NOTE

THE ESTABLISHMENT OF MATERNITY AND PATERNITY IN JEWISH AND AMERICAN LAW

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I. INTRODUCTION

This Note surveys and compares various issues relating to the establishment of maternal and paternal relationships in American and Jewish law and advocates solutions to certain problems within Jewish law. The Note is organized into four parts. Part One deals with the establishment of paternal relationships in both Jewish and American law, with an emphasis on those arising from artificial insemination. Part Two analyzes surrogate motherhood under both legal systems, as well as the general rules for establishing maternal identity. In analyzing how Jewish law treats surrogate motherhood, this Note presents a detailed analysis of the talmudic sources dealing with surrogate motherhood and argues that Jewish law focuses on conception and implantation in establishing maternal identity. The American law section summarizes the case law in this field and points out the analytic disharmony between the different court opinions.

Part Three explains the adoption law according to American and Jewish law and focuses on the fundamental differences in methodology used by each system. Part Four analyzes the effects of sex reassignment surgery on parental and marital status, and the method of establishing sexual identity according to the American and Jewish legal systems. Fundamental principles used by each system to establish parental and personal status are emphasized throughout the Note. This Note con-

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cludes that while Jewish law has maintained both an analytically clear definition and a consistent application of rules to establish maternity and paternity, American law has not; instead it has chosen to focus on the individual equities of the parties before the court, thus sacrificing consistency for equity.

II. THE ESTABLISHMENT OF PATERNITY AND ARTIFICIAL INSEMINATION

A. *Jewish Law*

The Talmud, in numerous places, recounts the list of prohibited marriages.[1] The genesis of such prohibited relationships always begins at birth. As the Talmud states,[2] non-biological relationships, such as those created by adoption, are not recognized as creating a prohibition against marriage in Jewish law. As noted in the *Shulchan Aruch*,[3] it is permissible to marry one's adopted sister, even if she was raised in the same house. Thus, it is safe to say that according to Jewish law, parental relationships are granted to the natural parent[4] and cannot later be changed to be in harmony with custodial relationships. Thus, unlike American law, the establishment of parental status is not typically a significant legal issue in Jewish law because in almost all situations the identity of the parent is legally clear.[5]

It is possible that some of the privileges and duties of parenthood which are rabbinic,[6] rather than biblical,[7] in origin can be transferred upon the establishment of custody by a non-parental guardian; these aspects of parenthood will be dealt with in the section on adoption.[8] However, in the normal situation, in which the natural father's identity is clear, Jewish law dictates that he is also the legal father.[9] No other considerations can change paternity once it is established. Thus, Jewish law

1. *See, e.g.*, BABYLONIAN TALMUD, *Yevamot* 22a-b; *Sanhedrin* 53a-54b, 75a.

2. BABYLONIAN TALMUD, *Yevamot* 21a.

3. J. CARO, SHULCHAN ARUCH, *Even Haezer* 15:11.

4. JACOB BEN ASHER, TUR, *Even Haezer* ch. 15 (two boys raised together may marry each other's wife [after one brother dies] without concern about the appearance of impropriety); J. CARO, BEIT YOSEF, *commenting on id.*

5. There are, obviously, cases in which the identity of the father or mother is factually unknown; see J. CARO, SHULCHAN ARUCH, *Even Haezer* 71:4 and commentaries *ad locum*, on how Jewish law deals with these circumstances.

6. The term "rabbinic law" is used in Jewish law to indicate rules of law which were created by the rabbis in a legislative rather than a hermeneutic manner. They are, at least theoretically, changeable. MENACHEM BEN MEIR (MEIRI), BEIT HA'BECHERA, *commenting on Avodah Zarah* 35a.

7. The term "biblical law" is used in Jewish law to indicate rules of law, either explicit in the Bible or derived from Biblical sources. There is some dispute as to which forms of derivation create biblical law. *Compare* MAIMONIDES, SEFER HA'MITZVOT, *Shoresh* 2 *with* COMMENTARY OF NACHMANIDES on *id*. *See generally* M. ELON, HA'MISHPAT HA'IVRI 194-208 (1978).

8. *See infra* Part IV.

9. J. CARO, SHULCHAN ARUCH, *Even Haezer* 15:2-11.

faces none of the problems intrinsically associated with the American approach. Jewish law faces only a single definitional problem — who is the natural father in the "hard" cases — artificial insemination, testicular transplants and a host of other "unnatural" events potentially leading to fatherhood.

Currently, the only well developed dispute in Jewish law concerning the establishment of paternity arises in the case of artificial insemination — however, the principles enunciated there solve almost all other "hard" cases. Four basic positions exist. The first position, referred to as the position of Rabbi Feinstein,[10] due to his vigorous advocacy of this position, is that artificial insemination is permitted and that the paternity of the child is established by the genetic relationship between the child and the father.[11] Thus, he who donates the sperm is the father. Furthermore, Rabbi Feinstein is of the opinion that the act of artificial insemination does not violate Jewish law[12] and does not constitute an act of adultery by the woman.[13]

The second position, that of the *Divrei Yoel* is identical to that of Rabbi Feinstein's in acknowledging that the genetic relationship is of legal significance and the paternity is established solely through the genetic relationship.[14] However, he also maintains that the genetic relationship predominates to establish illegitimacy and the legal propriety of these actions. Thus, heterologous artificial insemination is an act of adultery.[15] Both Rabbi Feinstein and Rabbi Teitelbaum agree on how paternity is established; however, they differ as to how illegitimacy is established.

Two other positions are also offered on this topic. The first is that of Rabbi Waldenberg. He is of the opinion that an act of adultery occurs, not through the genetic mixing of sperm that is not the husband's with the wife's egg, but rather by the act of heterologous insemination itself; this act is physically analogous to adultery and is not permitted.[16] This view is not based on the presence or absence of genetic relationships between child and husband, but rather upon Rabbi Waldenberg's belief

10. *See* M. FEINSTEIN, IGROT MOSHE, 1 *Even Haezer* 10, 71; 2 *Even Haezer* 11; 3 *Even Haezer* 11. For another vigorous defense of his position, see M. FEINSTEIN, DIBROT MOSHE, *Ketubot* 233-48.

11. There are situations in Jewish law where, even in the course of a sexual relationship, no paternity is established. According to Jewish law, the child of a relationship between a Jew and a gentile always assumes the legal status of its mother. The child bears no legal relationship to its father. *See* BABYLONIAN TALMUD, *Yevamot* 22a-b; JACOB BEN ASHER, TUR, *Even Haezer* ch. 16. This is equally true in cases of artificial insemination.

12. M. FEINSTEIN, IGROT MOSHE, 2 *Even Haezer* 11.

13. Which in normal circumstances would lead to the classification of the child as illegitimate, *see* J. CARO, SHULCHAN ARUCH, *Even Haezer* 4:13, and if done intentionally, would mandate the separation of the couple.

14. Y. TEITELBAUM, 2 DIVREI YOEL 110, 140.

15. *Id.*

16. E. WALDENBERG, 9 TZITZ ELIEZER 51:4.

that the injection of sperm is itself a prohibited form of adultery. Furthermore, Rabbi Waldenberg maintains that this conduct is also a violation of the rules of modesty, which are of rabbinic origin.[17] He would thus prohibit this conduct in all circumstances regardless of whether it technically violates the biblical prohibition of adultery.[18]

A fourth position is advocated by Rabbi Breish, who maintains that heterologous insemination is not an act of adultery, and no biblical violation occurs.[19] Nonetheless, he maintains that "from the point of view of our religion these ugly and disgusting things should not be done, for they are similar to the deeds of the land of Canaan and its abominations."[20]

In researching artificial insemination, one thing becomes apparent — there is a paucity of talmudic sources on the topic. Except for the single talmudic source in *Hagigah*,[21] which discusses artificial insemination *en passant*, no clear sources exist. The single talmudic source states as follows:

> Ben-Zomah was asked: May a pregnant virgin marry a High Priest.[22] Do we assume that Samuel is correct, when he states that one can have intercourse many times without removing the physical characteristics of virginity, or perhaps this is unlikely. He replied: Samuel's position is unlikely, and we assume that the woman was artificially inseminated.

The simple explanation of the talmudic text is that artificial insemination does not create legal prohibitions which are normally based on prohibited sexual conduct, and through silence, the Talmud implies that it establishes paternity — for if the Talmud maintained that even paternity was not established, it would have stated this.[23]

17. *Id.* Rabbi Waldenberg maintains that this conduct violates the laws of marital modesty (*dat yehudit*). *See* BABYLONIAN TALMUD, *Ketubot* 72a.

18. Rabbi Waldenberg, in a recent responsum, prohibited surrogate motherhood on these same grounds. *See* E. Waldenberg, *Test Tube Infertilization*, 5 SEFER ASYA 84-92 (1986).

19. Y. BREISH, 3 CHELKAT YAKOV 45-48. Similarly, see Y. WEINBERG, 3 SREDAI EISH 5.

20. Y. BREISH, 3 CHELKAT YAKOV 45-51.

21. BABYLONIAN TALMUD, *Hagigah* 14b-15a.

22. According to Jewish law, the High Priest may only marry a woman who has never had intercourse before her marriage to him. *Leviticus* 21:13. *See also* MAIMONIDES, MISHNEH TORAH, SEFER KEDUSHA, *Hilchot Issurai Biah* 17:13.

23. This is the near unanimous opinion of the decisors. See O. YOSEF, 2 YABIAH OMER, *Even Haezer* 1:6; Y. WEINBERG, 3 SREDAI EISH 5; SAMUEL BEN URI, CHELKAT MECHOKET, *commenting on* J. CARO, SHULCHAN ARUCH, *Even Haezer* 1:6; M. FEINSTEIN, IGROT MOSHE, 1 *Even Haezer* 10, 71; M. KLEIN, 4 MISHNAH HALACHOT 160; E. WALDENBERG, 3 TZITZ ELIEZER 27:3; Y. TEITELBAUM, 2 DIVREI YOEL 110, 140; S. DURAN (TASHBETZ), 3 RESPONSA 263; SHMUEL PURDA, BEIT SHMUEL, *commenting on* J. CARO, SHULCHAN ARUCH, *Even Haezer* 1:10; J. ETTLINGER, ARUCH LENEIR, *commenting on* YEVAMOT 10. J. EMDEN, 2 SHEALAT YAVETZ 96. It is sometimes claimed that the *Turai Zahav* (*Taz*) disagrees with this; *see* D. HALEVI, TURAI ZAHAV, *commenting on* J. CARO, SHULCHAN ARUCH, *Even Haezer* 1:8. This is not necessarily true. It is likely that the *Taz* is only referring to the question of the fulfillment of the commandment to have children, and not the establishment of paternity. *See generally* Rosner, *Artificial Insemination in Jewish Law*, in F. ROSNER & J.D. BLEICH, JEWISH BIOETHICS 105, 111 (1979).

Rabbi Feinstein, in mustering additional support for his opinion, quotes a ruling by Rabbi David Halevi (*Taz*) of the 17th century, which is itself based on a responsom of Rabbi Peretz, an 11th century Jewish scholar.[24] Rabbi Peretz states that in the absence of sexual intercourse, the child resulting from the mixing of sperm and egg is always legitimate.[25] Rabbi Feinstein, based on this source, reaches a critically important conclusion: if there is no forbidden sexual act, the child is acceptable for all functions and is totally legitimate according to Jewish law.[26] Furthermore, this child is not even stigmatized to the extent that he is forbidden to marry one of priestly descent,[27] since all of the stigmas associated with the child of an illicit relationship are dependent on the presence of prohibited intercourse, and not the genetic combination of two people who are prohibited to each other.[28] Furthermore, he accepts the literal interpretation of the talmudic text in *Hagigah*, and states that the genetic father is also the legal one.

The position of the *Divrei Yoel* can best be described as relying on radically different sources than Rabbi Feinstein. The *Divrei Yoel* relies on a position articulated by Rabbi Moses ben Nachman (Nachmanides), a twelfth century commentator on both the Talmud and the Bible. In his explanation on the verse "one may not have intercourse with one's neighbor's wife for seed [or sperm],"[29] he focuses on the final two words of the verse — "for seed." Nachmanides claims that these two words are apparently not necessary, and suggests the possibility that the words "for seed" were placed in the text to emphasize one reason for the prohibition of adultery — that society will not know from whom the child is descended.[30] Accepting this as one of the intellectual bases for the prohibition of adultery, the *Divrei Yoel* claims that heterologous insemination, even without any physical act of intercourse, is biblically prohibited, since had there been intercourse, it would be categorized as an act of adultery.[31] The genetic combination of two people who are prohibited to marry leads to illegitimacy, even when there is no sexual intercourse.[32]

24. M. FEINSTEIN, IGROT MOSHE, 1 *Even Haezer* 10. *See* D. HALEVI, TURAI ZAHAV, *commenting on* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 195 n.7. The original work by Rabbi Peretz has been lost. The authenticity however, is not in doubt, as this position has been frequently cited in his name. *See* J. SIRKES, BAYIT CHADASH (BACH), *commenting on* JACOB BEN ASHER, TUR, *Yoreh Deah* 195; SHMUEL PURDA, BEIT SHMUEL, *commenting on* J. CARO, SHULCHAN ARUCH, *Even Haezer* 1:10; I. ROZANZ, MISHNAH LEMELECH, *commenting on* MAIMONIDES, MISHNEH TORAH, SEFER NASHIM, *Hilchot Ishut* 15:4.

25. M. FEINSTEIN, IGROT MOSHE, 1 *Even Haezer* 10; 2 *Even Haezer* 11; 3 *Even Haezer* 11.

26. *Id.* at 1 *Even Haezer* 10.

27. M. FEINSTEIN, DIBROT MOSHE, *Ketubot* 239-43.

28. M. FEINSTEIN, IGROT MOSHE, 1 *Even Haezer* 10. In this response he advances an alternative explanation of why the child is permitted to marry a priest.

29. *Leviticus* 18:20.

