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# HEMDAT YAMIM

## הַמְדָת יָמִים

### Parashat HaShavua

Tazria, 1 Nissan 5776

#### The First Surrogate Mother

Harav Yosef Carmel

Many have tried to explain the sequential significance of "Should a woman give forth seed and give birth to a male" (Vayikra 12:2). A *baraita* seems to take things literally: "If the woman ovulates first, she will bear a male. If the male's seed is first, she will bear a girl." Rabbi Tzadok cites further support for this correlation from the *pasuk*, "These are the sons that Leah bore for Yaakov in Padan Aram, along with Dina, his daughter" (Bereishit 46:15). Still, it is hard to understand what the Torah is hinting at and what the various rabbis are saying.

A fascinating *gemara* (Berachot 60a) builds on the story behind Dina's birth. The Torah says, "And afterward, she gave birth to a daughter, and she called her name Dina" (Bereishit 30:21). Rav explains that "afterward" hints at Leah's calculation (*din*) during her pregnancy that if she would have a seventh son, Rachel would have only one of the twelve prophesied sons of Yaakov, and therefore the baby was turned into a girl, called Dina.

The *gemara* does not explain how the fetus turned into a girl, whether it was through a change in genes or in some other way. Targum Yonatan explains the miracle as follows. Leah was pregnant with Yosef, and Rachel was pregnant with Dina, and Hashem switched the babies from womb to womb. Rabbi Elazar Hakalir also takes this approach in a *yotzer* for Mussaf of Rosh Hashana.

Following the logical conclusion of this *midrashic* approach, in the case that a baby is born from the egg of Woman A that was implanted in the womb of Woman B, it is considered the child of Woman B. Only in that way can we (and, more importantly, the Torah) call Yosef the son of Rachel and Dina the daughter of Leah. There are those who wanted to reach halachic conclusions regarding the modern miraculous (in its own way) phenomenon of surrogate motherhood, that the birth mother is the halachic mother, not the genetic mother (the egg provider). There are many halachic ramifications to the claim that the surrogate is the halachic mother.

However, many argue cogently that *midrashim* are intended to teach matters of ethics, not halacha, for which *Chazal* employed a different system. So what do we learn ethically? From the story of Rachel, Leah, and Yaakov we see the importance of people being willing to sacrifice for the sake of their relative, which is also true regarding others in society. We also are reminded about the extreme personal yearning for children and the extent to which we should help such people bring children into the world.

Today there are many more avenues to explore in fulfilling these natural yearnings, and we are proud that Israel and significant parts of the rabbinic community are in the forefront of these efforts. Feel free to contact us at: [info@eretzhemda.org](mailto:info@eretzhemda.org) for a copy of our responsum on surrogacy. In the meantime, we wish all a life full of happiness and the laughter of children, grandchildren, and great-grandchildren.

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# Ask the Rabbi

by Rav Daniel Mann

## Tricking a Cheater

**Question:** If someone asks me for an answer during a test, can I tell him the wrong answer? (Response to follow-up question – I prefer not to refuse either to not suffer socially or so the cheater gets what he deserves.)

**Answer:** Cheating on a test is an example of *geneivat da'at* (deception) (*Igrot Moshe, Choshen Mishpat II:30*), which is forbidden whether one fools a Jew or a non-Jew (*Chulin 94a*). Many consider this a Torah prohibition, under the rubric of stealing (*Ritva ad loc.*). It is highly destructive to one's moral standing (*Sha'arei Teshuva 3:184*) and distances him from the path of He whose "seal is truth" (*Shabbat 55a*). We cannot but mention that the amount of cheating that occurs in far too many of our schools is tragic, and is sometimes done even by morally/religiously "quality students." Your frustration is justified, but your suggestion is flawed on several important grounds. We will divide the discussion based on the motivations you mention.

*Geneivat da'at* applies to such innocuous situations as making someone think you did him a bigger favor than you did (*Chulin 94a*). Rashi (*ad loc.*) explains that it is because he makes the recipient unnecessarily grateful. One can ask: is the deceptive act intrinsically forbidden, or is the prohibition dependent on the deceiver eventually receiving more than he deserves. While I cannot explain it succinctly, it is clear to me that the deception is intrinsic as long as he intends it to be impactful, even if that never comes to fruition (see *Igrot Moshe ibid.*). Thus, for example, every deceitful test answer is forbidden even if the examinee's final grade (including F) was not improved by the cheating.

