

SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE

IN VITRO FERTILIZATION: QUESTIONS OF MATERNAL IDENTITY AND CONVERSION

The question of maternal identity in situations involving a host mother as well as the issue of maternal identity in instances of in vitro fertilization have been addressed in this column on two separate occasions.¹ In vitro techniques are employed when it is not possible for a woman to become pregnant by natural means because of her inability to produce viable ova, because of a blockage of the fallopian tubes, because the husband suffers from an inability to produce a sufficient number of sperm or because pregnancy has not occurred in utero for other, sometimes unknown, physiological reasons. When normal ovulation does occur an ovum or, more commonly, a multiple number of ova are removed from the ovaries. The ova are then fertilized in a petri dish by sperm ejaculated by the husband and, after undergoing a number of cell divisions, the developing zygote is inserted into the uterus of the woman from whom the ovum was removed. If, however, the woman cannot produce viable ova an ovum, or a multiple number of ova, may be donated by a relative or stranger, fertilized by means of an in vitro procedure and inserted into the uterus of the otherwise infertile woman and carried to term. When the fertility problem arises from the woman's inability to sustain a pregnancy for the full period of gestation the fertilized zygote may be implanted in the uterus of another woman, i.e., a host mother, who will carry the fetus to term. In each of these cases there is some question with regard to whether the genetic mother or the

gestational mother is regarded as the child's mother for matters in which such a relationship is significant in Jewish law, e.g., consanguinity, inheritance, laws of mourning, etc.

Although there is a minority view that regards the donor mother as the sole mother of a child born of in vitro fertilization,² the consensus of rabbinic opinion is that a maternal-filial relationship is generated between the gestational mother and the child, despite the absence of any genetic relationship, by virtue of parturition alone.³ Whether or not the genetic mother, i.e., the woman who produced the ovum from which the child was conceived, is also a mother from the vantage point of Jewish law is a more complex question. The question of whether the baby may, in effect, have two halakhic mothers must be regarded as yet open.⁴

I. ABSENCE OF A MATERNAL RELATIONSHIP

R. Eliezer Waldenberg, *Ziv Eli'ezer*, XV, no. 45,⁵ has advanced the novel view that, in the eyes of Halakhah, a child born of in vitro fertilization has neither a father nor a mother even if the biological mother and the gestational mother are one and the same, as is the case in the majority of instances in which in vitro procedures are employed. Rabbi Waldenberg's arguments, which are not based upon cited precedents or analogy to other halakhic provisions, are

three in number: 1) Fertilization in the course of an in vitro procedure occurs in an "unnatural" manner through the intermediacy of a "third power" extraneous to the father or mother, i.e., the petri dish. 2) Conception occurs in a manner "that has no relationship to genealogy." 3) In natural reproduction the ovum remains "attached" to the body and is fertilized therein. Maternal identity is consequent solely upon fertilization that occurs while the ovum is yet attached to the mother's body. Thus, upon "severance" and removal of the ovum from the mother's body any genealogical relationship between the ovum and the mother is destroyed.

To this writer, those arguments appear to be without substance. In response to the first argument it must be stated that the petri dish is not a "third power" and in no way contributes biologically or chemically to the fertilization process. It is simply a convenient receptacle designed to provide a hospitable environment in which fertilization may occur.⁶ Rabbi Waldenberg's second argument, if indeed he intended to present it as an independent argument, is entirely conclusory. In order to demonstrate that no maternal relationship exists some evidence or argument must be presented that would serve to demonstrate that genealogical relationships are generated solely in utero. Rabbi Waldenberg provides no such demonstration. Whatever cogency the third argument may have is lost if it is recognized that parturition, in and of itself, establishes a maternal relationship.

In the early days of in vitro fertilization a position similar to that advanced by Rabbi Waldenberg was presented by R. Judah Gershuni in the Tishri 5739 issue of *Or ha-Mizrah*.⁷ Rabbi Gershuni's argument is based upon a statement of *Divrei Malki'el*, IV, no. 107. There is a significant disagreement among rabbinic authorities with regard to whether a paternal relationship may occur as a result of artificial insemination or whether such a relationship can arise only as the result of a sexual act.⁸ *Divrei Malki'el* expresses tentative support for the latter position but does so on the basis of the novel view that "once the

semen has been emitted and has warmth only because of the ministrations of the physician and his skill with the pipette or due to the heat of the bath" a baby born as a result of that process is not regarded as the son of the donor. Although *Divrei Malki'el* stands virtually alone in developing this argument⁹ and himself concludes that a child born of artificial insemination is indeed the child of the donor, Rabbi Gershuni observes that a fertilized zygote sustained in a petri dish by means of "artificial nutrition and blood serum" should not be regarded by Jewish law as the child of either parent. The earlier presented rebuttal of Rabbi Waldenberg's argument applies with equal force to that advanced by Rabbi Gershuni. Moreover, any cogency the argument may have with regard to establishment of a paternal relationship notwithstanding, if parturition, in and of itself, serves to establish a maternal relationship, the sources of antecedent nutrition of the fetus are totally irrelevant.