30. NACHMANIDES, *commenting on Leviticus* 18:20.

31. Y. TEITELBAUM, 2 DIVREI YOEL 110, 140.

32. *Id.*

He also devotes considerable time and space to defending his reliance upon a biblical commentary to derive principles of Jewish law, and notes that while some authorities believe that the reliance on commentaries on the bible is not acceptable, since commentaries were not intended to be used as sources for establishing Jewish law, nonetheless, such sources ought to serve as a guide and furnish us with a better understanding of the scope of the law, particularly when these sources indicate that our conduct should become stricter rather than more lenient.[33] He also points out the position of the *Sheltei Gibborim* who deals with the same facts as the *Taz* relied on by Rabbi Feinstein.[34] The conclusion of the *Sheltei Gibborim*, however, is dramatically opposite to that of the *Taz*.[35]

The position of Rabbi Waldenberg is, to a great extent, based on the same material as the *Divrei Yoel*. However, Rabbi Waldenberg does not emphasize the genetic relationship, i.e., the mixing of a sperm and an egg; rather, he notes that according to Nachmanides, the injection of sperm is itself an act of adultery analogous to intercourse.[36] Thus, he maintains that the act of insemination is prohibited because it is the legal equivalent of actual intercourse, just as anal intercourse is legally identical to normal intercourse.[37] Rabbi Waldenberg also vigorously disputes the conclusions of Rabbi Peretz, quoting a number of early decisors who disagree with Rabbi Peretz.[38] It is worth noting that, according to Rabbi Waldenberg, it is possible to conclude that the one who injects the sperm is committing the act of adultery and is culpable as such.[39] Another commentator has gone so far as to assert that the person who injects the sperm is the legal father, since he or she is committing the adultery.[40] This position has been widely attacked as it seems to be based on what on its face is an illogical position — that neither the genetic father nor the husband of the wife would be considered the father of the child.[41]

Rabbi Breish's position is the intellectual hybrid of the position of Rabbis Feinstein and Waldenberg. Rabbi Breish concedes that the child resulting from an artificial insemination is legitimate, a major concession to the intellectual opinion of Rabbi Feinstein.[42] He notes, however, his hesitancy to permit this conduct on grounds unrelated to the legal rules of adultery just as Rabbi Waldenberg does. He maintains that permitting conduct which people widely assume to be prohibited will result in the

33. *Id*. For Rabbi Feinstein's reply, see M. FEINSTEIN, DIBROT MOSHE, *Ketubot* 238-39.
34. *Id*; *See supra* notes 24-29 and accompanying text.
35. *Id*.
36. E. WALDENBERG, 9 TZITZ ELIEZER at 51:4; 3 TZITZ ELIEZER 27:1.
37. *See* M. ISSERLES, *glosses on* J. CARO, SHULCHAN ARUCH, *Even Haezer* 20:1.
38. E. WALDENBERG, 3 TZITZ ELIEZER, *supra* note 15, at 27:1.
39. *Id.*
40. Shapiro, *Artificial Insemination*, 1 NOAM 138-42 (1957).
41. *See* Kasher, *Artificial Insemination*, 1 NOAM 125-28, and Y. BREISH, CHELKAT YAKOV 47.
42. Y. BREISH at 45-46.

general decline of moral values.[43] Thus, he prohibits this conduct because it is the top of a slippery slope which he is not willing to even tiptoe down.[44]

The positions articulated by these four commentators on heterologous insemination can equally be applied to future "hard" cases including one just over the horizon, testicular transplants. Rabbi Feinstein would maintain that Jewish law focuses on the presence of impermissible sexual liaisons. If the intercourse occurred between people permitted to marry, the child would be legitimate, and presumably would be the child of the biological[45] father.[46] In such a case, Rabbi Waldenberg too would maintain that paternity is assigned to the man who has the intercourse, since his understanding of Nachmanides is based on artificial insemination being a form of intercourse: like Rabbi Feinstein, if the intercourse is permitted, the child is legitimate. Its paternity is its biological father. The *Divrei Yoel*, on the other hand, focuses on the genetic relationship, which would follow the donor in answering these questions. Rabbi Breish would presumably permit this conduct since this type of relationship could easily be maintained in accordance with Jewish law's rules of modesty.[47]

B. *American Law*

American law, unlike its Jewish counterpart, does not view the identity of the natural parent as the critical question in establishing legal paternity; rather, it views that question only as the starting point of its analysis. American law has always reserved to the legal system the power to shift parental rights in order to harmonize them with other values,[48] such as custodial parenthood[49] or the best interest of the

43. *Id*. at 48-51. For an earlier articulation of this concept, see JUDAH BEN SAMUEL OF REGENSBURG HA'CHASID, SEFER HA'CHASIDIM ch. 829 (R. Margolies ed. 1956).
44. Rabbis Feinstein and Breish kept a quite vigorous written correspondence on these various topics; *see* M. FEINSTEIN, DIBROT MOSHE, *Ketubot* 232-48.
45. This Note uses three terms to refer to the theoretically different types of parent:
(a) Custodial Parent: This is the person who is currently functioning *in loco parentis*.
(b) Genetic Parent: This is the person whose genetic material is used to initiate life. Currently there must be two genetic parents.
(c) Biological Parent: This is the person with whom the procreative activity that led to the starting of life occurred. This last category currently typically overlaps with the genetic parent. It need not. In the case of ovarian or testicular transplant, they would not. In the case of artificial insemination there is no biological father.
46. *See supra* text accompanying notes 11-28 for further details.
47. The reasons that this would be so are beyond the scope of this Note. *See generally* J. CARO, SHULCHAN ARUCH, *Even Haezer* 115:1-6 and commentaries *ad locum*.
48. 2 AM. JUR. 2D, ADOPTION § 1-2; J. MCCAHEY, M. KAUFMAN, C. KRAUT, D. GAFFNER, M. SILVERMAN & J. ZETT, 2 CHILD CUSTODY & VISITATION LAW AND PRACTICE § 10.01-03, § 11.0(1) (1987); H. GAMBLE, THE LAW RELATING TO PARENTS AND CHILDREN 169 (1981).
49. J. MCCAHEY at § 11.02.

child.[50] The question of the natural parent is only the opening question in the process of deciding who should be a parent. Focusing on artificial insemination, one sees a significant example of a situation in which parenthood under the law has been rearranged to be in harmony with factors other than natural parenthood.

Although the medical technique of artificial insemination is more than 1500 years old,[51] and has been commonly practiced for more than 50 years, American statutes and case law dealing with the issue are no more than twenty years old. Two legally different types of artificial insemination exist. The first, heterologous insemination, refers to insemination of a woman by a man other than her husband; this is commonly referred to as A.I.D. - Artificial Insemination, Donor. The second type, homologous insemination, refers to insemination of a woman by her husband; it is commonly referred to as A.I.H. - Artificial Insemination, Husband. No state in the Union currently attempts to regulate homologous insemination. It is very likely that the United States Constitution prohibits the states from regulating this or any other type of sexual activity between two people married to each other.[52]

Two legal issues are presented by heterologous insemination. The first is the rights and responsibilities of a husband to a child who is not genetically his. The second is the rights and duties of the sperm donor to his genetic child. The leading, and one of the earliest cases, on the duties of a husband towards a child not genetically his, is *People v. Sorensen*.[53] This case involved a criminal action for non-support of a child resulting from the artificial insemination of a woman with the consent of her husband. After the couple's divorce, the husband refused to pay child support on the grounds that the child was not legally his.[54] The California Supreme Court ruled that the wife was entitled to child support from her former husband. The court relied on three analytically different grounds.

First, the court ruled on equity grounds that the husband's consent to the insemination estopped him from litigating the issue of genetic paternity.[55] Second, the court maintained that a strong public policy prevented the creation of a rule which would allow the breaking of the

50. S. TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 141 (1982).

51. BABYLONIAN TALMUD, *Hagigah* 14b-15a. The Talmud deals with the possibility of birth without sexual intercourse, and mentions artificial insemination as a possibility. *See supra* text accompanying notes 21-28.

52. *See* Carey v. Population Servs. Int'l., 431 U.S. 678, 685-87 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). It is likely that the Supreme Court would extend the protections of Carey and Eisenstadt to procreative actions by married couples outside of intercourse. New York State has, however, explicitly extended the protection granted to include all consensual heterosexual sexual activity between adults. *See* People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).

53. 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).

54. *Id.* at 283, 437 P.2d at 497, 66 Cal. Rptr at 9.

55. *Id.* at 285, 437 P.2d at 499, 66 Cal. Rptr. at 11.

paternal relationship at the will of a now estranged husband.[56] Finally, the court added that, according to traditional common law theory, a child born to a married woman is presumed to be her husband's, and that presumption, along with the husband's consent, is strong enough to prevent the stigma of illegitimacy from applying to the child.[57] Based on these reasons, the California Supreme Court granted the state's request for criminal sanctions against the non-supporting husband.[58]

In a similar vein, the Chancery Division of the New Jersey court in *S. v. S.*,[59] ordered payment of child support to a woman who was artificially inseminated with her husband's consent, although the husband had tried to withdraw his consent in the third month of pregnancy. The Chancery Court held that even absent written consent, consent is presumed in these cases; such presumption can only be overcome by "clear and convincing evidence."[60] Furthermore, once consent is given, it cannot later be withdrawn. For reasons which are unclear, however, the court awarded only partial child support to the woman.

Another example of this type of reasoning can be seen in the New York case of *In Re Adoption of Anonymous*,[61] where a man would not consent to the adoption of his child by his former wife's current husband. The wife argued that the consent of her former husband was not needed, since the child was the product of heterologous insemination, and was not the former husband's genetic child.[62] The court stated that both parties are estopped from raising the issue of the paternity of the child because the former husband consented to the insemination and thus became the child's legal father.[63]

A large number of cases from jurisdictions across the United States have accepted the holdings of the above-cited cases and have ruled that a husband who consents to the artificial insemination of his wife is legally bound to function as the father of the child.[64] In the very recent case of

56. *Id.* at 288, 437 P.2d at 501, 66 Cal. Rptr. at 13.

57. *Id.* at 283, 289, 437 P.2d at 497, 501-02, 66 Cal. Rptr. at 9, 13. Delaware, relying on an opinion by Lord Mansfield, has ruled that this presumption is almost irrebuttable. *See* F. v. R., 430 A.2d 1075, 1077 n.2 (1981), *quoting* Goodnight v. Moss, 98 Eng. Rep. 1257 (1777). ("The law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage".) Many years earlier, Jewish law adopted a similar position. *See* M. ISSERLES, *glosses on* J. CARO, SHULCHAN ARUCH, *Even Haezer* 4:29.

58. 68 Cal. 2d at 289, 437 P.2d at 501-02, 66 Cal. Rptr. at 13-14.

59. 182 N.J. Super. 102, 440 A.2d 64 (1981).

60. *Id.* at 109, 440 A.2d at 68.

61. 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur. Ct. 1973).

62. Normally, consent of both parents is needed for adoption in New York. *Id.* at 101, 345 N.Y.S.2d at 431 (citing N.Y. DOM. REL. LAW § 111 (McKinney 1972)).

63. *Id.* at 105, 345 N.Y.S.2d at 434-35.

64. *See, e.g.*, Noggle v. Arnold, 338 S.E.2d 763, 177 Ga. App. 119 (1985); R.S. v. R.S., 670 P.2d 923, 9 Kan. App. 2d 39 (1983); Mace v. Webb, 614 P.2d 647 (Utah 1980); *In re* Custody of D.M.M., 404 N.W.2d 530, 137 Wis. 2d 375 (1987); L.M.S. v. S.L.S., 312 N.W. 2d 853, 105 Wis. 2d 118 (1981).

In re Baby Doe,[65] the Supreme Court of South Carolina held that the husband's knowledge of and assistance in his wife's efforts to conceive through artificial insemination constituted consent to the procedure, thereby rendering the husband the legal father of the child with all legal responsibilities, including support. This case found the husband obligated to support the child notwithstanding the lack of written consent, in harmony with the New Jersey case of *S. v. S.*[66]

The first case to rely exclusively on the estoppel argument, i.e., although the husband is not the real father, the law will treat him as such because he agreed to be so called, is the New York case of *People v. Dennett*.[67] The court ruled that in a divorce action, the wife was estopped from grounding her sole right to custody of her child on the fact that the child, being a product of artificial insemination, was not her husband's child. The court stated that she could not suddenly advance this position at the divorce stage having never mentioned it before.[68] The functioning of the couple as husband and wife and the implication that this child was their joint issue showed mutual consent to the parental nature of the relationship towards the child.[69]

The case of *Anonymous v. Anonymous*[70] involved a situation in which a husband attempted to deny paternity of a child resulting from heterologous artificial insemination. The court held that the husband had a duty to support such children as a direct result of the written agreement between the husband and the wife. The court also found that the husband's actions in aiding the artificial insemination, the wife's pregnancy, and the child's delivery, demonstrated the husband's specific consent, and that proof of this kind is almost irrebuttable.[71] Another example of this type of reasoning is *State v. P.*,[72] in which the New York Appellate Division reversed a Supreme Court ruling ordering a blood test of the husband to determine paternity in the case of an artificial insemination.[73]

The Appellate Division stated that ordering the test was an error since it had potential to bastardize the child without settling the issue of paternity, as it is possible that the legal father of the child is the husband notwithstanding the lack of genetic relationship.[74] Thus, ordering a blood test offended the state's public policy against bastardizing children.[75] Furthermore, in light of the artificial insemination of the woman

65. 291 S.C. 389, 353 S.E.2d 877 (1987).
66. 182 N.J. Super. 102, 440 A.2d 64 (1981); *see supra* notes 59-60 and accompanying text.
67. 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958).
68. 15 Misc. 2d at 265, 184 N.Y.S.2d at 182.
69. *Id.*
70. 41 Misc. 2d 886, 246 N.Y.S.2d 835 (Sup. Ct. 1964).
71. *Id.*
72. 90 A.D.2d 434, 457 N.Y.S.2d 488 (App. Div. 1982).
73. *Id.* at 441, 457 N.Y.S.2d at 493.
74. *Id.* at 440-41, 457 N.Y.S.2d at 492.
75. *Id.*

by a doctor, even the husband's sterility would not disturb the legal obligation upon the husband to function as the father of the child.[76] Both parties were thus estopped from contesting the husband's paternity of the child.

Only one case ever found that children who are the product of consensual heterologous artificial insemination are illegitimate. This case, *Gursky v. Gursky*,[77] found that the husband's consent estopped him from litigating the issue of his financial duty of support towards the children. However, vis-a-vis other aspects of legitimacy, such as inheritance or use of his last name, the child was not legitimate. The *Gursky* court also strongly criticized a previous New York case, *Strnad v. Strnad*,[78] which claimed that children who are the product of heterologous insemination are "adopted" informally by the husband. According to *Strnad*, the husband's obligation toward such a child is similar to his obligation toward any other adopted child. The *Gursky* court stated that this rationale is incorrect as there is no statutory creature called "informal adoption":[79] no adoption procedure takes place, and if such an adoption were to take place, a court decree would be required.[80] In artificial insemination cases, the *Gursky* court noted, no court consent is needed.[81] Many commentators have criticized the *Gursky* decision, arguing that it violated a judicial policy against the stigmatization of children through artificial insemination.[82]

Thus, the status of the common law can be summarized in the following manner: it is close to unanimous that children resulting from heterologous insemination are legitimate. Furthermore, all of the states that have commented on the issue have accepted that once a man consents to the artificial insemination of his wife, he is legally obligated to support the resulting children either through the theory of equitable estoppel, which prohibits the husband from litigating the paternity of a child resulting from heterologous insemination to which he consented, or through the theory of adoption which states that the husband, by his consent, has formally or informally adopted the children.

