GESTATION: WORK FOR HIRE OR THE ESSENCE OF MOTHERHOOD? A COMPARATIVE LEGAL ANALYSIS

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I. INTRODUCTION

Motherhood is no longer a simple concept. Black's Law Dictionary defines "mother" as "a woman who has given birth to or legally adopted a child."[1] Recent advances in reproductive technologies have called into question this basic definition of motherhood. Through *in vitro* fertilization, it is possible to extract an egg from one woman and implant the fertilized egg into the uterus of another woman, thereby severing the genetic and gestational aspects of motherhood. Depending on the identity of the intended mother, this process is known either as gestational or full surrogacy (if the egg donor is the intended mother and the birth mother is acting as a surrogate) or egg donation (if the birth mother is the intended mother and another woman acted as an egg donor).[2] The legal mother in gestational surrogate motherhood could be the egg donor, the intended mother, the birth mother or some combination thereof. In U.S. case law, "mother" has been defined in a variety of ways, including the woman who donates an ovum and the woman who intends to be the mother of a new born.[3] U.S. courts have held that whatever motherhood is, the Black's Law definition of giving birth to a child is not necessarily definitive.[4]

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1. BLACK'S LAW DICTIONARY 1031 (7th ed. 1999).

2. Traditional or partial surrogacy necessitates only artificial insemination; the birth mother is also the egg donor and is therefore the genetic mother. *In vitro* fertilization allows for the division of the normal process of childbirth; one woman the donator of the child's genes and the other woman carries and gives birth to the child. This division happens in two contexts. The first is in egg donation, where a woman who cannot produce a fertile egg uses another woman's egg, which is then inseminated with her husband's sperm. The second is gestational surrogacy where a woman who cannot carry a pregnancy to term hires or recruits another woman to carry the child for her.

3. *See infra* Part II(B), notes 35-73 and accompanying text.

4. *See infra* Part II(B), notes 35-73 and accompanying text.

The potential ethical implications of surrogate motherhood have garnered considerable public attention,[5] largely because the different definitions of motherhood are based on competing ethical outlooks. The argument for autonomy and choice, strongly advocated by Dr. Carmel Shalev, maintains that women have a right to sell gestational services along with the sale of their ova and to receive payment for using their wombs. She argues that to deny women the right to do so based on concerns for their ability to consent to such a contract is patriarchal in that it questions a women's ability to make valid contracts and minimizes their full autonomy.[6] This argument favors choice and intention as the determining factors in deciding legal motherhood. On the other end of the spectrum is the argument for protection of women from financial exploitation and the imperative to keep certain body parts or biological acts sacred, similar to the prohibition on prostitution.[7] This point of view favors using gestation or parturition as the definition of motherhood, thereby making surrogacy arrangements less palatable since the birth mother will always be considered the legal mother.

The act of defining motherhood also involves a value judgment that affects the use of reproductive technologies.[8] Allowing a woman's or a couple's inten-

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5. The case of *In re* Baby M received much public attention from reporters as well as scholars. *See, e.g.*, Avi Katz, *Surrogate Motherhood and Baby-Selling Laws*, 20 COLUM. J. L. & SOC. PROBS. 1 (1986); Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127 (1986); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405 (1983).

6. CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 120-23, 149-51 (1989); *see also* Lori Andrews, *Surrogate Motherhood*: *The Challenge for Feminists*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY, 171-76 (Larry Golstin, ed., 1990) (arguing that negative reactions to surrogacy paternalistically assume that women cannot act in their own best interests); Janet L. Dolgin, *Status and Contract In Feminist Legal Theory of the Family*, 12 WOMEN'S RTS. L. REP. 103, 104-08 (1990) (arguing that family law should be based on contract principles).

7. *See* Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis*, 16 L. MED. & HEALTH CARE 57, 62 (1988) (arguing against enforcement of surrogacy agreements because they are exploitive of poor women); Janice Raymond, *Reproductive Gifts and Gift Giving: The Altruistic Woman*, HASTINGS CTR. REP., Nov.-Dec. 1990, at 11 (arguing that even altruistic surrogacy is exploitive, in that it sets women apart as the caregiver and the breeder class).

8. The underlying ethical complexity of defining motherhood stems from an attack on the concept of "natural" motherhood by the advent of modern technology. *See* Janet L. Dolgin, *Just a Gene*: *Judicial Assumptions about Parenthood*, 40 UCLA L. REV. 637, 673 (1993).