II. PARTURITION AS A DETERMINANT

The view that the maternal relationship is predicated upon parturition is based upon the statement of the Gemara, *Yevamot* 97b, to the effect that a fraternal relationship exists between male twins born to a woman who converts to Judaism during the course of her pregnancy. Since a proselyte is regarded as a "newly born child" and all halakhic relationships with existing blood relatives are severed upon conversion, the relationship of the child to its mother, and through her to its twin sibling, cannot be regarded as having arisen at the moment of conception.¹⁰ From the vantage point of Halakhah, the situation of a pregnant convert is analogous to that of a woman who receives an ovum into her uterus that has been fertilized outside of her body. Upon conversion, all relationships with relatives, including her own fetus, are severed. Accordingly, the status of her fetus at the moment of conversion is precisely identical to that of a fetus that is abruptly

thrust into her uterus, i.e., a fetus that has not been conceived within her body.¹¹ Clearly then, since a maternal relationship is recognized by Jewish law in the case of a pregnant convert, it must be the process of parturition that, at least in such instances, establishes the maternal relationship.¹² If so, it follows that the site in which fertilization occurs or the provenance of the ovum is irrelevant;¹³ parturition, in and of itself, establishes a mother-child relationship.¹⁴ This principle is also reflected in the observation of *Tosafot*, *Ketubot* 11a, to the effect that the fetus of a pregnant woman who undergoes conversion is itself a convert but nevertheless inherits its mother's estate. Quite obviously the child can be an heir only if a maternal-filial relationship has been established and in the case of a pregnant proselyte that relationship can come into being only by virtue of parturition.

It might, however, be argued that although this source amply demonstrates that generation of the ovum is not the definitive criterion of the existence of a maternal relationship, nevertheless, it may be gestation rather than parturition that constitutes the factor serving to establish such a relationship. The convert would then be considered to be the mother of the child on the basis of having nurtured the fetus in her womb during the post-conversion period of gestation. This would lead to the conclusion that a naturally conceived fetus that is subsequently transferred from the womb of one woman to that of another would have two mothers for purposes of Halakhah. There are, however, aggadic sources that speak of the intrauterine transfer of Dinah from the womb of Rachel to Leah and of Joseph from Leah to Rachel.¹⁵ Subsequent scriptural references to Dinah as the daughter of Leah and of Joseph as the son of Rachel ostensibly indicate that each child had but a single mother. If so, it must be parturition, rather than gestation, that establishes the maternal relationship.¹⁶ Of course, aggadic sources are not dispositive with regard to matters of Halakhah and, accordingly, the matter cannot be regarded as entirely resolved.

III. GESTATION AS A DETERMINANT

In an article published in *Tehumin*, vol. V (5744), R. Zalman Nechemiah Goldberg cites one significant source in support of the position that gestation establishes a maternal relationship even prior to parturition and, accordingly, that source would support the conclusion that a woman who carries a fetus in her womb for any portion of the gestational period—at least during the last two trimesters of pregnancy—is regarded as the baby's mother for purposes of Halakhah.¹⁷

The Gemara, *Hullin* 113b, declares that the biblical prohibition against cooking and eating commingled milk and meat is not attendant upon meat cooked with the milk removed from an animal that has been slaughtered. Milk derived from a slaughtered animal is excluded from the prohibition because, according to talmudic exegesis of the verse "you shall not cook a kid in the milk of its mother" (Exodus 23:19; Exodus 34:26; Deuteronomy 14:21), the biblical prohibition applies only to the milk of an animal "that has the capacity to become a mother" (*re'uyah lehiyot em*). Obviously, a dead animal can no longer bear a child and hence lacks the capacity to become a mother.