Currently, twenty-eight states have passed statutes regulating artificial insemination by a donor.[83] While the length of these statutes range

76. *Id.* at 439, 457 N.Y.S.2d at 491.
77. 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).
78. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).
79. Adoption, unlike many other areas of family law is totally of statutory origins; no common law adoption exists. *See infra* text accompanying notes 244-52.
80. 39 Misc. 2d at 1087, 242 N.Y.S.2d at 411.
81. *Id.*
82. T. v. T., 484 N.Y.S.2d 780, 782, 127 Misc. 2d 14, 16 (Fam. Ct. 1985); R.S. v. R.S., 670 P.2d 923, 925, 9 Kan. App. 2d 39 (Ct. App. 1983); L.M.S. v. S.L.S., 312 N.W.2d 853, 855, 105 Wis. 2d 118 (Ct. App. 1981); *see also supra* note 57.
83. *See* Note, *The Need For Statutes Regulating Artificial Insemination by Donors*, 46 OHIO ST. L.J. 1055, 1062 n.79 (1985) [hereinafter *Statutes*].

from the very terse to the very long, the primary focus of all the legislation is the legitimization and support of the resulting children. Almost all of the statutes either explicitly or implicitly limit the procedure to married women.[84] Many statutes require that the insemination be performed only by a licensed physician, and typically require the filing of consent and registration forms with the state.[85] Confidentiality of these forms is protected.[86] Many also explicitly deal with the inheritance rights of the child conceived through artificial insemination.[87] Only one of these statutes imposes criminal sanctions for not following the statutory procedures.[88] Most significantly, each statute explicitly assigns all paternal rights to the husband who consents to the artificial insemination of his wife.[89]

A number of states have enacted a particular type of statute. It reads generally:[90]

> (1) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of the child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination and shall file the husband's consent with the department of health, where it shall be kept confidential and in a sealed file; however, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> (2) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

This exact statutory language is in effect in eight states.[91] On the other hand, not all statutes are as clear as this statutory scheme; the vaguest statute is found in Louisiana. It states: "The husband. . . cannot disavow paternity of a child born as the result of artificial insemination of the

84. *Id.* at 1063-64; only Oregon explicitly allows the artificial insemination of unmarried women. *See* OR. REV. STAT. § 677.365(1) (1983).

85. *Statutes*, *supra* note 83, at 1063 nn. 94-100.

86. *Id*. at 1063-64; UNIF. PARENTAGE ACT § 5, 9B U.L.A. 579 (1979) [hereinafter UPA].

87. *Statutes*, *supra* note 83, at 1062-64; UPA at § 5.

88. GA. CODE ANN. § 19-7-21 (1982). It appears likely that criminal sanctions would not be constitutional. *See supra* text accompanying notes 50-51.

89. UPA, *supra* note 86, at § 5; *Statutes*, *supra* note 83, at 1061-65.

90. UPA, *supra* note 86, at § 5. For a list of the state by state modifications of § 5, see UPA at nn. 1-12.

91. CAL. CIV. CODE § 7005 (West 1983); COLO. REV. STAT. § 19-6-106 (1986); MINN. STAT. § 257.56 (1982); MONT. CODE ANN. § 40-6 106 (1987); (12) NEV. REV. STAT. § 126.061 (1985); WASH. REV. CODE 26.26.050 (1986); WIS. STAT. CODE. § 767.47, 891.40 (1981); WYO. STAT. § 14-2-103 (1986).

mother to which he consented."[92] No court cases elaborate on this statute.

The second major issue in artificial insemination cases is the rights of the sperm donor. As shown above, the most common statutory regulation of sperm donation strips the sperm donor of any statutory rights to the resulting child. Only two American cases discuss the rights of a sperm donor. The first case, *C.M. v. C.C.*,[93] is an action brought by the donor of semen used by an unmarried woman to artificially inseminate herself. The artificial insemination was done privately, without the assistance of a physician. The donor requested that he be named the legal parent and be granted visitation rights to the child who was born as a result of the artificial insemination. The court ruled that the donor was the natural father of the child and entitled to visitation rights.[94] This case did not involve a married woman. In such a case, the court would likely use a husband's consent as dispositive of legal paternity.[95]

The second case, *Jhordan C. v. Mary K.*,[96] also involves the informal donation of sperm to a woman without the presence of a physician. In an extensive opinion, a California court ruled that the statutory provisions of the Artificial Insemination Act only encompasses the donation of sperm to a licensed physician. In the case of private donation, the anonymity of the sperm donor is not protected, nor are his legal rights and duties as a father removed.[97] The court also addressed a number of constitutional issues as they related to artificial insemination. The court ruled that the statutory distinctions between married and unmarried women are constitutional as there is a longstanding state policy to encourage a stable family environment.[98] The court also noted that the vulnerability of sperm donors to paternity actions in the case of informal donation does not make such sperm donation illegal under the statute; it only strips the donor of certain legislatively granted protection from responsibilities that are normally his. The court claimed that being named the father of one's own child is not a punishment.[99] Furthermore, it strongly implied that a statutory scheme prohibiting private sperm donation would be unconstitutional.

92. LA. CIV. CODE. ANN. art. 188 (West 1985).

93. 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977).

94. *Id*. at 167, 377 A.2d at 825.

95. Others have commented that the court fundamentally misunderstood the facts of this case and that this case involved a lesbian woman who asked a homosexual man if he would donate sperm to her so she could inseminate herself. They attribute the result in this case to a fundamental lack of understanding of the lesbian sub-culture. Lesbians and homosexuals are forced to use artificial insemination since they cannot adopt. Wadlington, *Artificial Conception; The Challenge for Family Law*, 69 VIRG. L. REV. 465 n. 111 (1983).

96. 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (App. Div. 1986).

97. *Id.* at 392, 224 Cal. Rptr. at 534.

98. *Id*.

99. *Id*.

Except for these two cases, no cases question the constitutionality of denying custody or paternity rights to sperm donors. This may be because sperm donors generally desire anonymity and do not wish to assume financial or emotional responsibility for the children that they father.[100] Nor typically are the receivers of the donated sperm interested in tracing the genetic father.[101] A concerted effort to attack the constitutional basis for the denial of paternity rights to one who is the genetic father would probably succeed when the donation is not done through a sperm bank. The Supreme Court has ruled numerous times that decisions relating to method and frequency of procreative, sexual, and marital activity have a very high constitutional value.[102] A state must show a compelling state interest and be subject to the strictest of scrutiny before it can successfully regulate these activities.[103] Although this issue was not discussed in *C.M. v. C.C.*,[104] it was probably a major factor in granting visitation to the sperm donor who deliberately donated to a particular woman in order to oversee the raising of the child.[105]

100. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAM. L.Q. 1 (1980).

101. *Id.* at 1-3.

102. Lehr v. Robertson, 463 U.S. 248 (1983); Santosky v. Kramer, 455 U.S. 745 (1982); Zablocki v. Redhail, 434 U.S. 374 (1978); Quilloin v. Walcott, 434 U.S. 246 (1978); Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

103. Moore v. City of East Cleveland, 431 U.S. 494 (1977); *See* Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 591-95 (1977).

104. 152 N.J. Super. 160, 377 A.2d 821 (1977).

105. One final artificial insemination type case exists. In the case of *In Re* Adoption of McFadyen, 108 Ill. App. 3d 329, 64 Ill. 43, 438 N.E.2d 1362 (1982), the court dealt with a unique type of artificial insemination. In that case the court was confronted by what appeared to be an agreement by the husband that the wife could engage in extramarital intercourse for the purposes of conception, since he, the husband, was infertile. The wife did engage in extramarital intercourse, and bore a child, whom she later placed for adoption without consulting the husband. When the husband realized that this had occurred, he immediately attempted to have the adoption voided, arguing that his consent as the father was necessary. One of his arguments equates his agreement that his wife could engage in sexual relations outside of marriage for the purposes of bearing a child to a husband's consent to the artificial insemination of his wife. The husband specifically stated that his wife's extramarital affairs were "their type of artificial insemination" as well as "artificial insemination by means of a surrogate donor's penis." The husband relied on the New York case of *In Re* Adoption of Anonymous, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sup. Ct. 1973), where the New York court ruled that the consent of the custodial father is needed. The court in McFadyen did not resolve the legal issue in this case, but concluded that the husband and wife had not demonstrated to the satisfaction of the court the existence of a surrogate insemination agreement.

It appears to this author that the husband in this type of agreement is legally estopped from relitigating the issue of support which he has equitably conceded by consenting to his wife's adulterous relationships. It is unclear whether or not the logic of the New York case of *In Re* Adoption of Anonymous should extend to the case of surrogate intercourse, rather than artificial insemination. It appears likely that in a state with a public policy against adultery, such as New York (N.Y. PENAL LAW § 255.17), a court would rule that consent to intercourse outside of marriage does not increase the legal rights of either party.

C. *Comparison and Summary*

In summation, Jewish law maintains that paternity is established irrevocably as belonging to the natural parent. In the typical case in which the same person is both the genetic and biological father, Jewish law mandates that such a person is the legal father. In the case of artificial insemination, where there is no biological father but only a genetic father, almost all decisors maintain that Jewish law defaults to the principle of genetics to establish paternity. Furthermore, most of the commentators hold that in the absence of any intercourse there can be no illegitimacy.[106] A significant minority of the commentators disagree and maintain that illegitimacy can be established through genetic relationships, absent intercourse.

In contrast, American law focuses on radically different values. Natural parenthood is just the starting point for determining who the father is. American law will look at such diverse factors as estoppel, best interests of the child, common law presumptions, and general principles of equity to establish fatherhood. Typically, in artificial insemination cases, when the donor does not claim parental rights, the law transfers them to the wife's husband as he is best suited to be the father.

III. THE ESTABLISHMENT OF MATERNITY AND SURROGATE MOTHERHOOD

A. *Jewish Law*

According to Jewish law, maternity, like paternity, is irrevocably established as belonging to the natural parent. It is beyond the power of a court of law to rearrange the parent-child relationship to create a parental relationship which mirrors the custodial one. Although it is true, as shall be shown later, that certain rabbinically created institutions associated with parenthood are transferred when custody is transferred, all biblically mandated duties, rights, obligations, and prohibitions of motherhood are uniquely the natural mother's and cannot be diminished by the transfer of custody.[107] Thus, in the "normal" situation, when a woman provides the ovum and also carries the child to term, that woman is the mother according to Jewish law.

Some controversy is starting to brew on the issue of "surrogate motherhood," although the phrase refers to a different type of case in the Jewish periodicals. There are four different kinds of surrogate or host

106. Without intending to voice a personal opinion in an area of law upon which the leaders of our generation have commented on, it appears that Rabbi Feinstein's position is the one most widely accepted among those who observe Jewish law in the United States; *see* I. JAKOBOVITS, JEWISH MEDICAL ETHICS 248 (1959).

107. J. CARO, SHULCHAN ARUCH, *Even Haezer* 15:11 and commentators *ad locom*. *See supra* text accompanying notes 1-9.

motherhoods. The first type is that of the now famous *Baby M*[108] case. This occurs when a woman provides the ovum and her uterus to carry the fetus to term. The father provides his sperm. The result is a child conceived through artificial insemination. The father and his wife agree to raise the child as their own, and the mother agrees to waive her custody rights in favor of the sperm provider and his wife.[109] The "surrogate" mother is the genetic mother as well as the person in whom ovulation, conception, pregnancy, and birth occur.

A second type of case involves the donation of an ovary to a woman whose ovaries are not functioning. In this case, the child conceived from such a donation is genetically related to the donor, but is the product of ovulation, conception, pregnancy, and birth from the surrogate[110] mother. A third case occurs when a single egg is removed from the genetic mother and implanted in the surrogate mother. Conception then occurs in the surrogate mother, or, more likely, in a test tube. Although ovulation occurs in the genetic mother, the surrogate mother again carries the child to term and gives birth to it. A fourth type of case is that of a fetal transplant. The genetic mother's ovum is naturally fertilized. The fetus is then transferred into the surrogate mother's uterus. The surrogate mother carries the child to term. The child is genetically identical to its genetic mother.

According to Jewish law, there is no doubt that in a *Baby M* type case, where the mother is both the genetic and biological mother, she is also the legal mother. Furthermore, the sperm provider is the legal father.[111] This situation is no different from an artificial insemination case; it is mislabelled a "surrogate" case because of a later agreement to transfer custody, which Jewish law maintains does not affect the law's choice of who is the mother. Thus, while it is possible that the father would be granted custody in such a case, the mother, and not the wife would always have the legal duties of a parent; these duties, while delegable, are never totally alienable from a natural parent. They revert back to her if the delegatee does not fulfill them. The sperm donor's wife, if she was to raise the child, would have the status of adopted mother, with all of the attendant privileges and obligations.[112]

108. *In re* Baby M, — A.2d —, slip Op. No. A-39 (N.J. S. Ct. Feb 3, 1988) (Westlaw, WL 6251); *see also infra* text accompanying notes 204-17.

109. This relationship is analogous to, but not identical with, the relationship Jacob had with Bilhah and Zilpah. *Genesis* 30:3-13.

110. Purely for the sake of convenience, throughout this section the term "surrogate" will be used in reference to the "mother" who is not the genetic mother.

111. This assumes that both parents are Jewish. If the mother was not Jewish, the father would not have any of the legal rights or obligations of a father, since, according to Jewish law only a Jewish father assumes the privilege of fatherhood if the child is Jewish. *See supra* note 11.

112. See Part IV for a discussion of various aspects of adoption.

The remaining three cases are far more difficult than the first one. The question is relatively simple. What factors does Jewish law consider in deciding who is the "mother"? Is it the same for all aspects of motherhood — inheritance, incest, and redemption of the first born; or do different aspects of motherhood have different criteria?

