

YD 269:9.2022

Rabbi Judith Hauptman, Rabbi Suzanne Brody and Jessica Rosenthal Chod, Esq.

An Alternative to Maternal Identity and the Status of Children Born Using a Gestational Carrier

Approved on December 5, 2022 by a vote of 9-12-2. Voting in favor: Rabbis Aaron Alexander, Jaymee Alpert, Suzanne Brody, Elliot Dorff, David Fine, Judith Hauptman, Barry Leff, Tracee Rosen, Rachel Safman. Voting against: Rabbis Adam Baldachin, Pamela Barmash, Emily Barton, Nate Crane, Joshua Heller, Rachel Isaacs, Amy Levin, Daniel Nevins, Micah Peltz, Robert Scheinberg, Deborah Silver, Ellen S. Wolintz-Fields. Abstaining: Rabbis Avram Reisner and Mordecai Schwartz.

שאלה (Question)

If a Jewish woman contributes her egg, which results in an embryo, that is then implanted into a non-Jewish Gestational Carrier, is the resulting child Jewish by birth or is conversion to Judaism required?

תשובה (Response)

The commandment to “be fruitful and multiply” (*peru urevu*) is the first mitzvah in the Torah.¹ It is considered such a “great mitzvah” that in some cases it even overrides certain other laws.² However, since biblical times, we have simultaneously acknowledged the biological imperative to reproduce³ and the fact that it is not always easy to do so. According to the Centers for Disease Control (CDC)⁴, about 12% of (1 in 8) women aged 15 to 44 years in the United States have difficulty getting pregnant or carrying a pregnancy to term.⁵ In other words, in the United States alone, nearly seven-and-a-half million Americans,⁶ suffer from infertility. Among the American Jewish population an even higher percentage, 1 in 6, experience infertility.

In the Tanakh, we learn of the fertility challenges of 8 women and the techniques they use to build families. Hannah⁷ and Rebecca⁸ rely on fervent prayer. Sarah⁹, the wife of

¹ Genesis 9:7 and 1:28 provides the blessing.

² See Tosafot on Shabbat 4a, d.h. Vekhi Omrim Lo Le'adam.

³ Although not an individual biological imperative, in order for species to persist, it must by definition reproduce to ensure the continuation of the species. Without reproduction the species ceases to exist. We recognize that some individuals facing infertility may choose not to pursue having children and we support such choices.

⁴ 2006-2010 National Survey of Family Growth, CDC

⁵ <https://www.cdc.gov/reproductivehealth/infertility/index.htm>

⁶ <https://resolve.org/infertility-101/what-is-infertility/fast-facts/>

⁷ 1 Samuel 1:9

⁸ Genesis 25:21

⁹ Genesis 11:30, 18:10-11

Manoach¹⁰, and the Shunamite woman¹¹ experience miraculous direct intervention in the form of messages conveyed by angels and prophets. Michal never gives birth,¹² but does adopt her sister's children. And, most relevant to the question posed here, three of our foremothers, Sarah¹³, Rachel¹⁴, and Leah¹⁵ all used an early form of surrogacy.

In recent years, surrogacy has evolved into a more formalized process, which is discussed further in this paper. This paper has been written to address the fact that current Jewish law requires a child, resulting from the egg¹⁶ of a Jewish woman¹⁷, that is born using a non-Jewish Gestational Carrier, to convert. Although, in many cases, the child is genetically the child of the intended Jewish parents, and in the eyes of state law legally their own, the Jewish mother is not seen as the “mother” and therefore the child is not considered Jewish at birth. The current CJLS responsum instructs that the child must be converted in a mikveh.¹⁸ This is not a simple dunk as some rabbis have relayed to parents.¹⁹ Immersion in a mikveh is used to complete a conversion and is steeped in meaning.²⁰ Jewish parents may feel confused and even angry with the current CJLS position that the child who they intend to raise as Jewish, and who they will name at a *berit* (colloquially known as a bris) or other Jewish naming ceremony, although a product of the

¹⁰ Judges 13:2-3

¹¹ 2 Kings 4:14-16

¹² 1 Samuel 6:23

¹³ Genesis 16:1-2

¹⁴ Genesis 30:3

¹⁵ Genesis 30:9

¹⁶ In this paper, we use the term “egg” to refer to the female reproductive cell. We understand that the term “ovum” may also be used, but we have decided to use “egg” in this paper to avoid confusion as we believe that is the more commonly used term for the sex cells that may fuse with sperm to create a fertilized egg that may result in an embryo.

¹⁷ Throughout this paper, we use the term “woman” to refer to a person whose gametes are ova.

¹⁸ Aaron Mackler, Maternal Identity and the Status of Children Born to a Surrogate Mother,” YD 268:6.1997.

¹⁹ While some will argue that taking a child to the mikveh is a simple answer to this question, taking someone or something to the mikvah has meaning and we believe that this response undermines the sanctity of the mikveh. In this instance, taking a child to the mikveh is saying the child is born as a non-Jew and must convert to Judaism. To the child's Jewish, biological parents, this can be seen as undermining their status as biological parents. Taking a child in this scenario to the mikveh attempts to make the situation closer to an adoption scenario than it is. Adoption is beautiful, but is a completely different fact pattern and origin story. It also means that the child's status will always have the label of a convert.

