ingly interrelated world, an appreciation of competing values may increase opportunities for mutual understanding, cooperation, and respect.

This symposium offers perspectives from three religious law traditions: Roman Catholicism, Islam, and Judaism. Each of the three legal traditions offers a comprehensive, normative system that translates doctrine into practice and religious values into concrete directives. While the place of theological law differs in the respective religious bodies, each body asserts a binding authority over its confessional members.

In preparing the symposium, the editors adopted a format of responses to specific fact patterns that raise pertinent issues in familial life. These fact patterns were presented to legal writers from the three traditions, who were then asked to respond to the situations within the context of their own religious law. It is interesting to note that not only do the authors' conclusions differ on each subject, but so do their underlying beliefs about the pertinent issues raised by the fact patterns. Our laws express values that are rooted in religious doctrine and belief; as the beliefs differ, so do their concrete expressions in the law.

The editors wish to acknowledge and thank Gerald T. McLaughlin, Dean of Loyola Law School, for both suggesting the topic of the symposium and assisting in its development. It is through such comparative studies that jurists may more thoroughly understand the manifold contributions of religious legal systems to American law and the particular religious values that provide the basis for American legal thought.

II. Duty to Educate—Fact Pattern

Part A

Fred and Ethel are a married couple living in rural Ruritania. They are wealthy farmers, as were their parents before them. They have a child named Johnny, who is lovingly raised by them.

Ruritania provides free education for every citizen; however, education is not compulsory. Neither Fred nor Ethel were formally educated, so they see no reason for Johnny to receive a formal education. They consider no other future for Johnny other than farming. Therefore, they do not allow him to obtain a formal education, even though Johnny appears bright and says that he wants to go to school and learn.

Later, when Johnny reaches adulthood, he has his intelligence tested. He is discovered to be a near genius in natural ability. No university, however, will take this unschooled young man. He is now locked into a farming career, as his options have been narrowed significantly by his lack of formal education. Johnny is so unhappy with his situation that he wishes to sue his parents for a breach of the duty to educate him. He comes to you to inquire whether your laws can help him. His parents desire the same advice.

Part B

David and Mary share the same religious faith and are actively committed to it. As their children approach school age, however, David and Mary become increasingly concerned about the moral environment the children will find in school. They agree that no social environment is value-free, and that the public school system fosters an environment of moral relativism repugnant to them. They consider this environment to constitute a secular religion that contradicts their own faith.

David and Mary also believe they have the fundamental right to choose the educational environment of their children, as they, not the state, are primarily responsible for their children's welfare. David and Mary conclude that their tax money spent on education should be allocated to the school of their choice. For the state to refuse to allocate funds to the school of their choice would be tantamount to establishing a secular religion and thus denying individuals the free exercise of their own. They plan to bring suit and desire your advice.

A. Roman Catholic Response

JAMES CONN, S.J.*

Part A

As in Anglo-American law, the Roman Catholic moral and canonical traditions require both a substantive and procedural analysis of the instant case. Substantively, the question is whether Johnny has a right to a formal education. If the answer is yes, we

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children get the best possible education. In Islam, such an education carefully balances temporal knowledge with spiritual and moral education.

If the case appears to be constitutionally viable, then David and Mary should contact other Muslims, People of the Book (mainly Christians and Jews), as well as other Americans who may share a similar position. I would recommend that they consider the possibility of these other individuals joining them in the suit to give the suit a broader base and a greater chance of success.

On the other hand, if the suit by David and Mary is not viable, they should attempt to supplement their children's education through additional instruction at home. If they conclude, however, that this is useless in light of overwhelming negative influences and pressures in the local public schools, and if they cannot discover any alternative resolutions that protect their children's well-being, David and Mary ought to contemplate moving to a more suitable community in the United States. After all, the *Qur'an* clearly recognizes the efforts of those who immigrate for God's sake.[28] Such a move, however, should be undertaken only as a last resort because it is preferable to advance the cause of morality in one's own community.

C. Jewish Response

MICHAEL J. BROYDE*

> "Rabbi Judah states: Anyone who does not teach his children a profession, it is as if he has taught them robbery."[1]

Part A

As the above quote makes clear, Jewish law requires that one teach one's children a profession.[2] This duty is part of the specific

28. *Id.* at IX:20.

* J.D., New York University; Ordination, Yeshiva University. Rabbi Broyde is an Assistant Professor in the Department of Religion at Emory University, Atlanta, Georgia, and also serves at Emory University Law School as an Adjunct Assistant Professor. Writing about educational issues reinforces the author's feelings of profound gratitude towards his parents, Rabbi Dr. Barret Broyde and Dr. Suse Broyde, for the education they provided to him. It is difficult for a child to express the magnitude of debt owed to a parent.

1. BABYLONIAN TALMUD, *Kiddushin* 29a, 30b.

2. Interestingly, it is unclear if the word "livelihood" is synonymous with the word "profession" in this context. A profession appears to mean more than a way to earn a

obligation to educate one's own children.[3] Generally, Jewish law on the parental obligation to teach one's children has three different, yet interrelated, components. The first is the obligation to educate one's children in accordance with the tenants of the faith, both in matters of theology and in matters of ritual practice.[4] The second is the obligation to teach one's sons *torah*, the corpus of classical Jewish law and ethics that all are obligated to study.[5] The third and final obligation is to train one's children in a trade or livelihood.[6] The second and third obligations are mentioned in the *Talmud* and Responsa in various forms and places,[7] and are the focus of this Essay.[8]

The duty to teach a child *torah* (Jewish law and ethics) is a clear biblical obligation upon the father that is recited every day in

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living; it denotes specific skills. As implied by Rabbi Joshua Boaz, a parent does not fulfill this obligation merely by providing a child with an ongoing source of income such as a trust fund, or by providing the child with an income-producing business that the child derives income from but cannot run. Rabbi Joshua Boaz, *Sheltai Gibborim*, *in* BABYLONIAN TALMUD, *Kiddushin* 12a(1) (Rif pages). Instead, the law appears to obligate parents to provide a skill for the child. On the other hand, providing children with the skills needed to be farmers, rather than just providing the farm, would certainly fulfill this obligation. *See* Rabbi Shlomo Yitzchaki (Rashi), *in* BABYLONIAN TALMUD, *Kiddushin* 30b (stating that Rabbi Yehuda's ruling was predicated on the belief that, absent work to occupy the child's time, the child might turn to robbery out of boredom). *See also* Rabbi Abraham Gumbiner, *Magen Avraham*, *in* SHULCHAN ARUCH, *Orach Chaim* 156 [hereinafter *Magen Avraham*].

3. *See generally* 16 ENCYCLOPEDIA TALMUDICA, *Chinuch* 162 (1978).

4. For a general discussion of this *mitzvah* and its parameters, see *id.*

5. SHULCHAN ARUCH, *Yoreh Deah* 245:1. For a very detailed discussion of the parameters of a woman's obligation to study Jewish law, see SHOSHANA PANTEL ZOLTY, AND ALL YOUR CHILDREN SHALL BE LEARNED: WOMEN AND THE STUDY OF TORAH IN JEWISH LAW AND HISTORY chs. 1, 2, 3, 9 (1993). This book is an extraordinary survey of the topic and deserves reading by all interested.

6. Rabbi Asher ben Yecheil, *Commentary of Rosh*, *in* BABYLONIAN TALMUD, *Kiddushin* 29a, 30b; *see also* Rabbi Nathan Weil, *Karban Nethanial*, *in* BABYLONIAN TALMUD, *Kiddushin* 29a.

7. It is worth noting that the rule requiring that one teach one's child a trade is not cited explicitly in either Maimonides' code or *Shulchan Aruch*. As demonstrated by Rabbi Jacob Emden, this does not mean that these authorities reject such an obligation. *See* RABBI JACOB EMDEN, RESPONSA SHELAT YAVETZ 2:68; RABBI OVADIA YOSEF, RESPONSA YACHAVE DAAT 3:75.