Although somewhat counter-intuitive, Jewish law does not automatically employ genetics to answer all questions of lineage. This can be generally proven from three examples, each from a different area of law. The first example is from the laws of conversion. According to Jewish law, the rule is that one who converts to Judaism loses all legal ties based upon her genetic relationships, and it is as if she were born anew.[113] Accepting this rule, the Talmud acknowledges that according to biblical law, one who converts can marry his mother or sister, or her father or brother, assuming they also convert.[114] The rabbis in the time of the Talmud prohibited these marriages only because they feared that people would mock Judaism by saying that converts join Judaism in order to engage in these previously prohibited relationships.[115] The rabbis did not prohibit these relationships on the grounds that they involved sexual relations between genetically close relatives.[116]

The second example of Jewish law's rejection of genetics as entirely determinative is the dispute over whether genetic fatherhood has any legal status in animal husbandry law. A large number of decisors maintain that the law does not recognize any link at all between a male animal and its progeny.[117] This is true, according to these same commentators, even though the Bible, when dealing with the prohibition against killing an animal and its child on the same day, says: "a male animal (*oto*) and its male child (*beno*) should not be slaughtered on the same day."[118] Furthermore, according to these commentators, the refusal to acknowledge the male lineage is true even if one knows with certainty the paternity of the animal.[119] A number of decisors disagree and maintain that Jewish law does assign legal significance to fatherhood in animals.[120]

113. *See* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 269:1.

114. BABYLONIAN TALMUD, *Yevamot* 22a; MAIMONIDES, MISHNEH TORAH, SEFER KEDUSHA, *Hilchot Issurai Biah* 14:12.

115. *Id.*

116. In fact, certain genetically incestuous relationships are still permitted to converts. *See* JACOB BEN ASHER, TUR, *Yoreh Deah* ch. 269.

117. *See* RABBI ALFASI (RIF) on *Chulin* 27a-b; NACHMANIDES, *commenting on Chulin* 78b (in *Melchamot);* TOSAFOT, *commenting on Chulin* 79a (starting with the word *ayeel*). *See also* the following commentaries on *Leviticus* 22:28: Rashi, Onkolus and Nachmanides (all endorse the position of Rabbi Alfasi).

118. *Leviticus* 22:28; Hebrew, like all semitic languages, uses different constructions to distinguish between masculine and feminine. *See* 8 ENCYCLOPEDIA JUDAICA 117-24 (1972).

119. *See* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 16:2.

120. For a complete list of those who decide this way, see 13 ENCYCLOPEDIA TALMUDIT 410 n.20 (1980). Among those who ascribe to this position are: Maimonides, Rabbenu Tam, Rabbi Shlomo Ben Adret (*Rashba*), and the Mordechai.

The *Shulchan Aruch* leaves this dispute unresolved,[121] and mandates that we should conduct ourselves in accordance with whichever is the stricter opinion, depending on the factual scenario.

The third proof comes from the laws of *orla*. According to Jewish law, it is not permissible to use the fruit growing on a newly planted fruit tree during the first three years of the tree's life.[122] Although there is considerable talmudic debate on the topic, all decisors agree that a graft from a tree which is six years old and not obligated in *orla,* onto another tree two years old and obligated in *orla*, legally makes the grafted branch part of the two year old tree.[123] This is true even though the branches are still growing fruit of the old tree and genetically unrelated to the host.[124]

Discussions of the last three types of host motherhood have generated a considerable amount of literature among the current periodicals of Jewish law.[125] When the topic was first raised, one of the primary sources discussed was a Midrash.[126] The Midrash was quoted by the biblical commentary Targum Yonatan ben Uziel on *Genesis* 29:22, where Dina, Jacob's eleventh child, was born. While commenting on this verse, *Targum Yonatan* states that originally Dina was conceived in Rachel's womb, but that God transferred her after conception to Leah's, so that Rachel could give birth to Joseph.[127] Yet, the Bible still unquestionably refers to Leah as Dina's mother and Rachel as Joseph's mother. This Midrash is directly on point and appears to state authoritatively that she who gives birth to the child is the mother. Many of the early discussions of this subject focus on this Midrash and its other variant readings.[128]

121. J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 16:2.

122. *Id*. at 294:1.

123. *Id*. at 294:16; Y. EPSTEIN, ARUCH HA'SHULCHAN, *Yoreh Deah* 294:3, 7-39. The analogy between *orla* and other transplants was first noted by Rabbi Y. Leibes. *See* Leibes, *Organ Transplants*, 14 NOAM 28, 90-100 (1970). Leibes quotes a large number of commentators who maintain that a grafted branch assumes the legal status of the plant it is living on even to the point of what blessing to make on it before eating it.

124. A fourth example where genetics is rejected can be found in the position, taken by a minority of authorities, that the child resulting from artificial insemination does not relate to the genetic father. A few authorities appear to go as far as to maintain that he who injects the sperm is the "father" according to the law. However, almost all authorities reject this position. *See supra* text accompanying notes 36-41.

125. *See, e.g.*, Bick, *Maternity in Fetal Implants*, 7 TECHUMIN 266 (1987); Drori, *Genetic Engineering: Preliminary Discussion of its Legal and Halachic Aspects*, 1 TECHUMIN 280 (1980); Goldberg, *Fetal Implant*, 5 TECHUMIN 248 (1985); Kilav, *Test Tube Babies*, 5 TECHUMIN 260 (1985); Warhaftig & Goldberg, *Test Tube Babies - Addendum*, 5 TECHUMIN 268 (1985); Herschler, *Test Tube Babies According to Halakha,* 1 HALAKHA U'REFUAH 307-320 (1980); *see also infra* notes 128 and 131.

126. The Midrash is a commentary on the Bible authored in the tannaitic (first - second century C.E.) period.

127. *See* TARGUM YONATAN, *commenting on Genesis* 30:21.

128. *See, e.g.*, J. D. BLEICH, JUDAISM AND HEALING 92 (1981); *but see* Letter from Dov Frimer, 20 TRADITION 174 (1982).

Although initially this Midrash appears to be dispositive on the issue, it actually suffers from a fatal flaw - it is a midrash. Many commentators object to the deciding of practical legal questions from Aggadic non-talmudic sources.[129] These objections are particularly forceful when the Aggadic material is of a non-talmudic origin.[130] This is especially true on a topic such as this one, where the Talmud is replete with discussions of similar topics.[131] Two other problems exist in reference to this particular Midrash: first, it is quoted in the Talmud in a form which does not mention surrogate motherhood,[132] which seems to indicate that the Targum Yonatan's version is not accurate. Furthermore, this text appears for the first time in the Targum Yonatan, whose authorship is unknown.[133] As more scholarship is generated on the topic of surrogate motherhood, it is unlikely that this Midrash will be dispositive, or even significant, in the ultimate decision of the law.

A number of talmudic sources have been cited as relevant to the issue of surrogate motherhood. The first such piece is located in *Yevamot* 97b:

> Twin brothers who were converts, or similarly, emancipated slaves, may neither participate in *chalitza* or a levirate marriage; nor are they punishable for marrying their brother's wife.[134] If, however, they were not conceived in holiness but were born into holiness[135] they may neither participate in *chalitza* nor a levirate marriage and are guilty of a punishable offense if they marry their brother's wife.

Rashi, commenting on the final words of this talmudic passage, states that the two brothers are prohibited from marrying each other's wives since they were born to the same Jewish mother and thus, are related to each other as half brothers, i.e., they have a legally recognized mother in common.[136] It is critically important to realize that the law only recognizes the mother as such because she gave birth to these children; her genetic relationship with the children has been legally severed by her conversion — as is the case of any convert who, upon conversion, loses all previously established genetic relationships.[137] Thus, it appears that

129. Aggadic material is material which addresses various issues in a non-legal manner. *See also* Rackman, *The Case of Sotah in Jewish Law: Ordeal or Psychodrama?*, 3 NAT'L JEWISH L. REV. 49 (1988).

130. For a very recent statement of this position, *see* M. FEINSTEIN, DIBROT MOSHE, *Ketubot* 242-43.

131. *See* Soloveitchik, *Test Tube Babies*, 29 OHR HA'MIZRACH 128 (1980).

132. *See* BABYLONIAN TALMUD, *Berachot* 60a. *See also* M. KASHER, ENCYCLOPEDIA OF BIBLICAL INTERPRETATION on *Genesis* 30:21-22.

133. The one thing that is known about this biblical commentary is that it positively was not written by Yonatan ben Uziel, since he wrote only on the Prophets. *See* BABYLONIAN TALMUD, *Megillah* 3a; *See also* 4 JEWISH ENCYCLOPEDIA 846-47 (1906).

134. Which is prohibited in all situations except those permitted by levirate marriages.

135. I.e., they were conceived before conversion, but born after conversion.

136. They also have a father in common, but the law does not recognize the genetic father as the legal father since at the time of conception the mother was not Jewish. *See supra* note 11.

137. *See supra* text accompanying notes 113-16 on this topic.

the Talmud legally recognizes "motherhood" as being established solely because of parturition and birth. *Rashi* sharpens this point by explaining that these children are Jewish because "this woman is like any other Jewish woman who gives birth."[138] The analogy between the talmudic passages dealing with conversion and those dealing with surrogate motherhood indicates that Jewish law determines motherhood based upon birth, at least when conception is legally insignificant, which in a surrogate motherhood case would be when conception occurs in a test tube.

An equally significant proof that birth dispositively determines motherhood can be deduced from a number of other texts dealing with converts and conversion. The Talmud states:[139] "Rava says: If a pregnant gentile converts, when her child is born it does not need a conversion [literally immersion]." The Talmud also states:[140] "A pregnant gentile who converts . . . [and has a first born son] this child has the status of a first born vis-a-vis the laws of the first-born [literally the priest][141] but not vis-a-vis any inheritance." There is a significant dispute among the commentators as to the reasons why such a child is born Jewish and does not require conversion. Most commentators adopt the intuitive explanation that the child is Jewish because it is born from a Jewish mother.[142] Furthermore, they claim that this statement of Ravah is accepted by both sides of the dispute over whether or not a fetus is part of the mother.[143] Thus, they claim the child is Jewish because at the time of birth its mother was Jewish, and not because it itself underwent a separate conversion. This is in harmony with the previous text quoted which also argues for birth as the key time in establishing motherhood when conception is not legally significant.

Nachmanides understands this talmudic section in a different way. He claims that the child is only Jewish because it, itself, underwent an immersion when its mother was immersed.[144] This immersion converted both the fetus and its mother. Furthermore, Nachmanides claims that this whole talmudic piece only follows the opinion that a fetus is never legally part of the mother.[145] Finally, Nachmanides advances one other

138. RASHI, *commenting on* BABYLONIAN TALMUD, *Yevamot* 97b (starting with the words *aval chayavin*).

139. BABYLONIAN TALMUD, *Yevamot* 78a.

140. BABYLONIAN TALMUD, *Bechorot* 46a.

141. He must be redeemed for five *shekalim* (100 gm.) of silver. *See Numbers* 18:15-16.

142. *See supra* text accompanying notes 113-16. It follows from this that if having a Jewish mother at the time of birth makes the child Jewish then the mother who makes the child Jewish is also its mother with respect to all the other significant aspects of motherhood.

143. *See* TOSAFOT, *commenting on* BABYLONIAN TALMUD, *Yevamot* 78a (starting with the words *ela ha'da'amar*).

144. Nachmanides is quoted in Y. HABIB, NIMUKEI YOSEF, *commenting on* RABBI YITZCHAK ALFASI (RIF), *Yevamot* 16a. He is also quoted in SHLOMO BEN ADRET (Rashba), *commenting on Yevamot* 47b-48a.

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novel idea: normally conversion requires first circumcision and then immersion in a *mikva* (ritual bath); Nachmanides claims that if the order is inverted, the conversion is still valid.[146] This final point of Nachmanides is the focal point upon which he is attacked. Many commentators disagree with this point and try to prove that an immersion before circumcision is not valid.[147] Thus, they disagree by implication with his whole analysis of this talmudic piece.

This author believes that this dispute is significant in establishing whether Jewish law considers birth as critical for motherhood. If one accepts the position of Nachmanides' opponents, then it follows that birth is definitive in establishing motherhood when conception is legally insignificant. According to these authorities, the birth mother is one's true parent. If one accepts the Nachmanides position, then birth is less significant than conception or even genetic relationships — they are Jewish because they converted. On the contrary, according to Nachmanides, either conception or genetics fixes motherhood.[148] Rabbi Chaim Ozer Grodzinski, in his responsa, also understands the dispute in this manner.[149] He states that Nachmanides seems to be of the opinion that conception is the critical time — and birth only relates back to conception.

Although in the *Beit Yosef*, Rabbi Caro quotes Nachmanides as being authoritative,[150] he does not do so in his work intended to codify the law, the *Shulchan Aruch*. Rabbi Isserles (*Rema*), however, does quote Nachmanides' view, and says that "an immersion done before a circumcision is valid but should not initially be done that way; others, however, claim it is invalid."[151] The *Shach* maintains that one should conduct oneself according to the stricter opinion,[152] and Rabbi Elijah of Vilna (*Gra*) holds that the law is actually in accordance with those authorities who disagree with Nachmanides.[153] Among the modern day commentators there is considerable disagreement over whether or not the law is actually in accordance with Nachmanides.[154]

146. *See* NACHMANIDES, *supra* note 144.

147. *See* Y. HABIB, *supra* note 144, in the name of the Rabbi Aharon HaLevi (*Ra'ah*). *See also* S. MEIR HA'COHEN, SIFTEI COHEN (SHACH), *commenting on* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 268:2.

148. Not surprisingly, this is in harmony with the position of Nachmanides advanced in his commentary on the Bible, *see supra* text accompanying notes 31-41.

149. *See* C.O. GRODZINSKI, 2 SHEALOT U'TESHUVOT ACHIEZER 29:6; *See also* 4 SHEALOT U'TESHUVOT ACHIEZER 44.

150. J. CARO, BEIT YOSEF, *commenting on* JACOB BEN ASHER, TUR, *Yoreh Deah* 268; *see also* M. ISSERLES, DARKEI MOSHE, *commenting on id.*

151. *See* M. ISSERLES (REMA), *commenting on* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 268:1.

152. SIFTEI COHEN (SHACH), *supra* note 147, *commenting on id.*

153. ELIYAHU OF VILNA, BEUREI HA'GRA, *commenting on id.* at n. 5.

154. *Compare* Y. EPSTEIN, ARUCH HASHULCHAN, *Yoreh Deah* 268:11 *with* Y.A. LANDAU, DAGUL MEREVAVA, *commenting on* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 268.

the Talmud legally recognizes "motherhood" as being established solely because of parturition and birth. *Rashi* sharpens this point by explaining that these children are Jewish because "this woman is like any other Jewish woman who gives birth."[138] The analogy between the talmudic passages dealing with conversion and those dealing with surrogate motherhood indicates that Jewish law determines motherhood based upon birth, at least when conception is legally insignificant, which in a surrogate motherhood case would be when conception occurs in a test tube.