In his notes on *Shulhan Arukh*, *Yoreh De'ah* 87:6, R. Akiva Eger queries whether the milk of a live animal that is a *treifah* is similarly excluded from the prohibition. The talmudic principle is that a *treifah*, (i.e., an animal that suffers from one of a number of specified anatomical defects either congenitally or as the result of trauma causing loss or perforation of the organ) cannot conceive and carry a fetus to term. Hence, comments R. Akiva Eger, since a *treifah* cannot become a mother, it might be assumed that the milk of a *treifah* is excluded from the prohibition against cooking or consuming commingled milk and meat. Nevertheless, R. Akiva Eger cites a statement of the Gemara, *Sanhedrin* 69a, to the effect that a male who has sired a fetus is to be termed a "father" immediately upon

expiration of the first trimester of pregnancy. If the male parent of a fetus is a "father" it would stand to reason that the female parent is similarly to be regarded as a "mother." As applied to the question before him, R. Akiva Eger remarks that the talmudic reference to a parental relationship vis-à-vis a fetus may be limited to a relationship with a viable fetus and hence, since the fetus of a *treifah* is not viable, there may well be no halakhic relationship between the fetus of a *treifah* and its gestational mother. Nevertheless, it would appear that, in the case of a viable fetus, such a relationship does indeed exist. Thus R. Akiva Eger's comment serves to establish that the gestational mother is a mother in the eyes of Jewish law. However, insofar as a child born of in vitro fertilization is concerned, since the Gemara recognizes a paternal relationship only subsequent to the expiration of the first trimester and R. Akiva Eger equates inception of the maternal relationship with that of the paternal relationship, R. Akiva Eger's comments do not serve to establish the existence of a halakhically recognized relationship with the genetic mother. By virtue of the nature of in vitro fertilization, the physiological relationship between the donor of the unfertilized ovum and the fetus is severed long before the end of the first trimester of pregnancy.

Rabbi Goldberg points out that R. Akiva Eger's position is contradicted by at least one authority. R. Joseph Engel, *Bet ha-Ozar, erekh av*, argues that, although the sire of a fetus is a "father," nevertheless the female carrying the fetus in her womb is not recognized as a "mother" in the eyes of Jewish law until the moment of parturition. The Gemara, *Megillah* 13a, notes the redundancy inherent in the phrases "for she did not have a father or a mother" and "upon the death of her father and her mother" (Esther 2:7) and indicates that the second phrase is designed to convey additional information to the effect that Esther did not have a father or mother for even a single day. The Gemara comments that Esther's father died as soon as her mother

conceived and that her mother perished upon her birth. The Gemara carefully spells out that Esther is described as never having had a father because her father died following conception before he could properly be termed a "father," i.e., before the end of the first trimester of pregnancy, and that she is described as never having had a mother despite the fact that her mother survived until the end of the gestational period. Esther is described as not having a mother because her mother died in childbirth. Hence this talmudic passage clearly indicates that a woman may properly be termed a "mother" only upon parturition. Presumably, the distinction between the male and female parent is based upon the fact that the male's role in reproduction ceases upon fertilization of the ovum and, accordingly, he is termed a "father" as soon as the fetus has reached a significant stage of development, whereas the female's role remains incomplete until the moment of birth.¹⁸ Why R. Akiva Eger ignored the discussion in *Megillah* is unclear.¹⁹ He may have regarded that discussion as aggadic in nature and hence as not being a proper source for derivation of a halakhic principle.

It should also be noted that the comments of Maharal of Prague in his explication of this verse in his commentary on the Book of Esther²⁰ suggest that he understood the Gemara's statement as being predicated upon the position that a fetus is an integral part of the mother (*ubar yerekh imo*). It then follows that during gestation mother and fetus constitute an undivided entity; accordingly, the maternal progenitor cannot become a "mother" until a physiological separation occurs, i.e., parturition. If, however, the opposing view is adopted and the fetus is not regarded as an integral part of the mother (*ubar lav yerekh imo*) there is no reason to assume, according to Maharal, that the maternal relationship is established any differently from the paternal relationship with the result that according to that view the maternal-filial relationship is established at a much earlier stage of gestation.

IV. DUAL MATERNAL RELATIONSHIPS

Although, as discussed earlier, there is strong evidence supporting the position that parturition serves to determine maternal relationship, those sources serve only to establish that parturition establishes a maternal-child relationship but do not preclude the possibility that Halakhah may recognize two or more maternal relationships, i.e., a relationship arising from parturition and an additional relationship or relationships arising from gestation or provision of a gamete.²¹

The possibility of "doubtful" dual maternal relationships is raised in one recent discussion of this issue, albeit on the basis of entirely different considerations. A talmudic discussion regarding a similar quandary in the area of agricultural law is cited by Professor Ze'ev Low, *Emek Halakhah*, II (Jerusalem, 5749), 165–169, as reflecting the principle to be employed in resolving the issue of maternal identity. It is forbidden to consume newly harvested grain crops until the *omer* has been offered in the Temple on the second day of Passover. That offering renders permissible not only already harvested grain but also grain in the field that has taken root but which has, as yet, not fully matured. Any crop planted subsequent to the offering of the *omer* does not become permissible for use as food until the following Passover. The Gemara, *Menahot* 69b, posits a situation in which a stalk of grain is planted and has reached a stage of development equal to a third of its ultimate growth (i.e., the stage at which the produce has reached a state of maturity at which it is recognized, for halakhic purposes, as a grain product); having reached this stage of development, the stalk is removed from the ground before the *omer* is offered and replanted after the offering of the *omer* whereupon it continues to mature and ultimately reaches its normal state of growth. The question posed by the Gemara is whether the *omer* renders the entire plant permissible since the primary growth of the stalk occurred before the time of offering of the *omer* or whether, because