²⁰ While some individuals are born into the religion, others may choose to convert to Judaism. Upon completion of conversion rituals, they are considered to be Jewish. This is very different from saying that only one who is born to a kohen father can be considered a kohen. Genes determine status of kehunah. While genes are not necessary to be Jewish, the concept of Jewish by birth has remained and will remain. It is clear that Judaism is open to all through the avenue of conversion, however the concept of Jewish by birth is well established. It is not surprising that Jewish status, and also Jewish caste (Kohen, Levi, Yisrael), are also conceptualized as being transmitted by genes since, in the ancient world, this was a common technique.

egg from a Jewish woman is, in fact, not Jewish. It makes little sense in today's world.²¹ It is this situation that has given rise to this paper.

It should be clearly noted that this paper does not intend to modify the current ruling-- that a child born to a Jewish woman, who is the individual who both gestates and will raise the child, using a donor egg from a woman that is not Jewish does not require conversion. Instead, this paper addresses a different scenario entirely.

Utilizing solid Talmudic sources, this paper seeks to address the use by Jewish parents of a non-Jewish Gestational Carrier. This scenario is coming up with increasing frequency and deserves to be addressed and given its own unique analysis, separate from other methods of artificial reproductive contexts.²² **In addition, before this paper continues any further, the authors wish to expressly state that this paper does not and should not be used to challenge or change in any way CJLS' well-established position on when personhood is established vis-à-vis abortion. The CJLS has stated clearly that life does not begin at conception.**²³ **In addition, as early as 1959²⁴ and as recent as 2003²⁵, the CJLS has consistently taken the position that abortion is permissible in a variety of contexts.** What is at question is the onset of the child's Jewish identity, not the onset of life or personhood. Our paper describes Jewish identity as being imbued at conception and attaching to any resulting child that is born.²⁶ This is consistent with the CJLS' position that life begins at birth.²⁷

History of the CJLS on Infertility Matters and Artificial Reproductive Techniques

²¹ Generations ago the rabbis were merely trying to establish "Jewish by birth" based on the best scientific knowledge of their day. In their estimation, the way to establish "Jewish by birth" was to determine the Jewish status of the woman who gave birth. Today we have alternative ways of establishing the biological mother of the child.

²² What it means to be born to a Jewish mother is a major cornerstone of Jewish law. Here we have a situation where science has evolved in a way that requires the current standard of what it means to have a Jewish mother to be modified to fit the new reality. This situation is exactly the type of situation where this recalibration should occur and the definition of what it means to be born to a Jewish mother should be expanded to mean either gestation or conception, particularly in cases where the baby's intended parent(s) is (are) Jewish and will raise the child as Jewish.

²³ Grossman, 2001, "'Partial Birth Abortion' and the Question of When Human Life Begins." HM 425:2.2001b

²⁴ Klein, 1959 (adopted as majority opinion in 1983) "A Teshuvah on Abortion." HM 425:2.1983e

²⁵ Grossman, 2001, "'Partial Birth Abortion' and the Question of When Human Life Begins." HM 425:2.2001b

²⁶ In other words, this paper utilizes the conditional (*al tenai*) approach, e.g. The child that grows from this egg will be Jewish if and only if it is born alive.

²⁷ Grossman, 2001, "'Partial Birth Abortion' and the Question of When Human Life Begins." HM 425:2.2001b

As medical technology has changed, the ways in which people have sought to overcome infertility and build their families has also evolved. In addition to prayer and adoption, we have developed a variety of different ways to bring two gametes together and help the resultant embryo implant in an environment conducive to healthy growth.

In the mid-1990s, it was affirmed that when couples cannot have children, Jewish law clearly allows that they may take advantage of fertility drugs and other techniques.²⁸ Both artificial insemination and egg donation were deemed permissible by the CJLS in 1994.²⁹ At the time, it was stated that use of the husband's sperm and of the wife's egg are considered preferable to that of a donor, but even donor insemination is permissible and is neither licentious nor adulterous since there is no contact of the genital organs. In other words, a child conceived using either egg or sperm donation is considered to be fully legitimate, and the Jewish identity of the resultant child was determined to follow that of the bearing mother.³⁰ Rabbi Dorff was careful to note that, in the future, as technology develops yet further, some of the specific questions and answers presented might be subject to change.

A year later³¹, in 1995, Rabbi Mackler reaffirmed that an infertile couple may use in vitro fertilization (IVF) to have a child and that the result of such a procedure is fully the parents' child in all respects. Like Dorff in the preceding year, Mackler asserted that the woman who gestates and gives birth to a child is to be treated as the child's mother for purposes of Jewish law, including the determination of Jewish identity.³²

In the more than 20 years since the last responsum concerning surrogacy, much has changed. As assisted reproductive technology (ART) has expanded and evolved, so has the use of surrogates.³³ In the earlier days of ART, it was common for a surrogate to be a woman who

²⁸ It should be noted that Jewish law allows, but does not require individuals take advantage of such drugs and technologies. Dorff, 1994 "Artificial Insemination, Egg Donation and Adoption" EH 1:3.1994.

²⁹ Dorff, 1994 "Artificial Insemination, Egg Donation and Adoption" EH 1:3.1994.

³⁰ Dorff, 1994 "Artificial Insemination, Egg Donation and Adoption," EH 1:3.1994.

³¹ Mackler, 1995, "In Vitro Fertilization," EH 1:3.1995.