An equally significant proof that birth dispositively determines motherhood can be deduced from a number of other texts dealing with converts and conversion. The Talmud states:[139] "Rava says: If a pregnant gentile converts, when her child is born it does not need a conversion [literally immersion]." The Talmud also states:[140] "A pregnant gentile who converts . . . [and has a first born son] this child has the status of a first born vis-a-vis the laws of the first-born [literally the priest][141] but not vis-a-vis any inheritance." There is a significant dispute among the commentators as to the reasons why such a child is born Jewish and does not require conversion. Most commentators adopt the intuitive explanation that the child is Jewish because it is born from a Jewish mother.[142] Furthermore, they claim that this statement of Ravah is accepted by both sides of the dispute over whether or not a fetus is part of the mother.[143] Thus, they claim the child is Jewish because at the time of birth its mother was Jewish, and not because it itself underwent a separate conversion. This is in harmony with the previous text quoted which also argues for birth as the key time in establishing motherhood when conception is not legally significant.

Nachmanides understands this talmudic section in a different way. He claims that the child is only Jewish because it, itself, underwent an immersion when its mother was immersed.[144] This immersion converted both the fetus and its mother. Furthermore, Nachmanides claims that this whole talmudic piece only follows the opinion that a fetus is never legally part of the mother.[145] Finally, Nachmanides advances one other

138. RASHI, *commenting on* BABYLONIAN TALMUD, *Yevamot* 97b (starting with the words *aval chayavin*).

139. BABYLONIAN TALMUD, *Yevamot* 78a.

140. BABYLONIAN TALMUD, *Bechorot* 46a.

141. He must be redeemed for five *shekalim* (100 gm.) of silver. *See Numbers* 18:15-16.

142. *See supra* text accompanying notes 113-16. It follows from this that if having a Jewish mother at the time of birth makes the child Jewish then the mother who makes the child Jewish is also its mother with respect to all the other significant aspects of motherhood.

143. *See* TOSAFOT, *commenting on* BABYLONIAN TALMUD, *Yevamot* 78a (starting with the words *ela ha'da'amar*).

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146. *See* NACHMANIDES, *supra* note 144.

147. *See* Y. HABIB, *supra* note 144, in the name of the Rabbi Aharon HaLevi (*Ra'ah*). *See also* S. MEIR HA'COHEN, SIFTEI COHEN (SHACH), *commenting on* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 268:2.

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150. J. CARO, BEIT YOSEF, *commenting on* JACOB BEN ASHER, TUR, *Yoreh Deah* 268; *see also* M. ISSERLES, DARKEI MOSHE, *commenting on id.*

151. *See* M. ISSERLES (REMA), *commenting on* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 268:1.

152. SIFTEI COHEN (SHACH), *supra* note 147, *commenting on id.*

153. ELIYAHU OF VILNA, BEUREI HA'GRA, *commenting on id.* at n. 5.

154. *Compare* Y. EPSTEIN, ARUCH HASHULCHAN, *Yoreh Deah* 268:11 *with* Y.A. LANDAU, DAGUL MEREVAVA, *commenting on* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 268.

This author believes that the law is, in fact, codified contrary to the position of Nachmanides on the issue of establishing maternity, even if one part of his argument, on inverted order in conversion, is possibly accepted. Nachmanides' stance on maternity can only be accepted by those authorities who also maintain that a fetus is never legally part of its mother (*ubar lav yerech imo*), which excludes many decisors. Furthermore, many decisors disagree with his position on inverting the order of conversion. Thus, the following commentators clearly disagree with Nachmanides' bottom line position on the establishment of maternity: Maimonides,[155] Menachem ben Meir (*Meiri*),[156] Rabbi Asher ben Yechiel (*Rosh*),[157] Rabbi Shlomo ben Adret (*Rashba*),[158] Tosaphot,[159] Rabbi Yom Tov Alashveli (*Ritva*),[160] Rabbi Yosef Habiba (*Nemukei Yosef*),[161] and Rabbi Aharon Halevi (*Ra'ah*).[162] Accepting that the law is codified against Nachmanides, it appears that Jewish law focuses on birth, rather than genetic relationship.[163]

One other source supports the position that conception, rather than birth, fixes motherhood. The Talmud, when discussing the law of first-born asks what the law is if one takes a fetus from one womb and places it in the womb of another. Which womb is excused from the laws of first born?[164] The Talmud answers that it does not know the answer to this question (*teku*). Maimonides explains the question as follows: if one removes a fetus from its mother's womb and places it in the womb of another, it is understood that the conception-mother is excused from having another first born; the question is, is the mother that received that

155. MAIMONIDES, MISHNEH TORAH, SEFER KEDUSHA, *Hilchot Shechita* 12:10.

156. M. HA'MEIRI, BEIT HA'BECHERA, *commenting on* BABYLONIAN TALMUD, *Yevamot* 78a.

157. ASHER BEN YECHIEL (ROSH), *commenting on* BABYLONIAN TALMUD, *Bava Kamma* 5:2.

158. SHLOMO BEN ADRET (RASHBA), 1 RESPONSA 1240. *See also* E. WASSERMAN, COLLECTED COMMENTS ON YEVAMOT & RESPONSA OF RASHBA 39, *responsa* n.4.

159. TOSAFOT, *commenting on Yevamot* 78a (starting with the word *ela*); *Sanhedrin* 80b (starting with the word *ubar*).

160. Y.T. ALASHEVI (RITVA), *commenting on* BABYLONIAN TALMUD, *Yevamot* 78a.

161. J. HABIBA, NEMUKEI YOSEF, *commenting on* RABBI ALFASI (RIF), *Yevamot* 16a.

162. Quoted in *id*.

163. Another source supporting the position that Jewish law recognizes the host mother as the legal mother is the statement by the Talmud and Rashi in BABYLONIAN TALMUD, *Megillah* 13a. The Talmud states, in an aggadic (non-legal) discussion, that Esther lacked both a mother and a father and, hence, was raised by her uncle. The Talmud states that Esther's mother died at birth, according to Rashi, the earliest time that motherhood could be fixed. This added proof indicates that in Jewish law, birth is at least as important as genetics. Arguably this source is not dispositive for two reasons. First, the Talmud is analyzing the issues in a non-legal manner, but rather in a midrashic one. Second, even if the Talmud is referring to parenthood in a legal sense, it might be referring to it in the sense of the obligation to care for the child and not in terms of technical "motherhood."

164. BABYLONIAN TALMUD, *Chulin* 70a. According to the law of first born this kind of discharge normally excuses the next child born from the rules of first born. J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 305:22-23.

fetus also excused?[165] Thus, according to the Maimonides (and none dispute his understanding of this talmudic passage), the person in whom conception occurred is clearly the mother — at least when the fetus is removed within 40 days after conception,[166] when its removal would excuse its mother according to the laws of first born.

Rabbi Ezra Bick, in a recent article in *Techumin*,[167] adds a most important rule to the host motherhood equation. He states, based upon *Chulin* 70a, a general rule: a fertilized egg, once removed from the womb of its mother, is born and no reimplantation in another womb can change who its mother is — since motherhood is fixed at the time of birth and the baby was born upon removal from the womb. According to this analysis, when ovulation, conception, and birth (removal from the womb) all occur in one person, that one person is the mother and reimplantation or rebirth in another does not create a new mother. Thus, according to Rabbi Bick's analysis, a woman who after conception transfers her fetus to another to carry the fetus to term remains the mother of the resulting child, notwithstanding the fact that the child was carried in another womb.

One important limitation must be placed on this theory's application. The fetus, in order to be considered "born" must be removed from its human mother after at least forty days following conception. Before day forty it is considered "mere water" and is not even considered a fetus.[168] Even if one did not accept the forty day rule as applying in this context,[169] Rabbi Bick's rule would still not apply until implantation (day 7)[170] at the very earliest.

Thus, three rules can be deduced to determine the mother in surrogate or host motherhood cases:

l) If conception occurs in a woman's body, removal of the fetus after implantation (and, according to most authorities, after 40 days) does not change the identity of the mother according to Jewish law. The mother would be fixed at the time of removal from the womb and would be the woman in whom conception occurred.

2) Children conceived in a test tube and implanted in a host carrier are the legal children of the woman who gave birth to them since parturition and birth occurred in that woman, and conception is not legally significant since it occurred in no woman's body.

165. MAIMONIDES, MISHNEH TORAH, SEFER KARBANOT, *Hilchot Bechorot* 4:18.

166. Or the 40 day equivalent for animals. *See* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 315:7.

167. Bick, *Fetal Implants,* 7 TECHUMIN 259 (1987).

168. BABYLONIAN TALMUD, *Nidah* 30a.

169. A number of authorities understood the forty day rule differently; *See generally* J.D. BLEICH, 1 CONTEMP. HALACHIC PROBLEMS 339-47 (1977).

170. *See* D. DANFORTH, OBSTETRICS AND GYNECOLOGY 297 (4th ed. 1982).

3) Children conceived in a woman who had an ovarian transplant are the legal children of the woman who bore them.[171]

B. *American Law*

Although surrogate motherhood is a topic which has generated much interest in the legal,[172] as well as non-legal literature, only five[173] court opinions have been issued evaluating the appropriate legal response to the institution of surrogate motherhood. Besides the now famous *Baby M* case in New Jersey, three other courts have issued published opinions concerning surrogate motherhood. These five opinions contain widely divergent views on the legal issues relating to surrogate motherhood in the United States.

The first opinion, *Doe v. Kelley*,[174] issued in 1981, discusses a state's

171. Additionally, since the Talmud leaves the question undecided (*teku*), the host mother would not have to pay the 5 *shekalim* for the redemption of the first born, although this issue is not beyond dispute. *See* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 305:13. According to the position of Rav Hai Gaon, in cases of doubt, half payment is to be made. *See* TOSAFOT, *commenting on* BABYLONIAN TALMUD, *Bava Kamma* 62a (starting with the words *ato takanat nigzal)*: Tosafot, in the name of Rav Yitzchak disagrees, *id.*, as does MAIMONIDES, MISHNEH TORAH, SEFER NEZIKIN, *Hilchot Chovel U'mazik* 8:7. *See also* J. CARO, SHULCHAN ARUCH, *Choshen Mishpat* 388:7 and especially, glosses of M. ISSERLES (REMA), on *id*.

The laws of inheritance for the first born do not change, however, since they are dependent on the first born of the father and not the mother. *See id.* at 277:11-13.

172. *See generally* Note, *Embryo Transplant, Parental Conflict, and Reproductive Freedom*, 15 Hofstra L. Rev. 609 (1987); Note, *Litigation, Legislation and Limelight: Obstacles to Commercial Surrogate Mother Arrangements*, 72 IOWA L. REV. 415 (1987); Katz, *Surrogate Motherhood and Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROB. 1 (1986); O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C.L. REV. 127 (1986); Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986); Note *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986); Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L. J. 1283 (1985); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983). For the current position of the Catholic Church, see MAGISTERIUM OF THE CATHOLIC CHURCH, Instruction on Respect for Human Life in Its Origin and Dignity of Procreation: *Replies to Certain Questions of the Day* 25 (Feb. 22, 1987) (Surrogacy is "contrary to the unity of Marriage and to the dignity of the procreation of the human person").

173. Actually, there are six. The Idaho Supreme Court, in the case of Petition of Steve B.D., 723 P.2d 829, 111 Idaho 285 (1986), incidentally discussed the law of surrogate motherhood. While it could have been quite central to the case, as the facts of the case were almost identical to the Baby M case, the court was sidetracked into a dispute over the standard used to determine custody generally. The majority used this case as a vehicle for overruling the case of *In re* Anderson, 589 P.2d 957, 99 Idaho 805 (1978), which established the right of a parent generally to withdraw consent to giving up a child for adoption. The majority overruled Anderson, and established that consent to adoption is irrevocable. The court simply ignored the fact that this case involved surrogate motherhood, and decided it as it would any adoption case. Thus, at least in dicta, the court ruled in accordance with the Michigan case discussed above, *see infra* text accompanying notes 174-97, that adoption is the appropriate model in surrogate motherhood cases.

174. 106 Mich. App. 169, 307 N.W.2d 438 (Ct. App. 1981), *cert. denied*, 459 U.S. 1183 (1983); *see also* Syrkowski v. Appleyard, 333 N.W.2d 90 (Ct. App. 1983), *rev'd*, 420 Mich. 367, 362 N.W.2d 211 (1985).

right to regulate monetary payments in surrogate motherhood contracts. In this case, a married couple contracted with an unmarried woman to conceive through artificial insemination of the man's sperm. The woman contractually promised that she would consent to the child's adoption by the father's wife, and that she would waive all custody rights in return for the payment of $5,000 and expenses.[175] The issue was whether this type of contract violated the Michigan statute prohibiting the payment of money in connection with adoption or related procedures.[176]

The court initially acknowledged that the decision to bear or beget children has been held to be a fundamental right, protected under the United States Constitution, and cited *Maher v. Roe*[177] in support. However, the court stated:

> we do not view this right [to have children] as a valid prohibition to state interference in the plaintiff's contractual arrangement. The statute in question, does not directly prohibit [plaintiffs] from having the child as planned. It acts instead to preclude plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures.[178]

Thus, the court ruled that while it was constitutionally permissible for a woman to be a surrogate mother and artificially inseminated by the sperm of a person she is not married to, it is nonetheless well within a state's powers to prohibit any of the parties from receiving financial benefit from such conduct.[179] The court further stated that the adoption laws of Michigan explicitly prohibit deriving an economic benefit from the transfer or waiver of custody rights.[180] Thus, Michigan law prohibits payment as an inducement to waive custody rights in a surrogate motherhood contract.

The second case analyzing surrogate motherhood is a 1986 Kentucky case. This case, *Surrogate Parenting Associates, Inc. v. Kentucky,*[181] was brought to the Kentucky Supreme Court in a procedurally interesting way. The Attorney General of Kentucky challenged the corporate charter of Surrogate Parenting Associates Inc., arguing that the organization was incorporated for illegal purposes — the promotion of surrogate motherhood for pay. He requested that the court revoke the corporate charter of the organization. In response, the court evaluated surrogate motherhood from a number of different perspectives. The court primarily focused on whether surrogate motherhood violated the Kentucky adoption statutes, prohibiting the payment of money as an inducement to

175. *Id.* at 172, 307 N.W.2d at 440.