8. Indeed, this answer assumes that the practical religious education of Johnny is somehow taken care of independently from the issue of providing a trade for him. According to the Jewish tradition, it is clearly prohibited for Fred and Ethel to deprive Johnny of educational opportunities within the field of Judaic studies or Jewish law, even if they could so deprive him of a secular education and confine him to life on the farm. For a long essay on this topic, see ENCYCLOPEDIA TALMUDICA, *supra* note 3, at 162-202.

the prayer service. This is one of the basic obligations of a parent.[9] Indeed, in situations where the parent is incapable or unwilling to fulfill the obligation, others must do so at the father's expense.[10] Thus, one must make one's children as literate and competent as possible in the fields of *Judaica*.[11] Yet, because one reaches adulthood at the age of twelve or thirteen in Jewish law,[12] a father is certainly not obligated to educate his son or daughter beyond legal adulthood.[13] Thus, the duty ends upon legal maturity.

The duty to train a child to earn a livelihood is not explicitly found in any of the classical post-*talmudic* codes, although it is clearly an obligation under Jewish law. This duty is also created by a specific rabbinic commandment.[14] It is unclear how precisely one needs to teach a child such a livelihood, particularly when the need to earn a living conflicts with the obligation or inclination to study Jewish law or other aspects of Judaism.[15] Yet, it is clear that an obligation does exist.[16] Thus, the pressing question is whether Jewish law requires a father to provide for the intellectual training of a child, in addition to training for technical matters of earning a livelihood or *Torah* study. Jewish legal tradition indicates that it does not. Except for the child who wishes to pursue advanced studies in *Judaica*, the father who is willing and able to provide a child with career training through which he may earn a living, even in a discipline that the son does not find intellectually attractive, has clearly fulfilled the obligation. Thus, it appears that Fred and Ethel have

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9. This is found in *Deuteronomy* 11:19, and is one of the three paragraphs recited every day with the *Shema* and its related prayers.

10. SHULCHAN ARUCH, *Yoreh Deah* 245:2, 3, 7. It is worth noting that, when a parent is unavailable and a guardian has been appointed, the guardian is under an obligation to educate the child. *See* RABBI EZRA BATZRI, DINNAI MAMMONUT 3:353 (2d ed. Machon HaKatav 1990).

11. *See generally Magen Avraham*, *supra* note 2; *see also supra* notes 2-6; 1 ENCYCLOPEDIA TALMUDICA *Av* 5 nn.108-14 (2d ed. Yad Harav Herzog 1972).

12. Twelve for a girl and thirteen for a boy. SHULCHAN ARUCH, *Orach Chaim* 55:9, *Even Haezer* 155:12. This age also requires signs of physical maturity. *Id.*

13. There is, however, a series of decrees by the Israeli Chief rabbinate that requires a parent to support the children into adulthood. These decrees are not discussed in this Essay.

14. Indeed, as recounted in the *Babylonian Talmud*, this obligation supercedes one particular aspect of the Sabbath laws. BABYLONIAN TALMUD, *Ketubot* 5a.

15. *See* YOSEF, *supra* note 7, at 3:75 (addressing the issue of whether one should send a child to a trade school or an institution of higher study of Judaism). Rabbi Yosef concludes that the obligation to teach a child about Judaism supersedes the obligation to teach them to errand a living. *Id.*

16. *See supra* notes 2-6 and accompanying text.

fulfilled the third part of the duty to educate their son, namely, to provide for his livelihood on the farm with the necessary skills to become a farmer.

It is unlikely, however, that Fred has fulfilled his mandate to teach his son *Judaica* to the full extent mandated by Jewish law. Was Johnny given instruction in Jewish law, the various codes, and *talmudic* texts? Was he exposed to the breadth and depth of Jewish learning? While it is true that one need not expose one's children to all secular disciplines[17] as part of the religious mandate to educate one's children, within *Judaica* more exposure is better.

Under Jewish law, a community may force parents to educate their children properly.[18] What is clear from the Jewish perspective, however, is that the obligations a child has to a father, and a father to his child, are not financially actionable retrospectively.[19] Instead, Jewish law retrospectively sees the parents' failure as a violation of a divine obligation, not remediable by the civil law. Therefore, the son has no cause of action to sue his father for the father's failure to educate him; similarly, the father may not sue his son for his son's failure to honor him.[20]

If a son were to take advantage of a secular cause of action and sue for breach of duty to educate under the common law[21] of the secular courts, I would remind him that Jewish law prohibits, at least for Jews, resorting to the secular legal system to resolve these types of disputes. The *Babylonian Talmud* prohibits this kind of lawsuit in secular court when it states:

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17. This is not to say that the exposure to all things secular is prohibited or unwise, but merely that it is not mandated by Jewish law. *See generally* RABBI NORMAN LAMM, TORAH UMADAH *passim* (1992).

18. *See* sources cited *supra* note 10.

19. In other words, no *damages* may be sought by a person against his parents for their failure to educate him.

20. The sole actionable financial claim is for the ongoing obligation to support, whether it be parents by children or children by parents. *See generally* GERALD BLIDSTEIN, HONOR THY FATHER AND MOTHER: FILIAL RESPONSIBILITY IN JEWISH LAW AND ETHICS chs. 3-4 (1975).

21. It is clear that, historically, there has been a common law duty to educate one's children, as in Jewish law. The common law, however, occasionally would recognize in tort a failure to educate. *See* Frank D. Aquila, *Educational Malpractice: A Tort en Ventre*, 39 CLEV. ST. L. REV. 323 (1991); Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992) (particularly material cited in note 280); John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349 (1992). *But see* Kathryn J. Parsley, Note, *Constitutional Limitations on State Power To Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441 (1991).

> Rabbi Tarfon stated: In all situations where one finds Gentile courts, even if their laws are the same as Jewish law, one may not use them for judgment, because the Bible states; "these are the laws that you shall place before them," that is to say, "before the Jews" and not before Gentiles.[22]

Indeed, Rabbi Karo clearly states that "[i]t is prohibited to be judged before Gentile judges or their courts, even if they apply Jewish law and even if both litigants agree to be judged by them."[23]

Thus, even if the child could show a valid cause of action under the law of the state in which he or she resides, such an action would be improper. First, the plaintiff violates the above prohibitions by initiating a suit against the wishes of the other party who would prefer a Jewish tribunal. Second, it is akin to thievery when the plaintiff is awarded damages that Jewish law would not otherwise award.[24]

In sum, Johnny should not sue. As a matter of substantive Jewish law, there is a clear duty to educate one's children, but there is no remedy in tort for the breach of that duty. Further, even if such a remedy existed, Johnny suffered no damages because his parents provided him instruction in a trade. Additionally, any suit would violate Jewish law because resorting to secular courts is prohibited.

If he wishes, Johnny may leave his parents and seek the education he desires. Jewish tradition avers that Rabbi Akiva did not begin to pursue Judaic studies until he had reached the age of forty; however, after diligent study that he began at an age much older than Johnny is now, Rabbi Akiva became the preeminent scholar of his generation.[25] There is no need for Johnny to harbor a grudge, as his parents did for him what they thought was in his best interest.

In final words of advice to Johnny's parents, Jewish law requires that Fred (and Ethel) educate their children. The obligation is not limited merely to the duty to teach them technical aspects of observing ritual law, but also to teach them all aspects of Jewish

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22. BABYLONIAN TALMUD, *Gittin* 88b. For more on this issue, see generally Michael J. Broyde, *The Practice of Law According to Halacha*, 20 J. HALACHA & CONTEMP. SOC'Y 5 (1992).

23. SHULCHAN ARUCH, *Choshen Mishpat* 26:1.

24. *See* Rabbi Akiba Eiger, *in* SHULCHAN ARUCH, *Choshen Mishpat* 26:1; RABBI ISRAEL MEYER MIZRACHI, RESPONSA PRI HAARETZ, *Choshen Mishpat* 1:13.

