as Rabbi Isaac Klein, this is simply because the woman's status at the time of birth determines the child's identity. "If a woman converts while pregnant, the child does not require conversion, even if it was conceived before conversion, because at the time of its birth its mother was already Jewish."<sup>7</sup> For Rabbi Yehezkel Landau (*Dagul Merevavah*), however, the reason is that the woman's own immersion in a mikveh at her conversion serves as the immersion required for the child's conversion.<sup>8</sup>

Some support for Landau's interpretation is found in the Talmudic source of the Shulhan Arukh's ruling, Yevamot 78a, where at least one opinion holds that the reason the child's immersion is not required is that the woman's body does not constitute a barrier to the immersion of the fetus. This interpretation becomes less plausible however, in light of another passage, Yevamot 97b, that discusses the status of twins born to a woman who converts while pregnant. (This position was later codified in the Shulhan Arukh, Y.D. 269:4.)

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 כישראלים לכל דבריהן.

Come and hear: twin brothers who are converts, and similarly if they are emancipated slaves, they do not participate in חליצה or ייבום (levirate marriage), and they are not liable for the prohibition

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York: Doubleday, 1957]). Within a few decades, this apparently elusive element had in fact been achieved, while other developments remained distant.

<sup>6</sup> J. David Bleich, "In Vitro Fertilization: Maternal Identity and Conversion," *Contemporary Halakhic Problems IV* (New York: Ktav, 1995), pp. 237-272; a revised version of an article that appeared in *Tradition* 25, no. 4 (1991): 82-102. As Bleich notes, a few writers have articulated minority positions according to which the child in such cases has no mother, or the genetic mother is primary. As I indicate in the body of the paper, I believe that stronger justification supports the view that has been advocated by most authorities who have addressed these issues, that maternal identity is to be determined primarily by gestation and birth.

<sup>7</sup> Isaac Klein, *A Guide to Jewish Religious Practice* (New York: Jewish Theological Seminary of America, 1979), p. 446. This would seem to be the view of R. Boaz Cohen as well. In a letter dated 5 Dec. 1955 (CJLS Archives) he wrote: "If the woman is converted while she is still pregnant, her children will be born Jewish, otherwise they will need conversion."

<sup>8</sup> *Dagul Merevavah*, on Shulhan Arukh, Y.D. 268:6. Accordingly, Landau suggests that if the בית דין at her conversion did not know that she was pregnant, another immersion might be required.

of marrying a brother's wife. If they were conceived when the woman was not Jewish (lit., "not in holiness") but were born when she was Jewish, they do not participate in חליצה or ייבום, but they are liable for the prohibition of not marrying a brother's wife. If they were conceived and born when the woman was Jewish, they have the status as Jews in all regards.

The first clause reflects the Talmud's understanding that when an individual converts to Judaism, their familial relations are understood to start from a blank slate for purposes of Jewish law; they are considered to be as newly born (תינוק שנולד). But, according to the second clause, the twin brothers born to a woman who converted while pregnant are in a different category. They must be brothers, and Jews, from the moment of birth.<sup>9</sup> Hence, they must be recognized as having the status of Jews simply because of their mother's status at the time of birth. Indeed, Rashi gives this rationale explicitly in his commentary. He explains that the twins do not participate in חליצה or ייבום because these practices apply to brothers with the same father, and their biological father is not technically recognized as their father for these purposes:

אבל חייבין כרת משום אשת אח מן האם שהרי היא כישראלית שילדה בנים.

"But they are liable": for the penalty of excision (כרת) for the prohibition of not marrying a brother's wife, because they are brothers who share the same mother, because she was Jewish when she gave birth.

Klein's rationale for the Jewish status of a child born to a woman who converted while pregnant is supported by, and is virtually a paraphrase of, this explanation.