There have been four basic approaches used to determine motherhood in the absence of a clear natural definition. Some writers advocate contract principles which privilege the intended mother as the legal mother according to the dictates of an agreement or consent form from the egg donor. *See* John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 419 (1991) (concluding that contractual intent provides a rule of certainty in favor of the "prime movers" of the child's conception); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 72 (1987) (arguing for a free market in babies and reproductive services); Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397-98 (reasoning that contract principles further the gender-neutral goals of intention and choice in reproductive decisions).

Others argue that the genetic mother should be considered the legal mother because the genetic contribution is the most significant. *See, e.g.*, Ruth Macklin, *Artificial Means of Reproduction and Our Understanding of the Family*, HASTINGS CTR. REP., Jan.-Feb., 1991, at 5 (considering the various methods, including genetics, to determine the actual mother); Suzanne F. Seavello, *Are You My Mother? A*

tion to determine legal parenthood in reproductive technology situations promotes the use of these technologies. Those who believe that intention and genetics are the significant factors in determining motherhood tend to promote the use of gestational surrogate motherhood.[9] If it is determined that the genetic or intended mother is the legal mother, such contracts would not be controversial because the contract would provide for the mother who is thereby defined as the natural or legal mother to be given custody. Thus, such definitions avoid attacks of baby-selling and exploitation of women and their babies.

On the other hand, those who believe that gestational surrogates should be deemed the legal mothers generally do not distinguish between traditional surrogate motherhood and gestational surrogacy, and tend to oppose both.[10] Despite the popularity of traditional surrogate motherhood contracts, when courts are faced with opposing claims of the surrogate and intended mothers to the child, they have deemed traditional surrogate motherhood agreements unenforceable and against public policy because they are seen as a form of baby selling.[11] If gestation is considered the basis of legal motherhood, similar problems would arise in gestational surrogacy, as the legal (natural) mother would be contracting to give up her own child. Preserving biology and gestation as determining factors that cannot be altered through intent alone makes the use of these technologies more complex. Preserving the natural status of the gestational mother despite a contract that provides otherwise throws uncertainty over the whole process by allowing the surrogate mother to withdraw from the contract or protest.

In contrast to these logically polar viewpoints, Jewish law is in the unwieldy position of having legal precedent that weighs in favor of holding that the gestational surrogate is the legal mother, and simultaneously supporting the

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Judge's Decision in In Vitro Fertilization Surrogacy, 3 HASTINGS WOMEN'S L.J. 211, 211-24 (1992) (arguing for a genetics based determination);

Still others clam that gestation is the most significant element of motherhood. *See, e.g.*, SCOTT B. RAE, THE ETHICS OF SURROGATE MOTHERHOOD, BRAVE NEW FAMILIES? (1994) (arguing that the woman who gives birth to the child should be considered the legal mother of the child); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY (1989) (arguing that the essential maternal tie is based on carrying the child in pregnancy).

Others rely upon a "best interests of the child" standard for their final determination of which woman is the mother. *See* MARTHA A. FIELD, SURROGATE MOTHERHOOD 126-60, 151-52 (1988) (arguing for a best interest test with a presumption of maternal custody in traditional surrogacy). Another original suggestion that has been made is for both women to be considered as the "mother" of the child and for a kinship relationship to ensue. *See* Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy* 47 RUTGERS L. REV. 165, 168, 221-22 (1994) (arguing for multiple mothers from the perspective of a kinship relationship).

9. For commentators who have argued for the standard of intent and who also support surrogate motherhood, *see generally* Posner, *supra* note 8; Hill, *supra* note 8; Schultz, *supra* note 8.

10. *See, e.g.*, RAE, *supra* note 8, at 77-116 (arguing that the woman who gives birth to the child should be considered the legal mother of the child and opposing commercial surrogate motherhood); ROTHMAN, *supra* note 8, at 229-46 (arguing that pregnancy and interpersonal relationships determine a woman's fitness to parent and not genetic ties or intent).

11. *See infra* notes 36-37 and accompanying text. Egg donations present fewer problems because an egg donor contributes her eggs and immediately waives all rights to the child. The donation is often anonymous, but even if it is not, the egg donor has much less of a physiological connection with the child.

usage of reproductive technologies in order to promote the important goal of reproduction.[12] Motherhood in Jewish law is rigidly defined and derived from precedent and through the use of analogy. The traditional and morally normative perspective of Jewish law necessitates an analysis of the surrogate mothers' status without subverting this concern to overriding consequentialist opinions as to whether or not surrogate motherhood should be permissible. Therefore, Jewish law provides a forum for analyzing the definition of motherhood in isolation from the larger issue of the permissibility of surrogate motherhood.