25. *See* AKIBA BEN JOSEPH, THE JEWISH ENCYCLOPEDIA 1:304-10 (1901).

law and the intellectual love for learning and studying *Torah*, such as Jewish law, *Bible*, and *Mishnah*. They did not fulfill that mandate with Johnny, who now feels deprived. According to technical rules under Jewish law, they are under no ongoing obligation to provide for Johnny's further education. Yet, they must do better by their remaining children; they should send them to a Jewish school where the children will receive both a Jewish and a secular education. Additionally, it would be the charitable thing to do to support Johnny while he pursues his goals of a higher education.[26]

Part B

The issue presented in this case has nothing to do with substantive Jewish law. The Jewish education network educates nearly 400,000 children every year.[27] There is an acute money shortage within the Jewish education system that undoubtedly hampers its effectiveness, and at every opportunity the Jewish community seeks to expand the asset-base available to support Jewish education.[28] Indeed, this cross-religious alliance to expand governmental support for parochial schools is most likely the single most significant forum of interfaith cooperation functioning in the United States.[29]

Clearly, allowing parents to pay for the private Jewish education of their children out of money that would otherwise be spent on educating them in public schools would vastly increase the number of Jewish children attending Jewish schools.[30] An increase in Jewish education would, over the course of a number of years, vastly increase the pool of educated Jews, which would lead to an increase in Jewish activity in every facet of American life. There is

26. SHULCHAN ARUCH, *Yoreh Deah* 251:3.

27. *See* Sergio Dellapergola and Uziel Schmelz, *Demography and Jewish Education in the Diaspora*, *in* JEWISH EDUCATION WORLDWIDE: CROSS CULTURAL PERSPECTIVES 43, 55 (Harold Himmelfarb & Sergio DellaPergola eds., 1989).

28. For example, one who compares the rate of attendance at Jewish day schools in Canada and the United States notes that the Canadian rate is markedly higher, undoubtedly due to the reduced burdens of tuition. *See generally* Jerome Kutnick, *Jewish Education in Canada*, *in* JEWISH EDUCATION WORLDWIDE, *supra* note 27, at 135.

29. For example, in Decker v. O'Donnell, 661 F.2d 598 (7th Cir. 1980), the Union of Orthodox Jewish Congregations filed an amicus brief supporting the right of the Roman Catholic Archdiocese of Milwaukee to use taxpayer-provided money for job training. These alliances cross profound theological barriers. *Id.*

30. *See, e.g.*, Ya'acov Rubel, *Jewish Education in Argentina*, *in* JEWISH EDUCATION WORLDWIDE, *supra* note 27, at 185 (noting the precipitous decline in enrollment in Argentina's Jewish schools as tuition increased).

a clear statistical correlation between Jewish education and involvement in every area of Jewish existence.[31]

What David and Mary seek is a wonderful idea and a glorious dream. Nonetheless, the constitutional claim that they are seeking to litigate has no chance of succeeding in the milieu of American jurisprudence, and has been rejected repeatedly by every court that has examined it in the last twenty years.[32] Thus, I would urge them to abandon any idea of suing, even as I commend their outrage.[33] David and Mary have no chance to succeed through a lawsuit and it will benefit no one except the lawyer they employ.

I would, however, suggest that David and Mary involve themselves politically in this cause.[34] Much can be changed in local school boards. They should involve themselves by running for office or joining a political action committee. If a time comes when a lawsuit might succeed, they should then file one. Until that time, they should do what the rest of the committed Jewish world has done; send their children to a Jewish day-school, even at great personal sacrifice.

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31. *See, e.g.*, Geulah Solomon, *Jewish Education in Australia*, *in* JEWISH EDUCATION WORLDWIDE, *supra* note 27, at 395, 431 (noting the correlation between early Jewish education and adult involvement in communal Jewish issues).

32. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1214-26 (2d ed. 1988) (reviewing the various cases). As described by Tribe, it is abundantly clear that this lawsuit would have no chance of succeeding.

33. There is no tension between the right to sue permitted under Jewish law and the prohibition to sue noted in Part A of this Essay. In this case, David and Mary would sue the school district, whereas in the suit contemplated in Part A, Johnny would sue his parents. Public causes of action, such as those actions created by secular governments under the rubric, "The law of the land is the law," that aid the government in its task of governing, may often be litigated in secular court. One may unquestionably litigate against the government or its agents or agencies, such as the Securities and Exchange Commission, the Environmental Protection Agency, or the Internal Revenue Service. Also permitted is any litigation where the primary cause of action was created by the secular government and involves public litigation in order to "make the world a better place" (*tikkun ha'Olam*). *See, e.g.*, SHULCHAN ARUCH, *Choshen Mishpat* 369:8; RABBI JOSHUA FALK, SEFER MEIROT AYNAYIN (SEMA) 269:21. It is sometimes difficult to determine whether an action is public or private according to Jewish law. *See generally* Steven Resnicoff, *Bankruptcy—A Viable Halachic Option?*, 24 J. HALACHA & CONTEMP. SOC'Y 5 (1992) (discussing whether bankruptcy and discharge are public or private actions).

34. As noted by Laurence Tribe, it is clear that a school district can legally provide large amounts of aid to parochial schools *if it wishes to*. *See* TRIBE, *supra* note 32, at 1214-26 (discussing the various permissible and impermissible types of aid).

herently undesirable situation for the child, the dictates of Jewish law require the judge to award the embryos to George.

If, for some reason, the judge awarded the embryos to Diane and she produced children from them, then George would, indeed, be responsible for child support. This is true until and unless the children are adopted by any new husband of Diane. Therefore, George would have yet another property interest in preventing Diane from having children with their joint embryos.

V. Prenuptial Agreements—Fact Pattern

John and Deborah are young professionals in their early thirties. They come from different religious backgrounds. In their professional careers, both have acquired significant financial assets. After dating for several years, the couple decides to marry. Although they are sure that their love will last forever, John and Deborah are also aware that divorce does occur, and are concerned about the religious upbringing of their children as well as the considerable financial investments each has made. In consultation with an attorney, the couple is preparing to sign an agreement that would settle property disputes in the event of divorce. The agreement also indicates that they desire to have two children, the first to be raised in the religion of the father and the second in the religion of the mother.

One week before the document is ready to be signed, John begins to have serious doubts about the propriety of such an action. He is now appalled at the notion of planning for divorce while planning for marriage. He has come to question Deborah's commitment to the marriage and whether the prenuptial agreement itself precludes a legally valid marriage. He comes to you for advice.

A. Roman Catholic Response

Michael R. Moodie, S.J.

From the perspective of Roman Catholic canon law,[1] John and Deborah's prenuptial agreement raises the question of conditioned

1. Canon law is not of exclusively Roman Catholic usage. The Eastern Orthodox churches, as well as some sectors of the Anglican Church, refer to their laws as "canon law." The term *canon* comes from the early centuries of Christianity. The Greek word Κανου, meaning a "rule" or "measure," was used to refer to the laws passed by Church Councils; distinguish this from the Νομοι, or "imperial laws."

jective value. This view is likely to result from the children's inability to appreciate philosophical differences among the three Abrahamic religions. Therefore, despite their parents' best intentions, such children may flounder spiritually in, or even totally reject, the very milieu from which they were supposed to have derived their early guidance and support.

It is for these reasons that parents must provide their children with solid guidance until they are old enough to properly understand questions in life and make their own choices. American family law lent its support to this point of view when many states decided not to honor agreements among parents relating to "splitting" the children along religious lines. Instead, these states chose to entrust the primary caretaker with the religious upbringing of the children, regardless of any prior agreements between the two parents.[22] It would be advisable for John and Deborah to discuss these potential problems thoroughly prior to marriage.