176. *See* MICH. COMP. LAWS § 710.54, § 710.69 (Supp. 1987).

177. 432 U.S. 464 (1977).

178. 106 Mich. App. at 173-74, 307 N.W.2d at 441.

179. *Id.*

180. *Id.* The court noted that it is likely that the preclusion of economic gain functionally prevents such conduct from ever being done. *See generally* Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987).

181. 704 S.W.2d 209 (Ky. 1986).

a transfer of custody.[182]

The court stated that it believed that the Kentucky legislature had not intended to prohibit commercial payment in surrogate motherhood contracts in the same manner that they prohibited commercial transactions in adoption.[183] The court did note that various protections of the adoption law do apply to surrogate motherhood; for example, the surrogate mother is free to change her mind after she signs the contract and refuses to surrender the baby.[184] Nonetheless, the legislature did not intend to totally prohibit the payment of money as an inducement to the waiver of custody in surrogate motherhood cases, as it did in adoption cases.[185] This is because in surrogate motherhood cases, the undisputed legal father is the one petitioning the court, rather than a third party who has no apparent interest in the child.[186] However, the Kentucky Supreme Court did note that the legislature had the power to regulate surrogate motherhood if it so wished.[187]

Two judges dissented from this opinion. The first dissent, by Justice Vance, focused on the technical statutory interpretation of the Kentucky adoption statutes. It attempted to demonstrate that the Kentucky legislature intended to regulate surrogate motherhood when it regulated adoption.[188] The second, by Justice Wintersheimer, was more policy oriented, claiming that it was repugnant to the morals of the state to allow payment to a woman in return for the waiver of her custody rights. He stated:

> The attractiveness of assistance to childless couples should not be a cosmetic facade for unnecessary tampering with human procreation. Animals are reproduced; human beings are procreated. The procedure endorsed by the majority is nothing more than a commercial transaction in which a surrogate mother receives money in exchange for terminating her natural and biological rights in the child.[189]

He further stated that although he is sympathetic to the plight of infertile couples, it seems no worse than that of couples who wish to adopt.[190] The policy against allowing payment for adoption of children should also prohibit payment to a surrogate mother in return for her transfer of custody rights.[191]

The third case to consider the issue of surrogate motherhood is the

182. 704 S.W.2d at 213 (construing KY. REV. STAT. ANN. § 199.601(2) and § 199.500(5) (1982) (Supp. 1986)).
183. *Id.* at 211.
184. *Id.* at 213.
185. *Id.* at 211-12.
186. *Id.* at 212.
187. *Id.* at 214.
188. *Id.*
189. *Id.* at 214-15.
190. *Id.* at 215.
191. *Id.*

1986 New York case, *In The Matter of the Adoption of Baby Girl L.J.*[192] This case involved a child born to a woman artificially inseminated by a donor who wished to have custody of the child and have his spouse adopt the child. The court discussed two distinct issues. The first concerned the appropriateness of granting custody to the biological father and his wife, rather than the surrogate mother. The second concerned the payment of fees in such a situation.[193] The court stated that, when deciding issues of custody, it should be based solely on the best interests of the child.[194] The court concluded that on the facts of the case, which were not described, it was appropriate to grant complete custody to the biological father and his wife rather than the surrogate mother.[195] It granted this adoption without any visitation rights to the surrogate mother.[196] The court noted that it would be improper to decide the custody issue here in any manner other than the "best interest of the child,"[197] in order to discourage future surrogate motherhood transactions. Such an action penalizes the one child in front of the court for the benefit of society as a whole. The surrogate court thought the issue was beyond its jurisdiction and that it was statutorily limited to a best interest of the child analysis.[198]

The court then discussed whether it should permit payment to the surrogate mother.[199] It noted that in New York it is a misdemeanor to violate any of New York's adoption statutes,[200] and that it is also illegal to transfer or accept compensation in connection with the placing of a child for adoption or to assist, for a fee, a parent, relative or guardian of a child arranging for adoption.[201] After reviewing the Michigan and Kentucky cases discussed above, the court stated that the New York statute most closely resembled the Kentucky statute.[202] The court agreed with the Kentucky Supreme Court that the legislature did not intend to regulate surrogate motherhood in the same manner that it regulated adoption. It stated:

> However, this court, in spite of its strong reservations about these arrangements both on moral and ethical grounds, is inclined to follow the majority opinion [of the Kentucky Supreme Court] by finding that biomedical science has advanced man into a new era of genetics which

192. 132 Misc. 2d 972, 505 N.Y.S.2d 813 (Sur. Ct. 1986).
193. *Id.* at 973-74, 505 N.Y.S.2d at 814-15.
194. *Id.* at 974-75, 505 N.Y.S.2d at 815.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 978, 505 N.Y.S.2d. at 818. This balancing of issues, it thought, belonged to the legislature.
199. *Id.* at 974-79, 505 N.Y.S.2d at 815-18.
200. *Id.* (construing N.Y. SOC. SERV. LAW. § 389 (McKinney 1983)).
201. *Id.* (construing N.Y. SOC. SERV. LAW § 374(6)).
202. *See supra* text accompanying notes 181-191.

> was not contemplated by either the Kentucky legislature nor by the New York legislature when it enacted [its adoption laws] prohibiting payments in connection with an adoption.[203]

Thus, the New York court ruled that surrogate motherhood contracts are enforceable in New York to the extent that they provide for monetary payment to one of the parties.

Most recently, there were the two New Jersey opinions of *In re Baby M*.[204] In this case, a father and his wife brought suit to enforce the provisions of the surrogate parenting agreement between the parties which mandated that the surrogate mother transfer custody of the resulting child she bore—an act which the mother refused to do. Plaintiffs sought to compel the surrender of the infant, to restrain any interference with their custody, and to terminate the surrogate mother's parental rights. The New Jersey Superior Court, in an extremely long, factually detailed opinion, decided the case on grounds radically different from the previous three opinions. It stated that the adoption laws have no bearing on the issue of surrogate motherhood, because the New Jersey legislature did not intend to regulate surrogate motherhood.[205] The court maintained that the only legally significant item in the dispute was the contract signed between the two parties which it found to be a valid contract.[206]

The second section of the opinion dealt with a constitutional analysis of one's right to privacy as well as to have children. The court noted that while there was a constitutional right to conceive, both through coital and non-coital means, contracts between private parties limiting such rights are constitutional even absent a compelling state interest.[207] However, within the scope of the constitutional protection are certain rights, beyond which the legislature cannot regulate, absent a compelling interest.[208] The court concluded, however, that given the absence of any legislation in New Jersey:

> [T]he surrogate and parenting agreement is a valid and enforceable contract pursuant to the laws of New Jersey. The rights of the parties to contract are constitutionally protected under the 14th Amendment of the United States Constitution. This court further finds that Mrs. Whitehead has breached her contract in two ways: 1) by failing to surrender to Mr. Stern the child born to her and Mr. Stern and 2) by failing to renounce her parental rights to the child.[209]

On appeal, the New Jersey Supreme Court, in an opinion written by Chief Justice Wilentz, unanimously reversed almost all of the District Court's opinion.[210] The court held that a surrogacy contract was void because it "conflicts with the law and public policy of this State."[211] It grounded this statement in its belief that the principles of adoption and custody disputes generally, should be applied in surrogacy cases. The New Jersey Supreme Court accepted the reasoning of the Michigan appellate court case discussed above. The first step in the courts reasoning was that the contract to transfer custody was void. The use of money to facilitate the transfer of custody is illegal[212] as is the forced transfer of custody upon birth — both of these principles can be seen from New Jersey's adoption laws. Accepting that the termination of the natural mother's parental rights was improper, the court stated that Mrs. Stern's adoption of *Baby M* was a nullity. The court concluded this section stating:

> The surrogacy contract creates, it is based upon, principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.[213]

The court then reinstated Mrs. Whitehead's parental rights.

The court then focused on the constitutional issues involved in the case. It extended the constitutional right to procreate to include artificial methods of procreation, including artificial insemination.[214] However, as the Michigan case stated, the right to custody of those children is not

203. 132 Misc. 2d at 978, 505 N.Y.S.2d at 817-18.

204. *In re* Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *rev'd*, — A.2d —, Slip. Op. No A-39 (N.J. S. Ct. Feb. 3, 1988) (Westlaw 1988 WL 6251).

205. *Id.* at 372-73, 525 A.2d at 1157.

206. The court then analyzed this contract in classical contract law terms. It stated that the contract was not a contract of adhesion, as it was negotiable in the full sense of the word, and it was willfully signed with consideration. *Id.* at 376, 525 A.2d at 1159. The court also disagreed with the defendant's contention that the contract was unconscionable. *Id.* at 376-77, 525 A.2d at 1159-60. It also disagreed with the surrogate mother's contention that the contract price of $10,000 was statutorily too low and would always be unconscionable. The court stated that inequity, unless it is of gross magnitude, does not make contracts unconscionable. *Id.* at 377-78, 525 A.2d at 1160. It further disagreed with the surrogate mother's position that the contract should not be enforced because she did not have an attorney at the time of contract. *Id.* at 378, 525 A.2d at 1160. The court noted that it has been widely accepted that "any person that possesses legal capacity may be bound by a contract even when it is entered without representation unless there is fraud, overreaching or undue influence which causes the party to enter the contract." *Id.* at 378, 525 A.2d at 1160. The court then noted that the surrogate mother had legal capacity to contract, and that there was no evidence of fraud on the part of the father. *Id.* at 378-83, 525 A.2d at 1160-63.

207. *Id.* at 386, 525 A.2d at 1164.

208. *Id.* at 387, 525 A.2d at 1165.

209. *Id.* at 388-89, 525 A.2d at 1166. The court discussed the appropriate remedy for this breach of contract. After noting that monetary damages were inappropriate and discussing in detail every other possible compensation to the plaintiff, the court decided that the most equitable award to the plaintiff was custody of the child.

210. *In re* Baby M, S. Ct. N.J. (Feb. 3, 1988) (Westlaw, 1988 WL 6251).

211. *Id.*

212. And perhaps criminal. *Id.* *See* N.J. STAT. ANN. § 9:3-54 (West 1963). The court explicitly rejected the categorization of the payments in the contract as a payment for services by noting that payment was reduced to a tenth the agreed upon price if the child was stillborn.

213. *Id.*

214. *Id.*

simply a continuation of the right to procreate. "The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected, but that involve many considerations other than the right of procreation,"[215] and these rights are adequately protected by the general rules of custody of the state of New Jersey.[216] Thus, the New Jersey Supreme Court opted for the adoption/custody model of surrogate motherhood — totally rejecting the model created by the lower court. In New Jersey, surrogacy contracts are not enforceable, and contracts for payment are arguably criminal. The Court specifically approved of voluntary surrogacy arrangements with no financial remuneration.[217]

Thus, three different types of analysis have been used in surrogate motherhood cases in the United States. The first type of analysis maintains that adoption legislation is the appropriate model for evaluating surrogacy agreements and that in the absence of specific legislation regulating surrogate motherhood, the courts should apply adoption law as needed. The second denies this; rather it maintains that only key concepts should be incorporated from adoption in order to prevent manifest injustice. Finally, the Superior Court opinion in the *Baby M* case decided surrogate motherhood issues based on contract law rules and denied that adoption law has any validity in the rules of surrogate motherhood.

C. *Comparison and Summary*

American law is still in its infancy in analyzing the multiple issues related to surrogate motherhood. Although medical technology has already advanced to the point of ovum transplants,[218] American law is still confronting the "easy" case of the first type of surrogacy — where the surrogate mother is also the genetic mother. The "hard" cases, where the identity of the natural mother is in doubt, have not even been considered. Presumably, as the legal issues are further fleshed out, various legislatures will more closely scrutinize surrogacy, and choose to directly regulate it; this will remove the major issue currently under debate, which is whether surrogacy is analogous to adoption. This author thinks it is likely that legislatures will choose to apply most of the abuse-protecting rules of adoption to surrogacy, perhaps even extending them to discouraging private surrogacy agreements.

215. *Id.*

216. The court in its final two sections focused on the factual issue of custody and visitation in the narrow case at bar. It granted Mr. Stern joint temporary custody and gave Mrs. Whitehead visitation rights. The case was remanded to determine permanent visitation rights and to work out a permanent custody arrangement. *Id.*

217. *Id.* However, even in such contracts, custody can not be involuntarily transferred.

218. Annas & Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199, 203-206 (1983).

Jewish law, on the other hand, is confronted with only a single issue — who is the natural parent. The "hard" case of *Baby "M"* poses no difficulty. While very little has been written directly on the topic of what makes a "natural" parent in host motherhood situations, Jewish law is replete with cases of a similar type. It is very likely that Jewish law focuses on two discrete time periods: conception and birth. If conception occurs in a woman, even if the fetus is implanted in another, the place of conception establishes motherhood. If conception occurs in a test tube, Jewish law focuses on birth as establishing motherhood. As always, once parenthood is established, it cannot be changed by a court of law.

IV. ADOPTION AND ESTABLISHING PARENTAL STATUS

A. *Jewish Law*

Although the institution of adoption, through its widespread use in Roman law,[219] was well known in talmudic times, the codifiers of Jewish law denied that Jewish law recognized an institution of "adoption." Rather, they created the institution which they called "One Who Raises Another's Child."[220] Unlike either Roman law or current adoption law, this institution does not change the legal parents of the person whose custody has changed.[221] A person who raises another's child is an agent of the natural parent; and like any agency rule in Jewish law,[222] if the agent fails to accomplish the task delegated, the obligation reverts to the principal. Thus, the biblical obligations, duties and prohibitions of parenthood still apply between the natural parents and the child whose custody they no longer have.[223]

Conversely, one who raises another's child does not assume the biblical prohibitions associated with having a child of one's own. For example, regardless of who is currently raising the child, it is never permitted for a natural parent to marry his or her child; on the other hand, the assumption of custody cannot raise to a biblical level the prohibition of incest between a parent and the adopted child.[224] Furthermore, the Talmud explicitly discusses whether or not adopted children raised in the same home may marry each other, and concludes that such marriages are permitted.[225] One medieval authority, Rabbi Judah of Regensberg,

219. F.P. WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW 72 (1920).

220. *See* BABYLONIAN TALMUD, *Sanhedrin* 19b. This is viewed as a righteous deed, *see* EXODUS RABBA ch. 4.