³² Mackler's ruling here applies appropriately to the following donor egg scenario: A Jewish woman discovers that she is unable to produce an egg. She secures an egg from a non-Jewish woman. It is fertilized with the sperm of the intended father (or sperm donor) and then implanted in a Jewish woman's uterus. She brings it to term. When Mackler ruled that the offspring in such a case is deemed Jewish at birth, his rationale was that even though the egg is taken from a non-Jewish woman, a Jewish woman gave birth to the child. She, therefore, is its halakhic mother. See Rabbi Aaron L. Mackler's responsum, "Maternal Identity and the Status of Children Born to a Surrogate Mother," YD 268:6.1997, 137-145, in which he concludes that a child birthed by a Jewish mother, even if the egg donor is not Jewish, is deemed Jewish at birth (143).

³³ According to the Society for Assisted Reproductive Technology, the number of babies born in the US via surrogate has increased from 738 in 2004 to 2,807 in 2015.

<https://www.nbcnews.com/news/us-news/long-wait-legalized-surrogacy-may-soon-end-new-york-n968541>.

(1) donated her own egg, (2) was inseminated by sperm, and then (3) carried a pregnancy to term for another person, something that is now sometimes known as “*Traditional Surrogacy*”.³⁴ In fact, this describes the scenarios regarding our foremothers in the Bible.

Today, the overwhelmingly more common scenario is *Gestational Surrogacy*. Gestational Surrogacy is when a woman, referred to as a “*Gestational Carrier*” (1) has an embryo, that is not a result of her own egg, (2) implanted into her uterus, (3) with the intent to carry a child for another. In the Gestational Carrier scenario, the Gestational Carrier has no genetic relationship to the embryo and often the embryo is the product of an egg and sperm from the couple³⁵ who have agreed with the Gestational Carrier to carry a baby for them, known as the “*Intended Parents*”.³⁶

Circumstances have changed so much, that medical and legal practitioners that specialize in this area of reproductive medicine and law, no longer refer to the woman that has agreed to carry the baby as a “*Surrogate Mother*”, instead preferring the use of the term Gestational Carrier, the term that recognizes that the woman’s relationship with the baby she is carrying is not one of motherhood. In such a case, the embryo was created, and the transfer into the Gestational Carrier was done, with the intention by all parties³⁷ for any resulting child to be the legal child of the Intended Parents, who are very often the genetic parents of the resulting child.

In 1995, when Rabbi Mackler’s responsum passed, surrogacy laws were in their infancy in the United States. Only 3 states (Arkansas, Nevada, and Florida) allowed the Intended Parents to be legal parents without the need to go through the adoption process, and this was only true in cases where the embryo being gestated was formed using the intended parents’ gametes. In contrast, at the same time, in Arizona and North Dakota, it was the gestational surrogate who was considered to be the legal parent.³⁸ Now, more than 25 years later, along with our evolving

³⁴https://www.reproductivefacts.org/resources/infographic-gallery/images/gestational-carrier-vs.-surrogate/?_ga=2.185490412.493691715.1610743724-2095551104.1610324509

³⁵ In other instances, the intended parent or parents, such as the case of a gay couple or a single father by choice, may have no genetic relation to the egg.

³⁶ For a comprehensive overview of the science and the current established medical ethics opinion on the use of Gestational Carriers, please see the Ethics Committee of the American Society for Reproductive Medicine’s “Consideration of the gestational carrier: an Ethics Committee opinion”, Ethics Committee of the American Society for Reproductive Medicine, 2018. https://www.reproductivefacts.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/consideration_of_the_gestational_carrier-pdfmembers.pdf and the Ethics Committee of the American Society of Assisted Reproductive Medicine, “Recommendations for practices utilizing gestational carriers: a committee opinion” Ethics Committee of the American Society for Reproductive Medicine, 2015. [https://www.fertstert.org/article/S0015-0282\(16\)63005-4/pdf](https://www.fertstert.org/article/S0015-0282(16)63005-4/pdf)

³⁷ This intention is usually recorded in a written document signed by all parties involved.

³⁸ Virginia Law Review, Vol. 81, No. 8, Symposium: New Directions in Family Law (Nov., 1995), pp. 2343-2375.

understanding of science, gestation, and family building in general, the secular laws in the United States have changed considerably.³⁹

Legal Background/History of Surrogacy in the United States⁴⁰

As with many legal issues in the United States, the laws governing the use of surrogates and surrogacy agreements vary by state. As of the end of February 2021,⁴¹ the use of a compensated Gestational Carrier is legal, or not expressly prohibited, in all states except Louisiana, Michigan and Nebraska.⁴² The laws of the state where the surrogate lives govern the legality of the contractual relationship and any the terms of any agreements.

Although the laws and approaches to surrogacy are varied, there are 3 primary groupings of states when it comes to the legal status of surrogacy.

1. States where surrogacy is legal and there is a statute or ruling from the state's highest court governing the process and legality of surrogacy.
2. States where surrogacy is legal but there is not a statute or ruling from the state's highest court governing the process and legality of surrogacy. In these states, how birth orders are granted by the courts are determined on a county by county or judge by judge basis.
3. States where surrogacy is expressly prohibited.

In the states where surrogacy is permissible, the intent of the parties or genetics has been used in determining parentage and has generally been codified by statute or by decisions of the

³⁹ While we do not decide halakhah based on the laws of the land in which we live, we do give a certain amount of authority to those laws. While halakhah is not, nor should it be, determined by the secular law of the land in which we reside, there is, nevertheless, an interaction between the two. There are times when halakhah permits something that the local law of the land forbids. In such cases, we rely on the principle of *dina demalkhuta dina* (the law of the land is the law) and we refrain from that which is halachically permissible.