Based on the above, the cheater violates *geneivat da'at* even if you give him the wrong answer, meaning that you will violate *lifnei iver* (sometimes, by Torah law and sometimes Rabbinically) by facilitating his *aveira* by providing an answer other than his own. "Giving him what he deserves," does not justify your *lifnei iver* of aiding in his *aveira* or in deceiving him even if it were moral (our next topic).

Ideally, you should rebuke the perpetrator, acting out of not only love of the *mitzvot* but also of the unfortunate sinner, who needs guidance (see *Rambam, De'ot 6:7*). Even if this is not feasible (see *Yevamot 65b*), you should not give the impression of agreeing with cheating, which may be a form of *lifnei iver* (see *Shach, Yoreh Deah 151:6*) and a *chillul Hashem*. Also, while there are cases it is justified to be deceitful with the deceitful (see *Tehillim 18:27* and Yaakov-Lavan story), there seems to be little need/gain/justification for you to lie.

The matter of concern for your social standing, which can sometimes be a serious problem, makes a better question. The *gemara* (*Berachot 19b*) allows significant halachic leniency to avoid embarrassment. Just as we suggested that one is not required to snitch on fare-beaters to a bus driver (*Living the Halachic Process III:I-8*), your fear can be an excuse to not tell the proctor about the cheating. However, to take part in the cheating (even with the wrong answer) is more difficult. One might claim that if the cheater could cheat from someone else, you would only be violating a Rabbinic version of *lifnei iver* (see *Shach ibid* and that there are times that one may violate Rabbinic prohibitions to avoid extreme embarrassment (*Berachot ibid.*)). However, such leniencies apply when there is a conflict by chance between one's dignity and a Rabbinic prohibition. Here, the embarrassment is that one will scorn your halachically mandated morality. Therefore, even if many peers tragically rationalize or otherwise fail to keep this halacha, you must stand your ground and refuse to take part. It is similar to one whose friends invite him to eat (even Rabbinically) non-kosher food and will ridicule him if he refuses. We expect him to stick to his principles, as obligated.

We wish you *hatzlacha* in protecting yourself from the moral corrosiveness of cheating and from the barbs of those who cheat – but in the right way.



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# Ein Ayah

(from the writings of Harav Avraham Yitzchak Hakohen Kook, z.t.l.)

**Gemara:** Rabbi Simon and Rabbi Elazar were sitting. Rabbi Yaakov bar Acha passed by. One said to his friend: "Let us stand up before him, for he is a man who is fearful of sin." The other one said to him: "Let us stand up before him, for he is a man who is a son of Torah."

## A Man of Fear of Sin

(condensed from Ein Ayah, Shabbat 2:172)

**Ein Ayah:** Standing up before a *talmid chacham* and before people of stature improves the soul by getting it used to having a perception of something noble that inspires he who stands and causes him to act properly. By strengthening the reaction to good people, he will also improve his reaction to every good deed and display of pleasant morality, so that instead of being passive, he will act and be inspired. That is the reason that standing up is a good way to express honor for someone, for the purpose of honor for people of stature is so their influence should be as clear and active as possible.

It is possible for a person to acquire a certain degree of stature or a certain characteristic, but in a manner that does not fit in with his general behavior. As one example, it is possible for a person to be fearful of sin, but the significance of this fact is lessened because the essence of his personality is weak due to feebleness of the body or the spirit or to lack of awareness. In other words, it can be that the reason he does not seek sin is because he does not see doing bad as a viable choice the way most people do. Such a person does not know how to do bad, and thus it cannot fully be said that he chose to avoid it due to fearfulness of sin. We can call him "fearful of sin" but not "a man who is fearful of sin." The purpose of the Torah is to fulfill the *pasuk* (*Vayikra* 18:5): "... that a person should do them and live by them." In other words, we are referring to one whose powers of the body and the spirit are all fully intact and with all that vibrancy chose to lead a more sacred and lofty life, in which he is close to Hashem and follows His path. That is why it stresses "a man," one who is full of vigor, which gives greater significance to his fear of sin.

