EH 1:3.1997b

On the Use of Birth Surrogates

Rabbi Elie Kaplan Spitz

This paper was approved by the CJLS on June 4, 1997, by a vote of six in favor, six opposed and eight abstaining (6-6-8). Voting in favor: Rabbis Kassel Abelson, Elliot N. Dorff, Alan B. Lucas, Mayer Rabinowitz, Joel Roth, and Elie Kaplan Spitz. Voting against: Rabbis Samuel Fraint, Arnold M. Goodman, Aaron L. Mackler, Paul Plotkin, Avram Israel Reisner, and James S. Rosen. Abstaining: Rabbis Ben Zion Bergman, Jerome M. Epstein, Shoshana Gelfand, Myron S. Geller, Susan Grossman, Judah Kogen, Vernon H. Kurtz, and Joel E. Rembaum.

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

Is an infertile couple's use of a surrogate mother acceptable? Specifically, is it permissible to:

1. Use an ovum surrogate?
2. Pay her for her services?
3. Employ a gestational surrogate?
4. Is the mitzvah of procreation met through a surrogate birth?

תשובה

Surrogates: Some Background

The Rabbinical Assembly Committee on Jewish Law and Standards dealt with the permissibility of ovum surrogacy in 1988. In that opinion, authored by Rabbi David Lincoln, the committee concluded: "The mitzvah of having children is so great, we should not deny couples this opportunity." That opinion was written while there was still relatively little experience with ovum surrogacy. Gestational surrogacy had not yet taken place. In order to evaluate the increased data of the last decade and to analyze in greater detail the ramifications of surrogacy this paper is presented.

Jewish law lacks direct precedent for surrogate birth. Much of the rabbinic debate that has taken place has focused on theoretical risks.[1] Halakhic authorities are in agreement

[1] Noam Zohar of Jerusalem, writes, "Regarding surrogacy the rejection is almost universal." "Artificial Insemination and Surrogate Motherhood: A Halakhic Perspective," *S'vara*, vol. 2, no. 1 (1991): 13-19.

Little in fact has even been written. To quote Pinhas Shifman of Hebrew University in Jerusalem, "Rabbinic opinion has not yet addressed itself to religious problems created by surrogate motherhood." "The Right to

that a couple has no duty to resort to surrogacy to fulfill the mitzvah of procreation. The difference of opinion is whether an infertile couple may choose to do so. Before an analysis of the ethics of surrogacy, let us clarify terms and examine the data which encompass the experience of the last fifteen years.

What is a Surrogate?

There are two categories of surrogate motherhood, based on the surrogate's genetic relationship to the child. Currently in the majority of cases the surrogate is an ovum surrogate: both her ovum and womb are used. She is impregnated by artificial insemination with the sperm of the intended father and agrees to give the newborn over to him and his wife.[2] The first acknowledged paid surrogacy arrangement occurred in 1980.[3] As many as 4,000 children were born to surrogates[4] since then, and the present

---

Parenthood and the Best Interests of the Child: A perspective on Surrogate Motherhood in Jewish and Israeli Law," 4 *Human Rights Annual* 555, 560 (1987).

Among the Orthodox rabbis, I have not found a rabbi in favor of ovum surrogacy; among the non-Orthodox rabbinate opinions are divided. A selection of rabbinic views to date follows:

- Immanuel Jakobovits: "To use another woman as an incubator. . .for a fee. . .[is a] revolting degradation of maternity and an affront to human dignity." *Jewish Medical Ethics* (New York: Bloch, 1959, 1975), pp. 264-265.
- Moshe Tendler, opposed to both ovum and gestational surrogacy as undermining a woman's dignity, "If the surrogate is a married woman. . .this is not a curative modality. It substitutes illness for illness, pathology involving many for the pathology of one woman." "Infertility Management: Cure or Ill," *Sh'ma* 17 (15 May 1987), pp. 109-110.
- Daniel H. Gordis: "Jewish women should not serves as surrogates for pay, nor should Jewish couples seek to hire such women. Our commitment to human dignity and social good and our desire to forge a link between halakhah and morality requires a stance no less inflexible than this." "Give Me Progeny. . .: Jewish Ethics and the Economics of Surrogate Motherhood," *University of Judaism Papers* 8, no. 1 (Los Angeles: University of Judaism, 1988), p. 21.
- Marc Gellman: "The sanctity of family life requires a single husband and wife." "The Ethics of Surrogate Motherhood," *Sh'ma*, pp. 105, 107.
- David M. Feldman: ovum-surrogacy contract is unenforceable as a matter of public policy; courts should determine custody based on best interests of the child. *Sh'ma*, pp. 108-109. In *Health and Medicine in the Jewish Tradition* (New York: Crossroads, 1986), pp. 71-75, supports gestational surrogacy as a last resort.
- Rabbinical Assembly Committee of Law and Standards voted in favor of surrogacy (5 June 1985): responsa by Rabbi David Lincoln – anything that helps overcome low Jewish birthrate is welcome. *PCJLS 86-90*, pp. 3-6.
- Walter Jacobs on behalf of the Central Conference of American Rabbis, *American Reform Responsa* (New York: CCAR, 1983), cautiously permits surrogacy due to importance of procreation.
- Seymour Siegel: "Our society rests on the expectation that contracts made in good faith will be honored." Surrogacy contract is moral and hence should be enforced. "The Ethics of Baby M's Custody," *Sh'ma*, at pp. 108-109.
- Michael Gold: accepts surrogacy as a last resort response to infertility, although prefers adoption and sees need for surrogacy legislation. *And Hannah Wept* (Philadelphia: JPS, 1988), pp. 120-127.
- Fred Rosner permits gestational surrogacy as a last resort. *Modern Medicine and Jewish Ethics*, (New York: Ktav, 2d ed., 1991), p. 114.

[2] Overwhelmingly today the initiating couple is a husband and wife. Beyond the scope of this paper are the possibilities of single and gay parents and the anonymous donation of the sperm and/or the ovum.

[3] Lori B. Andrews and Lisa Douglass, "Alternative Reproduction," 65 *Southern California Law Review*, pp. 623, 637 (1991).

[4] No official statistics are maintained by any agency and the 4,000 figure is only an estimate, but it is widely cited. Minority Report of the Advisory Panel to the Joint Legislative Committee on Surrogate Parenting,

pace is estimated at 1,000 new agreements a year.[5]

A gestational surrogate, the second category, essentially serves as an incubator. Referred to as a "tummy mummy," the gestational surrogate is impregnated through in vitro fertilization with a fertilized ovum of the intended parents.[6] In vitro ("in glass") fertilization produced a child for the first time in 1978.[7] The first birth of an infant carried by a gestational surrogate was in 1986.[8] Yet gestational surrogacy is increasing quickly and may soon outnumber "traditional surrogacy" activity.[9]

Dollars and Sense: What are Some of the Conditions and Costs of a Surrogate Agreement?

Surrogacy arrangements usually involve pay and a written agreement. This is not always the case. There are moving stories of family members using the technology to facilitate birth.[10] A well-publicized example is the case of Arlette Schweitzer, who was the gestational surrogate for her daughter, who lacked a uterus. Mrs. Schweitzer gave birth to her granddaughter![11]

Yet, most couples lack the family member or friend who will incur the inconvenience and run the risks of pregnancy as a gift. In the 1970s, surrogacy couples often found their own surrogates for pay and entered into private contracts. Today people overwhelmingly use an established center which includes the guidance of an attorney, well-drafted agreements, and a psychologist. To date, sixty percent of surrogacy births were arranged through such a surrogacy center.[12]

A couple who contracts with a paid ovum surrogate will spend approximately $42,000; of that amount, the surrogate will typically receive $12,000.[13] For the couple, the most uncertain variable in cost is the expense of medical procedures, particularly for gestational surrogacy. Each in vitro attempt, which commonly uses three fertilized eggs, has less than a one out of six success rate. The average medical cost for a successful in vitro fertilization is $22,000.[14]

California Legislature (1991), p. M8 (hereinafter Minority Report); Andrews and Douglass, p. 670; Susan Edmiston, "Whose Child is This," *Glamour* 89 (Nov. 1991): 234, 276; Estimate of New York Health Department cited in *Center for Surrogate Parenting Inc. Newsletter*, vol. 1 (spring 1993): 1.

[5] Edmiston, p. 236.

[6] In this procedure an egg is removed from a ripe follicle and fertilized by a sperm cell outside the human body. The fertilized egg is allowed to divide in a protected environment for about two days and then is inserted into the uterus of the gestational surrogate.

[7] Louise Brown was born in England in 1978. Andrews and Douglass, p. 625.