The U.S. has ultimately placed an overwhelming emphasis on the importance of genetics and intention in defining motherhood in gestational surrogacy, and has largely supported gestational surrogate contracts.[13] On the other hand, Jewish law, for the most part, has endorsed the criteria of birth as the defining factor of motherhood.[14] However, Jewish law's emphasis on biology and gender difference that lead to identifying the birth mother as the legal mother has not prevented a number of prominent Jewish law authorities from condoning gestational surrogate motherhood agreements. The result is that whether the mother is originally defined as the intended mother, as she is in U.S. law, or whether the surrogate is defined as the legal mother, as she is in Jewish law, legal systems find a means of permitting the use of surrogate motherhood. The two systems of law are striking in their distinctive analyses of gestational surrogate motherhood, yet they are also striking in the similarity of their conclusions.

Both of these legal systems subjugate the rights of the surrogate mother and are paternalistic. Allowing gestational surrogate motherhood, without provisions for the protection of the surrogate, leads to sublimating the woman's rights for the sake of the biological father and his wife. The purpose of this paper is to show how two different legal approaches to surrogate motherhood, with different premises and, most importantly, two different ways of defining motherhood, each ignore the rights of the surrogate mothers because of patriarchal considerations.

U.S. law fails to take any account of gender differences or the importance of gestation in a woman's experience of motherhood, and uses the concept of "natural" blithely in order to facilitate the use of surrogate motherhood. Thus U.S. law uses male standards of judgment as to what constitutes parenthood and ignores that which is unique about motherhood. Alternately, Jewish law, while recognizing the surrogate mother as the natural mother, ultimately subsumes her rights for the sake of procreation and the importance of fatherhood.

By means of contrast and comparison of U.S. law and Jewish law, this article will uncover those principles of each legal system that lead to their disregard

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12. For the purposes of this article, Jewish law refers to that law which finds its source in *The Bible* and *The Talmud*. *See infra* note 102 for a more complete explanation of Jewish law and its sources. This use of Jewish law is meant to be non-sectarian and applicable to all denominations of Judaism. However, this article does not use response from Conservative or Reformed Rabbis; rather the usage of Jewish law is most reflective of Orthodox Judaism. For a summary of opinions that explain Jewish law's support of reproductive technologies *see* David J. Bleich, *In Vitro Fertilization*: *Questions of Maternal Identity and Conversion*, *in* JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES 46 (Emanuel Feldman & Joel Wolowelsky eds., 1997).

13. *See infra* Part II(B).

14. *See infra* Part II(C).

of the gestational surrogate's rights. The flow of the argument will center on Jewish law and will simultaneously compare and contrast U.S. law. Since surrogate motherhood agreements entail varied arrangements, the comparative analysis will be carried out through a focus on the Israeli Surrogate Agreements Law,[15] which is substantially identical or comparable to a number of U.S. State laws.[16]

Part II will focus on different legal approaches to defining motherhood in the context of surrogate motherhood. The Israeli, American and Jewish law precedent on legal motherhood in gestational surrogacy will be examined. Based on the majority decision of Jewish authorities as to the identity of the gestational mother as the legal mother, Part III discusses the feasibility of enforcing surrogacy contracts under Jewish law in comparison to the factors dictating whether these contracts are enforced or not enforced in the U.S. Part IV discusses other legal principles that may influence the permissibility of gestational surrogacy agreements, despite the problems with promoting such contracts uncovered in the previous sections: the imperative to procreate, adoption and custody. Finally, Part V will explain how both systems are ultimately patriarchal and subjugate the rights of the gestational surrogate in favor of the rights of the intended parents due to male-based standards and interests.

II. THE DEFINITION OF MOTHERHOOD

A. The Israel Surrogate Motherhood Agreements Law

The Israeli Surrogate Motherhood Agreements Law ("Surrogate Agreements Law") was enacted after recommendations were offered by the Aloni Commission, set up to discuss the ethical, legal and religious implications of reproductive technologies, including surrogate motherhood.[17] With the passing of

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15. Surrogate Motherhood Agreements Law, 1996, S.H. 1577 [hereinafter Surrogate Agreements Law].

16. FLA. STAT. ANN. § 742.15 (West 1997) is the only statute that, by its implication, is identical to that of Israel by condoning commercial gestational surrogate motherhood and not traditional surrogate motherhood. Other statutes exist in certain jurisdictions of the U.S. that regulate surrogate motherhood, but no other law besides the Florida statute and Israeli law go so far as to facilitate the transfer of children born of gestational surrogate motherhood agreements for consideration to the intended mothers. *See infra* notes 76-94 and accompanying text (for a discussion of U.S. statutes that regulate surrogate motherhood).