of its enhanced growth subsequent to the offering of the *omer*, the produce may not be eaten. The Gemara identifies a similar problem with regard to *orlah*, the fruit of a tree that is forbidden during the first three-year period after planting. The problem involves a situation in which a young sapling already bearing fruit is grafted onto a mature tree and that fruit subsequently greatly increases in size. The question is whether the newly grown portion of the fruit produced by the grafted sapling is to be regarded as the product of the mature tree and hence permissible or whether, since the identity of the fruit has been established as *orlah* prior to grafting, the newly grown portion of the fruit is also infused with that identity. A third problem occurs with regard to *kilayim*, produce that is forbidden because of mingling in the planting of diverse species. The situation discussed by the Gemara involves a vegetable that has been planted in a vineyard; the vines are then uprooted and the vegetable continues to grow after the vine has been removed. Both the vegetable and the grapes become forbidden upon mingling of the species in planting. The question is whether the additional growth of the vegetable subsequent to removal of the grape vine is permissible since that portion of the vegetable was never commingled with grapes or whether the identity of the vegetable was established as forbidden produce upon its planting in the vineyard and hence all subsequent growth acquires the same identity.

A number of talmudic commentators make it clear that they regard the issue in each of these related cases, not as involving a question concerning the admixture of a small quantity of a forbidden foodstuff with a much larger quantity of a permitted foodstuff, as might perhaps be presumed, but as a question of determination of identity in cases in which there is continued growth and development. Is the identity of a stalk of grain determined with finality as soon as it is halakhically recognized as grain? If so, then, having acquired identity and status as grain before the offering of the *omer*, it retains the identity of "pre-omeric"

(and hence presently permissible) grain even if a significant portion of its growth occurs after the offering of the *omer*, much in the same manner that we regard a person who gains a considerable amount of weight to be the same person after the weight-gain as before or in the manner that we regard an infant who grows to adulthood as retaining the same identity he possessed as a child. Or do we regard the portion of the grain added as a result of accretion or incremental growth of the grain as having an independent identity since that growth occurs subsequent to a second "post-omeric" (and hence as yet forbidden) planting? Has the identity of the fruit of the sapling been irreversibly determined upon its first appearance so that it predetermines the identity of the even much greater portion of the fruit that develops after grafting with the result that the entire fruit is forbidden *orlah* or does the added portion of the fruit that grows after grafting have its own identity as a permitted fruit? A vegetable planted in a vineyard acquires identity as a forbidden planting of diverse species. But does that identity infuse even the portion of the vegetable that comes into being after the grapevine is removed or does the newly developing portion of the vegetable acquire an identity of its own, *viz.*, an identity as a vegetable that has not been compromised by diverse planting in a vineyard? These questions are left unresolved by the Gemara with the result that, in any given case, the stringencies of both possible resolutions of the issue must be applied, *i.e.*, the grain is forbidden because of the possibility that the previously-acquired status does not control the enhanced growth of the grain, but the fruit of the grafted sapling and the increased growth of the vegetable are forbidden because the earlier acquired identity may indeed control the identity of that which is a natural outgrowth of the old.

If this analysis of these talmudic questions is accepted as correct, the question of maternal identity of progeny born as the result of *in vitro* fertilization of a donated ovum may be regarded as analogous. Maternal identity is established in the first instance by production of the gamete.

The question is whether that determination is also dispositive with regard to the identity of the fetus whose later physical development is attributable to the gestational host or whether the identity of the developing fetus is derived from its nurturer, *viz.*, the host mother, in which case the child could be regarded as having two mothers just as, for example, a single grain of wheat may be, in part, "pre-omeric" and, in part, "post-omeric." Since the Gemara leaves the basic issue unresolved and, accordingly, rules that the stringencies of both possible identities must be applied, a child born of *in vitro* fertilization, on the basis of this analogy, would to all intents and purposes be regarded as having two mothers.