⁴⁰ Of course, many other jurisdictions around the world also have laws which govern the use of surrogacy and in some cases still prohibit its use altogether. While all of these jurisdictions and their applicable laws are too lengthy to describe in this paper, the authors note, as an example, that with respect to Canada, the substantive issue relating to the legality of surrogacy is a matter of federal jurisdiction and is governed by "The Assisted Human Reproduction Act S.C.2004, c. 2" ("AHRA"). The AHRA sets out the terms and conditions pursuant to which a surrogacy process may legally occur. For example, a gestational carrier must be at least 21 years of age and may not be paid compensation for acting as a surrogate but may be compensated only for her reasonable out of pocket expenses. However, the registration of "live births" (i.e, birth certificates) is a matter of provincial jurisdiction and the ease with which a live birth may be registered by the intended parents in a surrogate birth situation varies widely from province to province. As well, agreements relating to surrogacy must comply with both the provisions of the AHRA and provincial law respecting contracts. The authors thank Norman Kahn for providing this information.

⁴¹ New York's law permitting gestational surrogacy went into effect on February 15, 2021.

⁴² <https://www.creativefamilyconnections.com/us-surrogacy-law-map/>

courts. It is also generally accepted that the embryo transferred into the Gestational Carrier is the property of the intended parents, regardless of genetics.

When a surrogate is used, there are two main steps in the legal process: 1) creation of a Surrogacy Agreement and 2) completion of a process to have the Intended Parents listed on the birth certificate (frequently called a “Declaration of Parentage”). In negotiating the legal agreements, it is best practice for both the Intended Parents and the Gestational Carrier to be represented by separate legal counsel.⁴³

As mentioned above, the general concept of surrogacy is not a new one. In Biblical times, our foremothers had their handmaidens actually copulate with our forefathers to conceive and birth children. These offspring were then raised by and considered to be, for all intents and purposes, the children of our foremothers. In such a scenario, thinking of surrogacy as somewhat analogous to adoption seems apt. In modern times, however, using a gestational surrogate resembles other pregnancies that result from IVF procedures more than it does adoption. While the medical technology has undergone significant changes over time, what has not changed is that the Intended Parents are the driving force behind this particular pregnancy and the resultant child. From the outset, it is made clear, usually with legal documents, that the baby belongs to the Intended Parents, and not the Gestational Carrier.

Current Situations Involving Jewish Parents

The impact the current halakhah--that has not been revisited in light of current science and technologies--has on Jewish parents and children that are born via gestational surrogacy is complex and should not be minimized.⁴⁴

It is well-known that, according to halakhah, someone born to a Jewish mother is Jewish. Such a rule worked well in the past because the identity of the birth mother was always known, and in ancient times, it was inconceivable that an egg could be taken from one woman and then implanted in another to bring it to term. Today that possibility exists and has the potential to create some untenable scenarios among siblings in a Jewish household. If one’s identity is determined by the uterus in which one grows, then children that result from the same IVF batch of embryos are not considered siblings (or even related) if one is carried in the uterus of Jewish woman and another is carried in a uterus of non-Jewish women, which has potential implications on marriage, inheritance, mourning, and other practices in addition to its potential impact on

⁴³ See Ethics Committee of the American Society for Reproductive Medicine’s “Consideration of the gestational carrier: an Ethics Committee opinion”, Ethics Committee of the American Society for Reproductive Medicine, 2018.

https://www.reproductivefacts.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/consideration_of_the_gestational_carrier-pdfmembers.pdf

⁴⁴ Applying the current halakhah to the case of a child born using an egg from a Jewish woman and a non-Jewish Gestational Carrier, ignores our understanding of science and reproductive biology which have made it clear that a child is the product of its biological parents, i.e., those who donated egg and sperm.

Jewish identity.⁴⁵

With gestational surrogacy becoming more common, thanks to IVF success rates, women who are unable to bear their own children can still produce a biological child if they seek the assistance of a Gestational Carrier.⁴⁶ The resulting embryo is then implanted into the uterus of a designated carrier, the Gestational Carrier. In such a case there are two possible candidates for the title “mother”—the egg donor and the carrier of the pregnancy. Determining which one is recognized by halakhah as the mother is of great significance. The answer will decide the Jewish identity of the child.

An Alternative to the Current Rule for Children Born to Non-Jewish Gestational Carriers

The current application of the Mackler opinion to the scenario of the use of an egg from a Jewish woman carried to term in a non-Jewish gestational carrier, which results in the conclusion that the child is not Jewish at birth, causes significant distress to the intended Jewish parent or parents, makes the halakhic system seem divorced from social and scientific reality, and is inconsistent with the laws of the United States, as outlined earlier. For these reasons and others, as will be explained below, this responsum argues, on sound Talmudic basis, that a child that is the result of an embryo created with an egg taken from a Jewish woman, and brought to term by a non-Jewish gestational carrier with the intent of the intended parent or parents to raise the child Jewish, as evidenced by a *berit* or other Jewish naming ceremony, should be considered Jewish at birth and not in need of conversion.⁴⁷

⁴⁵ That is, if the Jewish Intended Mother carried the first embryo, resulting in a child, but then ended up using a non-Jewish Gestational Carrier for the second embryo, which also resulted in a child, one child would be seen as Jewish and the other would not be Jewish, and they would not even be considered related to one another maternally. These children were both “conceived” on the same day via insemination in a petri dish and, as is typical with the IVF process, both were frozen on the same day for later use. The only differences are that each embryo was thawed on a different day and placed into a different uterus. One child would be welcome at a synagogue to participate in lifecycle events and be able to have a Bar or Bat Mitzvah without any qualifications, but the other child, being raised in the same family and with the same genetic background, would not unless converted to Judaism.