221. Although it is true that there are four instances in the Bible in which adopted parents are called actual parents, *see* I *Chronicles* 4:18, *Ruth* 4:17, and *Psalms* 77:16, *II Samuel* 21:8; these are assumed to be in a non-legal context, *see* BABYLONIAN TAMUD, sanhedrin 9b.

222. I.H. LEVINTHAL, THE JEWISH LAW OF AGENCY 58-73 (1923).

223. J. CARO, SHULCHAN ARUCH, *Even Haezer* 15:11

224. *Id.* at 15:11. ("It is permitted to marry one's adopted sister.")

225. BABYLONIAN TALMUD, *Sotah* 43b.

decreed that such marriages not be performed.[226] This decree has not been generally accepted.[227] Although legally permitted, few such marriages are actually performed.

On the other hand, certain non-biblical aspects of parenthood created by the rabbis have been connected to custody rather than parenthood. For example, in talmudic times it was decreed that the possessions, earnings, and findings of a minor child belong to his father.[228] Although the wording of the Talmud refers only to a father, it is clear from later discussions that this law applies to anyone who supports the child, i.e., adopting parents.[229] The reason for the rabbinic decree is that it was equitable that one who supports a child should get the earnings of that child.[230] Thus, a financially independent minor does not transfer his income to his parents.[231] Similarly, the earnings of an adopted child go to his adopted parents since the rationale for the decree applies equally well to adopted and biological children.[232]

Other examples of adopted parents being treated as natural parents can be found in the area of ritual law. For example, while the rabbis prohibited two unrelated unmarried people of the opposite sex from rooming together alone, (in Hebrew, the laws of *yichud*);[233] it is argued that these rules do not apply in the adoption scenario. Although some commentators disagree,[234] most maintain that it is permissible for an adopted child to room and live with his adopted family[235] notwithstanding the prima facie violations of the prohibition of isolation.[236] As one commentator noted, without this lenient rule, the institution of raising another's child would disappear.[237] Another example of a change in the ritual law due to the adoption of a child, is the lack of obligation to recite

226. SEFER HA'CHASIDIM, *supra* note 43, comm. 29. *See also* BABYLONIAN TALMUD, *Sotah* 43b.

227. *See* M. SOFER, RESPONSA 2, *Yoreh Deah* 125.

228. BABYLONIAN TALMUD, *Bava Metzia* 12b.

229. J. CARO, SHULCHAN ARUCH, *Choshen Mishpat* 370:2.

230. J. FALK, MEIRAT EINAIM, *commenting on id*.

231. J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 370:2.

232. *Id*. at 370:2; Z. MENDAL, BE'ER HAYTAIV, *commenting on id*. at § 4.

233. J. CARO, SHULCHAN ARUCH, *Even Haezer* 22:2. According to one commentator, this rabbinic prohibition even included the rooming together of a married woman with a man not her husband. *See* MAIMONIDES, MISHNEH TORAH, SEFER KEDUSHA, *Hilchot Issurai Biah* 22:2.

234. M.M. SHNEERSON, 4 ZICHRON AKEDAT YITZCHAK 33-37. For a complete list of those authorities agreeing with this position, see Berzon, *Contemporary Issues in the Laws of Yichud*, 13 J. OF HALACHA & CONTEMP. SOC'Y 77, 108 (1986).

235. This, for example, occurs when a couple adopts a boy, and the boy's adopted father later dies, leaving the adopted child living alone with a woman not his natural mother.

236. *See* E. WALDENBERG, 6 TZITZ ELIEZER, at 40:21; C.D. HALEVI, ASEH LECHA RAV 194-201. Rabbi Joseph B. Soloveitchik has also been quoted as permitting this. *See* Schacter, *Various Aspects of Adoption*, 4 J. OF HALACHA & CONTEMP. SOC'Y 93, 96 (1982). Rabbi Feinstein has also commented on this issue, *see* M. FEINSTEIN, IGROT MOSHE, 4 *Even Haezer* 64:2.

237. 6 TZITZ ELIEZER, *supra* note 15, at 226-28.

the mourner's prayer (*kaddish*) upon the death of one's natural parents, and the incumbent obligation to mourn upon the death of one's adopted parents.[238] This is so because the institution of mourning as we know it is totally rabbinic in nature.[239] Numerous other examples exist of rabbinic institutions that are not strictly applied in the context of raising another's child since Jewish law would like to encourage this activity.[240]

Notwithstanding the high praise the law showers on a person who raises another's child,[241] it is critical to realize that the institution of "adoption" in Jewish law is radically different from the adoption law of American jurisdictions. In Jewish law adoption operates on an agency theory. The natural parents are always the parents; the adopted parents never are. While a number of incidental areas of parental rights are associated with custody and not natural parenthood, they are the exception and not the law. In the main, Jewish law focuses entirely on natural relationships to establish parental rights and duties.

B. *American Law*

Although it is commonly thought that adoption is a relatively recent phenomenon, it is not so. Adoption was recognized in the Babylonian Code of Hamurabi[242] four thousand years ago, and was regulated in the ancient Greek, Egyptian, and Roman civilizations.[243] It is true, however, that the main purpose of adoption has shifted dramatically from the ancient goal of insuring the continuity of a family lines to the current goal of providing complete family lives to both orphaned children and childless couples. Nonetheless, the institution of adoption, complete with its problems, is ancient.

On a more recent historical level, adoption in the United States is one of the few areas of the law where common law had no influence, as English common law rejected *in toto* the institution of adoption.[244] The first public adoption statute in America was enacted in 1851 in Massachusetts.[245] This statute rendered what had previously been private,

238. M. SOFER, RESPONSA, 1 ORACH CHAIM 174. Rabbi Sofer also notes the praise Jewish law gives to one who raises another's child.

239. This issue is in dispute. *Compare* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 398:1 *with* M. ISSERLES, *commenting on* J. CARO, SHULCHAN ARUCH, *Yoreh Deah* 399:13.

240. *See generally* J. CARO, SHULCHAN ARUCH, *Orach Chaim* 139:3. *See also* A. AULI, MAGEN AVRAHAM, *commenting on id.*; M. FEINSTEIN, IGROT MOSHE, 1 *Yoreh Deah* 161. For a summary of various laws of adoption, see generally Schacter, *supra* note 236.

241. *See supra* note 221.

242. THE CODE OF HAMURABI, KING OF BABYLON § 185-186 (R.F. Harper trans. 1904).

243. *See* Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332 (1922); Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956) (summarizing various ancient adoption laws).

244. McLauliff, *The First English Adoption Law and Its American Precursors*, 16 SETON HALL L. REV. 656, 659-60 (1986). It was not until the late 1920's that adoption became possible in England without a special act of Parliament.

245. *Id*. at 666.

unsupervised adoptions into judicially regulated transfers of custody. Before the passage of the Massachusetts Act, adoption had been a "private legal act, like a conveyance of real estate or a commercial contractual transaction."[246] However, even before the Massachusetts statute was passed, most states systematically recognized adoption as valid grounds for a petition to change one's name as well as one's family associations.[247] Thus, adoption law in America from its legal inception rejected Jewish law's analysis of adoption as a type of agency, and accepted the Roman model of the legal change in the parenthood of the child.[248] As with Roman law, such a change was apparently total and complete, virtually stripping the child of his prior identity.

Between 1860 and the end of World War II, all states passed adoption and child welfare acts which closely scrutinized requests for adoption.[249] Typically, there were five requirements necessary to adopt. The first was the consent of the birth parent or guardian. This was done in order to insure that parental ties were not broken improperly or due to duress. The second was that a social study or investigation be conducted by the court or the adoption agency to determine if the adoptive parents would provide a suitable environment for the child. The third requirement was a trial period in the adoptive home under court or agency supervision. The fourth was that the court issue a final decree establishing that the adoptive parents had adopted the child. The fifth was the secrecy of the legal proceedings, and the provision for the alteration of the child's birth certificate. As one commentator noted, "Adoption laws were designed to imitate nature."[250] They were intended to put children in an environment where one could not determine that they had been adopted; even the children themselves many times did not know. The law reflected this, and severed all parental rights and duties with an adopted child's natural parents and reestablished them in total with the adoptive parents, as per the Roman model of adoption law.

In the last thirty years major changes have occurred in adoption law in the various states.[251] One of the most significant changes has been the realization that adoption, like many other areas of law, takes place in an adversarial proceeding. This scenario can pit the parents putting the child up for adoption against the parents who would like to adopt the child. This is well reflected in the American Bar Association's Family Law formal statement in 1964 acknowledging that it was unethical for an attorney to represent both the adopting and relinquishing parents in an

246. *See* Katz, *Re-writing the Adoption Story*, 5 FAM. ADVOC. 9 (1982).

247. *Id*. at 9-10; McLauliff, *supra* note 244, at 666-67. Before this act and its comparable acts in other states, adoption was done by private petition in front of the state legislatures.

248. "Roman law provided the ultimate source for all of the state statues permitting adoption." McLauliff, *supra* note 244, at 667.

249. Howe, *Adoption Practice, Issues and Law, 1958-1983,* 17 FAM. L.Q. 173 (1983).

250. *See* Katz, *supra* note 246, at 9-10.

251. Howe, *supra* note 249, at 177.

adoption case,[252] just as it was unethical for an attorney to represent both sides in any other dispute.[253] This conflict of interest was well noted by one commentator who stated that the adoption laws have been torn asunder because they reflect a need to "promote the best interest of adoptive children on one hand and to protect the rights of their natural and adoptive parents on the other hand."[254]

This tension between the newly perceived rights of the parent and the previously well established attempts to model adoption laws only after the best interests of the child, has changed adoption law. From its earlier model of attempting to recreate a new family unit for an adopted child, one in which the child could not determine if he was adopted, and one in which the law prescribed all parental rights to his adoptive parents, it metamorphosed into a system of balancing rights between the various parties in an adoption — almost insuring that a child is at least aware of the fact that he is adopted.

The United States Supreme Court in *Stanley v. Illinois*,[255] added constitutional impetus to the modernization of adoption law by recognizing a right to procedural due process when stripping a parent of his or her parental rights. Until this case, it was assumed that the father of an illegitimate child had no legal rights towards that child and could not protest the mother's placing of the child up for adoption. Nor was it clear until this case that any parent giving up a child was entitled to constitutional protections. In *Stanley*, the Supreme Court recognized the due process of the unwed father and, by implication, all other parents. Immediately after *Stanley*, nearly half of the states changed their adoption laws to reflect the new rights of the parents.[256] Other states took a broader view of *Stanley*, establishing that the unwed mother and father enjoy equal rights just as a married couple.[257] *Stanley* provided yet another impetus for the opening up of adoption law and moving away from the highly secretive model of the last one hundred years. By mandating court hearings and simple due process, the highly secretive adoptions of yesteryear became an impracticality.

Another equally significant change in the adoption practice occurred during the controversy over the ability or propriety of a state to seal its

252. *See Policy Statement Approved by ABA Board of Governors*, 1 FAM. L.Q., 137, 139 (1967).

253. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A)-(C) (1980); ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7 (1)-(8) (1983).

254. InFausto, *Annual Review of Decisions and Statutory Revisions Affecting Adoptions (Dec. 1st, 1967-Sept. 31, 1968*), 3 FAM. L.Q. 123 (1969).

255. 405 U.S. 1645 (1972).

256. *See, e.g.,* ALASKA STAT. § 20.15.040 (1975); COLO. REV. STAT. § 19-6-125 (1973); MICH. STAT. ANN. § 27.3178 (555.31) (1980); MINN. STAT. ANN. § 259.26 (1971); *See generally* W. MEEZAN, S. KATZ & E. RUSSO, ADOPTION WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTION 133-152 (1978).

257. *See* UPA, *supra* note 86, at § 24.

adoption records - an issue which goes to the very heart of the current American approach to adoption.[258] If adoption records cannot or should not be sealed, then it is beyond the state's power to create an adoption system which effectively mimics the creation of a new parental unit, since the children will become aware of the fact that they have biological parents separate from their adoptive parents. Historically, almost all states sealed adoption records and provided virtually no access.[259] The original birth records are sealed, and if, by coincidence, the adopted child was to meet and marry a natural sibling, the state would permit such a marriage since there is no legal relationship with his natural family.

The "right to know" controversy has resulted in a number of states granting adoptees (upon attaining their majority) access to all the information collected.[260] Once children have a right to know who their natural parents are, the adoption law must reflect the dichotomous relationship between one's natural parents and one's adoptive parents.[261] These tensions have not yet been resolved in American law. Most states still ascribe to adoption law the ability to totally recreate maternal and paternal relationships notwithstanding the knowledge of one's biological parents. Along with their ability to completely recreate maternal and paternal relationships, states also maintain the ability to legally destroy any such relationships. It is well within the power of the state to not only create new parental rights and duties, but also to remove the rights of a parent towards its child; this is true not only for the rights towards the child, but also for the duties of a parent to a child.

C. *Comparison and Summary*

This policy disagreement reflects a fundamental difference between American and Jewish law. Jewish law denies to a governing body the ability to destroy essential parental relationships created at birth. American jurisprudence grants itself that power; the law can artificially create parental relationships in the best interest of the child. It can also destroy natural ones for the same reason.

258. Howe, *supra* note 251, at 185.

259. *Id.*

260. *See* VA. CODE ANN. 63.1-236 (1980); GA. CODE ANN. § 81-1714(b); MICH. STAT. ANN. § 27.3178 (555.68(1)) (1980); MONT. CODE ANN. § 50-15-304(2) (1987); TENN. CODE ANN. § 6-132 (1980); and D.C. CODE ANN. § 16-311 (1981).

261. Amadio & Deutsch, *Open Adoption: Allowing Adopted Children To 'Stay in Touch' With Blood Relatives*, 22 J. FAM. L. 59 (1983); Levin, *Adoption Trilemma: The Adult Adoptee's Emerging Search for His Ancestral Identity*, 8 U. BALT. L. REV. 496 (1979).