As surveyed by Bleich, a number of Orthodox authorities have suggested varied understandings of these sources and of the status of children gestated by and born to one woman but deriving in part from the genetic material of another. Among the most significant views:

Rabbi Avraham Yitzhak Halevi Kilav argues that in general the birth mother is decisive for the child's identity. However, there is a difference between "national" relations and "familial" relations. A child's status as Jewish depends on the woman in whose body conception and early development takes place, but if the child is Jewish, the birth mother is decisive for all other purposes. While this provides an ingenious reconciliation of the Talmudic sources, it seems excessively speculative and far-fetched. Kilav does not explicitly address the issue of a genetic mother who provided an ovum that was fertilized in vitro. He might be interpreted to offer some support for the genetic mother's religious status determining that of the child, though the genetic mother would not be considered to be the child's mother for any other purposes. (On the other hand, his discussion of the importance of gestation in accounting for differences between maternal and paternal identity suggests that he might not extend his argument to the case of in vitro fertilization). Kilav specifies that his discussion is only for purposes of theoretical discussion and *pilpul*, and is not intended to offer halakhic guidance.<sup>10</sup>

<sup>9</sup> Further casting doubt upon Landau's view, if the brothers are seen as undergoing conversion, either they are not officially Jewish until their circumcision eight days after birth, or one would have to postulate that it is possible for a male to convert to Judaism without circumcision. See Zalman Nehemiah Goldberg, יהוס אמהות ירוס אמהות, בהשתלת עובר ברחם של אחרת, *Tehumin* 5 (5744): 255.

<sup>10</sup> Kilav, *מי היא אמו של ילד, ההורה או היולדת*, *Tehumin* 5 (5744): 260-274.

For Rabbi Moshe Sternbuch, the birth mother simply is the mother, for all halakhic purposes. In fact, the child could marry children of the woman who provided the ovum, for they would in no way be considered siblings. Rabbi Sternbuch understands the discussion of immersion not to involve conversion to become Jewish, but rather a purification process to remove what he perceives as “impurity of gentleness” (טומאת עכר״ם). According to this view, a child born to a non-Jewish gestational mother would not be Jewish. Since Conservative Jewish authorities (and many others) reject his understanding of “impurity of gentleness,” the child’s status would simply follow that of the birth mother in all cases.<sup>11</sup>

Rabbi Moses Soloveitchik discusses a number of views, including positions that the mother is the woman who gestated the fetus on its fortieth day of development, or the first woman to gestate the fetus on or after the fortieth day without another maternal relationship having been already established. For cases such as gestational surrogacy where fertilization occurs in vitro, the birth mother’s status would be decisive, the genetic mother’s irrelevant. Similarly, in the case of ovum donation the birth mother would be recognized as mother.<sup>12</sup>

For Rabbi Zalman Nehemiah Goldberg, the maternal relationship is determined by the mother who gives birth. Another woman in whose body fertilization and early gestation took place would not have halakhic status as mother. All the more so, a woman who provides an ovum that is fertilized in vitro would not have halakhic status as mother. If conception takes place in the body of a non-Jew from her ovum, and a Jewish woman then gestates the fetus and gives birth, the child would be Jewish according to the view that the fetus’s status is subservient to the mother’s (עובר ירך עמו). For those who hold the view that the fetus’s status is not subservient, conversion should take place, but the child would then be regarded as the child of the birth mother in all regards. According to this view, a child born to a non-Jewish gestational surrogate would not be Jewish. In the case of ovum donation from a non-Jew to a Jew, the birth mother would be recognized as mother. Conversion would not be required for those agreeing that עובר ירך עמו, but should occur for those disagreeing with this view.<sup>13</sup>

The Talmudic sources and ensuing halakhic discussion are thus rather complicated. Virtually all authorities would agree, however, that birth (or gestation) represents the prime determinant of maternal status and that a child born to a non-Jewish gestational surrogate would require conversion to Judaism. In my judgment, Klein’s position, while not addressing all of the questions raised by the Talmudic sources, makes the most sense for deriving a conclusion for practical halakhah. The Talmudic sources may well simply reflect differing views among Talmudic authorities, which contributed to differing views among halakhic authorities. Klein’s view certainly represents the most authoritative statement on this issue by a Conservative authority to this point.

### ***Additional Considerations***

Halakhah recognizes the gestational/birth mother as mother in all regards. The above discussion of cases involving a woman who converts while pregnant provides the key halakhic evidence. At the same time, a number of additional considerations provide further support

<sup>11</sup> Sternbuch, תינוק מבחנה, *Bishvilei Harefuah* 8 (5747/1986): pp. 29-37. See Elliot N. Dorff, “Artificial Insemination, Egg Donation, and Adoption,” below, pp. 496-497.

<sup>12</sup> Joseph B. Soloveitchik, בדין התינוק המבחנה, *Or Hamizrah* (1980/5741): 122-128.

<sup>13</sup> Goldberg, pp. 245-259.

for this position. While I do not claim that each of these by itself would be decisive, together I believe they are compelling.