[8] Andrews and Douglass, p. 670, citing Wulf H. Utian et al., "Preliminary Experience with In Vitro Fertilization – Surrogate Gestational Surrogacy Pregnancy," *Fertility and Sterility* 52 (1989): 633.

[9] Minority report, p. M9, writes: ". . .the Center [for Surrogate Parenting] reports that approximately 50% of current surrogate activities involving their professional program involve gestational arrangements."

[10] See Deborah Diamond, "Labor of Love," *Ladies Home Journal* (Sept. 1994): 173. The touching story of sister carrying child for sister, who, until that point had been unsuccessful getting pregnant but as it turned out, simultaneously got pregnant with twins by in vitro fertilization. Consequently, the once infertile couple began parenthood with three children.

[11] "Miraculous Babies – The Woman Who Bore Her Own Grandchild," *Life*, Dec. 1993, pp. 78-79; *Time*, 19 Aug. 1991, p. 58.

[12] Andrews and Douglass, p. 671, n. 236.

[13] Sums supplied by Center for Surrogate Parenting, Beverly Hills, CA (1994). Other costs include approximately $5,000 for medical costs; $13,600 for administrative costs; $4,000 for psychological costs, $3,000 to retain legal counsel; $4,000 for miscellaneous costs.

[14] Andrews and Douglass, p. 635, citing Office of Technology Assessment, 100th Congress, 2d Session, *Infertility: Medicine and Social Choices* (Washington, D.C.: U.S. Government Printing Office, 1988), p. 50.

Surrogacy contracts serve to protect the surrogate's interests and to assure clear expectations for all parties involved.[15] Among the items often contained in an agreement are:

- Complete freedom of choice for the surrogate prior to conception, including the right to withdraw from the agreement.
- Payment for the surrogate of all medical costs, psychological counselling, attorney fees, and living expenses or pay (not to exceed a reasonable amount); to be paid on a monthly, installment basis.
- A commitment of the intended parents to accept the newborn, regardless of the child's physical condition, and the surrogate's agreement to turn the newborn over to the intended parents upon birth.
- A guarantee of the surrogates' right over her body during pregnancy, which includes the right to operations to protect her health and abortion (which would effect payment). In addition, the surrogate agrees not to abuse her body, including the use of illicit drugs, which if violated to the detriment of the fetus allows for compensatory damages.

Who Agrees to be a Surrogate?

At least eight Ph.D. dissertations and other professional level studies have been conducted to ascertain the emotional, psychological and financial profiles of surrogates.[16] The American Bar Foundation, consistent with the other research, found that the typical surrogate mother was twenty-eight years old, married with two children, employed full-time, and had thirteen years of education. Her husband was supportive of her decision to serve as a surrogate. Most were Caucasian, middle-range in income bracket, in good health, and had positive experiences in past pregnancies.[17] While money was a factor in choosing to become a surrogate, it rated consistently lower than the desire to help another couple.[18]

Why Hire a Surrogate?

Surrogacy is a last resort solution for female infertility. Infertility is defined as the inability to achieve a pregnancy after one year of regular, unprotected sexual relations or the inability of the woman to carry a pregnancy to live birth. Close to one out of seven couples will experience some degree of infertility.[19] In forty percent of those cases the infertility is directly linked to the woman.[20]

---

[15] William Handel of the Center for Surrogate Parenting (8383 Wilshire Boulevard, Suite 750, Beverly Hills, California 90211; [213] 655-1974) is the most accomplished attorney in the area of surrogacy agreement drafting.

[16] Minority Report, p. 16, n. 9, contains a list of the studies, which includes: "Surrogate Mother Demographics" by H. Daniel and K. Linkins (Harvard Medical School), which concludes that the primary motivation of surrogates is altruism; "Psychiatric Evaluation of Women in the Surrogate Mother Process," *American Journal of Psychiatry* (Oct. 1981), which is a favorable evaluation of surrogate mother candidates; Hilary Hanafin, Ph.D., "Surrogate Parenting: Reassessing Human Bonding," concludes no evidence of regret by surrogates; open contact between parties was an important variable.

[17] Minority Report, p. 16; Lisa Douglass, "Empirical Studies of Surrogate Mothers and Their Children."

[18] Not one surrogate in Hanafin's study said that money was the deciding factor for participation. Cited in Andrews and Douglass, pp. 673-674.

[19] Andrews and Douglass, p. 626, citing Office of Technology Assessment (1988).

[20] In forty percent of the couples the trouble is traced to the man, in another forty percent it is traced to the woman, and in the rest of the couples the source of the problem cannot by identified. "Miraculous Babies," *Life*, *supra*, p. 76; Andrews and Douglass, p. 634.

Not so long ago biology was destiny. Only recently have doctors learned to manipulate the mechanics of pregnancy and birth. There are many interventions short of surrogacy. Today medical intervention may open closed passageways, concentrate the sperm of a man with a low sperm count, or circumvent absent or dysfunctional tubes through in vitro fertilization. In addition to using refined medical technology couples often utilize new social arrangements. The American Fertility Society esti-mates that as many as fifty thousand couples each year use a third-party to have a child.[21] A third party participates either as a sperm-donor, ovum-donor, or as a surrogate.

Donor insemination, which overcomes the inability of a man to produce healthy sperm, is the most widely practiced third party intervention. Since the 1950s, donor insemination is responsible for as many as three hundred thousand births.[22] Donor insemination is conception in a doctor's office: the donor produces the sperm by masturbating and that semen is then injected with a syringe into the woman's vagina. Surrogacy, which addresses a woman's infertility, is the female equivalent of donor insemination.

In the case of the ovum surrogate, the wife either lacks healthy ovaries or the ability to produce ova for retrieval and is unable to carry a baby to term. Gestational surrogacy is a solution for women with one of a variety of fertility problems: a malformed or absent uterus; a medical condition which would make pregnancy dangerous for her, such as severe hypertension, diabetes, or lupus; or, a condition that would endanger the fetus, such as phenylketonuria.[23]

An infertile couple approaching an adoption agency is likely to encounter a long wait and complex selection process before succeeding in adopting a child.[24] The advantage in using a third-party, either through artificial insemination by a donor or surrogacy, is that the offspring is genetically linked to one, or in the case of gestational surrogacy to both, of the prospective parents. The genetic link meets the psychological need for continuity of a genetic chain, provides the gratification of a child who looks and may act like one of the parents, and may allow for more than one child that is genetically linked to his or her siblings.

There are serious potential problems entailed by surrogacy, too, it involves a third-party who may change her mind and assert her maternity of the child. For the future child there is the potential stigma of having been born to a woman who is not part of the child's life. There is also an ethical concern in barring access of a genetic mother to her child. Additionally, in contrast to adoption, in surrogacy arrangements parents accept responsibility for a future child who may turn out to be impaired.

To better assess the nature of these risks it is important to examine the legal data from the past two decades.

---

[21] Edmiston, p. 236.

[22] Minority Report, *supra* p. 7, citing at n. 2; Donovan, "New Reproductive Technologies: Some Legal Dilemmas," *Family Planning Perspectives* 18, no. 2 (Mar./Apr. 1986).

[23] Andrews and Douglass, p. 670; phenylketonuria is a genetic defect that may lead to mental retardation unless identified very early on in the child's life.

[24] Avi Katz, "Surrogate Motherhood and the Baby-Selling Laws," *Columbia Journal of Law and Social Problems* 20 (1986): 1, 4 at n. 12: "While there is an abundance of older, handicapped, or minority children waiting for adoption, healthy white infants are in scarce supply."

Surrogate Lawsuits

In recent years failed surrogacy arrangements have led to highly publicized, painful lawsuits. The most infamous of the surrogacy cases and among the first was the Matter of Baby M,[25] in which Mary Beth Whitehead, a twenty-nine year old surrogate, reneged on a contract to surrender the baby she bore for a childless couple. William Stern had supplied the sperm for the artificial insemination of Mary Beth Whitehead, and had paid her $10,000 to carry the fetus to term. In 1988 the New Jersey court held that the agreement between Whitehead, the surrogate, and the Sterns, the intended parents, was not binding because it violated the rule against payment for an adoption. The judge treated the matter as a custody case and awarded the child to her biological father, William Stern.

Most of the lawsuits filed to date are products of the surrogate changing her mind and wishing to keep the newborn. A recent example is the Marriage of Moschetta case[26] in which the ovum surrogate asserted her maternal rights when she learned that the intended couple had separated. The surrogate said that she had implicitly agreed to give the child only to a stable, married couple. The judge ruled that the contract was not binding and dealt with the case as one of custody. The biological father and surrogate were given joint custody and the intended mother – who lacked a biological link – was denied any privileges.