However, the analogy does not resolve the issue in its entirety. Presented in this manner it assumes as axiomatic that, in the first instance, motherhood is genetically determined but that the original relationship can perhaps be nullified by establishment of a subsequent maternal relationship. The thrust of the analogy is to establish that the earlier relationship is not extinguished. The crux of the question, however, is whether Halakhah at all recognizes a maternal relationship based upon donation of an ovum, *i.e.*, a relationship based solely upon genetic considerations. That is an issue with regard to which there may well be no evidence in rabbinic sources.²² Only after it is established that there exists halakhic cognizance of a maternal relationship based upon donation of an ovum can the question of possible subsequent nullification or supersedure be addressed. Nevertheless, the analogy does serve a valuable purpose. The thrust of this analogy, if it is properly understood, is to demonstrate that Halakhah may recognize two maternal relationships with the effect that the possibility of a maternal relationship based upon a genetic relationship cannot be regarded as excluded simply because there is evidence that Halakhah recognizes a different maternal relationship based upon parturition or gestation. The analogy to agricultural laws does not, however, serve to provide affirmative evidence demonstrating that Halakhah recognizes a maternal relationship based upon genetic considerations.²³

Although some scholars are reported as questioning the aptness of any analogy based upon determination of species or status with regard to agricultural law, Prof. Low concludes that the analogy cannot be dismissed out of hand and that, accordingly, at least for purposes of halakhic stringency, the child must be regarded as having two mothers. This writer would concur in that conclusion even in the absence of any analogy to agricultural law.²⁴ The halakhic (as distinct from aggadic)²⁵ evidence supporting parturition as determining motherhood does not serve to preclude the possibility of a dual maternal relationship. Hence the possibility of such a relationship cannot be ignored unless evidence of its non-existence is adduced.

This point notwithstanding, it seems to this writer that the analogy to the provisions of agricultural law fails entirely with regard to in vitro fertilization if the statement of the Gemara, *Yevamot* 69b, categorizing an embryo within the first forty days of gestation as "mere water" is to be understood literally. If the fetus is entirely lacking in status and identity during this period it would stand to reason that no maternal relationship can be established during that period. It is only logical that an entity that has no identity cannot be the subject of a relationship, or better, it stands to reason that that which is "mere water" knows no mother. On the other hand, if, as many authorities maintain, categorization of an embryo in the early stages of development as "mere water" is limited in application and, for example, does not serve to prohibit destruction during that period,²⁶ the analogy is quite apt.

Moreover, an entirely different analogy may be offered in demonstrating that, at least for some authorities, the child born of in vitro fertilization should be regarded as having two mothers. The Gemara, *Hullin* 79a, in discussing the classification of the offspring born as a result of the interbreeding of different species, records one opinion which maintains that the identity of the male partner is to be completely disregarded in determining the species of the offspring. According to this view, since it is

the mother who nurtures and sustains the embryo, it is the female parent alone who determines the species of the offspring. It is thus the identity of the mother which is transferred to members of an inter-species.

There is, however, a conflicting opinion which asserts that "the father's seed is to be considered" (*hosheshin le-zera he-av*). Presumably, according to this view, "the father's seed is to be considered" because the father plays a dynamic role in the birth of the offspring. In an analogous manner, a similar line of reasoning may be applied in determining the maternity of a child born of a fertilized ovum implanted in the womb of a host mother. It is the host mother who nurtures the embryo and sustains gestation. However, the role of the genetic mother in the determination of identity is a dynamic one and analogous to that of "the seed of the father." It may therefore be argued according to those who assert with reference to the classification of hybrids that "the seed of the father is to be considered" that, in the case of a donated ovum, the maternal relationship between the child and the donor mother is to be "considered" no less than "the seed of the father." Of course, the result of consideration of that principle in situations involving implantation of an already fertilized ovum would be to establish, not a paternal relationship, but rather a second maternal relationship between the child and the donor of the ovum.

V. A NON-JEWISH OVUM DONOR

Yet another complication arises in cases of in vitro fertilization in which the donor of the ovum is a gentile. Ova produced by another woman and donated to the childless couple are utilized in situations in which the infertile woman does not ovulate, or does not produce viable ova, but her uterus is capable of receiving a fertilized ovum and carrying it to term. In such situations the couple may seek a gentile donor, fertilize her ovum with the sperm of the infertile woman's husband by means of an in vitro procedure and implant the zygote in the

wife's uterus. If parturition is accepted as the sole criterion to be employed in determining maternal identity it might be assumed that, since the child has a Jewish mother, the child is also Jewish. However, if the donor mother also enjoys a maternal relationship with the child and the child, in effect, has two mothers, the resulting status of the child of two mothers, one a Jewess and the other a non-Jewess, is far from clear. Moreover, there is reason to conclude that some early authorities would maintain that a child whose genetic mother is non-Jewish requires conversion even if the child is regarded by Halakhah as the child of a Jewish mother. There may even be reason to infer that this conclusion is compelled by statements of the Gemara itself.