V. SEX CHANGE OPERATIONS AND THEIR EFFECT ON MARITAL STATUS: A BRIEF COMPARISON[262]

Sex reassignment surgery is another example of the legal difficulties certain medical, psychological, and technical advances have posed to legal systems. Do systems have the ability to redefine such basic statuses as male and female, and how do these changes affect pre-existing relationships which posit one member of each sex? Although a relatively recent phenomenon,[263] the sexual status of a person who has undergone a sex change operation has been widely discussed, both in American and in Jewish law. One of the recent American cases to discuss the status of such persons is a New Jersey case, *M. T. v. J. T.*,[264] where a wife filed a complaint for support and maintenance against her now-separated husband. In defense to the action for nonsupport, the husband asserted that his wife was a male and hence their marriage was void. He maintained that his wife was a former male who had "successfully" undergone sex reassignment surgery before the marriage. However, he maintained, the law still categorized "her" as a male. Thus, since New Jersey does not recognize marriages between two members of the same sex, the marriage was void. The New Jersey Superior Court ruled that "where a transsexual was born with physical characteristics of a male, but successful sex reassignment surgery harmonized her gender and genitalia so that she became a woman, such transsexual thereby became a member of the female sex for marital purposes and subsequent marriage to a male was not void."[265] The court ruled this way notwithstanding the undisputed fact that this individual was still genetically a male, though physiologically a female. The New York Supreme Court agreed with this view in ruling in the famous case of *Richards v. United States Tennis Association*.[266] The court ruled that the law must reflect the successful sex reassignment surgery when it is done properly and for an appropriate medical reason.

One court has disagreed with this analysis. In *In Re Declaratory Relief for Ladrach*,[267] an Ohio probate judge ruled that Ohio law does not permit a transsexual, after surgery, to obtain a marriage license reflecting his new sex. The court ruled that genetic factors dominate in determining sexual status. The court was heavily influenced by British

262. Many of the primary sources for the Jewish Law section of this part were first collected by Professor Bleich; *see* Bleich, *supra* note 169, at 100-105.

263. While there are ancient accounts of sex change operations, *see* R. GREEN & J. MONEY, TRANSSEXUALISM AND SEX REASSIGNMENT 13-15 (1969), it is only in the last twenty-five years that they have become at all common.

264. 355 A.2d 204, 140 N.J. Super. 77 (1976).

265. *Id.* at 210, 140 N.J. Super. at 84.

266. Richards v. United States Tennis Assoc., 93 Misc. 2d 713, 400 N.Y.S.2d 267 (Sup. Ct. 1977). (Richards sued the U.S.T.A. over its denial of permission for "her" to play professional tennis as a woman, after she underwent sex reassignment surgery.)

267. 513 N.E.2d 828, 32 Ohio Misc. 2d 6 (P. Ct. 1987).

case law which also adopted this standard.[268] The court also mischaracterized the law in New York state, apparently unaware of the *Richards* case.[269]

A number of state courts have commented on a related issue — the right of a transsexual to change his or her birth certificate to list his assigned sex. A number of state courts have refused to permit this,[270] although most do.[271] In 1975, a federal district court ordered that cause must be shown before a state could refuse to change the sex on the birth certificate of a person who has undergone a sex change operation.[272]

The marital status of one who has undergone transsexual surgery while married is without case law in the United States. The basic question is whether undergoing transsexual surgery is merely grounds for divorce or annulment, or is it actually the termination of the legal marriage as it stands, without the need for state intervention. This author believes that in states like New York, where marriage by people of the same sex is neither explicitly illegal or legal,[273] the marriage of a person who has undergone transsexual surgery is merely voidable. Thus, while it is well established that people of the same sex cannot enter into marriages in New York, once a valid marriage license has been issued to a man and a woman, further actions removing one of the them from the classification of those capable of being issued a marriage license, is not in itself grounds for voiding of the marriage.

An analogy to this type of situation is where the status of one of the parties in a marriage changes to one in which he or she could not contract to enter into a marriage. For example, if two people are married and one of them suddenly becomes insane, the marriage is not legally void upon the insanity of that party. The case of a transsexual whose sexual status has changed and to whom a valid marriage license could no longer be issued is identical to this case. Since the couple was lawfully married, the inability to enter into the marriage at this time would not void the marriage. Additionally, void marriages must be void at the time

268. Corbett v. Corbett, 2 W.L.R. 1306, 2 All E.R. 33 (P.D.A. 1970). This is also the law in New Zealand; *see Re* T, 2 N.Z.L.R. 449 (Sup. Ct. Auckland 1975).

269. 513 N.E.2d 828, 32 Ohio Misc. 2d 6.

270. *See* Anonymous v. Weiner, 270 N.Y.S.2d 319, 322, 50 Misc. 2d 380 (Sup. Ct. 1966); Hartin v. Director, Bureau of Records, 347 N.Y.S.2d 515, 75 Misc. 2d 229 (Sup. Ct. 1973).

271. Note, *An Enlightened Perspective on Transsexualism* 6 CAP. L. REV. (1977) (more than twenty-five states permit change in the birth certificate of a transsexual); Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 228 (1975).

272. Darnell v. Lloyd, 395 F. Supp. 1210 (D. Conn. 1975).

273. B. v. B., 355 N.Y.S.2d 712, 78 Misc. 2d 112 (Sup. Ct. 1975) ("New York neither specifically prohibits marriages between persons of the same sex nor authorizes issuance of marriage licenses to such persons. However, marriage is and always has been a contract between a man and a woman." *Id.* at 716, 78 Misc. 2d 117). *See also* Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd* 673 F.2d 1038 (9th Cir. 1982); De Santo v. Barnsley, 476 A.2d 952, 328 Pa. Super. 181 (1984); Singer v. Hara, 522 P.2d 1187, 11 Wash. App. 247 (1974).

of their inception, which is not true in the case of a transsexual who reassigns his sex after marriage. Hence, a unilateral act by one of the parties after commencement of the marriage cannot make that marriage void.

According to Jewish law, the removal of sexual organs is prohibited; hence sex reassignment surgery is prohibited according to biblical law for men;[274] and it is disputable whether the removal of sexual organs is a biblical or rabbinic prohibition for women.[275] Although the technical prohibition of removing sexual organs applies only in the context of physical removal, a number of authorities note that undergoing hormonal treatment to give the appearance of being a member of the opposite sex violates the biblical commandment in *Deuteronomy* which states that "A woman shall not wear that which pertains to a man, nor shall a man put on a woman's garment."[276] These commentators maintain that this prohibition against wearing the garments of the opposite sex also encompasses the attempt to develop physical appearances that are typically associated with the opposite sex.[277] This prohibition has been applied in a broad variety of contexts, each within its historical parameter prohibiting conduct which resembles that which the opposite sex does.[278] It seems almost intuitive that if actions designed to give the mere appearance of belonging to the wrong sex are forbidden, then actual physical changes, hormonal or surgical, are also prohibited.

The question of whether a physical operation to change one's sex accomplishes its goal, notwithstanding the prohibition, is a subject of some controversy in Jewish law. The earliest discussion concerning the sexual status of a transsexual is found in the twelfth century commentary of *Ibn Ezra* on *Leviticus* 18:22, where he, quoting Rabbenu Chananel, states that intercourse between a man and another man, in whom the sexual organs of a woman have been fashioned, constitutes a violation of the biblical prohibition of homosexuality, despite the presence of apparently female sexual organs.[279] Thus, *Ibn Ezra* rules that sexual status cannot be changed surgically, since if this person was now legally a woman, no violations of the sodomy laws could occur. Rabbi Yosef Palachi[280] is of the opinion that no divorce is necessary for the dissolu-

274. *See Leviticus* 22, 24; *See* BABYLONIAN TALMUD, *Shabbat* 110b.

275. *Compare* TOSAFOT, *commenting on* BABYLONIAN TALMUD, *Shabbat* 110b (starting with the word *v'hatanya*) (rabbinic violation) *with* MAIMONIDES, MISHNEH TORAH, SEFER KEDUSHA, *Hilchot Issurai Biah* 16:11 (biblical prohibition).

276. *Deuteronomy* 22:5.

277. Teitelbaum, *Sex Change Operations*, 208 HAMAOR 10 (1973).

278. JACOB BEN ASHER, TUR, *Yoreh Deah* ch. 182.

279. IBN EZRA, *commenting on Leviticus* 18:22.

280. Y. PALACHI, YOSEF ET ECHAV 3:5, as quoted in 1 CONTEMP. HALACHIC PROBLEMS, *supra* note 169, at 103-04.

tion of a marriage contracted prior to transsexual surgery.[281] This position is, at least on its face, contrary to *Ibn Ezra*'s since it implies that the operation successfully turned the husband into a female.

In a recent responsum of the *Tzitz Eliezer*, Rabbi Waldenberg claims that one who undergoes transsexual surgery assumes the status of the sex to which he is now surgically assigned.[282] Rabbi Waldenberg, apparently adopting the intellectual analysis of Rabbi Palachi, states that the transsexual surgery establishes a new person with a new sexual status. Hence, no bill of divorce is necessary in order to sever the previous marriage. Rabbi Waldenberg compares this situation to that of the removal of the prophet Elijah from the earth.[283] He states that just as the wife of a person who has been removed from the earth has had her marriage terminated, so too does a wife of a person who has had his sex reassigned. It is the equivalent of death which also terminates a marriage.[284] This understanding of the rules for terminating a marriage is based upon the position taken by the *Minchat Chinuch*,[285] that if a person no longer can enter into a valid marriage with anybody, that person's prior marriages are terminated.

Some commentators have attacked this responsum, arguing that it implies that an act which is prohibited in Jewish law, and which the law considers merely to be an act of self-mutilation, terminates a marriage duly entered into without the consent, or even knowledge, of the other spouse. These authorities maintain that transsexual surgery has no effect on one's sexual status on Jewish law.[286] They concede that such a person could no longer enter into a marriage as a male, due to his inability to function sexually as one. However, they strongly deny that he could enter into a marriage as a female, as Rabbi Waldenberg implies.[287] This

281. The first discussion on this topic among the latter commentaries is found in TESHUVOT BESAMIM ROSH no. 340. This responsum is not dealt with in this article, since all scholars agree that the BESAMIM ROSH is a forged work and offers no valid precedential or intellectual support in Jewish law. For a complete review of the history of the BESAMIM ROSH, *see* A. JACOBS, THEOLOGY IN THE RESPONSA 347-52 (1975) where the exact details of the forged nature of the BESAMIM ROSH are discussed.

282. E. WALDENBERG, 10 TZITZ ELIEZER, *supra* note 15, at 25:26, 6.

283. II *Kings* 2:1-12.

284. It is unclear what, according to the TZITZ ELIEZER, would be the parental status of a person after a sex change operation. Accepting the full force of his position, one could argue that parental rights and duties are also terminated, since it is as if the old person had died and a new one had been born.

285. Y. BABAD, MINCHAT CHINUCH comm. 203.

286. *See* F. ROSNER & M. TENDLER, PRACTICAL MEDICAL HALACHA 44 (1980).

287. When discussing transsexual surgery, it is important to note that the law concerning children born with ambiguous sexual status, is different from that of sex reassignment surgery in an adult. When a child is born genetically of one sex but with the outward physiological signs of another sex, it is permitted to remove the outward sexual organs and to harmonize the physiological appearance of the sexual organs with the genetic sexual status. That is not considered a violation of Jewish law as the sexual organs are not in fact genuine sexual organs capable of reproduction. This would also be the case of a person whose general physiological appearance is not in harmony with his genetic status. However, it is not true of a person whose genetic and physical appearance is not in harmony with his perceived psychological status. *See id.* at 43-45; Steinberg, *Change of Sex in Pseudo-hemaphroditism*, 1 ASSIA 142 (1976).

author believes that the second position is correct — primarily because Jewish law as codified appears not to accept the position that one who cannot enter into a marriage has his current marriage terminated,[288] and this is in accordance with Rabbenu Chananel quoted above.[289]

In the extremely new topic of sex reassignment surgery, American law remains true to its analytic premise. The law is given the right to reassign sexual identity, just as it is given the right to reassign parental status. Although there is a vigorous opinion to the contrary, this author believes that Jewish law also remains consistent with its own premise, and maintains that sexual status cannot be legally changed once correctly established.

VI. CONCLUSION

When surveying the establishment of parenthood and parental status in both American and Jewish law, a number of methodological conclusions can be drawn. The most significant feature in Jewish law is its methodological consistency for dealing with questions of maternity, paternity, and parental status. Jewish law focuses on immutable relationships, easily ascertainable and without any subjective elements of court judgment. Paternity is irrevocably established by being the biological and genetic father. Even in the relatively difficult case of artificial insemination, Jewish law looks to objective criteria, even if there is a dispute over which objective criteria should control. Jewish law does not accept the American approach of looking at various fact-specific equities, such as estoppel between the litigants, or consent to various actions, or the presence of an adopted child whose custodial situation is apparently not in harmony with the legal parental situation. Jewish law fixes on unchangeable paternity established at birth.

The same can be noted about maternal relationships. Jewish law immutably establishes that the natural parent is the mother. In the case of surrogate motherhood, motherhood is fixed by determining when conception occurred, and where that is not legally dispositive, as in test tube conception, where birth occurs, nonetheless, Jewish law bases its establishment of motherhood on objective, rather than subjective, criteria. American law has historically rejected these criteria and maintains that parenthood can be totally transferred by the courts, and that the equities of each and every situation require a different result. This is true in the establishment of both maternal and paternal relationships. Courts do not hesitate to rule in light of the equities and have even stated that transfer of custody is the appropriate remedy for a breach of contract.

288. Such a position cannot be found in any of the classical decisors of law.

289. *See supra* text accompanying notes 279-82.

The differences between American and Jewish law are highlighted when contrasting attitudes towards adoption. Jewish law, while encouraging the raising of parentless children, denies that adoption can transfer parental rights and duties from the natural parent to another person. On the other hand, American law focuses on a wider range of subjective criteria such as consent or abuse, and uses a "best interest" of the child form of analysis. The identical bifurcation can be noted in sex reassignment surgery, where American law is willing to shift sexual identity based upon mutable criteria, while Jewish law is not.

Thus, when surveying the establishment of parenthood and sexual status a concrete difference in methodology between Jewish and American law appears. Jewish law is objective and unchangeable. It emphasizes broad systemic concerns, and is willing to have apparently anomalous situations, such as children being raised by people who are not their legal parents, in return for theoretical consistency and ease in the applications of its rules. On the other hand, American family law focuses on the equities of the parties before the court. If any particular result on those facts is unjust, the court will transfer parental rights or create a more equitable situation for the litigants. The systemic uniformity, which is sacrificed through the application of different standards to analytically identical problems, is apparently not a significant force in American law.

The approach of Jewish law to these topics is instructive in various ways. While justice to the litigants and the promotion of equity to the parties is a valuable goal, consistency on a more global basis has many virtues. Inconsistency of methodology in similar cases, and rules too complicated to be applied, do not promote the interests of justice on a societal scale. Jewish law has clearly opted for simplicity of its fundamental rules in the belief that this will promote justice on a broader societal scale. That approach is perhaps one that American law should contemplate.