Although the emotional costs of failed surrogacy arrangements are high, surrogacy overwhelmingly succeeds. According to the Health Department of the State of New York, from an estimated four thousand children born to surrogates from the late 1970s to the early 1990s, only twelve surrogacy-related cases had been filed in the U.S. courts, and in every case except one, custody was awarded to the intended parents.[27]

Only one gestational surrogate case has wound up in court. In Anna Johnson v. Mark and Crispina Calvert,[28] the paid surrogate, Anna Johnson, asserted a maternal right to the child. The California Supreme Court upheld the lower courts and ruled that the contract between the parties for turning over the child was binding. Moreover, the court held that the intended mother, who was also the biological mother, was "the natural mother under California law." Currently in California it is only the genetic-intended mother's name that appears on the birth certificate of child born by a gestational surrogate.

Legal cases reveal only some of the complications entailed by surrogacy. There is little psychological data on the emotional costs of surrogacy to the surrogates family who see their wife or mother turn over a child she has borne. The long term feelings of surrogates concerning the process is still unclear due to the limited number of years that surrogacy has taken place and warrants ongoing evaluation.

To date the rabbis who have written on surrogacy have done so from a theoretical vantage point and have largely concluded that surrogacy is unacceptable. Jewish law is worth reexamining in light of the positive track record of surrogacy to date, the growing use of surrogacy, and the fact that surrogacy has successfully allowed for the blessing of children.

---

[25] 537 A2d 1227 (NJ, 1988)

[26] 25 Cal. App. 4th 1218, 30 Cal. Rptr. 893 (1994), the appellate court has redirected the trial court to examine the criteria of custody, but has also held that the surrogacy agreement was in no way binding. See the trial court opinion at LA Super CT., NO D324348; featured on CBS's *48 Hours*, 23 Nov. 1991.

[27] *Center for Surrogate Parenting Inc. Newsletter* (spring 1993) 1; Edmiston puts the number at fifteen, Edmiston, *supra*; Minority Report cites only ten lawsuits; an editorial in *USA Today*, 26 Sept. 1990, says, "Of the 1,000 babies born in the past decade, only a handful have wound up in court" (p. 126).

[28] 5 Cal. 4th 84, 19 *California Reporter*, p. 494 (1993).

Values Implicit in Jewish Law

Jewish law has no direct precedent for modern surrogacy. Until recently the possibility of gestational surrogacy was restricted to the realm of science fiction.[29] Similarly, ovum surrogacy in a monogamous context did not take place.

Early rabbis, however, possessed a prescient imagination and were able to envision embryo transfer. Targum Yonaton says that Dinah was conceived by Rachel and transferred to the womb of Leah, and Joseph was conceived by Leah and transferred to the womb of Rachel.[30] Such speculation, however, has no legal significance since the commentator derived no legal lesson from this legend and, in the Rabbis' account, neither mother intended nor even knew that the embryo transfer had occurred.

Surrogacy is a matter of legal first impression in Jewish law, as in American law. The analysis of jurists to date, both in the U.S. Courts and in the writing of the rabbis, has largely tried to analyze it within previously existing categories. Yet, ovum surrogacy is something new, a constellation of five factors: artificial insemination; payment of fees to a biological mother; agreement by a biological mother to relinquish rights; legitimation by a biological father; adoption by his wife.[31] Gestational surrogacy, in which the birth mother has no genetic link to the newborn is totally new. To define surrogacy with partial analogies to existing laws is a distortion and a disservice to halakhah.

Whether surrogacy is worthy of halakhic support comes down to a balancing test of moral, financial, communal, and personal costs coupled with the gains to the intended parents. Since there is no direct legal precedent for surrogacy in Jewish law, a place to begin such an analysis is with underlying values found in Judaism which touch on surrogacy.

Procreation

Children are among God's chief blessings. Indeed, procreation is the first command in the Torah: פרו ורבו ומלאו את הארץ, "Be fruitful and multiply and fill up the earth."[32] So important are offspring that the Mishnah contains a debate between Hillel and Shammai as to the number – they each say two – and genders of children – males for Shammai, one of each for Hillel – needed to fulfill the Biblical mandate.[33] Nonetheless, the Tosafot criticizes those who fulfill only the minimum requirement.[34]

Abundance of offspring is a recurring promise to the patriarchs: your descendants

---

[29] Surrogacy has been mentioned in futuristic literature, including George Orwell's *1984* (1949), p. 66, reference to totalitarian "Junior Anti-Sex League" which advocated all reproduction by artificial insemination or "artsem;" Aldous Huxley's *Brave New World* (1932), pp. 1-14, description of hatcheries used for human reproduction in totalitarian world; Margaret Atwood, *The Handmaid's Tale* (1986). These citations are noted by the California appellate court in Anna J. v. Mark C., 91 *Daily Journal* D.A.R. 12433, n. 7.

[30] Berakhot 60a, discussed in Fred Rosner, *Modern Medicine*, p. 122. The background on the legend is the story that knowing that Jacob would become the father of a total of twelve sons and not wishing her sister Rachel to bear fewer sons than the maidservants, Bilhah and Zilpah, Leah prayed that her already conceived fetus be born a female. In Berakhot, her prayer is answered by a sex-change. However, Targum Yonaton, on Gen. 30:2, suggests that an embryo transfer occurred to solve the problem. Bleich cites the talmudic commentary of Rabbi Samuel Edels as supporting the embryo transfer idea as a way to understand Berakhot 60a.

[31] Andrea E. Stumpf, "Redefining Mother: A Legal Matrix for New Reproductive Technologies," 96 *Yale Law Journal* 187, pp. 191-192 (1986).

[32] Gen. 1:28.

[33] Yevamot 6:6, Shammai sees Adam's two sons as the model; Hillel looks to Adam and Eve.

[34] Tosafot to Bava Batra 60b. s.v. דין.

shall be "like the stars in the heavens and sands of the sea."[35] The promise, however, required parental effort – hence the statement in the Midrash: there are three partners to creation – the father, mother, and God.[36] Rabbi Eleazar ben Azariah is quoted in a midrash as saying, "he who does not engage in procreation is as if he diminished the Divine image," for without human descendants there is no one to embody God's image.[37] In light of the importance of procreation, permission was given to even sell a Torah scroll to enable a marriage where procreation had yet to be fulfilled.[38] For in the words of Isaiah: "The world was created to be inhabited."[39]

Despite God's promise of progeny, each of the patriarchs had wives who confronted infertility.[40] Reflective of the pain of these couples are Rachel's words to Jacob: "Give me children lest I die!" In response, "Jacob was incensed at Rachel, and said, 'Can I take the place of God who has denied you fruit of the womb?'"[41] Jacob's anger reveals both his frustration and limitation. There was no medical knowledge in his day that could have solved Rachel or Jacob's infertility. An infertile couple only had prayer and the possibility of the aid of a third party – which we will see was Rachel's solution.

Third-Party Intervention

In response to infertility the Torah provides for third party intervention. Interestingly, there is such a possibility for both female and male infertility, the categories of שפחה and יבום. These two responses of last resort are not the direct equivalent of modern day surrogacy or artificial insemination by a donor, but are worth examining closely to uncover underlying values.

שפחה[42]

Unable to conceive, Rachel says to Jacob:

> הנה אמתי בלהה בא אליה ותלד על ברכי ואבנה גם אנכי ממנה.
>
> Here is my handmaid Bilhah, come unto her, and she shall give birth on my knees and I will be built up through her.[43]

Rachel's use of Bilhah her שפחה, Hebrew for handmaid, as her surrogate had precedent both among the patriarchs and the society in which she lives.

Sarah, too, resorts to a שפחה. "Look, the Lord has kept me from bearing," Sarah says to Abraham. "Consort with my handmaid, Hagar; perhaps I shall have a child

---

[35] Gen. 15:5; 22:17; 26:4; Exod. 32:13; Deut. 1:10; 10:22; 28:62.

[36] Niddah 31a.

[37] Genesis Rabbah 34:14 and is incorporated by Joseph Karo, Shulhan Arukh, Even HaEzer 1:1; even stronger were the words of Eliezer ben Hyrcanus, "Who brings no children into the world is like a murderer," Yevamot 63b.

[38] Megillah 27a.

[39] Isa. 45:18.

[40] A description of Sarai offering Avram her handmaid Hagar in order to have children through her is Genesis, chapter sixteen. In regard to Rebecca, the Torah records: "And Isaac entreated the Lord for his wife, because she was barren, and the Lord was entreated of him, and Rebecca his wife conceived" (Gen. 25:21).

[41] Gen. 30:1-2.