⁴⁶ See “In Vitro Fertilization,” Rabbi Aaron L. Mackler, EH1:3. 1995, 510-525, who permits IVF for infertile couples. See also “On the Use of Birth Surrogates,” Rabbi Elie Kaplan Spitz, EH 1:3, 1997b, 529-550, who permits the use of surrogates for an infertile couple. See also Rabbi Aaron L. Mackler’s paper, “Surrogate Parenting,” EH 1:3.1997c, 551-557, in which he deems surrogacy halakhically inadvisable and forbidden in most cases. Note also that while the focus of this responsum is on the egg of the Jewish woman who will raise the child, in other scenarios there may be a gay couple using sperm and a donor egg from Jewish woman or a single father by choice utilizing his sperm and a donor egg from a Jewish woman.

⁴⁷ Jewish individuals that are using a non-Jewish Gestational Carrier and an egg from a Jewish woman are still encouraged to consult with their rabbi as they would with other topics related to lifecycle events. It is the authors’ hope that rabbis that are members of the Rabbinical Assembly,

Unlike the Mackler opinion which seemingly only uses one factor to determine Jewish status at birth, given advances in understandings in science, the law, and Talmudic precedent, this paper will explain that we are using two factors when determining Jewish status in the cases of a child that results from the use of an egg from a Jewish woman and carried to term by a non-Jewish gestational carrier. In our scenario, if the intended parent or parents are Jewish and will raise the resulting child Jewish,⁴⁸ the child shall be deemed Jewish and not require conversion.

These arguments are not meant to overturn the centuries-old understanding that a child birthed by a Jewish woman is Jewish regardless of the origins of the egg. Instead, it is, however, meant to expand upon what it means to be birthed by a Jewish woman.⁴⁹

Talmudic Precedents For Regarding Conception as a Way to Determine Religious Identity⁵⁰

While there is no Talmudic discussion of taking an embryo that results from the egg of one woman and implanting it into another woman, there is clear Talmudic support for viewing an embryo created from the egg of a Jewish woman, but brought to term by a non-Jewish woman, as Jewish by birth. Analysis of the texts cited below clearly demonstrate that religious identity forms at conception and attaches to any resulting child throughout life and cannot be erased.

The first set of cases below focus on the question of how familial relationships are impacted by both the timing and the individual involved when someone converts to Judaism.

Case #1

הגיוורת שנתגיירו בניה עמה לא חולצין ולא מיבמין
אפי' הורתו של ראשון שלא בקדושה ולידתו בקדושה והשני הורתו ולידתו בקדושה.

honor the decisions of those rabbis that apply this paper to a child born under this scenario. As with any individual, if the resulting child later is faced with a situation where that individual chooses to go to the mikveh or otherwise take steps to satisfy another rabbi's request with respect to the individual's religious status, there is nothing in this paper that would prohibit those actions to be taken. In such a scenario, one rabbi questions the Jewish status of one individual. This teshuvah addresses a general principle: how the halakhic system determines the status of a child created with the egg from a Jewish woman but carried and birthed by a non-Jewish Gestational Carrier.

⁴⁸ Often, in this scenario, the intended mother will in fact be the biological mother of the child.

⁴⁹ Just as our understanding of birth includes babies born by c-section, now it is prudent to evolve the definition of who is Jewish from birth to include both those individuals who emerge from the uterus of a Jewish woman and those who were formed from the Jewish gametes of the intended parents.

⁵⁰ Rabbi Hauptman wishes to thank Dale Stern, her daughter-in-law Susanna Chu Esq., and Rabbis Pamela Barmash, Leonard Berkowitz, Elliot Dorff, and Avram Reisner for their very helpful comments on the Talmudic text analysis.

If a woman converts to Judaism, along with her sons [and they grow up and marry. Should one of them die childless] neither son performs the *halitzah* release ceremony [with his brother's widow], nor enters into levirate marriage with her. Even if one brother was conceived "outside holiness" (i.e., prior to his mother's conversion) but was born "in holiness" (i.e., his mother converted to Judaism during pregnancy), and the other was both conceived and born "in holiness" (i.e., both acts of the second son occurred after his mother's conversion), [should one of the brothers then die childless, the other does not perform the *halitzah* release ceremony nor enter into levirate marriage with the widow]. (Mishnah Yevamot 11:2)

This Mishnah's first rule is easy to grasp. Since the two brothers are converts to Judaism, they are no longer regarded by halakhah as related to each other. A convert is born anew. Upon conversion, family relationships are dissolved. Hence, the two brothers are, upon conversion, "strangers" to each other and therefore free of levirate obligations to one another.

