

**The ART of Producing Responsa:
Feminist Critiques of Rabbinic Law through the Lens of Assisted Reproductive
Technologies**

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Prior to the mid-twentieth century, when assisted reproductive technologies (ART) stepped on to the medical scene, supplications and prayers to God were the primary means for religious Jewish couples to cope with the issue of infertility. However, with the advent of artificial insemination techniques, fertility hormones, in vitro fertilization, and surrogacy, new medical technologies have successfully generated proactive methods for infertile individuals to have biological children of their own. Yet as these controversial technologies emerge, and prove to be of interest and use to Jewish persons, rabbis are compelled to contend with this new and challenging issue. In an effort to comply with *halakha*, or rabbinic law, modern rabbis have interpreted ART in various ways, putting restrictions on certain forms and implementing guidelines for their use in general. For religious Orthodox Jews, *halakha* is a prominent feature of everyday life that influences his or her actions and interactions in the most direct way. Because of this observance, Orthodox couples undergoing fertility treatment and utilizing ART take seriously the guidance of their rabbis, who are seen as authorities on *halakha*. Consequently, a potential problem that emerges from the *halakhic* discourse on assisted reproductive technologies is that this set of symbolically-loaded medical procedures takes place within the female body, yet is dictated by the tractates of a male-dominated religious legal system. The purpose of this paper, then, is to utilize feminist critiques of gender bias in legal systems to critically analyze Orthodox rabbinic discourse on assisted reproductive technologies. Due the unique cultural situation in Israel, which boasts a relatively strong Modern Orthodox presence, a pro-natal government, and unparalleled access to cheap fertility treatments for its citizens, this research will also reflect on the social and political ramifications

rabbinic rulings have on the assisted reproductive scene in Israel. Additionally, this paper will reflect on the importance of working within the *halakhic* system to achieve greater gender equality, and explore potential options for Orthodox feminists to realize that goal.

Before a critique of gender bias in *halakhic* rulings on assisted reproductive technologies is possible, it is first necessary to establish that a gender bias exists in this legal framework. While it is well known that rabbinic law has been generated and interpreted exclusively by an all-male academic elite for thousands of years, there are multiple interpretations about the significance of this fact. Those that deny any gender bias in *halakha* do so on the grounds of a formalist understanding of this legal system. Legal formalism is a system of thought that understands the law to be independent and objective. In legal formalism, judges are required to use strictly deductive reasoning, with their decisions unaffected by personal values or goals (Irshai 2012:12). This formalist understanding of *halakha* may be most notably demonstrated by R. Soloveitchik's viewpoint that, "The *halakha* has no need to reflect the character of the *halakhist*, and neither do circumstances nor historical events contribute to shaping it...Psychologization or sociologization of the *halakha* are an assault on its soul...If *halakhic* thought depends on psychological factors, it loses all its objectivity and deteriorates to a level of subjectivity lacking all substance" (Irshai 2012:13). While R. Soloveitchik's absolutist interpretation of *halakha's* dependence on objectivity may be more extreme than many Modern Orthodox Jews accept, it certainly does confer the benefits of a formalist approach to this legal system. Formalism assures that objectivity is an essential feature of *halakha*, and this promotes the idea that it is stable, timeless, authentic, and immutable. Additionally, the *halakhic* formalist approach supported by Soloveitchik's statement further suggests that any judge who has participated in the formulation and interpretation of *halakha* has always necessarily been objective and free of gender bias. While there are obvious benefits to taking a formalist

approach to *halakha*, a major issue that emerges from this stance is that it presents rabbinic law as being free of moral or ethical considerations throughout time, which, as Ronit Irshai contends, has not historically been the case, nor is it the general understanding of how *halakha* operates by Modern Orthodox Jews (2010). If examples of rabbinic rulings based on moral, ethical, or extra-*halakhic* ideology have been discovered by historians, and if *halakha* is not understood to be entirely objective in character even by those who observe it, then it reasons that there exists in *halakha* a great possibility for personal subjectivities and gender bias to enter into the legal rulings.