[42] שפחה and אמה are used interchangeably in the Torah to describe a slave of the patriarch's wife, who, as property of the patriarch, was also a member of the extended family (see Gen. 16:1 and 30:3,9). פלגש, concubine, was one of a harem of freeborn or freed women belonging directly to the patriarch as a secondary wife. See L. Epstein, *Marriage Laws in the Bible and Talmud* (1942), pp. 34-62.

[43] Gen. 30:3.

through her."[44] Abraham consents and Hagar gives birth to Yishmael. Later on when Leah (Rachel's sister) is unable to continue to bear children, she asks Jacob to consort with her handmaid, Zilpah.[45]

The handmaids are subservient to the matriarchs. Their rights are limited. Hence, when Sarah is displeased with Hagar, who at this point is pregnant by Abraham, Abraham says to Sarah: הנה שפחתך בידך עשי לה הטוב בעיניך "Behold, your שפחה is in your hands, do with her that which is good in your hands."[46] Subsequently, Sarah is so harsh with Hagar that she runs away.[47]

Consistent with the matriarchs' primacy in the marriage, when children are born to Bilhah and Zilpah, it is Rachel and Leah who give the children their names.[48] When Rachel says, "she shall give birth on my knees," she uses language similarly found as a formal act of adoption in contemporaneous Hittite documents.[49] The children born to the handmaids are considered Jacob's sons and are included among the twelve tribes along with the natural sons of Leah and Rachel.

Parallel to the Biblical שפחה are legal accounts found in ancient Near East documents. The Code of Hammurabi warns expressly that a slave girl elevated by her mistress could not claim equality.[50] A nuzi marriage document stipulates: "If Gillimninu bears children, Shennima shall not take another wife. But if Gillimninu fails to bear children, she shall get for him a slave girl as concubine. In that case, Gillimninu herself shall have authority over the offspring."[51] Despite the second class status of the שפחה in the Torah, she also has certain privileges which are absent in modern surrogacy arrangements. The שפחה is part of the patriarch's family and apparently helps to raise her own children.

Some critics of surrogacy have pointed to the case of Hagar as a warning. To quote Arlene Agus: "Despite many circumstances – the status and rights offered Hagar, the absence of payment, the shared custody arrangement – the arrangement failed. Perhaps there is a lesson to be learned here."[52] But, holding out Hagar and Sarah's relationship as typical overlooks the apparent success of Rachel and Leah with their handmaids.[53] Moreover, modern surrogacy offers the advantage of simplifying the family arrangement so that two women do not need to compete for the affection of the same man.

Indeed, the most obvious difference between the שפחה and the modern day surrogate is that the שפחה existed in a polygamous context. Then it was socially acceptable for a man to impregnate a woman in addition to his primary wife. With Rabbenu Gershon's mandate

---

[44] Gen. 16:2.

[45] Gen. 30:9.

[46] Gen. 16:6.

[47] Gen. 15:6.

[48] Rachel, Gen. 30:6 (Dan), 30:8 (Naftali); Leah, Gen. 30:10 (Gad), 30:3 (Asher).

[49] Sarna says that the origin of placing a child on knees as an act of adoption is in the idea of the knee as the seat of generative power. Indeed in Akkadian knee is *birku* which is used as a euphemism for sexual parts. This act of adoption is also found in ancient Greece and Rome. Sarna, *Genesis* (Philadelphia: JPS, 1989) (hereinafter JPS), p. 207.

[50] Pritchard, *ANET,* Code of Hammurabi 146, p. 172, cited in *The Torah: A Modern Commentary*, Gunther Plaut, ed, UAHC (hereinafter UAHC).

[51] Quoted by Speiser, *Genesis* (Garden City, NJ: Doubleday, 1964), p. 120, cited in UAHC, p. 111.

[52] Arlene Agus, *Lillith* (spring 1988): 31.

[53] Yishmael, Hagar's son, is only one of five children born to a Biblical surrogate. The other four are treated as the full sons of Jacob and no problems for their mothers are reported. In addition, when Hagar leaves the surrogate arrangement she does so with her son.

in the tenth century monogamy was required, a restriction which some critics construe as a prohibition of surrogacy today.[54]

Yet, there is a fundamental difference between procreation in the past and today. In the ancient world the only way a man had children with a woman was through sexual intercourse. Today, children may be born without violating the sacred sexual intimacy of marriage. In that light, artificial insemination by a donor is not considered an act of adultery across a broad spectrum of halakhic authorities.[55] Because of the division between sex and procreation, and even between gestation and providing the ovum, modern surrogacy is not easily dismissed by reference to the category of monogamy alone.

Despite some differences between the שפחה and the contemporary surrogate, there are significant shared values to glean from the Bible's acceptance of a third party to procreation. First, the use of a third party is a permitted last resort to assure genetic continuity for the husband. Although the patriarchs and matriarchs could have adopted a child, a legal category in the ancient world too, they chose the option of using a שפחה. Second, although children were born to the שפחה, the Torah recognized the maternal role of the "intended mother" and gave her rights. The offspring were adopted by the matriarchs and named by them. Third, although the שפחה was not recognized as a "wife," her offspring were treated as a descendant of the patriarch, which entailed full inheritance rights.

יבום

A second Biblical category of third-party intervention, יבום, offered a form of artificial insemination. An analysis of יבום demonstrates the Bible's willingness to redraft familial lines to overcome infertility. Moreover, the history of the category of יבום reveals that the halakhah evolves and responds to changing social mores.

When a man died childless, his next of kin was commanded to procreate with the widow in order to perpetuate the deceased's name and memory. This duty, called יבום, is present in Genesis. When Tamar's husband, Er, died without issue, her father-in-law, Judah, said to his second son, Onan: "Join with your brother's wife and do your duty by her as a brother-in-law and provide offspring for your brother – ויבם אותה."[56] Onan was an intended surrogate for his deceased brother. This form of artificial insemination required sexual intercourse, the only conceivable way to fertilize a woman in the ancient world.

The law of יבום, levirate marriage, is codified in Deuteronomy as follows:

> When brothers dwell together and one of them dies and leaves no son, the wife of the deceased shall not be married to a stranger, outside the family. Her husband's brother shall unite with her: take her as his wife and perform the levir's duty. And the firstborn she bears shall succeed in the name of his brother that is dead, that his name not be blotted out of Israel.[57]

Normally marriage between a man and his brother's former wife was forbidden.[58] יבום was

---

[54] Marc Gellman, *supra.*

[55] Only a small number of the authorities permit artificial insemination by a donor, because of concerns with potential incest. Rabbi Elliot N. Dorff, in his responsa for the CJLS, above, pp. 473-477, has permitted the use of donor insemination and in response to the concern of incest encourages as much information as possible to be shared with the prospective parents and for them to share it with their child. In addition, Rabbi Dorff notes Rabbi Feinstein's position that incest is a limited concern when the donor is not Jewish.

[56] Gen. 32:8.

[57] Deut. 25:5-6.

[58] Lev. 18:16 and 20:21.

the exception to the rule. Apparently, familial continuity and having a child was so great a value that it overrode the societal norm of familial boundaries.

Deuteronomy did, however, provide a brother-in-law with a way out of the levirate duty too. The man could publicly refuse to perform יבום. The widow had to agree, which was marked by a public ritual, called חליצה ("removal"), whereby she removed her brother-in-law's shoe, spit toward his face, and declared, "This is what shall be done to the man who will not build up a family for his brother."[59]

Recent scholarship documents that יבום was not unique to the Bible. It was part of a legislative pattern of the ancient Near East. A fragmentary text from the Middle Assyrian Empire's compendium of laws (fifteenth and fourteenth centuries B.C.E.) requires a widow who has no son to be married off by the father-in-law to the son of his choice.[60] In the Hittite laws, approximately from Abraham's lifetime, is the statement that if a married man dies, "his brother shall take his wife, then (if he dies) his father shall take her."[61] These laws offered financial and physical protection for a widow, and they also treated the woman as the property of the clan.

יבום in Jewish law evolved in response to changing societal mores. As Judaism moved away from polygamy, the Rabbis of the Talmud interpreted the Torah to make חליצה easier. יבום was restricted to the case of a brother who died without any issue,[62] instead of the previous gloss of a male child, and the brother-in-law could fulfill the command only if his motives were pure.[63] Therefore, if he was drawn to the widow by her attractiveness, he was barred from having sex with her. The Rabbis also made it easier for the widow to release her brother-in-law. Rather than spitting in his face she was permitted to symbolically spit on the ground in front of her brother-in-law.[64]

Although the Biblical law's interpretation evolved, the Rabbis of the Talmudic and subsequent and even later halakhic authorities remained divided over the preference of חליצה to יבום.[65] The difference in opinion correlates with whether the rabbis lived in a polygamous or monogamous society.[66] Only in 1950 did the two chief rabbis of Israel, a state which prohibited polygamy, issue an edict (a תקנה) which prohibited יבום. They explained that in modern society, most levirs do not undergo levirate marriage for the sake of fulfilling a mitzvah, and that there is a need to maintain a norm of monogamy to protect society's stability.[67]

יבום and שפחה are two biblical examples of third-party intervention in the context of

---

[59] Deut. 25:8-9.