This rather anomalous conclusion is based upon the position formulated by Ramban in his commentary on *Yevamot* 47b. Ramban maintains that a male child born to a woman who has converted to Judaism during pregnancy requires circumcision for purposes of conversion. Ramban acknowledges that immersion of the mother in a *mikveh* for the purpose of conversion constitutes immersion of the fetus as well but that, in the case of a male, circumcision is required in order to complete the conversion process. However, as noted earlier, the Gemara, *Yevamot* 97b, declares that, should the same woman give birth to twins, a fraternal relationship exists between the children. If so, Ramban's position is problematic. If, as he maintains, the conversion is as yet incomplete, how can a fraternal relationship arise? Upon completion of the conversion process, each of the children is deemed to be "a newly born child" and, in the eyes of Jewish law, lacks any familial relationship with previously born relatives even if they, too, become converts to Judaism.²⁷

Addressing himself to the problem presented by Ramban's position, Rabbi Moshe Sternbuch, *Be-Shevilei ha-Refu'ah*, no. 8 (Kislev 5747), resolves the difficulty by suggesting that the maternal relationship—and consequently any other maternal blood relationship—is indeed established at the time of parturition and

therefore the baby is not "a newly born child" bereft of blood relatives. Nevertheless, since the child's genotype is non-Jewish, the child requires conversion in order to eliminate "impurity" associated with the gentile state. Similarly, a child born of in vitro fertilization would be deemed the child of the Jewish birth mother but would yet require conversion because of its non-Jewish genetic origin.²⁸

Rabbi Sternbuch's discussion is unclear with regard to one point, i.e., the problem that he addresses exists even if Ramban's position with regard to circumcision is not accepted.²⁹ The Gemara, *Yevamot* 78a, clearly states that immersion of the mother for purposes of conversion constitutes immersion of the fetus. Implicit in that statement is the proposition that the fetus requires conversion. Yet, as noted earlier, the Gemara, *Yevamot* 97b, declares that if the pregnant proselyte gives birth to twins they are regarded as maternal siblings. If the fetus is a proselyte lacking blood relatives, including a mother, how can it later acquire a brother at the time of parturition? To be sure, absent Ramban's position maintaining that conversion is not complete until circumcision is performed, the problem might be resolved by postulating that, since parturition gives rise to a maternal-filial relationship, parturition subsequent to conversion also serves to generate a maternal relationship even though the fetus is a proselyte. However, that solution gives rise to a further problem: If parturition generates a maternal relationship, why does it not also serve to establish the status of the neonate as a Jew? If so, antecedent conversion of the fetus in utero, as posited by the Gemara, *Yevamot* 78a, would be superfluous. This problem is resolved if it is understood that conversion is required in all instances in which the maternal genetic origin of the child is non-Jewish in nature. If so, that conclusion follows directly from the discussion of the Gemara itself rather than from Ramban's analysis thereof.

Rabbi Sternbuch points to an interesting historical parallel in illustrating his thesis. Our ancestors became "converts" to Judaism at the time of revelation on Mount

Sinai and, indeed, many of the principles concerning conversion are derived from biblical passages concerning that event. Nevertheless, asserts Rabbi Sternbuch, prohibitions concerning incest were fully binding upon our ancestors at that time and encompassed blood relatives who themselves became “converts” contemporaneously. In accordance with the talmudic dictum “A proselyte who converts is comparable to a newly born child” (*Yevamot* 22a and *Bekhorot* 47a) the recipients of the Torah at Mount Sinai should, ostensibly, have been regarded as “newly born children” lacking blood relatives. Rabbi Sternbuch suggests that the status as Jews enjoyed by our ancestors at Mount Sinai was assured by virtue of the fact that they were the progeny of Abraham the Patriarch and that “conversion” at Sinai was necessary only in order to remove the “impurity” associated with the gentile state and concludes that conversion required solely for the purpose of eliminating such impurity does not give rise to status as “newly born children” that would, in turn, serve to render consanguineous relationships permissible.

In point of fact, Rabbi Sternbuch’s assertion that our ancestors did not have the status of “newly born children” at Mount Sinai is a matter of some dispute. Rabbi Sternbuch’s position echoes that of Maharal of Prague, *Gur Aryeh, Parashat Va-Yigash* (Genesis 46:8), cited by the author of *Shev Shematata* in section 9 of his introduction to that work. Maharal of Prague is of the opinion that, unlike subsequent proselytes, the recipients of the Torah at Mount Sinai did not acquire status as “newly born children” and, accordingly, they were forbidden to marry close relatives. However, Maharal offers a rationale entirely different from that advanced by Rabbi Sternbuch in explaining why those who became Jews at Mount Sinai were not deemed to be “newly born children.” Acceptance of the commandments at Sinai is described by the Gemara, *Shabbat* 88a, as having been coerced. Status as “newly born children,” asserts Maharal, is acquired only when acceptance of commandments is voluntary.