C. Jewish Response

MICHAEL J. BROYDE

There are two aspects of John and Deborah's prenuptial agreement that require analysis. First, the agreement purports to allow John and Deborah to raise their two children in separate faiths. Second, the agreement dictates the financial circumstances of a future divorce. Although the latter is not definitionally problematic in the Jewish tradition, the agreement is completely void with respect to the religious upbringing of their children.

1. Intermarriage in the Jewish Tradition

Before discussing the prenuptial agreement itself, it is important to note that the hypothetical raises a serious problem under Jewish law; namely, interfaith marriages are completely prohibited according to the Jewish tradition. The statement of Rabbi J. David Bleich as to the nature of the violation is clear, unambiguous, and to the point. He states:

> Among Jews no practice is more widely abhorred than is intermarriage. Commitment to take as a marriage partner only a fellow member of the Jewish community is not only a matter of religious obligation but the bedrock of Jewish ethnic identity.

22. *See, e.g.*, PETER N. SWISHER ET AL., VIRGINIA FAMILY LAW §§ 3-7 (1992 Supp.).

> A popular folk saying observes that wherever there are two Jews, there are three opinions. It seems that in the area of *Halacha* the number of opinions often increases geometrically, according to the number of authorities writing about or discussing any given topic. In the area of intermarriage, however, this is not the case; there is little, if any, disagreement, and there are very, very few hairs to split.[1]

Accordingly, because Jewish law does not recognize interfaith marriage as legally binding, it would allow and encourage both parties to terminate the relationship at any time.[2]

2. Religious Upbringing of Children in the Jewish Tradition

Although intermarriage is forbidden under Jewish law, it is still a practical reality that intermarriages do occur. Thus, Jewish law still governs problems arising within intermarriages, such as the prenuptial agreement proposed between John and Deborah.

As to the agreement's provisions concerning the religious affiliation of their children, the agreement would be void in the eyes of Jewish law because Jewish law seeks to have all children raised in the faith of the mother. In fact, Jewish law recognizes the faith of the mother as being the faith of her children.[3] Indeed, it does not recognize paternity as legally established in the case of intermarriage; this is true whether the father is Jewish and the mother is not, or vice versa.[4] No paternal relationship is legally established. Thus, according to Jewish law, the child of a Jewish-Gentile mar-

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1. Rabbi J. David Bleich, *The Prohibition Against Intermarriage*, 1 J. HALACHA & CONTEMP. SOC'Y 5 (1980). Rabbi Bleich is a Professor of Law at Benjamin Cardozo School of Law, *Rosh Yeshiva*, Yeshiva University. He is one of the premier writers and influencers of Jewish law in America. [Admittedly, some do theorize about the precise nature of the prohibition on intermarriage. Yet, on a practical level, intermarriage is clearly forbidden.].

2. Like incestuous marriages and adulterous marriages, these "marriages" are void and of no legal significance. SHULCHAN ARUCH, *Even Haezer* 16:1-2.

3. *Id.* at 8:4.

4. 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*, *in* SHULCHAN ARUCH, *Even Haezer* 16. This is equally true in cases of artificial insemination. *Id.*

riage always assumes the legal status and religion of its mother and bears no legal relationship to its father.[5]

3. Acceptability of Financial Planning Under a Prenuptial Agreement

The question of the validity of the financial aspects of the agreement under Jewish law in the case of an intermarriage is nearly a question of first impression to this author. The most likely answer is that the agreement is valid in this respect, as Jewish law recognizes the right to contractually regulate financial activity through mutual agreement; this is true even if the agreement is contrary to Jewish financial law and concerns a prohibited transaction—in this case, an intermarriage.[6] Nevertheless, this issue requires further analysis that is beyond the scope of this Essay.

4. Conclusion

In short, John and Deborah should not sign the prenuptial agreement and, more significantly, should not enter into a marriage. A commitment to religious values entails a commitment to same-faith marriages. An intermarriage is equivalent to an abandonment of the Jewish faith.

VI. CONTRACEPTION—FACT PATTERN

Helen and Herbert have been married for three years. They are childless. Helen and Herbert have no economic concerns, as they are beneficiaries of a rather generous trust. Helen has decided that she does not wish to bear children and sees a doctor to obtain a birth control device. Helen believes that natural methods are too uncertain, and she is concerned about the side effects of birth control pills. She chooses to have one of the new "safer" Intrauterine Devices ("IUDs") inserted into her uterus. In the event that the IUD fails, however, Helen is open to the option of abortion.

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5. *See* BABYLONIAN TALMUD, *Yevamot* 22a-b; RABBI JACOB BEN ASHER, TUR, *Even Haezer* 16; SHULCHAN ARUCH, *Even Haezer* 8:4.

6. *See* SHULCHAN ARUCH, *Choshen Mishpat* 208. This result is agreed to by my colleague, Rabbi Howard Jachter of Congregation Beth Judah, Brooklyn, N.Y., an expert on prenuptial agreements. For a similar case with a similar result, see Rabbi Chaim Shlomo Shan, *Summoning the Plaintiff to Secular Court*, *in* TECHUMIN 12:257-58 (1990).

Moreover, Helen's duplicitous behavior in this case only adds to the justice and moral correctness of Herbert's case.

VII. MARITAL FRAUD—FACT PATTERN

Alex and Phyllis have dated for four years. They have begun to think seriously about marriage. Throughout the years of dating, Phyllis has often expressed her desire to have a large family; her love of children is well-known. Alex has always agreed with her and apparently loves children as well.

Alex, however, is aware that, because of a childhood illness, he is sterile. He realizes that Phyllis' desire for a large family is so strong that she would probably not marry him if she knew he could not father children. He decides not to tell her, thinking that, once they are married, she will accept not having children or will be amenable to adoption.

After two years of marriage, Phyllis becomes concerned because she is not yet pregnant. After a thorough medical exam, the doctor tells her that nothing is physically wrong. She later insists that Alex make an appointment for a similar checkup, and Alex finally admits the truth. Phyllis is devastated by his deception. She returns to her parents' home and consults an attorney. Because both Alex and Phyllis are of your confession of faith, they request that you provide an *amicus curiae* brief for the court to consider.

A. Roman Catholic Response

MICHAEL R. MOODIE, S.J.

Apart from specific and rare exceptions, Catholic Church doctrine does not admit the possibility of divorce.[1] Consent to marry, once given, cannot be revoked; the resulting marriage is legally indissoluble. Because of this doctrine of indissolubility, the attention of canonists has historically focused upon the conditions necessary to give the binding consent necessary to enter marriage.

1. A word of clarification regarding Catholic doctrine is needed here. The Catholic Church teaches that marriage between two baptized Christians, whether Catholic, Protestant, Orthodox, etc., is a sacrament. A sacramental marriage, once consummated, can never be dissolved. Divorce, consequently, is impossible. The Catholic Church also teaches, however, that marriages between non-baptized persons, although intrinsically permanent, can be dissolved "in favor of the faith." Only the Church can dissolve these marriages, that is, grant a divorce. The Catholic Church does not recognize any other type of divorce, whether religious or civil, as dissolving an existing marriage bond.

cial position under the latter. The argument that God can do the impossible provides a slippery slope that most scholars would not approve of; for example, the argument could later be used to deny other well-established Islamic rights like those of inheritance. The argument, thus, would be that "if God wanted to give someone money, God would have done so anyway." In short, Islamic courts are charged with the responsibility of applying Islamic law carefully and vigorously and are not entitled to vaguely speculate regarding God's will. Phyllis should, therefore, be permitted to annul her marriage to Alex.

C. Jewish Response

MICHAEL J. BROYDE

This hypothetical raises two interrelated issues under Jewish law: First, whether Phyllis may divorce Alex in light of the discovery; and, second, whether Phyllis may choose to remain married to Alex even though he cannot procreate.