[60] A, par. 33, cited in Sarna, JPS, p. 266, n. 8.

[61] Par. 193, cited in Sarna, ibid.

[62] M. Yevamot 2:5 and B. Yevamot 22b; M. Nedarim 5:3.

[63] M. Bekhorot 1:7 and Rashi there (Bekhorot 13a); also T. Yevamot 6:9, where Abba Saul said, "I am inclined to think that the child of such a union is a ממזר."

[64] Yevamot 12:6; Yad, Yibum 4:1-23; S.A., Even HaEzer 169.

[65] In the third generation of tannaim, levirate marriage was customarily upheld (Yevamot 8:4). Although the majority of Babylonian amoraim left the choice between marriage and חליצה to the levir (Yevamot 39a-b), the Palestinian amoraim held that חליצה took priority. This summary is from *Encyclopaedia Judaica (E.J.)*, "Levirate Marriage and Halitzah," vol. 11, pp. 125-126.

[66] In the medieval rabbinic period, Sephardic rabbis gave priority to levirate marriage – see Alfasi to Yevamot 39b; Maimonides, Yad, Yibum 1:2; and Joseph Karo, S.A., Even HaEzer 165:1; the rabbis of northern France and Germany held that חליצה took priority over יבום – see Rashi and Rabbenu Tam; Asher b. Yehiel, Tur, Even HaEzer 165; and Moses Isserles, Rema, Even HaEzer 165:1.

[67] Cited in *E.J.*, 11:129.

polygamy. Each was a last resort. Although significantly different from contemporary surrogacy, we may learn the following values and lessons from these precedents:

- Social norms are dynamic and halakhah responds to evolving societal mores.
- Extraordinary effort and even crossing familial lines is accepted as a last resort in assuring genetic continuity.
- Recognition is warranted for the investment made by an initiating mother and her role in shaping the identity of her adopted child.

In contrast to the days of the patriarchs, sex is no longer needed for procreation. Hence polygamy and monogamy may no longer define reproductive boundaries. There are two distinct questions which emerge in assessing the novelty of contemporary surrogacy: Does Judaism accept scientific intervention to overcome infertility? And is it moral for a couple in our day to use a third party to enable procreation?

Science as Blessing and Mandate

When the Torah commands "be fruitful and multiply," it continues, "and conquer it (the earth) – וכבשוה."[68] The phrase "and conquer it" is interpreted as a mandate to serve as God's partner in maintaining and assisting nature.[69] In that light, Rabbi Seymour Siegel writes:

> We are called upon to care for nature and to preserve it – but not to worship it. We are also called upon to use our ingenuity, our imagination, and intelligence to improve nature when human happiness and well being [are] thwarted. This is the basis for the whole medical enterprise.[70]

Physicians, in the Jewish tradition, help fashion creation. Their role is beautifully illustrated in the following midrash of a pair of leading Rabbis in second-century Palestine:

> Once Rabbi Yishmael and Rabbi Akiva were strolling in the streets of Jerusalem along with another man. They met a sick person who said to them, "Masters, tell me how I can be healed." They quickly advised him to take a certain medicine until he felt better.
>
> The man with them turned to them and said, "Who made this man sick?"
>
> "The Holy One, Source of Blessing," they replied.
>
> "And do you presume to interfere in an area that is not yours? He afflicted and you heal?!"
>
> "What is your occupation?" they asked the man.
>
> "I'm a tiller of the soil," he answered, "as you can see from the sickle I carry."
>
> "Who created the field and the vineyard?"

---

[68] Gen. 1:28.

[69] An important essay on this theme is Joseph Soloveichik's "The Lonely Man of Faith," *Tradition* 7 (1965): 1-67.

[70] Seymour Siegel, unpublished responsum prepared for the Committee of Jewish Law and Standards of the Rabbinical Assembly (1978), quoted in Gold, p. 83.

> "The Holy One, Source of Blessing."
>
> "And you dare to move in an area that is not yours? God created these and you eat their fruit?"
>
> "Don't you see the sickle in my hand?" the man said. "If I did not go out and plow the field, cover it, fertilize it, weed it, nothing would grow."
>
> "Fool," the Rabbis said, "just as a tree does not grow if it is not fertilized, plowed and weeded – and even if it already grew, but then is not watered it dies. So the body is like a tree: the medicine is the fertilizer and the doctor is the farmer."[71]

Medicine, in this account, is seen as a way to actualize God's blessing. Rabbis Akiva and Yishmael's words are a compelling response to those, like the Catholic Church,[72] which speak of natural law and greatly restrict the use of technology to overcome infertility. The imagery of the two Rabbis – speaking of seed, field, and fruit – is well-suited to the area of medical intervention and procreation.

Rabbis universally accept the use of medical technology, but may question the ethical implications of the process. Hence, Rabbi Jakobovits, the former chief rabbi of England and among the first to write on the ethics of reproductive technology, said in 1975:

> Artificial insemination utilizing an outside donor (AID) is, however, considered to pose grave moral problems. Such operations, even if they may not technically constitute adultery, would completely disrupt the family relationship. Moreover, a child so conceived would be denied its birth-right to have a father and other relations who can be identified. Altogether, to reduce human generation to "stud-farming" methods would be a debasement of human life, utterly repugnant to Jewish ideals and traditions. . . .
>
> Hardly less offensive to moral susceptibilities is the proposal to abort a mother's naturally fertilized egg and to reimplant it into a "host-mother" as a convenience for women who seek the gift of a child without the encumbrance and disfigurement of pregnancy. To use another person as an "incubator" and then take from her the child she carried and delivered for a fee is a revolting degradation of maternity and an affront to human dignity.[73]

Rabbi Jakobovits' words are a sample of the alarm generated by the new tools of medical reproductive intervention. It is not the use of the tools which is objectionable, but the social and ethical implications. Regrettably, the concerns have rarely encompassed the data of the last two decades and instead have focused on theoretical scenarios, often of the most extreme kind. Surrogacy is something fundamentally new which warrants a balancing test of the gains and risks and must be seen as a new composite of legal concerns.

---

[71] Midrash Samuel 4:1; Midrash Temurah as cited in *Otzar Midrashim*, J.D. Eisenstein, ed. (New York, 1915), vol. 2, pp. 580-581.

[72] "Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation." *Origins*, vol. 16, no. 40 (19 Mar. 1987): 700. Cited by Gold, at ch. 5, n. 3: Prohibition of procreation by non-natural means.

[73] Immanuel Jakobovits, at pp. 264-265.

Ethical and Legal Objections to the New Social Arrangements

A private arrangement like that of the Sterns and Mary Beth Whitehead would not bind a court, according to Jewish law, because traditionally parents do not have the right to independently determine the status of their children. In all such matters of parental responsibility and rights, including custody, it is the court who makes an authoritative determination based on the best interests of the child.[74]

Whether surrogacy is in the best interests of children and a societal good is a widely debated question. If these novel social arrangements are ethical, enhance family, and serve to protect the child, then the courts might choose to oversee and validate such agreements. The following analysis of the ethical and legal concerns which stem from surrogacy affirms the needs of the child as the priority.

Baby-Selling

Baby-selling is repugnant to the Jewish tradition and illegal in all fifty states. Hence, a mother in the United States may not receive payment for her child when she turns her offspring over to another couple for adoption. Nonetheless, most surrogate birth arrangements involve pay. Is the pay to a surrogate mother the equivalent of baby selling?

When the California Legislature's Subcommittee gave their findings on surrogates in 1991, the majority equated surrogacy with adoption and wrote: Paid surrogacy arrangements would "treat the child as a commodity and would set up a distinction between ordinary adoptions and surrogacy adoptions that would be neither defensible or practically enforceable."[75] The recommendation of the California Legislative Committee was to permit surrogacy for free, but to make it a criminal offense to participate on any level in enabling surrogacy for pay. While the California legislature is still debating the question, four states have made it outright illegal to receive payment as a surrogate.[76]

There are, however, some critical differences between adoption and surrogacy. First, the intended father – in either ovum or gestational surrogacy – is the genetic and intended father of the child.[77] Second, the intended parents accept responsibility from the moment of conception. The interests of the child to enter a secure home where he or she is wanted is therefore protected. Third, there is limited duress on the woman agreeing to give up the child, because she makes her decision even before conception.