Nevertheless, R. Meir Simchah of Dvinsk, *Meshekh Hokhmah, Parashat Va-Ethanan* (Deuteronomy 5:27), espouses an opposing view in declaring that previously existing consanguineous relationships were not terminated at Sinai as evidenced by the fact that all participants were directed “Return to your tents” (Deuteronomy 5:27), i.e., they were granted permission to resume conjugal relations prohibited in the preparatory period before receiving the Torah at Mount Sinai. Indeed, *Meshekh Hokhmah* points to that directive as the biblical source of the talmudic dictum “A proselyte who converts is comparable to a newly born child.”³⁰

The thesis advanced by Rabbi Sternbuch in postulating two types of conversion is remarkably similar to that expounded by R. Naphtali Trop in his *Shi’urei ha-Granat, Ketubot* 11a,³¹ save that Reb Naphtali’s comments are expressed in the positive rather than in the negative.³² Rabbi Sternbuch’s analysis of the principle “A proselyte who converts is comparable to a newly born child” and his conclusion that it is inapplicable to the recipients of the Torah at Mount Sinai are also identical to those of Reb Naphtali. In resolving a number of problems involving the difficulty associated with Ramban’s position, Reb Naphtali explains that there are two forms of conversion: 1) conversion for the purpose of becoming a Jew, i.e., a member of the community of Israel; and 2) conversion for the purpose of acquiring sanctification as an Israelite (*kedushat Yisra’el*). Reb Naphtali suggests that one who enjoys the status of a member of the Jewish community is under obligation to undergo conversion in order to acquire the “sanctity of an Israelite.” Presumably, the implication of that position is that obligations pertaining to fulfillment of commandments are contingent upon acquiring the “sanctity of an Israelite.” Thus he asserts that even those authorities who maintain that the child of a Jewess whose father is a non-Jew requires conversion agree that conversion of such a child for purposes of membership in the Jewish community is unnecessary since membership in the Jewish community is transmitted

by virtue of matrilineal succession. According to those authorities, Reb Naphtali asserts, conversion is necessary solely for the purpose of acquiring "sanctity of an Israelite" which is acquired automatically upon birth only if both parents are Jews. Similarly, maintains Reb Naphtali, even according to Ramban, a child born to a proselyte who was pregnant at the time of her conversion acquires status as a member of the community of Israel by virtue of having been born to a Jewish mother and, accordingly, a maternal-filial relationship is also established by virtue of parturition for all genealogical purposes. Conversion, according to Ramban, asserts Reb Naphtali, is necessary only for the purpose of acquiring the "sanctity of an Israelite."³³ Reb Naphtali similarly asserts that conversion at the time of revelation at Mount Sinai was solely for the purpose of acquiring the "sanctity of an Israelite" and, accordingly, prohibitions with regard to sexual relations with blood relatives remained in effect.

On the basis of the thesis developed by R. Naphtali Trop it would follow that a fetus transplanted from a gentile woman to a Jewess would require conversion for purposes of *kedushat Yisra'el*. It would appear to be the case that such conversion might be performed even during pregnancy by means of immersion of the pregnant mother in a *mikveh* as is the case with regard to the fetus of a pregnant non-Jewess who converts to Judaism.³⁴ According to this thesis, the same would be true of a fetus conceived from an ovum donated by a gentile donor.³⁵

In a contribution to *Tehumin*, vol. V, devoted to a discussion of the status of a child born as the result of in vitro procedures, Rabbi Abraham Kilav accepts the basic principle that a maternal relationship is established by virtue of parturition. Nevertheless, Rabbi Kilav denies that parturition serves to establish such a relationship in situations in which the ovum was donated by a non-Jewish woman.³⁶ The fact that a fetus carried by a proselyte at the time of her conversion itself requires conversion leads to the conclusion that a fetus born of in vitro fertilization of an ovum donated by a gentile also requires conversion. Yet,

maintains Rabbi Kilav, a maternal relationship exists in the case of the pregnant proselyte but not in the case of an implanted ovum of gentile origin. In the former case, conversion takes place during pregnancy and at the time of birth the child is already Jewish. In the case of in vitro fertilization, the gestational mother is Jewish and no conversion of the fetus takes place during pregnancy. Since conversion of the fetus does not occur prior to parturition, argues Rabbi Kilav, no relationship to the mother is established by parturition. Rabbi Goldberg, on the other hand, maintains that, although the child requires conversion, parturition nevertheless serves to establish a maternal relationship even in such circumstances.