According to normative Jewish law, every man is obligated to procreate and have, at a minimum, one boy and one girl.[1] Under normative Jewish law, however, a woman is not obligated to follow the commandment to procreate.[2] Thus, Jewish law would deem it proper if Phyllis were happy to continue in a marriage without having children with her husband.[3]

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1. SHULCHAN ARUCH, *Even Haezer* 1:5. To have more than the minimum is to fulfill a rabbinic commandment. *Id.* at 5-8.

2. SHULCHAN ARUCH, *Even Haezer* 1:13. Different rationales are presented for the reason that Jewish law excluded women from the obligation to procreate. Lord Jacobivitz suggests that it is because a woman's instinct is already so strong that there is no need to add a legal obligation. Julius Preuss suggests that this was done to prevent "a kind of well motivated promiscuity." DAVID FELDMAN, MARITAL RELATIONS, BIRTH CONTROL AND ABORTION IN JEWISH LAW 54 (1975) (citing JULIUS PREUSS, BIBLISCH-TALMUDISCHE MEDIZIN 479 (n.d.)). The *Talmud* linguistically derives it from the woman's exception from combat. BABYLONIAN TALMUD, *Yevamot* 65b. Rabbi Moshe Sofer appears to relate the exception to the risks of childbirth. RABBI MOSHE SOFER, CHATAM SOFER, *Even Haezer* 20.

It has been suggested that there is a rabbinic obligation to procreate applicable to women. Rabbi Noach Chaim Tzui, *Atzay Arazim*, *in* SHULCHAN ARUCH, *Even Haezer* 5:9; RABBI YITZCHAH SHEMELKES, RESPONSA BEIT YITZCHAK, *Even Haezer* 91. This is very difficult to accept in light of the clear statements to the contrary cited above. *See* SHULCHAN ARUCH, *Even Haezer* 1:4 (proposing a possible way to resolve this tension). *See also* FELDMAN, *supra* note 2, at 55.

3. The same could not be said if the case were reversed. Because Jewish law obligates a man to have children, a man is discouraged from staying in a relationship where children cannot be produced, assuming he had no children from a prior relationship. The

On the other hand, Jewish law also recognizes the right of a woman to have a child if she wishes; indeed, it accepts that she may seek to end a marriage if the man is incapable or unwilling to have children with her.[4] Jewish law also recognizes that a woman has a right to an ongoing sexual relationship with her husband.[5] Should the husband be incapable of an ongoing sexual relationship, the wife may end the relationship on those grounds.[6]

Phyllis, therefore, has the ultimate choice of whether to remain married to Alex or divorce him. If she chooses to remain in the marriage, she may choose not to have children, to adopt children, or, according to many authorities, to be artificially inseminated. Regardless of which route Phyllis chooses, she must be aware of the consequences of her choice under Jewish law, and the differences in American law on the same issues.

1. The Alternative of Adoption for Phyllis and Alex[7]

Jewish law does not have an institution called adoption. Although adoption must have been well known in *talmudic* times because of its widespread use in Roman law,[8] the codifiers of Jewish law denied that the law recognized an institution of adoption. Rather, they created an institution that they called "a person who raises another's child."[9] Unlike either Roman law or current U.S.

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ancient custom, however, is not to scrutinize these matters closely, even when people are marrying in situations where no children will be produced. *See* Rabbi Moshe Isserless, *in* SHULCHAN ARUCH, *Even Haezer* 1:3, 154:10.

4. SHULCHAN ARUCH, *Even Haezer* 154:6. As noted by Rabbi Samuel Pardu, this assumes that she has no children from a previous relationship. Rabbi Samuel Pardu, *Beit Shemuel, in id.* at 154:10-11.

5. *See* SHULCHAN ARUCH, *Orach Chaim* 240:1 (discussing the precise parameters of this obligation).

6. SHULCHAN ARUCH, *Even Haezer* 154:6-7.

7. Much of this discussion is based on the author's previous analysis of adoption and artificial insemination, in Michael J. Broyde, Note, *The Establishment of Maternity and Paternity in Jewish and American Law*, 3 NAT'L JEWISH L. REV. 117 (1988).

8. F.P. WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW 72 (1920). Although it is commonly thought that adoption is a relatively recent phenomenon, it is not. Adoption was recognized in the *Babylonian Code of Hamurabi.* THE CODE OF HAMURABI, KING OF BABYLON arts. 185-186 (R.F. Harper trans., 1904). It was also regulated in ancient Greek, Egyptian, and Roman civilization. *See* John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332 (1922); Leo A. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956) (summarizing various ancient adoption laws).

9. *See* BABYLONIAN TALMUD, *Sanhedrin* 19b. This is viewed as a righteous deed. *See also* EXODUS RABBAH ch. 4. Although the institution under Jewish law is different

adoption law,[10] in Jewish law, this act does not change the legal status of the child's parentage.[11] One who raises another's child is an agent of the natural parent and, like any agency rule in Jewish law,[12] 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.[13]

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than commonly accepted notions of adoption, the author uses the terms "adopted child" and "adoptive parents" for ease of communication.

10. Adoption in the United States is one of the few areas of law where common law had no influence, in contrast with England, where the common law rejected *in toto* the institution of adoption. *See* C.M.A. McLauliff, *The First English Adoption Law and Its American Precursors*, 16 SETON HALL L. REV. 656, 659-60 (1986). Thus, from its legal inception, adoption law in America rejected Jewish law's analysis of adoption as a type of agency, and instead accepted the Roman model of legally changing the parenthood of the child. As with Roman law, such a change was apparently total and complete, virtually stripping the child of his prior identity. *See* Sanford N. Katz, *Re-writing the Adoption Story*, 5 FAM. ADVOC. 9, 9-13 (1982).

Adoption laws were intended to put children in an environment where society could not determine that they had been adopted; even the children themselves many times did not know. U.S. law reflected this, severing all parental rights and duties with an adopted child's natural parents, and establishing those rights and duties with the adoptive parents, again following the Roman model. *Id.* The "right to know" controversy has resulted in a number of state statutes governing an adoptee's ability, upon attaining the age of majority, to access adoption information, including information identifying the biological parents. *See, e.g.*, VA. CODE ANN. § 63.1-236 (1993); GA. CODE ANN. § 19-8-23(4)(D) (1993); MICH. STAT. ANN. § 710.68 (1992); MO. REV. STAT. § 453.121 (1992); TENN. CODE ANN. § 36-1-141 (1993); D.C. CODE ANN. § 16-311 (1993). Each of these statutes has different standards for revealing "identifying" versus "non-identifying" information, with the former standards predictably much harder to meet due to privacy concerns. 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. *See generally* Carol Amadio & Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children To 'Stay in Touch' with Blood Relatives*, 22 J. FAM. L. 59 (1983); Marshall A. Levin, *Adoption Trilemma: The Adult Adoptee's Emerging Search for His Ancestral Identity*, 8 U. BALT. L. REV. 496 (1979). These tensions have not yet been resolved in American law. Most states still ascribe to adoption law the ability to recreate maternal and paternal relationships, notwithstanding the knowledge of one's biological parents. 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. Levin, *supra*, at 496-97.

11. Although it is true that there are four instances in the Bible in which adopted parents are called actual parents, these are assumed to be in a non-legal context. *See* 1 *Chronicles* 4:18; *Ruth* 4:17; *Psalms* 77:16; 2 *Samuel* 21:8; *cf.* BABYLONIAN TALMUD, *Sanhedrin* 9b.