Distinctions between the typical surrogate and adoption-giving mother further demonstrate that surrogacy and adoption are dissimilar. The profile of a typical adoption mother is an unmarried teenager who lacks financial security and is giving birth for the first time. The adoption-oriented mother has usually gotten pregnant unintentionally, which both she and the biological father regret. She is vulnerable to the manipulation of baby-brokers who may offer her a small monetary fee and care during pregnancy in exchange for the child.[78] Adoption law seeks to protect a vulnerable pregnant mother and

---

[74] See "Parent and Child," in *E.J.*, vol. 13, p. 99, citing *Piskei Din shel Batei HaDin HaRabanim B'Yisrael* 2:3, 171-177; 5:171, 173.

[75] *Advisory Panel Report, Joint Committee on Surrogate Parenting*, Sunny Mojonnier, chair, California, Legislature (1991) p. 15.

[76] Arizona, Kentucky, Michigan and Utah. Five more states ban payment but have the caveat of allowing "expenses" – Florida, New Hampshire, New York, Virginia and Washington.

[77] A father has a duty to maintain his minor children (M.T. Ishut 13:6; S.A., Even HaEzer 73:6, 7), and is responsible whether or not he is married to the woman, e.g., born out of wedlock – Resp. Ribash no. 41; Resp. Rosh 17:7 – cited in *E.J.*, "Parent and Child," 13:96.

[78] Katz, p. 8.

to facilitate giving up an unwanted child, rather than to orchestrate a child's conception.[79]

The chances of an adoptive mother changing her mind about giving up a child are also significant, commonly put at between five to fifteen percent.[80] In one study adoption specialist Carol Wolfe, MFCC, interviewed 250 birth mothers who had agreed to place their children with prospective adoptive parents. In ninety-five of these cases (thirty-eight percent), one or the other party withdrew from the agreement prior to or following the birth.[81]

In contrast, surrogate mothers make a decision prior to conception – usually with the aid of an attorney and therapist – to give the child to parents who very much want to establish a family. Because of the time frame there is no need for hurried decisions, no rival bidding, and no unwanted pregnancy. The studies on surrogates consistently show that surrogates are usually married, have already borne at least one child, and are financially and psychologically stable.[82]

An ovum surrogate mother, let alone a gestational surrogate, does not experience the stress of an unplanned pregnancy. Nor is she likely to feel guilty about giving away her child if she views herself as performing a good deed for the natural father and his wife.[83] The fact that less than one percent of surrogate arrangements have ended up in the courts is strong evidence that surrogacy is different from adoption after birth.

Critics of paid surrogacy say that the payment to the surrogate is for the child because that is what the intended parents really want and that such payments demean human life. Sharon Huddle, who founded the National Coalition Against Surrogacy argues: "The ultimate victims are children. Their very existence was pre-negotiated, pre-designed, and contracted for just like any other commercial transaction."[84]

While it is tempting (and rhetorically effective) to characterize the money that changes hands as a payment for a commodity (the child), it is unclear that this is true. Pregnancy entails lost time, medical risk, and pain, all of which warrant remuneration.[85] In addition, payments to an ovum surrogate may be viewed as the biological father's attempt to protect the welfare of his child by insuring that the mother is provided with proper care.[86]

If payment is banned, then there is the need to pressure a friend or relative to serve as an unpaid surrogate, an act of persuasion which may be even more coercive and problematic than remuneration. It is unrealistic to expect that couples who wish to have a child through a surrogate will be able to find one without participating in the cost, including living costs, entailed by pregnancy. To ban paid surrogacy is to encourage a "surrogacy underground," because the law will not eliminate a strong desire to utilize medical technology to have one's own children through a third party.

---

[79] Margaret D. Townsend, "Surrogate Mother Agreements: Contemporary Aspects of a Biblical Notion," *University of Richmond Law Review*, 16 (1982): 406.

[80] *Center for Surrogacy Parenting Newsletter*, vol. 1, no. 4 (spring 1993): 1.

[81] Ibid.

[82] Andrews and Douglass, pp. 673-674.

[83] Katz, p. 8.

[84] Cited in Andrews, "Surrogacy Wars," *California Law* 12 (Oct. 1992): 47.

[85] In the Talmud there are parallel categories of compensation for willful injury: נזק – loss or damage; צער – pain and suffering; רפוי – medical expenses; שבת – loss of earnings; בושת – humiliation. See B. Bava Kamma, ch. 8; Hoshen Mishpat 420.

[86] Carmel Shalev, *Birth Power: The Case for Surrogacy* (New Haven, Ct.: Yale University Press, 1989), p. 159. She points out that giving life a monetary value took place in the nineteenth century with respect to life insurance, which was thought to represent a form of trafficking in human lives. Shalev wrote the book as her doctoral dissertation at Yale Law School and currently practices law in Jerusalem.

Money linked to pregnancy does not mean that the resulting child is any less loved or is reduced to a mere commodity. Currently, a billion dollars a year are spent in medical clinics to assist procreation. The money does not detract from the uniqueness of the child; it only underscores that a child is a much-wanted blessing.

The best interests of a child are served if the child is loved, cared for, and nurtured, which has little to do with the manner of conception and gestation. Payment compensates the surrogate for the hardship of pregnancy and helps assure that the intended child is properly taken care of beginning with conception. Surrogacy is not baby-selling, unless there is exploitation.

עושק – *Exploitation*

עושק, which translates as exploitation, is condemned in Jewish law. The prohibition stems from the biblical injunction, לא תעשק את רעיך "Thou shall not oppress your neighbor."[87] Technically, this mandate is identified by its Biblical context and in later Jewish law as the wrongful withholding of funds, usually that of wages.[88] Nonetheless, עושק may also be understood more broadly as a moral condemnation of taking advantage of the distress, weakness or inexperience of another person.[89] If there was exploitation, a Jewish court might disregard an agreement, as it does with gambling contracts.[90] Marc Gellman, among others, argues that עושק is inherently present in surrogacy arrangements.[91] He goes on to cite the statement in the Talmud that it is better to do a little good with what is yours than to do much good by exploiting that which belongs to others.[92]

The charge that surrogacy is exploitative is rooted in a variety of concerns: abuse of poor women by the rich; insensitivity to the birth mother's sacrifice in surrendering a child; frivolous avoidance of natural childbirth by fertile women; and undue risk with devaluing and commodifying the body. Put succinctly by Professor George Annas: "The core reality of surrogate motherhood is that it is both classist and sexist: a method to obtain children genetically related to white males by exploiting poor women."[93]

On the other side is the argument articulated by Carmel Shalev that "the exclusion of domestic reproduction labor from the public economy is the ultimate manifestation of a patriarchal double standard."[94] Shalev says that it is the historical failure to value the domestic work of mothers and housewives that has contributed to the sense that gestation has no value as a form of productive labor. She argues that women may exercise reason with respect to reproduction and may responsibly share birth power with those less fortunate.[95] As men get paid for their muscles, Shalev says, women should get reimbursed for their wombs.

Much of the debate to date has taken place in the theoretical realm. For instance, there is no evidence that women have used surrogates to avoid the hardship of pregnancy, as Rabbi Jakobovits had feared. Indeed, looking at the actual data on exploitation and surrogacy, Judge Parnelli in Anna Johnson v. Calvert wrote for the California Supreme Court:

---

[87] Lev. 19:13 – לא תעשק את רעיך.

[88] See Rashi to Lev. 19:3; Yad, Gezelah va-Avedah 1:4; and "Oppression," *E.J.*, 12:1435-1436.

[89] Bava Metzia 59b, also note Rashi there.

[90] Sanhedrin 25b; M.T. Gezelah 6:6-16.

[91] Gellman, p. 106.

[92] Sukkah 29b, cited by Gellman as an argument against ovum surrogacy.

[93] George Annas, "Fairy Tales Surrogate Mothers Tell," *Law, Medicine and Health Care* 16 (1988): 27.

[94] Shalev, p. 164.

[95] Shalev, p. 142.

> Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them to accept lower-paid or otherwise undesirable employment.[96]

The service as a surrogate is not to be equated with slavery, which some have done. The woman makes the choice in a free-willed manner and is given the right to withdraw at any point. She is not giving up her womb permanently, but using it for a specific purpose which is inherently time-bound.

In reference to the ovum surrogate, who is giving up a child which is genetically her own, a larger perspective is helpful. We as a committee have approved the donation of sperm and ovum. An ovum surrogate is essentially donating her ovum. Rather than it being placed in another woman, she is donating the ovum and serving as the gestational surrogate for that donated egg.