17. Prior to the passing of the law, a commission headed by former Judge Shaul Aloni, was called to evaluate the social, ethical, *halakhic* (Jewish law) and legal aspects of the methods of treatment related to *in vitro* fertilization, including the possibility of surrogate motherhood contracts. *See* ISRAEL MINISTRY OF JUSTICE, THE REPORT OF THE PUBLIC-PROFESSIONAL COMMISSION IN THE MATTER OF IN VITRO FERTILIZATION (1994)[hereinafter ALONI COMMISSION REPORT]. The committee was gathered shortly after a court case called on the High Court of Justice to direct the Minister of Health to explain why regulations had been drawn by the Ministry that prevented them for engaging a surrogate mother in Israel. H.C. 1237/91, Nachmani v. Minister of Health (unpublished). The regulations referred to are the Public Health Regulations on IVF (In Vitro Fertilization), 1987, K.T. 5035, 978, which outlawed surrogate motherhood agreements by stating that "[a]n ovum will not be transplanted unless it is into the womb of the woman who will be the child's mother." Ultimately, the majority of the Commission proposed to allow surrogate motherhood agreements on the condition that they receive prior approval, before conception, from a statutory committee with other

the Surrogate Motherhood Agreements Law in 1996, Israel became a pioneer in regulating and facilitating commercial surrogacy agreements. Since the passing of the law, there have been more than 12 children born to surrogate mothers in accordance with surrogacy contracts pre-approved by a committee as mandated by the law. The first birth took place in February 1998, with the first surrogate twins born in Israel and the use of the surrogacy contracts is growing more and more common.[18]

The Surrogate Agreements Law allows only for gestational surrogate arrangements, thereby implicitly forbidding traditional surrogacy.[19] Traditional surrogacy is usually accomplished through artificial insemination, while gestational surrogacy necessitates *in vitro* fertilization, a more complicated procedure for the surrogate mother.[20] In addition, according to the Surrogate Agreements Law, the sperm must be from the intended father.[21]

The Surrogate Agreements Law does not give any legal status to the birth mother upon the child's birth. Legal parenthood is delegated to the intended parents almost immediately.[22] The Surrogate Motherhood Agreements Law states, "The child shall, from its birth, be in the custody of the intended parents, and they shall bear toward it all the responsibilities and obligations of a parent to his child."[23] Delivery of the child by the birth mother into the custody of the intended parents must be in the presence of a Welfare Officer and must be carried out as soon as possible after the birth of the child.[24] Within seven days of the child's birth, the intended parents must apply for a parentage order.[25] The parentage order is given to the intended parents by the court automatically, unless, after having received a report from the Welfare Officer, the court determines that doing so would endanger the child's welfare.[26] The intended parents are the "default" parents and, in the absence of extraordinary circumstances, they will be given custody of the child upon its birth and full rights of parentage shortly thereafter.

The legal status of the intended parents is buttressed by the surrogate mother's lack of a right to withdraw from the agreement.[27] The law states that

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specified limitations. The two members in the minority did not disagree with the principle of regulating surrogacy and ultimately allowing it, but with the details of the regulatory scheme. The Aloni Commission's recommendations were accepted in part and partially modified in the Surrogate Agreements Law. *See* Rhona Schuz, *The Right to Parenthood: Surrogacy and Frozen Embryos*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 237 (Andrew Bainham ed., 1996).

18. *See* Allison Kaplan Sommer, *Labor Pains*, THE JERUSALEM POST, Jan. 7, 2000, at 14-17.

19. Surrogate Agreements Law, *supra* note 15, § 2(4).

20. For a full explanation of gestational and traditional surrogacy, *see In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994); Michael Korinaldi, *The Legal Status of a Child Born of Artificial Insemination from a Donor or from an Egg Donor*, 18 SHNATON HAMISHPAT HAIVRI 64-65 (1995).

21. Surrogate Agreements Law, *supra* note 15, § 2(4).

22. *Id.* § 10(a).

23. *Id.*

24. *Id.* § 10(c).

25. *Id.* § 11(a). Until that time, a welfare officer is to be appointed guardian of the child. *Id.* § 10(b).

26. Surrogate Agreements Law, *supra* note 15, § 11(a).

27. *Id.* § 13.

the court will not give its approval for the birth mother to withdraw from the contract "unless it is satisfied, after having received a report from the Welfare Officer, that there has been a change of circumstances which justifies the birth mother's withdrawal of her consent, and that this is not likely to have an adverse effect on the child's welfare."[28] But even this limited provision for possible withdrawal does not exist after a parentage order has been made.[29] The Israeli law is designed to facilitate and not impede these agreements by legalizing the relationship of the genetic mother and her genetic child, and minimizing the rights of the gestational mother.