1. Halakhah views the status of a fetus as subservient to that of the woman. As the Talmudic phrase *עובר ירך עמו*, (Hullin 58a) is explicated by Rabbi David Feldman: “The fetus is deemed a ‘part of the mother’ rather than an independent entity.” While this is not the unanimous view of all halakhic authorities, it seems to be the most common. This has been the position of all Conservative authorities who have addressed the issue and has helped to shape Conservative positions on abortion.<sup>14</sup> Accordingly, the status of the gestating woman determines the status of the fetus, and the status of the birth mother determines the status of the child.

2. The above argument is strengthened by the fact that embryo transfer takes place well within the first forty days of development, and in fact within the first few days of embryonic development, when the Talmudic designation of the embryo/fetus as “mere fluid” (*מיא בעלמא*), (Yevamot 69b) most clearly applies. The embryo at this stage consists of only a few cells, without any specialization of cells or embryonic structure.<sup>15</sup>

3. The halakhic identification of a firstborn son as one who “opens the womb” offers some additional support for defining the birth mother as the child’s mother.<sup>16</sup>

4. Some have suggested that one reason for basing Jewish identity on matrilineal descent is that the child’s mother can always be identified. This consideration would support determining the child’s status on the basis of the birth mother.<sup>17</sup>

5. Some (non-Jewish) thinkers have advocated identifying the birth mother as mother on policy grounds, in order to best assure the welfare of newborns. As George Annas argues, the birth mother “will of necessity be present at birth and immediately thereafter to care for the child.”<sup>18</sup> These considerations would be important to halakhah under the rubric of *הטוב והישר* (Deut. 6:18), the injunction to do “the right and the good.”

6. Targum Yonatan (Gen. 30:21) and Rabbi Samuel Edels (Maharsha, commenting on Niddah 31a) relate that, prior to the birth of Joseph and Dinah, Leah was pregnant with a male, and Rachel with a female. Leah prayed that Rachel would give birth to the male, and God switched the embryos. Dinah, conceived by Rachel but born to Leah, is considered Leah’s child; Joseph, conceived by Leah but born to Rachel, is considered Rachel’s child. Abstracting from the issue of the historical accuracy of this account, it does reflect rabbinic understandings and assumptions regarding maternity. This offers some support for the view that the status of the birth mother determines the child’s identity.<sup>19</sup>

Accordingly, 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 iden-

<sup>14</sup> David M. Feldman, “Abortion: The Jewish View,” in *PCJLS 80-85*, p. 11. The phrase is also cited in the *תשובות* of R. Robert Gordis, “Abortion: Major Wrong or Basic Right,” *ibid.*, p. 22; and R. Isaac Klein, “A Teshuvah on Abortion,” *ibid.*, p. 33.

<sup>15</sup> See David M. Feldman, *Birth Control in Jewish Law*, 3d ed. (Jerusalem: n.p., 1995), p. 266.

<sup>16</sup> See Exodus 13, and Dorff, below, p. 497. It should be noted that this argument serves only in a secondary, supportive role in this paper. If a child were born by Caesarean section, for which halakhah would not apply the category of opening the womb (*פטר רחם*), this would in no way affect the recognition of the birth mother as the child’s mother.

<sup>17</sup> See, e.g., Walter Jacob, ed., *Contemporary American Reform Responsa* (New York: Central Conference of American Rabbis, 1987), p. 63; and Shaye J.D. Cohen, “The Origins of the Matrilineal Principle in Rabbinic Law,” *AJS Review* 10 (1985): 40-41, who reports but argues against this view.

<sup>18</sup> Annas, pp. 23-24.

<sup>19</sup> See Bleich, pp. 247-48; Dorff, below, pp. 496-497.

tity. If a Jewish woman gives birth to a child, that child should be considered Jewish, whether the egg came from a Jewish or non-Jewish woman. If a non-Jewish woman gives birth to a child, that child would not be Jewish (and so would require conversion in order to be recognized as a Jew), whether the egg came from a Jewish or non-Jewish woman.