Another challenge to surrogacy, as articulated by Andrea Dworkin among others,[97] is that surrogacy is a form of prostitution. There are, however, fundamental differences between surrogacy and prostitution, as well. The goal of prostitution is a fleeting moment of carnal pleasure. In contrast, surrogacy enables a profound societal gain – the creation of a child. Second, prostitutes are easily and often exploited. Those who use their services usually have little regard for the prostitutes' well-being. In contrast, intended parents are committed to a surrogate during the extended time frame of conception and gestation. They are concerned for the surrogate's lifestyle, home life, emotional and psychological stability, physical health, and a myriad of other factors that could affect the baby's health. It is hard to imagine an employer who cares more for his or her workers than do intended parents for a surrogate. Last, the use of a surrogate, as in the case of artificial insemination, does not violate the marital bond, as would adultery. A third party who assists procreation does not harm a marriage, but strengthens it.

Exploitation is of critical concern and warrants monitoring by the courts and legislators, but is not inherent to surrogacy. If pay for the use of a womb is accepted as legitimate, then surrogacy for pay is defensible. If we recognize women as responsible and accountable for their decisions, then we should acknowledge that surrogacy provides women the opportunity to give the blessing of a child to a couple in need and allows the surrogate to get paid legitimately for her efforts.

Unjustified Risk

God commands: "Guard your lives carefully."[98] This charge led the codifiers of Jewish law to say that a person should not unreasonably risk his or her life.[99] No doubt giving birth entails risk. As one obstetrician (Dr. Jay Masserman) said to me, the day a woman gives birth is generally the most dangerous of her life. Rabbi Marc Gellman has challenged surrogacy on this basis, saying that a surrogate cannot justify self-endangerment, because she has no חיוב, legal obligation, to give birth for another couple.[100] However,

---

[96] 5 Cal. 4th, p. 97; 9 *California Reporter*, 2d, p. 503.

[97] Andrea Dworkin, *Right-Wing Women: The Politics of Domesticated Females* (New York: Coward, McCann, 1983), pp. 181-183, cited in Andrews and Douglass, and in Shalev, p. 148.

[98] Deut. 4:15 – ונשמרתם מאד לנפשתיכם.

[99] Hullin 10a; see Berakhot 32b; Shabbat 32a; Bava Kamma 15b, 80a, 91b; M.T. Hilkhot Rozeach 11:4-5; Orah Hayyim 173:2; Rema to Yoreh De'ah 116:5.

[100] Gellman, p. 106.

in the technical sense of חיוב, a woman is never obligated to procreate. The command is only binding on men.[101]

Yet, the rabbis have seen pregnancy as worthy of risk-taking by women. As a wife undertakes a risk to allow her husband to fulfill a mitzvah, so does the surrogate. As a woman derives joy from giving birth to her own child, so may a woman gain fulfillment in enabling another couple to be blessed with a child. The exception to self-endangerment can be read more broadly than Gellman's definition of חיוב and may be understood as a risk which provides a substantial good.

In that light, Rabbi Elliot N. Dorff permits ovum donation despite medical risks, and notes that the risks are smaller than kidney donation from a live donor, who only has two kidneys to start with, and which is permitted.[102] Moreover, the Sages permitted the performance of paid tasks, like sailing, which in their day entailed substantial risks to safety. And today we would allow a Jew to serve as an astronaut despite the risks and with only theoretical gains. In the case of surrogacy it is technically a mitzvah for the man in the couple to have a child, and it benefits family life. To enable a couple to have a child justifies risk.

A woman who is at greater risk than most during pregnancy should not serve as a surrogate because of the prohibition of self-endangerment. Fortunately, the risks of pregnancy and childbirth have declined in recent decades due to improved monitoring of the pregnant woman and the fetus and safer c-section techniques. Nonetheless, when a woman and her husband consider her serving as a surrogate they must take risk into account and be sure that her health is sound.

אסמכתא – *Finality of Conditions*

Another contractual concept which is discussed as a challenge to surrogacy agreements is that of אסמכתא,[103] which literally means "lean-on," and means that a contract is binding only if we can reasonably presume that the intentions of both parties are serious, deliberate, and final.[104] Maimonides goes so far as to void all contracts which are bound by an "if" clause, because the condition precedent implies that the contract only takes effect in the future.[105]

Yet, Maimonides and later poskim did accept commercial futures contracts when written with the language of "from now" (מעכשו), clarifying that the parties were bound from the moment of entering the agreement.[106] The symbolic act of acquisition (קנין), often marked by the exchange of a handkerchief, served to show that the parties had made up their minds to enter into an immediately binding transaction. Consequently, social agreements of future marriage, when properly composed, were enforced with penalties for breach of promise.[107] Nonetheless, the moral question remains whether a woman can in

---

[101] Yevamot 6:6. The majority holds that only men are required; a dissenting opinion is voiced by Rabbi Yohanan ben Berokah, who would obligate both men and women. Feldman, *Health and Medicine*, *supra* p. 71, shares this law and explains it as based on possibility of man engaging in polygamy and with the gloss of Rabbi Meir Simchah of Dvinsk (d. 1927) that since the pain and risk of childbearing is upon the woman, the Torah could not in fairness command a woman to undergo that pain and risk.

[102] Rabbi Elliot N. Dorff, "Artificial Insemination, Egg Donation and Adoption," above, p. 500.

[103] Gold, p. 122.

[104] Bava Metzia 48b, 66a-b, 109a-b; Bava Batra 168a.

[105] Yad, Mekhira 11:2,6.

[106] Yad, Mekhira 11. See discussion by A. Zvi Ehrman, "*Asmakhta*," in Menachem Elon, ed., *Principles of Jewish Law* (Jerusalem: Keter, 1974), pp. 171-174.

fact make a final decision to relinquish a yet unborn child.[108]

In response to such concerns, Carmel Shalev is vehement in her objection to the "insinuation that it is unreasonable to expect a woman to keep her promise because her faculty of reason is suspended by the emotional facets of her biological constituency."[109] Shalev says that as an artist may grow attached to a work of art, he or she is still bound by the agreement to part with the work. Likewise, Rabbi Seymour Siegel argued that a woman has the capacity to make a decision and should be bound by her word.[110] On a contract level the response to אסמכתא is that surrogacy is an agreement for services which binds the parties from the moment they enter into the agreement.

During the pregnancy a surrogate should have the right to withdraw from the agreement – an extension of her freedom of choice. But once the child is born it should be assumed that it goes to the intended parents. After all, it is their responsibility to accept the child from the moment of birth regardless of birth defects. After birth an ovum surrogate may assert her maternal rights, but the burden of proof is on her to show cause why the original intent should not be honored. אסמכתא is a legal concern in Jewish law to assure predictability of outcomes, which the court should protect in a surrogacy case as well, unless there is a violation of the best interests of the child.

דבר שלא בא לעולם – *Futures*

Another contractual concern related to אסמכתא is the prohibition against contracts for "something which is not yet in existence" – דבר שלא בא לעולם.[111] Parties could not technically give title to that which did not yet exist. Yet, here too the problem was overcome with language which shifted the focus to the parties themselves, who did exist, and their obligation to act in a certain way.[112] Hence, the concern is moot when a surrogate agreement is understood as a contract for services of pregnancy which binds the conduct of the respective parties, rather than determination of the status of the future child.

Family Integrity

Surrogacy is challenged in broad terms as contrary to a public policy of preserving family life. Some of the objections are as follows:

- "Frivolous motivations [for surrogacy] soon become socially acceptable."[113]
- "To use another person as an 'incubator' and then take from her the child she carried and delivered for a fee is a revolting degradation of maternity."[114]

---

[107] Ehrman, "*Asmakhta*," Tos. to Bava Metzia 66a; Sanhedrin 24b-25a and Shulhan Arukh, Hoshen Mishpat 207:16, although, Ashkenazic authorities widely argue that the penalty was not a matter of contract law, but compensation for damage and insult.

[108] This question is raised by Michael Gold, p. 122, who doesn't answer it, but goes on to emphasize that a woman who makes such an agreement still has a moral duty to fulfill it, quoting the Sages: "He who exacted punishment from the generations of the Flood and from the generations of the Tower of Babel will also exact punishment from one who does not abide by his word" (Bava Metzia 4:2).

[109] Shalev, p. 121.

[110] Siegel, pp. 107-108.

[111] Tosefta, Nedarim 6:7; also see Bava Metzia, *hamafkid* (ch. 3).

[112] Bava Batra 157a; Tur and Shulhan Arukh, Hoshen Mishpat 60:6.

[113] Tendler.

Jewish tradition values family integrity, which includes the ability to define who is in the family; forging secure family bonds; fashioning personal identity; and preserving the sanctity of marriage.[115] It is precisely the value of family which motivates an advocacy of surrogacy. For such arrangements allow for much-wanted children who enhance and create families. Infertility imposes a great strain on a marriage which for the couple with an infertile woman may find a solution in the benign assistance of another woman.