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

13. SHULCHAN ARUCH, *Even Haezer* 15:11.

Conversely, one who raises another's child does not assume the biblical prohibitions associated with one's own child. For example, regardless of who is currently raising the child, it is never permitted for a natural parent to marry his or her child. So too, the assumption of custody cannot raise to a biblical level the prohibition of incest between a parent and the adopted child.[14] Further, 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.[15]

On the other hand, certain non-biblical family guidelines promulgated by the rabbis have placed greater emphasis on custody than parenthood. For example, in *talmudic* times, it was decreed that the possessions, earnings, and findings of a minor child belong to his father.[16] Although the wording of the *Talmud* refers only to the father, it is clear from later discussions that this law applies to anyone who supports the child, including adoptive parents.[17] The reasoning behind this rabbinic decree was equity; one who supports a child should get the earnings of that child.[18] Thus, a financially independent minor does not transfer his income to his parents because he is supporting himself.[19] Similarly, the earnings of a dependent adopted child go to his adoptive parents, as the rationale for the decree applies equally to adopted and biological children.[20]

Other examples of adoptive 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,[21] some argue that these rules do not apply in the adoption scenario. Specifically, although

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14. *Id.* ("It is permitted to marry one's adopted sister.").

15. BABYLONIAN TALMUD, *Sotah* 43b. One medieval authority, Rabbi Judah ben Samuel, decreed that such marriages not be performed. JUDAH BEN SAMUEL OF REGENSBERG (HA'CHASID), SEFER HA'CHASIDIM sec. 829 (Rebeun Margolies ed., 1956) [hereinafter SEFER HA'CHASIDIM]; *see also* BABYLONIAN TALMUD, *Sotah* 43b. This decree has not been generally accepted. *See* RABBI M. SOFER, RESPONSA, 2 *Yoreh Deah* 125. Although legally permitted, few such marriages are actually performed. *Id.*

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

17. SHULCHAN ARUCH, *Choshen Mishpat* 370:2.

18. Rabbi J. Falk, *Meirat Einaim*, *in* SHULCHAN ARUCH, *Choshen Mishpat* 370:2.

19. SHULCHAN ARUCH, *Choshen Mishpat* 370:2.

20. *Id*; *see also* Rabbi Z. Mendal, *Be'er Haytaiv* § 4, *in* SHULCHAN ARUCH, *Choshen Mishpat* 370:2.

21. In Hebrew, these are the laws of *yichud*. *See* Shulchan Aruch, *Even Haezer* 22:2.

some commentators disagree,[22] many maintain that it is permissible for an adopted child to live with his adopted family,[23] notwithstanding the *prima facie* violations of the above prohibition.[24] As one of these commentators noted, without this lenient rule, the institution of raising another's child would disappear.[25]

Another example of the different treatment of adopted children under ritual law is the adopted children's lack of obligation to recite the mourner's prayer (*kaddish*) upon the death of their natural parents, and the incumbent obligation for them to mourn upon the death of their adoptive parents.[26] This is so because the institution of mourning is rabbinic in nature.[27] There exist numerous other examples of rabbinic institutions not strictly applied in the context of raising another's child, as Jewish law encourages this activity.[28]

Notwithstanding the high praise given by Jewish law to a person who raises another's child,[29] it is critical to realize that the institution of adoption in Jewish law is radically different from U.S. adoption law. 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 rather than natural parenthood, they are the exception, not the rule. Jewish law focuses entirely on natural relationships to establish parental rights and duties.

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22. 4 RABBI M.M. SHNEERSON, ZICHRON AKEDAT YITZCHAK 33-37. For a complete list of authorities agreeing with this position, see Azarya Berzon, *Contemporary Issues in the Laws of Yichud*, 13 J. HALACHA & CONTEMP. SOC'Y 77, 108 (1986).

23. For example, this occurs when a couple adopts a boy and the boy's adoptive father later dies, leaving the adopted child living alone with a woman not his natural mother.

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

25. 6 WALDENBERG, *supra* note 24, at 40:21.

26. RABBI M. SOFER, RESPONSA 1 ORACH CHAIM 164. Rabbi Sofer also notes the praise Jewish law gives to one who raises another's child.

27. This issue is in dispute. *Compare* SHULCHAN ARUCH, *Yoreh Deah* 398:1 *with* Rabbi Moshe Isserless, *in id.* 399:13.

28. *See generally* SHULCHAN ARUCH, *Orach Chaim* 139:3; *see also* Rabbi Abraham Gumbiner, *Magen Avraham*, *in* SHULCHAN ARUCH, *Orach Chaim* 156; 1 RABBI MOSHE FEINSTEIN, IGROT MOSHE, *Yoreh Deah* 161.

29. *See supra* note 9 and accompanying text.

Thus, if one chooses to adopt, it would be a laudable action. Yet, the adoptive parent must realize that the natural parents will always remain the true "parents" of the adopted child.

2. The Alternative of Artificial Insemination

Along with the traditional options of adoption and childless marriages, a woman whose husband is sterile could have children through artificial insemination. The permissibility of artificially inseminating a married woman with sperm other than her husband's is the subject of a multi-sided dispute in Jewish law, and touches on issues of adultery, legitimacy, and modesty.[30]

There are four basic positions that discuss this issue. The first position, held by Rabbi Moshe Feinstein, permits artificial insemination[31] and establishes the paternity of the child by the genetic relationship between the child and the father.[32] Thus, he who donates the sperm is the father. Further, Rabbi Feinstein believes that the act of artificial insemination does not violate Jewish law,[33] and does not constitute an act of adultery by the woman.[34]

The second position, held by Rabbi Teitelbaum, is identical to the first in that it acknowledges the legal significance of the genetic relationship and recognizes that paternity is established solely through the genetic relationship.[35] Yet, this position also maintains

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30. According to Jewish law, non-biological relationships such as those created by adoption are not recognized as creating a prohibition against marriage. BABYLONIAN TALMUD, *Yevamot* 21a. Indeed, as noted in the *Shulchan Aruch*, it is permissible to marry one's adopted sibling, even if he or she was raised in the same house. SHULCHAN ARUCH, *Even Haezer* 15:11. Thus, it is safe to say that, according to Jewish law, parental relationships are granted to the natural parent and cannot later be changed to be in harmony with custodial relationships. Unlike American law, Jewish law typically presents no problems for establishing parental status because, in almost all situations, the identity of the parent is legally clear. *Id.*

31. *See* Feinstein, *supra* note 24, at 1:10, :71, 2:11, 3:11. For another vigorous defense of his own position, see RABBI MOSHE FEINSTEIN, DIBROT MOSHE, *Ketubot* 233-48.

32. As discussed in my previous response to the Prenuptial Agreement fact-pattern, 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*, *in* SHULCHAN ARUCH, *Even Haezer* 16. This is equally true in cases of artificial insemination. *Id.*

33. Feinstein, *supra* note 24, at 2:11.

34. In normal circumstances, this would lead to the classification of the child as illegitimate. SHULCHAN ARUCH, *Even Haezer* 4:13. If done intentionally, it would mandate separation of the couple. *Id.*

35. 2 RABBI YOEL TEITELBAUM, DIVREI YOEL 110, 140.

that the genetic relationship predominates in establishing illegitimacy and the legal propriety of these actions. Thus, Rabbi Teitelbaum views heterologous artificial insemination as an act of adultery.[36] In sum, while Rabbis Feinstein and Teitelbaum agree on how paternity is established, they differ as to how illegitimacy is established.

The third position, held by Rabbi Waldenberg, posits that an act of adultery occurs when the act of heterologous insemination occurs, and not when the sperm mixes with the egg. Therefore, because this act is physically analogous to adultery, it is not permitted.[37] This view is not based on the presence or absence of genetic relationships between child and father, but rather upon the belief that the injection of sperm is itself a prohibited form of adultery.[38] Further, Rabbi Waldenberg maintains that such conduct violates the rules of modesty, which are of rabbinic origin.[39] Thus, he would prohibit such conduct in all circumstances, regardless of whether it technically violates the biblical prohibition against adultery.[40]

The fourth and final position, held by Rabbi Breish, believes that heterologous insemination is neither an act of adultery nor a biblical violation.[41] Nonetheless, Rabbi Breish 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."[42]

The essence of this dispute revolves around a single *talmudic* source found in Tractate *Hagigah*,[43] which discusses artificial insemination *en passant*. Tractate *Hagigah* states:

> Ben-Zomah was asked: May a pregnant virgin marry a High Priest? 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?