The second clause of this Mishnah pushes the rule of the first clause to its logical extreme. It distinguishes between a brother who was conceived and born "in holiness," i.e., conceived and brought to term by a Jewish woman, and a brother who was conceived "outside holiness," i.e., by a non-Jewish woman, but given birth to "in holiness", i.e., by a woman who converted to Judaism during pregnancy. Do such brothers have levirate obligations to each other? After all, both were birthed by the same mother and are both Jewish at birth. The somewhat surprising answer is no, they are not brothers for levirate purposes. Since one of them, at conception, was a non-Jew, his mother's conversion during pregnancy does not erase that fact and continues to have an impact on him once he is born. It is important to note that non-Jewish status at conception does not imply that life begins at conception, as one sees explicitly in a discussion further along in Yevamot. However, the understanding that conception can have an impact on Jewish identity after birth is further affirmed by Maimonides in his Mishneh Torah⁵¹ and Karo in his Shulh.an Arukh.⁵²

Similar to the above scenarios involving male offspring, when looking at the case of a

רמב"ם הלכות יבום וחליצה פרק א הלכה ח⁵¹
גרים שנתגיירו ועבדים שנשתחררו אין להן אחוה כלל והרי הן כזרים זה לזה, ואפילו אחד מהם הורתו שלא בקדושה ואפילו תאומים ונולדו בקדושה אין ביניהן אחוה עד ,ולידתו בקדושה והשני הורתו ולידתו בקדושה הרי הן כזרים שתהא הורתן ולידתן בקדושה. Even twins, who occupied the same uterus at the same time, are not considered as brothers if the egg donor was not Jewish and converted when pregnant. See bYevamot 97b.

שולחן ערוך אבן העזר הלכות יבום סימן קנז סעיף ג⁵²
גרים שנתגיירו ועבדים שנשתחררו, אין להם אחוה כלל, אפילו אחד מהם הורתו שלא בקדושה ולידתו בקדושה, והשני הורתו ולידתו בקדושה. ואפי' הם תאומים ונולדו בקדושה, אין להם אחוה עד שיהיו שניהם הורתם ולידתם בקדושה שולחן ערוך יורה דעה הלכות גרים סימן רסט סעיף ד שני אחים תאומים שהיתה הורתן שלא בקדושה ולידתן בקדושה, ו חייבים משום אשת אח, ז אבל לא חולצין ולא מיבמין

Karo decides, based on bYevamot 97b, that even twin brothers, who were non-Jewish at conception but Jewish at birth, are not brothers in the eyes of the halakhah with respect to levirate obligations to each other.

daughter who was conceived prior to the mother's conversion, but was born after her mother had converted, we find that both her identity at conception and her identity at birth impact her even as an adult.

Case #2

הגירות שנתגיירה בתה עמה וזנתה הרי זו בחנק אין לה לא פתח בית האב ולא מאה סלע
היתה הורתה שלא בקדושה ולידתה בקדושה הרי זו בסקילה אין לה לא פתח בית האב ולא מאה סלע
היתה הורתה ולידתה בקדושה הרי היא כבת ישראל לכל דבר

If a woman and her daughter converted [to Judaism], and the daughter [years later, when betrothed but not yet married] engaged in illicit sexual activity, she [will be executed by] strangulation [not by stoning as prescribed by the Torah], and not “at the doorway to her father’s home” [as would occur to a born-Jewish woman]. Nor [is the man to whom she is betrothed fined] 100 silver coins [if he accused her falsely, as would be the verdict if she were a born-Jewish woman].

[If a daughter] was conceived “outside holiness” (i.e., when her mother was not yet Jewish), but was birthed “in holiness,” (i.e., after her mother converted to Judaism), [should the daughter then engage in illicit sexual activity when already betrothed], she will be executed by stoning [as would a born-Jewish woman], but not “at the doorway to her father’s home.” And the man to whom she is betrothed is] not [fined] 100 silver coins [if he falsely accused her].

If she was conceived “in holiness,” and given birth to “in holiness,” she is [dealt with] in all matters as a Jew [which means that, if guilty, she will be executed by stoning at the doorway to her father’s home; and if her husband accused her falsely, he will be required to pay her father 100 silver coins]. (Mishnah Ketubot 4:3)

This mishnah from Ketubot is similar in many ways to the previous one from Yevamot. The issue under discussion is the Torah’s statements about the *motzi shem ra*, the man who claims that his bride was not a virgin at the time he married her, although he was assured she was when he betrothed her (Deuteronomy 22:13-21). What penalties are imposed on a young Jewish woman, if, following betrothal to one man, i.e., her husband, she engages in sexual activity with another? If the husband’s accusation of sexual impropriety is found to be true, she is to be executed by stoning at the doorway to her father’s home. If found to be false, the accusing husband must pay her father 100 silver coins.

According to this mishnah, these punishments apply only if the young woman in question was both conceived and carried by a Jewish woman. If the young woman was conceived when her mother was still non-Jewish but given birth to by a mother who converted to Judaism during pregnancy, then the punishments differ. Stoning is still the method of execution but it will not take place at the doorway to her father’s home because he, according to halakhah, is not her father. As noted above, when a person converts, blood ties are dissolved. Since the young woman’s mother converted to Judaism, the father of the child she was carrying when she converted is not regarded as its father, whether or not he was Jewish. In addition, if the young

woman's husband is found to be making a false accusation, he is not fined 100 silver coins. The reason for these changes is that the Torah's punishments, as understood by the tannaim of the Mishnah, only apply to a young woman both conceived and born Jewish. Again we see that status at conception has a halakhic impact later in life. Note that if the young woman herself converted to Judaism, her punishments again differ: execution is not by stoning but by strangulation, not at the doorway to her father's home, and so on.