Identification of gender bias in the law has become a major objective for feminist legal scholars, and some of these scholars have proposed theories for uncovering these biases, which are useful in critically analyzing the legal system of *halakha*. One approach to uncovering gender bias in legal systems is proposed by the cultural feminist, Carol Gilligan. This theory, as summarized by Ronit Irshai, contends that gender bias in the law stems from legal systems' predominantly masculine mode of thought, or the "ethics of justice," which contrasts with the feminine mode of thought, referred to as the "ethics of caring" (Irshai 2012:7). With an "ethics of justice" mode of thought, abstract ideas and rules are applied to concrete cases, whereas with an "ethics of caring" mode of thought, there is a greater focus on resolving disputes through a relational and personal approach. This theory suggests that laws constructed by men are biased by virtue of utilizing a mode of thinking that is not suited to women's personality system (Irshai 2012:7). A second theory about the origin of gender bias in the law is proposed by the radical feminist, Catherine MacKinnon. This theory, as summarized by Ronit Irshai, proposes that gender bias in the law stems from men's interest in structuring the law to maintain male dominance (Irshai 2012:8). Robin West presents an alternative theory to the origin of gender bias in the law. According to Irshai's summary, West's theory suggests that male bias in the

law stems from its failure to reflect, and even its propensity to disregard, women's subjectivities, because each sex's subjectivities are mitigated through distinct biological experiences (Irshai 2012:9). Each of these theories serve to counter the argument that the law is objective and gender-neutral by pointing out that legal systems constructed through an exclusively male narrative and frame of reference will maintain androcentric assumptions and interests. These theories, then, are useful tools for recognizing and understanding gender bias in *halakha*, and each harbor unique implications for rabbinic law.

The implication for *halakha*, according to Gilligan's theory, is that rabbinic decision-making would be interpreted completely differently by women than by men (Irshai 2012:14). According to this theory, because women maintain a different mode of thought, use different analytical tools, and have different frames of reference, *halakha* constructed by women would necessarily be dramatically reimagined and transformed. Tamar Ross echoes this sentiment in her discussion of potential feminist impacts on *halakha* by stating that "the very concept of a religion that is law-governed, dependent upon our performing a detailed series of mandated tasks, is regarded as a male way of thinking...a feminine view might emphasize more the importance of religious feeling and a sense of the presence of God" (Ross 2000:20). By proposing potentially radically different interpretations of *halakha* by women and men because of differences in each gender's modes of thinking, this statement reflects the essentialist view of men and women found in Gilligan's theory. Another implication for *halakha*, according to MacKinnon's theory, is that rabbinic law is structured to preserve male dominance and the existing patriarchal order (Irshai 2012:15). Applying this theory to *halakha*, any rabbinic interpretation that privileges male authority or prerogatives can be understood as an effort to systematically subjugate women and maintain the patriarchal status quo. A different *halakhic* implication stemming from West's theory is that, because *halakha* has been completely

informed and structured by male biological and life experiences, it does not and cannot suitably express the values and subjectivities of women (Irshai 2012:16). Even when *halakha* claims to express women's life experiences, it does so only by filtering it through a male lens. Moreover, because male subjectivities are dominant in constructing *halakha*, women's experiences are only a secondary consideration and are not equated with those of men. West's theory is particularly pertinent for analyzing *halakhic* rulings on assisted reproductive technologies, because it understands differences in men and women's subjectivities to be a result of biological experiences that are unique to each sex. Equipped with these theories as tools for recognizing and understanding gender bias in *halakha*, it is now possible to take a critical approach toward modern Orthodox rabbinic responsa on assisted reproductive technologies, particularly as it appears in the Israeli context.