Since that which is active in such a person is his own essence, the desire for goodness is already in his benevolent soul. He uses the Torah path to make sure that his spirit desires only the good and not the bad. Therefore, the full picture of his fearfulness of sin is in play when he stays away from sin.

## A Son of Torah

(condensed from Ein Ayah, Shabbat 2:173)

**Ein Ayah:** The positive effect that comes from recognizing he who deserves honor comes when the honorable person had to work hard and with good intentions. Then when people honor him, they will come to work harder to try to get closer to goodness. There are times when practical morality is found naturally in special people who were blessed with successful personalities and characteristics. Therefore, fear of sin is not always a measure of one's choice to embrace goodness.

Every person is born wild. However, when he inculcates himself with Torah, he merits to not only be called one who knows Torah but "a son of Torah." That is a sign that the Torah trained him the way a mother trains her son in a good, upright lifestyle. Such a person is fit for honor so that the ones who honor him will also strive to occupy themselves with Torah. Indeed, the crown of Torah is ownerless, so that whoever wants to come and acquire it can do so (Rambam, *Talmud Torah* 3:1).

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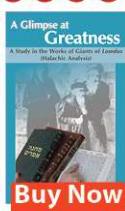
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## Partner or Employee?

(condensed from ruling 74003 of Eretz Hemdah-Gazit Rabbinical Courts)

**Case:** The defendants (=def) are a couple who embarked on publishing a magazine. They brought in the plaintiff (=pl) as a senior member of the team. The magazine was never published, and def ended pl's involvement in less than a month. Pl says he was promised 10,000 shekels a month for the first three months. Def claim that, as they always do with senior staff members, pl was a partner, who is paid only from profits, which never materialized here. Pl presented as evidence an e-mail in which def wrote that 10,000 shekels for pl was a business expense. They also asked pl to fill out a 101 worker form and sent him a message that they were firing him. Def bring as evidence that they did not register him as a worker, as would be required by law.

**Ruling (of majority):** All agree that both defs had rights to make decisions on behalf of the company, which pl did not have, and that they ended pl's employment unilaterally. These are clear indicators that there was no partnership.

Therefore, pl was either an employee or a contractor, the difference being that a contractor, as an independent, does not enjoy the same legal protections of payment that an employee has. The law requires every employee to receive at least the minimum wage for their work. This would preclude the worker's salary to be dependent on the employer's profit, so that he could not possibly receive less than the minimum wage. This is a law that we rule is binding, and the *gemara* (Bava Batra 8b) already talks of even a local society setting binding minimum wages.

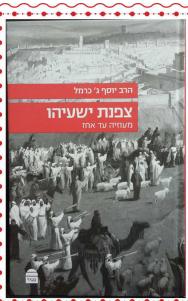
Both in halacha and by law, this status is not determined by registering a worker but by the actual nature of the relationship. *Beit din* considers it probable that pl was an employee (not a contractor and certainly a partner) because he needed def's approval for his actions, there were not set tasks/goals for him to receive payment, and other than having a higher salary, there was no difference between him and def's other employees.

There is a question whether, beyond minimum wage, pl was promised 10,000 shekels on condition or not. The only discussions on wages were held between pl and the female def. All agree that female def raised the idea that pl's salary would be conditional and that pl voiced displeasure. Pl said that the conversation ended with his salary being unconditional, and def does not remember but stresses that this was always their practice. However, personal practice is irrelevant unless it was known to the side with whom they interacted (*Igrot Moshe, Choshen Mishpat I:75*). Def's claim is weakened by the fact that throughout society (which is significant – see *Shulchan Aruch, CM 330:5*), pay on condition is uncommon.

In a case of conflicting claims, the first rule is that the one who wants to extract money (in this case, pl) has to bring proof. Even in a case where the plaintiff is certain and the defendant is not, the defendant is still not obligated to pay (*ibid. 75:9*). However, when all agree that there was an obligation and the question is whether it was paid, the certain plaintiff beats the doubtful defendant (*ibid.*). It can be demonstrated from the *Rashba* (details beyond our scope) that when there was cause for obligation but with the possibility of a condition to exempt, it is equivalent to a definite obligation and possible payment. Therefore, pl is believed that he was promised pay unconditionally.

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