Case #3

מתיב רבא: גר וגירות צריכין להמתין שלשה חדשים

Rava raised an objection [to a colleague's statement] from a tannaitic text: if a male and female convert [marry], they must wait three months . . .⁵³ (Bavli Yevamot 42a)

In an attempt to avoid (at least some) possible confusion, Rava states that a married couple who converted to Judaism must wait three months before trying to produce a child.⁵⁴ According to Rashi (s.v. *ger vegiyoret*), this means that they need to abstain from sexual relations for the first three months following conversion. The reason is clear. At the end of three months, a pregnancy "shows." The waiting period will determine if the woman was pregnant when she converted. If she had become pregnant before converting, the resulting child will have been non-Jewish at conception even though Jewish at birth. The same rules of the previous two texts would apply to such a child: if male, he would not be considered a sibling with levirate obligations to a subsequently born Jewish brother; if female, she would not be considered a "daughter of Israel" regarding punishments for engaging in extramarital sex while betrothed. This text, then, upholds the principle that non-Jewish status at conception remains with a person throughout life. It cannot be altered.⁵⁵ However, if the couple in question abstains from sexual relations for three

⁵³ See the discussion of epigenetics, in "Gestational Surrogacy," John D. Loike and Moshe D. Tendler, in *Hakirah, the Flatbush Journal of Jewish Law and Thought*, Vol. 16, 113-132. Loike and Tendler cite this source as showing that conception determines maternity (122). That is, conception is invested with halakhic significance.

⁵⁴ The principle that a female convert needs to wait three months following conversion before trying to become pregnant is already present in the Tosefta (below), likely a source for Rava's pronouncement. Karo, in the *Shulhan Arukh*, similarly notes that one needs to distinguish between conception as a Jew and as a non-Jew. Non-Jewish status at conception, thus, can never be erased.

תוספתא מסכת יבמות (ליברמן) פרק ו הלכה ו

דברי ר' יהודה ר' יוסה מתיר לינשא מיד וכן היה ר' יוסה והשבוי והמשוחררת צריכות להמתין שלשה חדשים הגירות
אומ' כל נשים יתארסו חוץ מאלמנה שלשים יום מפני האבול וכולן לא ינשאו עד שיהו להן שלשה חדשים

See also mYevamot 4:10, which does not mention a convert.

רמב"ם הלכות גירושין פרק יא הלכה כא

שפחה שנשתחררה וגירות שנתגירה ממתנין תשעים יום, ואפילו גר ואשתו שנתגירו מפרישין אותן תשעים יום כדי
בין זרע שנזרע בקדושה לזרע שלא נזרע בקדושה להבחין

⁵⁵ The impact that developmental stages can have on one's identity are explicitly examined on bYevamot 67a-b where we encounter the question as to at what point a developing infant has the

months following conversion, should the female partner then become pregnant, it will be clear that the child was Jewish from conception. Again, Maimonides in his Mishneh Torah and Yosef Karo in his Shulhan Arukh uphold this rule.⁵⁶

These Talmudic texts provide a strong basis for the argument today that when egg meets sperm Jewish identity is set,⁵⁷ and therefore such identity continues throughout any resulting child's life. This paper proposes that if an embryo is Jewish at conception, i.e., if the egg is taken from a Jewish woman, even if later carried in the uterus of a non-Jewish woman, the resulting child is considered Jewish prior to birth, at birth, and for the rest of its life.⁵⁸ The Talmudic texts make very clear that even conversion to Judaism during pregnancy does not erase the embryo's non-Jewish status at conception even if the mother converts before the baby is born. It follows that if an embryo is Jewish at conception, that Jewish status is not erased even if the woman who gives birth is not Jewish. In other words, implantation in the uterus of a non-Jewish woman cannot alter the religious identity of a Jewish embryo.

The feminist argument

There is a feminist argument to be made as well. Various responsa clearly state that a father's sperm determines Jewish caste, which means it does so at the moment of conception, when egg and sperm meet and form an embryo.⁵⁹ A (male) child will be considered a kohen if his father is a kohen and a Jewish woman served as gestational carrier, *even if the egg was taken*

power of the kehunah to enable the rest of the household to eat *terumah* (food given by Israelites to a kohen). In this text, we are presented with three distinct time points: conception, fetus/pregnancy, and birth. Whether the mother and slaves can eat *terumah* if the kohen father dies is examined at each of these three time points. Just as we maintain that our teshuva does not in any way conflict with our stance regarding abortion, this text reinforces the principle that the fetus is considered like a limb of the mother. Furthermore, the scenarios discussed in bYevamot make it clear that once born, if the sperm came from a kohen, the baby can both enable others to eat *terumah* and can itself receive an inheritance. In other words, at the moment of conception, the embryo is imbued with an identity as a kohen with full rights and responsibilities of a kohen at birth.

שולחן ערוך יורה דעה הלכות גרים סימן רסט סעיף ט
גר שנתגייר ואשתו עמו, צריכים לפרוש זה מזה ג' חדשים, להבחין בין זרע שנזרע בקדושה לזרע שנזרע שלא בקדושה.

⁵⁷ This Jewish identity is set/conferred in potentia at conception, and fully vests once the child is born and becomes a person capable of having an identity.

⁵⁸ A non-Jewish woman carrying an embryo created from with an egg from a Jewish woman cannot be considered an act of greater significance than conversion to Judaism during pregnancy. Therefore, if conversion to Judaism during pregnancy cannot erase the embryo's non-Jewish status at conception, neither can being carried in the uterus of non-Jewish woman erase an embryo's Jewish status at conception.

⁵⁹ Loike and Tendler, in "Epigenetics . . .", say that "paternity is established at conception because the father's role is primarily to fertilize the egg" (122).

from a non-Jewish woman.⁶⁰ But when a kohen's sperm joins the egg of a Jewish woman, and the resulting embryo is implanted in a non-Jewish gestational carrier, a (male) child not only will not be a kohen but will not even be considered Jewish! The feminist question is, why does a kohen father's sperm determine at conception the kohen status of the child, whereas a Jewish mother's egg at conception does not determine the Jewish status of the child if it is then brought to term by a non-Jewish gestational carrier? Hard to understand why the sperm is given that advantage whereas the egg is not. Note that this is yet another significant instance in which "religious" identity is determined at conception and remains with a person throughout life.