A less satisfactory alternative position to identifying the birth mother as mother, which might also be compatible with halakhic precedent, would be to recognize both the genetic and birth mothers as having maternal status: even if birth is the primary determinant of maternal identity, the genetic mother would be treated as mother because of doubt, or in order to follow a more stringent position. For the case of surrogacy, this would lead to little practical difference. As I argue elsewhere, in a paper approved by the Committee on Jewish Law and Standards (CJLS), this would prove far less satisfactory for the much more common practice of ovum donation and in vitro fertilization (IVF). The alternative is in some ways attractive at the theoretical level, for it would formally recognize the contributions of both women to the child's birth. At the practical level, however, it would impose unnecessary complications for the use of donated ova. If an anonymously donated egg were used, the presumption (outside of Israel) would be that the donor is not Jewish; accordingly, the child (born to a Jewish mother) would require conversion in order to be fully Jewish. Moreover, the child would have obligations of honoring her or his (genetic) mother (כיבוד אב ואם) that likely would be unfulfilled. Furthermore, recognizing only the birth mother and not additionally the genetic mother as mother for purposes of halakhah enables Jews to donate eggs and embryos, an important consideration in light of Jewish ethics and the halakhic mandate of דרכי שלום.<sup>20</sup>

While the genetic mother should not be viewed as mother halakhically, genetic siblings should not marry (or engage in sexual relations with) one another (as opposed to the opinion of Moshe Sternbuch). The most basic reason for this prohibition is that offspring of a consanguineous union face a high risk of genetically-based disease; this concern alone would suffice to support a rabbinic prohibition. Combining this ruling with those found in R. Dorff's paper, one comes to the unsurprising conclusion that one should not marry (or engage in sexual relations with) children of one's genetic, gestational, or social parents. Technically, the prohibition would be Toraitic with regard to children of one's genetic father and birth mother, and would reflect the category of secondary relations (שניורה) for children of other parents.<sup>21</sup>

### ***Intentions as Determinative?***

Rabbi Elie Kaplan Spitz has argued that intentions can be determinative for maternal identity. He has done so both in an academic paper, and in a thoughtful paper prepared for the CJLS but subsequently withdrawn from consideration.<sup>22</sup> In these papers, Rabbi Spitz agrees that a child born to an "ovum-surrogate," who provides genetic material as

<sup>20</sup> See Mackler, "In Vitro Fertilization," below, pp. 524-526. Reporting on procedures conducted in 1993, the Society for Assisted Reproductive Technology notes 2,766 IVF procedures using donated eggs, leading to 716 deliveries, and an additional 625 procedures using donated embryos, leading to 108 deliveries. The paper also reports 246 procedures involving gestational surrogacy, resulting in 78 deliveries (Society for Assisted Reproductive Technology, American Society for Reproductive Medicine, "Assisted Reproductive Technology in the United States and Canada: 1993 Results Generated from The Society for Reproductive Medicine/Society for Assisted Reproductive Technology Registry," *Fertility and Sterility* 64 [1995]: 13-21).

<sup>21</sup> See Dorff, below, pp. 476-477; S.A. Even HaEzer 15.

<sup>22</sup> "The Religious Identity of Offspring Born to a Surrogate," submitted to the CJLS but withdrawn, 1997; "Through Her I Too Shall Bear a Child: Birth Surrogates in Jewish Law," *Journal of Religious Ethics* 24 (1996): 89-91.

well as gestation and birth, follows the status of that mother. He argues, however, that in the case of a gestational mother, the child's status should follow that of the genetic/ intended social mother instead of that of the gestational/birth mother. In advancing this position he relies on an argument of David Kraemer, that parents' feelings about their fetus/child-to-be can affect its status in thinking about abortion.<sup>23</sup>

In my best judgment, halakhah cannot support such an exception. First, the precedents supporting the status of the gestational/birth mother in determining identity are powerful. As well, Kraemer's arguments for the importance of feelings in thinking about abortion do not translate easily to determining halakhic status. Kraemer presents his paper on abortion as exemplifying an approach to Jewish ethics that is sharply distinguished from halakhah; he seeks "to do ethics with traditional sources without accepting the ways of Halacha." On the specific issue of the status of the fetus, Kraemer argues that this should depend on the parents' feelings; the status "may change as a function of our emotional connections to it."<sup>24</sup> His claim that decisions about abortion hinge in large part on subjective feelings, known fully only to the individual and to God, is plausible and thought-provoking. To base the religious status of a child on such factors is more troubling. The problems are clearest in cases of ambivalence or dispute. For example, what if a gestational surrogate becomes subjectively convinced at some point in pregnancy that the child is really hers and should be raised by her, and gives birth with this subjective intentionality in mind? We would have a situation in which factors indicating the child's status would be evenly divided. Things would be further complicated if the genetic/social mother's feelings were ambivalent. In real life, subjective feelings and emotional connections are likely to vary widely. That is one reason why such factors generally are not and should not be decisive in determining parental identity and status.