Israel is fertile ground for understanding the broader significance of Orthodox rabbinic rulings on assisted reproductive technologies for several important reasons. As of 2012, Israel boasts the highest rates of infertility treatments in the world, as measured by the number of IVF cycles per capita (Shalev and Werner-Felmayer 2012). This propensity for utilizing assisted reproductive technologies in Israel stems from several cultural factors, including giving serious weight to the command "be fruitful and multiply" (Gen 1:28), and also regarding the family to be a central feature of normative Israeli society (Shalev and Werner-Felmayer 2012). A strong pro-natal social conviction in Israel is evidenced by a 2005 survey of Jewish Israeli married couples that reported that 59% of households "support public interventions that might encourage larger families" (Della Pergola 2009). For the Israeli government's part, it demonstrates its support of a pro-natal society by implementing social policies including "incremental monthly government stipends paid to mothers for the birth of each child, state-funded day care, protection for pregnant women from job termination, compensation for losses

from job absences resulting from fertility treatment and pregnancy,” and more (Rosenblum 2013). The Israeli government’s most notable support for a pro-natal society, however, is the state-funded National Health Insurance’s coverage of unlimited IVF treatments for each single woman and married couple’s first and second child (Shalev and Werner-Felmayer 2012).

However, the most important reason that Israel is a particularly exemplary place for understanding the broad social impact of Orthodox rabbinic rulings on assisted reproductive technologies, is that religion and state are intimately linked in this country. Susan Sered of Bar Ilan University summarizes Orthodox Judaism’s institutionalization in Israel by listing a series of direct connections that exist between religion and the state, including, but not limited to, state-funded religious schools and synagogues, rabbinic control of weddings and divorces, and publically recognized rabbinate whose legal rulings hold significant cultural weight (Sered 2000:194). Orthodox rabbinic courts’ full authority over marriage and divorce for Jewish Israelis was codified in 1958 when the Israeli Knesset passed the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law (Kahn 2000:72). Not inconsequentially, it is the Marriage and Divorce Law that became the main vehicle through which Orthodox rabbis gained dramatic influence over the government regulation of assisted reproductive technologies in Israel. Since Orthodox rabbis have a monopoly over marriage for all Jewish Israelis, those who desire to be married in-state, even if they are not religious or Orthodox, are obligated to comply with *halakhic* rulings in this particular area. One significant *halakhic* category that determines marriageability in Orthodox Judaism, and that is also intimately linked with reproduction, is that of the *mamzer*. A *mamzer* is an illegitimate child born of biblically defined incest, or of an adulterous relationship between a married Jewish woman and a Jewish man other than her husband. Because of the sinful sexual acts involved in his or her conception, a *mamzer* is prohibited from marrying another Jew, unless the intended spouse is also a *mamzer*. Since a

mamzer is disqualified from marrying another Jew under Orthodox rabbinic law, and Orthodox rabbinic courts have full authority on marriage in Israel, a *mamzer* is unable to participate in this important normative aspect of Israeli society (Kahn 2000:79). Producing socially debilitated Jewish Israelis is a concern for politicians, rabbis, and citizens alike, and because Orthodox rabbis understand *halakhic* principles used in determining *mamzer* status to cross over to assisted reproductive technologies, rabbinic considerations were allowed to enter into the government regulation of ART in Israel.

The direct effects of Orthodox rabbinic influence on the assisted reproductive technology scene in Israel can easily be discerned by analyzing government regulations on ART. Chapter B of the Embryo-Carrying Agreements Law of 1996, stipulates several conditions for contracting a gestational surrogate pregnancy that serve to circumvent several potential rabbinic concerns (Kahn 2000:143). Some conditions listed in this law mandate that the commissioning mother and surrogate mother must be of the same religion, that the sperm used to conceive the child must come from the husband of the commissioning couple, that the gestational surrogate cannot use her own ovum, and that every effort must be made to find a surrogate who is unmarried (Kahn 2000:143). The first stipulation, mandating that the two contracting mothers be of the same religion, comes from rabbinic concern with establishing which mother is the *halakhic* mother. Determining the *halakhic* mother is an important task for rabbis, because the status of “Jew” is inherited by the child from the mother. While the general rabbinic consensus on this issue is that the birth mother is the *halakhic* mother, assuring that the two mothers are of the same religion circumvents any dissenting views on this subject. The second mandate, concerned with the use of the husband’s sperm in the conception, assures that the male partner will have biological children of his own while simultaneously avoiding the highly contested debate about artificial insemination donation. In Orthodox Judaism, men are