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36. *Id.*

37. *See* 9 TZITZ ELIEZER, *supra* note 24, at 51:4.

38. *Id.*

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

40. Rabbi Waldenberg would also prohibit surrogate motherhood on the same grounds. *See* Rabbi E. Waldenberg, *Test Tube Infertilization*, 5 SEFER ASYA 84-92 (1986).

41. 3 RABBI YAKOV BREISH, CHELKAT YAKOV 45-48 [hereinafter CHELKAT YAKOV]; *see also* 3 RABBI YECHEIL YAKOV WEINBERG, SREDAI EISH 5 [hereinafter SREDAI EISH].

42. 3 CHELKAT YAKOV, *supra* note 41, at 45-51.

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

> He replied: Samuel's position is unlikely, and we assume that the woman was artificially inseminated.[44]

The simple explanation of the *talmudic* text is that artificial insemination does not create legal prohibitions that are normally based on prohibited sexual conduct. Through silence, the *Talmud* implies that it establishes paternity, for the *Talmud* would have explicitly stated that it did not establish paternity.[45]

Citing additional support for the first position, Rabbi Feinstein quotes a ruling by Rabbi David Halevi (*Taz*) of the seventeenth century, which is itself based on a *Responsa* of Rabbi Peretz, an eleventh century Jewish scholar.[46] Rabbi Peretz stated that, "in the absence of sexual intercourse, the child resulting from the mixing of sperm and egg is always legitimate."[47]

Based on this source, Rabbi Feinstein reaches a critically important conclusion: If there is no forbidden sexual act, the child is legitimate under Jewish law.[48] Additionally, this child is not even stigmatized to the extent that he is forbidden to marry someone of priestly descent,[49] because all of the stigmas associated with the child of an illicit relationship are dependent upon the presence of prohibited intercourse, not upon the genetic combination of two

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44. According to Jewish law, the High Priest may only marry a woman who has never had intercourse before her marriage to him. *See Leviticus* 21:13; *see also* MAIMONIDES, MISHNAH TORAH, *Sefer Kedusha, Hilchot Issurai Biah* 17:13.

45. This is the near unanimous opinion of the decisors. *See* 2 RABBI OBADIA YOSEF, YABIAH OMER, *Even Haezer* 1:6; 3 SREDAI EISH, *supra* note 41, at 5; Rabbi Samuel ben Uri, *Chelkat Mechoket, in* SHULCHAN ARUCH, *Even Haezer* 1:6; IGROT MOSHE, *supra* note 24, at 1:10, :71; RABBI MENASHE KLEIN, 4 MISHNAH HALACHOT 160; 3 TZITZ ELIEZER, *supra* note 24, at 27:3; 2 DIVREI YOEL, *supra* note 35, at 110, 140; RABBI S. DURAN (TASHBETZ), 3 RESPONSA 263; Rabbi Samuel Pardu, *Beit Shmuel, in* SHULCHAN ARUCH, *Even Haezer* 1:10; RABBI J. ETTLINGER, ARUCH LENEIR, *Yevamot* 10; 2 RABBI JACOB EMDEN, SHELAT YAVETZ 96. It is sometimes claimed that the *Turai Zahav* (*Taz*) disagrees with this. *See* Rabbi David Halevi, *Turai Zahav, in* SHULCHAN ARUCH, *Even Haezer* 1:8 [hereinafter *Turai Zahav*]. It is not necessarily true that the *Taz* is only referring to the question of the fulfillment of the commandment to have children, and not also the establishment of paternity. *See generally* Fred Rosner, *Artificial Insemination in Jewish Law, in* JEWISH BIOETHICS 105, 111 (Fred Rosner & J. David Bleich eds., 1979).

46. IGROT MOSHE, *supra* note 24, at 1:10. *See Turai Zahav, supra* note 45, *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* Rabbi Joel Sirkes, *Bayit Chadash* (*Bach*), *in* JACOB BEN ASHER, TUR, *Yoreh Deah* 195; Rabbi Samuel Pardu, *Beit Shmuel, in* SHULCHAN ARUCH, *Even Haezer* 1:10; Rabbi I. Rozanz, *Mishnah Le'Melech, in* MAIMONIDES, MISHNAH TORAH, *Sefer Nashim, Hilchot Ishut* 15:4.

47. IGROT MOSHE, *supra* note 24, at 1:10, 2:11, 3:11.

48. *Id.* 1:10.

49. DIBROT MOSHE, *supra* note 31, *Ketubot* 239-43.

people prohibited to each other.[50] Furthermore, Rabbi Feinstein accepts the literal interpretation of the *talmudic* text in Tractate *Hagigah* and states that the genetic father is also the legal one.

In support of the second position, Rabbi Teitelbaum relies on radically different sources than that of Rabbi Feinstein. Specifically, Rabbi Teitelbaum relies on a position articulated by Rabbi Moses ben Nachman (Nachmanides), a twelfth century commentator on both the *Talmud* and the Bible. In Nachnamides' explanation on the verse, "One may not have intercourse with one's neighbor's wife for seed [or sperm],"[51] Nachmanides focuses on the final two words of the verse "for seed." He claims that these two words seem to be unnecessary, but raises the possibility that they 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.[52] Accepting this as one of the intellectual bases for the prohibition of adultery, Rabbi Teitelbaum claims that heterologous insemination, even without any physical act of intercourse, is biblically prohibited because, had there been intercourse, it would have been categorized as an act of adultery.[53] Therefore, he concludes that the genetic combination of two people who are prohibited to marry leads to illegitimacy, even when there is no sexual intercourse.[54]

In support of the third position, Rabbi Waldenberg relies to a great extent upon the same material as Rabbi Teitelbaum. Yet, Rabbi Waldenberg does not emphasize the genetic relationship in the mixing of sperm and egg; rather, he notes that, according to Nachmanides, the injection of sperm is itself an act of adultery analogous to intercourse.[55] Thus, he maintains that the act of insemination is prohibited because it is the legal equivalent of actual

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50. IGROT MOSHE, *supra* note 24, at 1:10. In this Responsum, Rabbi Feinstein advances an alternative explanation of why the child is permitted to marry a priest.

51. *Leviticus* 18:20.

52. Rabbi Moses ben Nachman (Nachmanides), commenting on *Leviticus* 18:20.

53. 2 DIVREI YOEL, *supra* note 35, at 110, 140.

54. *Id.* Rabbi Teitelbaum also devoted considerable time and effort to defending his reliance upon a biblical commentary to derive principles of Jewish law. He noted that, while some authorities believe that the reliance upon commentaries on the Bible is not acceptable because such commentaries were not intended to be used as sources for establishing Jewish law, these sources ought to serve as a guide and furnish us with a better understanding of the scope of the law. This is particularly true when these sources indicate that our conduct should become stricter rather than more lenient. For Rabbi Feinstein's reply, see DIBROT MOSHE, *supra* note 31, at 238-39.

55. 9 TZITZ ELIEZER, *supra* note 24, at 51:4; 3 *id.* at 27:1.

intercourse, just as anal intercourse is legally identical to normal intercourse.[56] Rabbi Waldenberg also vigorously disputes Rabbi Peretz's conclusions, quoting a number of early decisors who disagree with Rabbi Peretz.[57] It is worth noting that, according to Rabbi Waldenberg, one may conclude that the one who injects the sperm is culpable of committing the act of adultery.[58] Another commentator has gone so far as to assert that the person who injects the sperm is the legal father, because he is the one committing adultery.[59] This position has been widely attacked as based on an illogical premise that neither the genetic father nor the husband of the wife would be considered the father of the child.[60]

As to the fourth and final position, Rabbi Breish represents the intellectual hybrid of the positions of Rabbis Feinstein and Waldenberg. Rabbi Breish concedes that the child resulting from artificial insemination is legitimate (a major concession according to Rabbi Feinstein).[61] Rabbi Breish hesitates, however, in permitting this conduct in contravention of the legal rules of adultery, in contrast to Rabbi Waldenberg's position. Rabbi Breish maintains that permitting conduct that people widely assume to be prohibited will result in the general decline of moral values.[62] Thus, he prohibits this conduct because it is the top of a slippery slope that he is not willing to slide down.[63]

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56. *See* Isserless, *supra* note 3, at 20:1.