The argument from ethics

Rabbi Elliot N. Dorff, in "Artificial Insemination, Egg Donation, and Adoption" (CJLS 1994), writes that in a case in which a couple experiences infertility and resorts to IVF in order to produce a child, the question arises as to whether the man who donates the sperm should get credit for fulfilling the obligation to procreate. R. Dorff argues that since the sperm is his, he shows he wants to obey the obligation of procreation. R. Dorff further says that since the man who cannot produce viable sperm experiences humiliation, pain, and even depression when coming to terms with the fact that he cannot impregnate his wife, it follows that he should be considered as having fulfilled the mitzvah of procreation (pp. 472-473). Like the Mishnah, R. Dorff is suggesting that conception is invested with halakhic significance.

We would apply the same empathetic reasoning to Jewish parents. They, too, may experience humiliation, pain, and even depression, when coming to terms with the fact that they cannot produce a child on their own but must seek out additional assistance, including the help of a gestational carrier. If so, just as a man gets credit for the mitzvah of procreation by donating sperm, because conception is invested with halakhic significance, then for that very same reason—that conception is invested with halakhic significance—a Jewish woman who creates an embryo from her own egg and with the intent to raise the child as Jewish, as will be clearly shown through a typical *berit* or naming ceremony, should be able to view her offspring as Jewish.

Conclusions

As Conservative/Masorti Jews, we accept halakhic changes that bring ancient Jewish law into alignment with evolving ethical sensitivities. Granting women full equality in Jewish ritual practice is one clear example of such a change. We are also willing to apply principles embedded in the Talmud to new cases that arise today, even if in the past these principles were not, and could not have been, so applied. We are willing to accept the findings of science and apply them

⁶⁰ See Elliot Dorff, *Matters of Life and Death*, p352, n. 18. It seems that the kohen status of the child is determined at conception, even if in a test tube. Dorff wrote in an email communication (4.18.21), "It is basically *gezeirat ha-katuv* that a kohen is the 'seed of Aaron,' and so that would apply no matter how that seed was procured, assuming that the bearing mother was Jewish and therefore the child is Jewish."

to halakhic questions as the need arises. We consider it ethically necessary to treat people as humanely as possible. And we are interested in protecting the good reputation of Jewish law and practice so that Conservative Jews continue to see halakhah as relevant to their lives.

It follows from these principles that there is no good reason for the child that results from the egg of a Jewish woman, and is born using a non-Jewish gestational carrier, to have to convert to Judaism. The child should be seen as Jewish by birth. This proposed change relies on a Talmudic principle, is in sync with scientific knowledge, is consonant with American law, is more ethical than the current halakhic position, more humane, more logical, and more protective of the good reputation of Jewish law.⁶¹

In earlier times, a person was considered Jewish by birth only if a Jewish woman gave birth to the child because the identity of the person birthing the child was not in doubt. Today, however, in addition to knowing the identity of the woman birthing the child, we are able to know with certainty who the genetic mother is. There is, thus, little reason for halakhah to deny that individual the status of mother. There is similarly little reason to deny that the child is Jewish by birth. A child who is Jewish at conception should be regarded as Jewish by birth. Jewishness is not erased by implantation of a Jewish embryo in the uterus of a non-Jewish woman. The mother of the child, in this situation, is the woman who contributed the egg. The gestational carrier fulfills an amazing, needed role,⁶² even donates a few cells to the embryo, but the child's genetic makeup is determined by the egg donor, the biological mother. To leave the "born of a Jewish mother" definition in place, for this scenario, as the woman who gives birth, creates disrespect for a halakhic system that ignores scientific knowledge and logic, and even lags behind the laws of the United States and many other jurisdictions.⁶³

פסקי דין/Rulings:

1. We maintain the longstanding halakhah that a child's Jewish identity is passed down matrilineally and a child should be considered Jewish at birth if its mother is Jewish.
2. We also reaffirm the CJLS position that personhood does not begin until birth.

⁶¹ To be clear these same rules would apply to same-sex couples, in particular families made up of two men, single fathers by choice and potentially others seeking to build their Jewish families: if the egg is taken from a Jewish woman or carried in the uterus of a Jewish woman, the child is Jewish by birth.

⁶² The authors of this paper do not wish to minimize in any way the contribution of Gestational Carriers, without whom many would not be able to build their families. Our discussion of their role in this paper is merely for purposes of determining the status of the child.

⁶³ We readily acknowledge that there are many other scenarios involving reproductive technologies used in conjunction with surrogacy that we have not addressed but which are equally deserving of attention and that as these technologies evolve, so too will our conceptions of both social and genetic family.

3. We further believe that the definition of a Jewish mother should be expanded. We therefore hold that a Jewish mother is *either* the one who gives birth to the child *or* the one who donates the egg, even when someone else gives birth to the child, provided the intended parent or parents will raise the resulting child as Jewish.⁶⁴ If the genetic father is a kohen or levi, his caste is transmitted to the child.
4. No conversion to Judaism is necessary for a child who is the result of either scenario.

⁶⁴ The intention of the parent to raise the child as Jewish will be made evident in a *berit* or other naming ceremony, as stated earlier in this teshuvah.