The conclusion reached by Rabbi Goldberg seems to be compelled according to the position of Ramban. Ramban maintains that conversion of a male fetus is not complete until circumcision is performed after birth. Nevertheless, as has been noted earlier, the existence of a maternal relationship between a proselyte and the children converted with her as fetuses during pregnancy is clear. According to Ramban, that relationship exists despite the fact that circumcision for the purpose of conversion did not occur.³⁷ Hence, the same relationship should exist even if the conversion process has not commenced, e.g., a non-Jewish fetus is implanted in the womb of a Jewish mother, or, according to *Dagul me-Revavah*, *Yoreh De'ah* 268:6, if the *Bet Din* was unaware of the pregnancy at the time of the mother's conversion. Similarly, if R. Naphtali Trop's thesis is accepted, the identical conclusion may be reached even without reliance upon Ramban's position. According to that thesis, membership in the community of Israel is established on the basis of parturition while conversion is necessary for purposes of *kedushat Yisra'el*. Hence, in the case of the implantation of an ovum donated by a non-Jewish woman, parturition would serve to establish membership in the community of Israel and would simultaneously serve to establish a maternal relationship with the birth mother while conversion would be required for purposes of *kedushat Yisra'el*.³⁸

Rabbi Goldberg adds one caveat that is apparently not accepted by either Rabbi Sternbuch or Rabbi Kilav. Rabbi Goldberg asserts that according to those who maintain that the fetus is an integral part of the mother's body (*ubar yerekh imo*) a fetus implanted in the womb of a Jewess does not require conversion in situations in which the donor of the ovum is a non-Jewess. Rabbi Goldberg argues that, upon implantation, the fetus becomes part of the mother and, hence, part of a Jewish body with the result that conversion of the fetus becomes unnecessary. In making this point without further discussion, Rabbi Goldberg seems to ignore the possibility that, if non-Jewish identity is established prior to implantation in the uterus of a Jewish woman, transformation into a limb of the gestational mother may not *ipso facto* result in negation of previously acquired identity as a gentile.

Prof. Low reports an intriguing opinion with regard to a hypothetical question involving a Jewish woman who becomes pregnant as the result of *in vitro* fertilization utilizing an ovum donated by a non-Jewish woman and who wishes to accomplish conversion of the fetus prior to its birth by undergoing immersion in a *mikveh* during the course of her pregnancy. Prof. Low cites an oral opinion expressed by R. Shlomo Zalman Auerbuch to the effect that "for [the purpose of conversion] the immersion of the host mother is of no effect" insofar as the fetus is concerned but fails to report the grounds supporting that conclusion. A communication from Rabbi Avigdor Nebenzal is also cited by Prof. Low in which Rabbi Nebenzal expresses a similar view even with regard to a situation in which an already fertilized ovum is removed from the non-Jewish natural mother and subsequently reinserted into her own uterus. Rabbi Nebenzal apparently maintains that, in such circumstances, immersion of the mother is not efficacious on behalf of the fetus. The more usual case, of course, is a situation in which the donor of the ovum is a gentile woman and the Jewish gestational mother would prefer to immerse the child *in utero* rather than delay the immersion of the neonate until medically advisable.

In each of these cases it is difficult to comprehend why the mother's immersion should not *ipso facto* be deemed immersion of the fetus. The Gemara, *Yevamot* 78a, certainly recognized the efficacy of fetal conversion in the case of natural pregnancy. In the course of that discussion the Gemara questions why the mother's body shall not be deemed a barrier between the fetus and the water of the *mikveh* since, because of the interposition of the mother, the fetus does not at all come into contact with the water. The response of the Gemara is, "A fetus is different. That is the way it grows (*hainu reviteih*)." The import of that response is that, whether or not the fetus is regarded as an "organ of its mother," i.e., as an integral part of her body, the mother's body is not a foreign entity separating the fetus from the water. Since attachment to the uterine wall is normal, natural and essential to the fetus, the mother's body does not constitute an interposition (*haz-izah*) for purposes of immersion.

As a ramification of the laws of interposition, the talmudic ruling permitting conversion of the fetus *in utero* would appear to be entirely unrelated to the principles that serve to determine maternal identity. It is certainly arguable that immersion of the pregnant woman may serve to effect a valid conversion even if she is not the genetic mother and even if the fetus is subsequently transferred to the uterus of another woman prior to term. Although there is no report to that effect, one may speculate that those who are quoted as adopting an opposing view regard the Gemara's statement regarding interposition as limited to natural pregnancy.³⁹ That, too, is difficult to comprehend since, assuredly a skin graft, or hypothetically, a graft of an entire limb, that has become a functioning part of the recipient's body does not constitute an interposition invalidating immersion in a *mikveh*. This would be true even if the skin graft covered the entire surface area of the body. The fact that the mother's body will ultimately become separated from the fetus at birth while the graft is destined to remain in place throughout the recipient's life should not serve to