57. *See* 3 TZITZ ELIEZER, *supra* note 24, at 27:1.

58. *Id.*

59. Shapiro, *Artificial Insemination*, 1 NOAM 138-42 (1957).

60. *See* Menachem Kasher, *Artificial Insemination*, 1 NOAM 125-28; 3 CHELKAT YAKOV, *supra* note 41, at 47.

61. 3 CHELKAT YAKOV, *supra* note 41, at 45-46.

62. *Id.* at 48-51. For an earlier articulation of this concept, see SEFER HA'CHASIDIM, *supra* note 15, ch. 829. Rabbis Feinstein and Breish engaged in vigorous written correspondence on these various topics. *See* DIBROT MOSHE, *supra* note 31, at 232-48.

63. The jurisprudential analysis used by normative U.S. law is completely contrary to the principles used in Jewish law. U.S. 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 the analysis. In the United States, the power is reserved to the legal system to harmonize parental rights with other values such as custodial parenthood or the best interest of the child. 2 AM. JUR. 2D *Adoption* § 2 (1962); 2 J. MCCAHEY ET AL., CHILD CUSTODY & VISITATION LAW AND PRACTICE §§ 10.01-03, 11.0(1) (1987); H. GAMBLE, THE LAW RELATING TO PARENTS AND CHILDREN 169 (1981).

Heterologous insemination presents two issues in U.S. law. The first issue regards the rights and responsibilities of a husband to a child who is not genetically his own. The second regards the rights and duties of a sperm donor to his genetic child. The leading case on the duties of a husband towards a child not genetically his own is People v. Sorensen, 437 P.2d 495 (Cal. 1968). *See also* S. v. S., 440 A.2d 64 (N.J. 1981); *In Re* Adoption of

3. The Alternative of a Childless Marriage

As explained above, there is no Jewish obligation for a woman to have children.[64] If a woman is comfortable without children, Jewish law recognizes that personal decision as completely proper and within the individual's discretion. Yet, there are a number of related concerns. Most significantly, if a woman's husband recovered from an illness-imposed sterility later in life, he, like his wife, would be within his rights under Jewish law to seek a divorce if, at that time, the woman could not provide him with children.[65] This choice must be made on an individual basis.

4. The Possibility of Divorce

Like all Jewish marriages, should either party wish to end the marriage, the couple is required to execute a *get*, or Jewish divorce. Indeed, a marriage formed in accordance with Jewish law cannot

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Anonymous, 345 N.Y.S.2d 430 (1973); Noggle v. Arnold, 338 S.E.2d 763 (Ga. 1985); R.S. v. R.S., 670 P.2d 923 (Kan. 1983); Mace v. Webb, 614 P.2d 647 (Utah 1980); *In re* Custody of D.M.M., 404 N.W.2d 530 (Wis. 1987); L.M.S. v. S.L.S., 312 N.W.2d 853 (Wis. 1981); *In re* Baby Doe, 353 S.E.2d 877 (S.C. 1987).

Only one case has found that children who are the product of consensual heterologous artificial inseminations are illegitimate. *See* Gursky v. Gursky, 242 N.Y.S.2d 406 (1963) (yet holding that the husband's consent estopped him from litigating the issue of his financial duty to support the children). Thus, U.S. law is nearly settled that children resulting from heterologous insemination are legitimate. Further, 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. This obligation is based on one of two theories: 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 the theory of adoption, which states that the husband, by his consent, has formally or informally adopted the children.

Most states strip the sperm donor (the father) of his rights when he donates through artificial insemination and a sperm bank. *See* Note, *The Need for Statutes Regulating Artificial Insemination by Donors*, 46 OHIO ST. L.J. 1055, 1062 n.79 (1985). Few American cases discuss the rights of a sperm donor. *See* C.M. v. C.C., 377 A.2d 821 (N.J. 1977) (ruling that the donor was the natural father of the child and entitled to visitation rights); *see also* Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986) (involving the informal donation of sperm to a woman without the presence of a physician).

64. As a side issue, if a woman dies childless and without a will, her husband will inherit her estate. SHULCHAN ARUCH, *Even Haezer*, 90:1. If her husband predeceases her, her estate goes to her immediate relatives. *Id.*, *Choshen Mishpat* 246:1-3 (noting the order or priorities of heirs). For an overview of the issues involved regarding wills, see Judah Dick, *Jewish Law and the Conventional Last Will and Testament*, 2 J. HALACHA & CONTEMP. SOC'Y 5 (1982); *see also* IGROT MOSHE, *supra* note 24, 1 *Yoreh Deah* 109.

65. SHULCHAN ARUCH, *Even Haezer* 1:5-6, 154:10; *see also* Isserless, *supra* note 3, at 1:5-6, 154:10 (explaining the terminology used in that section).

be ended, in the eyes of Jewish law, through a civil divorce.[66] Thus, one who is married religiously and divorced only civilly remains married according to Jewish law. This is no trivial matter, as all sexual relationships by a person still religiously married to another (other than with the spouse) are classified as adulterous. Children fathered by a man other than the husband are illegitimate.[67] Upon divorce, an individual is free to search for another to marry.[68]

Should it prove impossible to execute a religious divorce,[69] it is possible that the marraige is void due to sufficient fraud in its enactment. The essential issue then becomes whether the inability to father children, without impotence, is sufficient fraud in any given case.[70] Particularly because the facts of this case state only that Phyllis would *probably* not marry Alex if she knew he could not father children, the resolution of this issue is uncertain. Unquestionably, the preferred option is that a *get* be issued.[71]

5. Conclusion

The choice of remaining in the marriage belongs to Phyllis. If she wishes, she may continue in a marriage with a husband who is sterile. If she chooses to remain, she may choose not to have children, to adopt children, or, according to many authorities, to be artificially inseminated. On the other hand, if she wishes to end this marriage, that option is also valid. The choice is ultimately hers to make.

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66. For a complete discussion of this issue, see IRVING BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY chs. 1-3 (forthcoming 1994).

67. SHULCHAN ARUCH, *Even Haezer* 15:16-18.

68. One cannot, however, marry a Cohen after being divorced. SHULCHAN ARUCH, *Even Haezer* 6:1.

69. This is called an *agunah*, or "a chained woman." For various reasons, an *agunah* cannot have a Jewish divorce executed. For a discussion of this issue and various alternative solutions to this problem, see generally BREITOWITZ, *supra* note 66.

70. It is crucial to distinguish between impotence and sterility in this issue, as they are treated differently under Jewish law. *See* OTZAR HAPOSKIM SHULCHAN ARUCH, *Even Haezer* 39:5(32), 44:4(16); *see also* SHULCHAN ARUCH, *Even Haezer* 44:4.

71. Thus, for example, Rabbi Feinstein states that a man who is impotent and enters into a marriage, but does not inform his prospective spouse of his impotency, has used fraud in the enactment of the marriage. If no *get* can be issued, the woman may remarry without a *get*. IGROT MOSHE, *supra* note 24, at 1:79; *see also id.* at 1:80, 4:113 (adopting the same posture concerning uninformed lunacy and closet homosexuality); *see also* RABBI SHMUEL STERN, 7 RESPONSA EVEN HAEZER 6 (applying to venereal disease). Again, it is important to distinguish between impotence and sterility, as they are treated differently under Jewish Law. *See* SHULCHAN ARUCH, *Even Haezer* 154:6-7 (regarding the husband's ability to fulfill the obligation of an ongoing sexual relationship).