An alternative position, which I do not believe Rabbi Spitz advocates, would determine religious status on the basis of contract. In U.S. contract law, "intent" can be understood in a technical sense, as expressed in the wording of contracts rather than the thoughts and feelings of the persons involved. Kraemer's example of giving a gift to one's fetus, however, argues against such contractual intent being decisive. One generally cannot give a gift to a fetus, whatever language is used, unless these emotional and subjective feelings are present. More general halakhic grounds argue against defining parenthood and status on the basis of contract. One cannot buy or sell, or achieve by intent and formal agreement, the status of parent, child, kohen, Jew, etc. Such attribution of status would diverge more strongly from traditional precedent than does the Reform movement's acceptance of patrilineal descent. It also unacceptably treats relations as commodities.

Other practical difficulties can be anticipated as well. Imagine the case of two women (perhaps a lesbian couple) who decide to have children together by having the ova from one fertilized in vitro and gestated by the other. They plan for one of them to assume primary custody for the first child born, and the other to assume custody for the next. One woman is Jewish, and the other is not. According to the proposal (once) advocated by Rabbi Spitz, this could result in the birth of twins, one of which was Jewish from birth, the other of which was not Jewish. I do not believe that such a result would be an acceptable development for halakhah.<sup>25</sup>

<sup>23</sup> David Kraemer, "Jewish Ethics and Abortion," *Tikkun* 8, no. 1 (1993): 55-58 and 77.

<sup>24</sup> *Ibid.*, pp. 55 and 58.

<sup>25</sup> I am grateful to Rabbi Avram Israel Reisner for raising this issue.

In addition, the reasons given in Rabbi Spitz's paper for this dramatic change in halakhah do not seem compelling. He argues that requiring conversion for a child born to a non-Jewish gestational mother would offend the genetic/social parents. The conversion of infants, and ritual circumcision performed in this context, are common: for example, in cases involving adoption, or children born to a Jewish husband and non-Jewish wife who are raised as Jews. These ceremonies are joyful, welcoming, and affirming, especially when guided by rabbis with thoughtfulness and sensitivity. These children are really the couple's children, as Rabbi Elliot Dorff argues in his discussion of adoption.<sup>26</sup>

Finally, Rabbi Spitz argues that to follow the birth mother in determining status would make Judaism seem "behind the times" to parents who live in states where the genetic/social parents are recognized as sole parents. Such states remain in the minority.<sup>27</sup> It could be argued that to disregard the status of the gestational/birth mother in states where this is legally important would make Judaism seem less respectful of women's experience of gestation and birth (or of Jewish tradition) than secular authorities. Determining Jewish status using different criteria in different states of the U.S., not to mention other countries, is clearly unacceptable. Most basically, however, halakhah cannot follow *דינא דמלכותא דינא* (deference to civil law) in determining the religious status of children.

### **Conclusion**

Halakhah recognizes the woman who gestates and gives birth to a child as the child's mother. Accordingly, the religious status of a child follows that of the gestational/birth mother, in cases involving surrogacy as in all other cases. Children born to a non-Jewish surrogate would require conversion to be halakhically recognized as Jewish. Rabbis should display personal and pastoral sensitivity in such cases.<sup>28</sup>

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<sup>26</sup> Dorff, below, pp. 501-504; Avram Israel Reisner, "On the Conversion of Adopted and Patrilineal Children," *PCJLS 86-90*, pp. 157-183.

<sup>27</sup> Furthermore, states currently recognizing the genetic mother as mother in cases of gestational surrogacy could well change. In California, the minority report of a legislative committee, supported by six of its members, recommended identifying the genetic mother as mother in such cases; but the majority report, supported by twelve members, argued that the birth mother should be recognized as mother irrefutably ("Commercial and Noncommercial Surrogate Parenting," a report to the California Legislature from the Joint Legislative Committee on Surrogate Parenting, 1990).

<sup>28</sup> For their suggestions and thoughtful insights which have contributed greatly to this paper, I would like to thank Lorraine Newman Mackler, and members of the Committee on Jewish Law and Standards, including my fellow members of the Subcommittee on Biomedical Ethics: Rabbis Kassel Abelson, Elliot N. Dorff, Shoshana Gelfand, Avram Israel Reisner, Joel Roth and Elie Kaplan Spitz.