considered to be commanded by God to “be fruitful and multiply” (Gen 1:28), while women are not considered to be equally obligated. This stipulation, therefore, ensures that the husband will be able to fulfill his religious duty. The third and fourth mandate combined reflect a concern with the issue of adultery, and attempt to avert this *halakhic* concern by stipulating that the gestational mother be unmarried and that her ovum not be used in the conception.

Considering that these stipulations ensure that conception does not involve the surrogate’s ovum and that the embryo is conceived outside of her womb, “the illicit sexual union at issue here,” as Martha Susan Kahn explains, “is that between the contracting husband’s sperm and the *womb* of the carrying mother” (Kahn 2000:145). Many rabbis would contend that if a married woman carries the child of another Jewish man, even if her egg is not used and no sexual intercourse took place, that the act would still be equivalent to adultery. Furthermore, because she is the birth mother, and, therefore, the *halakhic* mother of the child, she would consequently render that child a *mamzer*. This exact sentiment is reflected by Chief Sephardi Rabbi, Rav Eliyahu in his criticism of the Embryo Carrying Agreements Law’s loophole that allows for a married woman to become a surrogate in extenuating circumstances:

The Surrogacy Law should not have come into the world at all. Let me just take the law as it exists in front of me. “It is possible that in extenuating circumstances the surrogate may be a married woman.” This is a disgrace to the people of Israel. The rabbi who approved this committed a sin; it is adulterous, promiscuous, and licentious...As to the question: Is a woman who receives an ovum the mother in all respects? The answer is yes. The child belongs to the carrying mother...So all you infertile men and women out there, pray to God Almighty and you will get a son or a daughter, don’t contract a surrogate mother. And you should all have as many children as you can, which will speed the coming of the redemption. (Kahn 2000: 144)

Rav Eliyahu's particular criticism of surrogacy, delineation of who should be considered "the mother in all respects," and subsequent call for a religiously prompted pro-natal mentality is worthy of further analysis in many respects. Firstly, the rhetoric used in his disavowal of surrogacy is centered on the issue of adultery. Understood through MacKinnon's theory of dominance, restricting surrogacy on the basis of adultery, which applies only to married women and not equally to married men, would be interpreted as an attempt to maintain a husband's control over his wife's reproductive capacities. While a counterargument may be made, and, indeed has been made, that rabbis who rule more stringently on assisted reproductive technologies do so because they recognize that there are other values more important than the command to procreate (Irshai 2012:244), Rav Eliyahu's emphatic and religiously-minded prompting to have "as many children as you can" does not seem to support this claim, unless the "more important values" in question are those that serve to maintain the patriarchal status quo.

Furthermore, while it may not necessarily reflect male interests, Rav Eliyahu's determination of the birth mother as the "mother in all respects" is an interesting topic for analysis, because it does not appear to reflect on any other issues other than the determination of the halakhic mother. Reflecting on West's theory, which understands gender bias in the law to stem from different gendered subjectivities informed by unique biological experiences, and incorporating Elly Teman's discussion of the subjectivities of Israeli surrogates and commissioning mothers from the perspective of the body, it is possible to elucidate how Rav Eliyahu's definition of "mother" does not, and cannot account for the lived experiences of women and their particular understandings of motherhood. In *Birthing a Mother*, Teman details women's experiences with the phenomena of "shifting body," or the process through which "the very aspects of pregnancy that the surrogate has distanced, detached, and disembodied are