There is currently no evidence of harm to a family unit which has had a child through surrogacy, such as the jealousy of the non-genetic parent or half-siblings of either family. If anything, the stories to date are overwhelmingly of the joy of gaining a child. No doubt there are risks worthy of monitoring through careful consideration and counselling before entering such an agreement. But, most persuasively is the fact that with thousands of children born to surrogates – thousands of children who otherwise would not have been born – only a minuscule percentage have resulted in litigation or reported problems. Surrogacy, evidenced anecdotally by the successes, strengthens family.

Conclusion: A Path for Surrogacy

The novelty of a woman carrying a child for another couple will take time to gain social acceptance. Comfort with surrogacy will properly increase and theoretical fears will dissipate as the data builds an unimpeachable case of happy families who successfully overcame the infertility of the female spouse.

Jewish law contains many examples of the power of the courts to redefine family relationships and rights. Such change comes slowly and is a response to shifting societal norms and new variables. Moreover, the legislation of the state, as in the case of adoption, may give Jewish courts authority to foster entirely new social arrangements. Yet, the reality is that Jewish courts, particularly in our Movement, refrain from monitoring social arrangements and adjudicating disputes. Largely, our בתי דין concern themselves with matters of marriage and divorce.

In Jewish law there is the principle of דינא דמלכותא דינא, the law of the land is the law. This principle, originally enunciated by Samuel in the Talmud in reference to civil matters,[116] would apply on a broader basis to any practice in violation of local law. Consequently, if legislatures prohibit surrogacy then Jewish courts and lawyers would need to abide by that holding.[117] If we believe in the benefits of surrogacy than we need to encourage our legislators to pass supportive legislation. We need to caution our members that if the law of their state prohibits surrogacy they must not violate the law, including the participation in writing "illegal" contracts.

Although surrogacy is a potentially positive use of new technology, controls are needed to protect against abuses and to oversee the best interests of the child. Without effective legislation there is the threat of reproductive anarchy. Recent alleged unauthorized use of ova by fertility physicians at the University of California at Irvine demonstrates the potential havoc created by an abuse of consent. Legislation must assure that the expectations of all the parties involved are clearly defined in an agreement and that there is mon-

---

[114] Jakobovits.

[115] Concerns cited by Agus, "Surrogacy."

[116] Nedarim 28a: Gittin 10b; Bava Kamma 113a; Bava Batra 54b, 55a.

[117] There is no state in the Union which has legislated surrogacy contracts as legal and enforceable. Only nineteen states have any laws on the subject as of the end of 1993 and most placed limits, some even made it a crime to engage in surrogacy for profit (editorial in *USA Today*, 19 Nov. 1993, p. 12A). State Legislatures are actively considering legislation. In 1992, there were fifteen states with legislation; the most common – applicable in eleven states – is to void paid surrogacy contracts. Lori B. Andrews, "Surrogacy Wars," p. 50.

itoring of the professionals.[118]

Wise legislation would require that even prior to conception parties would appear before a state court and request permission to enter into a surrogacy agreement. The judge would confirm the surrogate's physical health, emotional stability, informed consent, prior experience with pregnancy, and if she was married, confirm her husband's approval. The court would also determine that the initiating couple would make good parents and that their motive was infertility. The court would oversee fair compensation to any involved parties, including agencies or professionals and require that insemination be done by a licensed physician. The court would also ascertain that there was professional counselling and psychological preparedness for all parties prior to entering the agreement.

Guidelines for surrogacy agreements coupled with court monitoring would offer the following necessary ingredients for the child's security: certainty, efficiency and finality. Such legislation is a means for making workable that which might otherwise create social disorder. There is a need for such control to avoid underground, unscrupulous practices. Indeed, legislatures could make it a crime to enter a surrogacy agreement absent court approval and thereby put teeth into a law which would limit abuse of a potential blessing.

Couples should consider surrogacy as a last option to overcome infertility due to its great financial and emotional costs. Among the substantial emotional costs are the uncertainty of success – which may entail great psychological stress – and the possibility of a change in mind by the surrogate, which might entail a lawsuit or simply great disappointment. In addition, there remain ongoing ethical concerns which warrant ongoing evaluation, such as the impact of surrogacy on the family of the surrogate. Nonetheless, when a couple is aware of these risks the Rabbinical Assembly Committee of Law and Standards should affirm in light of the current evidence that surrogacy is permitted by halakhah.

Does Surrogacy Allow for Fulfilling the Mitzvah of "Be Fruitful and Multiply"?

Yes. A man, according to Jewish law, is considered the natural father of the offspring of his sperm. Hence, with the aid of a surrogate, a man would fulfill the mitzvah of procreation, which is incumbent only on the man. In the same vein, whether the child was a Kohen, Levite, or Israelite would be determined by the biological father.[119]

Must an Infertile Couple Hire a Surrogate to Fulfill the Mitzvah?

No. Surrogacy is an extraordinary method to conceive and gestate a child. A couple is only obligated to use natural means to fulfill the procreative mandate.[120]

Summary

Surrogacy – both ovum and gestational – is a new legal construct. Jewish law has no precedent for child-making without sex, let alone the splitting of biology and gestation. This is a time to acknowledge that new variables provide a need to craft law. To determine whether Jewish law should support surrogacy is to balance the gains of surrogacy over its potential damage.

---

[118] Examples of model legislation are Uniform Status of Children of Assisted Conception Act, National Conference of Commissioners of Uniform State Laws, 1988; analyzed and supported in Paul J. Greco, "Parental Guidance Suggested: A Proposal for Regulating Surrogacy," *Columbia Journal of Law and Social Problems* 22 (1989): 115; favorable legislation was drafted by California State Senator Watson, Senate bill 2635 (1988), and passed by the California legislature, but vetoed by Governor Pete Wilson.

[119] Dorff similarly holds according to the link to the biological father that the tribal identity follows the source of the sperm, above, pp. 478, 504.

[120] Dorff similarly writes in reference to the use of donor insemination, above, pp. 504-505.

Adoption is to be encouraged, but there are couples who will prefer a genetic link to the father (artificial insemination, ovum donation, or ovum surrogacy) or to the mother (gestational surrogacy). At first impression there may be a visceral discomfort with these relatively new modes of reproduction, specifically the transfer of genetic material or the use of a womb for another couple. Yet, when we examine this new technology in the context of its outcome, we find the blessing of children to couples who want them very much. The bigger picture, which includes the intended result, makes surrogacy more acceptable upon reexamination.

A contemporary surrogate is not the equivalent of the שפחה, because the surrogate may have a husband and children of her own and she is not involved in raising the intended child. Yet, the new medical technology allows the surrogate to help an infertile couple without violating her own sexual, marital commitment to her husband. And the intended child is given a home by parents who are genetically linked to the intended child and accept responsibility for the newborn from the point of conception.

The precedents of שפחה and יבום evidence that such constructs evolve in response to changing variables, including shifting social mores. Surrogacy has grown dramatically over the past two decades, because it meets the needs of many couples. As a new social construct, related to but different from שפחה, it warrants an open-minded examination. It is not ostensibly forbidden by Jewish law, and, if anything, the past constructs suggest the possibility of new social forms as a last resort solution to female infertility. There are potential abuses in surrogacy, and some cases have already led to lawsuits. Before a couple opts to use a surrogate they should explore all their reproductive options and be aware of the serious costs and risks entailed by depending on a third party to their child's birth.

Legislation would help overcome potential abuses, such as exploitation of surrogates. The test of a new social construct is not whether it can thrive in the absence of legislation, but whether legislation can control abuse.[121] In the context of surrogacy the success of the surrogacy centers in screening potential surrogates and writing contracts with clearly stated expectations reveals the potential of the courts to make surrogacy workable for all parties. To ban a technique based on potential psychological harm may cause even greater psychological harm by its absence. Jewish ethical concerns including baby-selling, exploitation, family integrity, and contractual needs for a meeting of the mind are each balanced in favor of surrogacy upon close examination.

From a Jewish perspective, it would be wrong to outlaw a procedure that has the potential to help so many couples overcome infertility and which works smoothly in the overwhelming majority of cases. On balance, surrogacy offers the joy of parenthood, a profound benefit to society. Judaism, we see in this analysis, affirms couples who say as did the matriarch Sarah: "Through her I too shall bear a child."[122]

Conclusion

It is permissible to employ a surrogate, whether gestational or ovum, to overcome infertility and to serve as a surrogate. A man fulfills the mandate of procreation in having a child with a surrogate.

---

[121] Greco, p. 180.

[122] Gen. 16:2.