channeled into the intended mother's construction of a 'pregnant identity'" (Teman 2010:134). This process involves, among other things, verbal communication between the surrogate and the intended mother about the physical, emotional, and psychological aspects of pregnancy experienced by the surrogate in an attempt to distance herself from the pregnancy while simultaneously helping the intended mother recognize herself as being "pregnant" (Teman 2010:146). For some intended mothers, the "shifting body" phenomena manifests itself in the form of the intended mothers experiencing the same physical and emotional symptoms as their surrogate partners. In more extreme cases, intended mothers even perceived their bodies to be completely merged with the body of the surrogate mother, yet understood their own sense of self to be dominant (Teman 2010:166). The effect of this perception is that, even though the intended mothers did not physically gestate the child, they still understood the pregnancy to be *theirs*. Given these women's particular subjective experiences, informed by embodied strategies of the surrogate mother to detach herself from the pregnancy and maternity, and by the intended mother to intensely identify with a vicarious pregnancy, Rav Eliyahu's overarching statement that the birth mother is the "mother in all respects" can readily be identified as insufficient, because it fails to acknowledge women's subjective experiences with pregnancy, and consequently, to account for women's multiple understandings about what constitutes a "mother" and "motherhood."

Thus far, gender bias in *halakha* has been considered and discerned through the exploration of rabbinic discourse on assisted reproductive technologies. Accepting that gender bias exists in rabbinic law, and recognizing that rabbis exert considerable influence over government regulation of assisted reproductive technologies in Israel, what are some possible solutions for realizing a more gender equal approach to these issues? One possible solution for reducing rabbis' influence over government regulation of ART is to remove the Orthodox

rabbinate's monopoly on marriage and institute civil marriages in Israel. By implementing civil marriages, government regulation of ART would no longer be directly constrained by *halakhic* concerns pertaining to reproduction and marriageability. While this does not solve the issue of gender bias in the government system that implements regulations on ART, it does eliminate the constraints of having to haggle with a legal system that is completely informed by male narratives and perspectives. Repealing Orthodox rabbinic control over marriage in Israel may liberate secular individuals, non-Orthodox Jews, and religious minorities from the current institutionalized constraints of *halakha*, but for observant Orthodox Jews, working around the *halakhic* framework is not a sufficient or satisfying solution.

Striving for greater gender equality from within the *halakhic* framework is the project of the Orthodox feminists. Currently, the Orthodox feminist agenda focuses primarily on achieving greater recognition from the spiritual community by participating in public rituals, such as reading aloud from the Torah. However, Orthodox feminists' unique position as insiders of the Orthodox community and outsiders of the religiously obligated and privileged male community allows them to recognize specific gender biases and injustices that Orthodox women, in particular, and the Orthodox community, in general, would deem to be important issues (Irshai 2010). Yet a recognition of gender bias and injustices in *halakha* alone does not account for the recent rise in Orthodox feminist activism. In Yael Israel-Cohen's discussion of Orthodox women's passive and active resistance to exclusion from synagogue ritual, she clearly credits the recent surge of Orthodox feminist activism to be a direct result of the increase of women studying Torah (Israel-Cohen 2012). By gaining knowledge of the Torah and *halakhic* discourse and tools, Orthodox women are in an unprecedented position to address gender bias in rabbinic law by utilizing newly equipped *halakhic* principles and tools to eliminate some of these injustices. While the ethical and moral issues surrounding assisted reproductive

technologies may not yet explicitly be on the Orthodox feminist agenda, gains in eliminating gender bias and achieving greater gender equality within the general framework of *halakha* may inadvertently lead to *halakhic* rulings on assisted reproductive technologies that are more equitable and applicable because they account for the subjectivities, values, and perspectives of both *men* and *women*.

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