The Israel Adoption Law declares that "the adoption ends the obligations and rights between the adopted child and his parents and the rest of his family and the authority given to them over him. . . ."[30] In contrast, the Surrogate Agreements Law does not necessitate a transfer of rights from the birth mother to the intended parents. The law assumes that these rights never existed, and requires only a parentage order. When a parentage order is made, "the intended parents shall be the parents and sole guardians of the child, and it shall be their child for all intents and purposes."[31] Even stronger language was used in the Aloni Commission's recommendations on the matter of surrogate motherhood, "With the transfer of the child from the surrogate mother to the intended parents, in the presence of a Welfare Officer, they [the intended parents] will be considered the parents of the child, and the child will be considered the natural child for all purposes."[32]

The Israeli law is an ideal point of comparison because it is one of the first to actively facilitate such surrogate motherhood agreements. In addition, there is significant discourse between Jewish and Israeli law making it possible to examine opinions by Jewish law authorities on Israeli law, which permits only gestational surrogate motherhood. Such direct opinions will allow for definitive rather than speculative judgments as to what Jewish law holds with regards to various provisions of surrogate motherhood. While issues of medical treatment discussed in this paper are not under the jurisdiction of Jewish law in Israel, in matters affecting ability to marry and legitimacy of children, Jewish law ("*halakhic*") considerations may affect the civil law determination.[33] Furthermore, the

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28. *Id.* § 13(a). Although this issue has not arisen or been litigated in the administrative context, possible changes in circumstances likely include: death of an intended parent, divorce of the intended parents, or refusal of an intended parent to care for the child.

29. *Id.* § 11.

30. Israel Adoption Law, 1996 A.G. 29 § 13.

31. Surrogate Agreements Law, *supra* note 15, § 12(a).

32. *See* ALONI COMMISSION REPORT, *supra* note 17, at 21.

33. Israel has a chief Rabbinate and is self-identified as a Jewish state. Although Jewish law does not govern, Jewish religious leaders have considerable influence on Israeli law and often pass judgment on Israeli laws. Israeli law is influenced by Jewish law in a number of ways—by use of Jewish law in judicial determinations and interpretations of Israeli laws, and incorporation of Jewish law into Israeli legislation and statutes by reference.

The Israeli legal system is comprised of a number of different components. Much of the law is a codification of English common law that was instituted before the establishment of the State. Until 1980, English common law was considered binding on the law of Israel, where relevant. The Foundations of Law Act effectively and formally dislodged Israeli law from English law and determined that, "Where the court finds that a legal issue requiring decision cannot be resolved by reference to

Israeli law epitomizes the movement promoting progressive pro-reproductive technologies and reproductive freedom that will continue to challenge us as science progresses.[34]

B. United States Law

1. Case Law

In the limited circumstances in which U.S. Courts have been asked to determine their permissibility, they have held that *traditional* surrogate motherhood contracts are either invalid, unenforceable or at least voidable.[35]

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legislation or judicial precedent, or my means of analogy, it shall reach its decision in the light of the principles of freedom, justice equity and peace of the Jewish heritage." *See* The Foundations of Law Act, 1980, 34 L.S.I. 181 (1979-80). Simultaneously, Article 46 of the Palestine Order in Council and Saving Clause, which implemented the system of British law was repealed. Thereafter, English and American law, as well as Jewish law, are used to analyze issues not yet dealt with in Israeli law, even though Israeli law is an independent system.

There are essentially two other ways that Jewish law is incorporated into Israeli law: by reference and directly. *See generally*, Itzchak Englard, *The Place of Religious Law in the Israel Legal System*, 2 MISHPATIM 268, 291 (1970); Brayahu Lifshitz, *Israeli Law and Jewish Law—Interaction and Independence*, 24 ISRAEL L. REV. 507 (1990). Under the Rabbinical Court Law, Rabbinical courts are given exclusive authority in "matters of marriage and divorce of Jews." *See* Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 1953, 7 L.S.I. 139 (1953) [hereinafter Rabbinical Court Law]. Accordingly, there is no civil marriage or divorce in Israel. Besides having exclusive jurisdiction over matters of personal status, the rabbinical courts have concurrent jurisdiction over the request of the wife in maintenance claims that are not part of a divorce settlement. *Id.* Questions of paternity, however, have been held not to be under concurrent jurisdiction. *See* H.C. 283/72, Buaron v. The Rabbinical Tribunal, 1972 26(2) P.D. 727.

Another area of interaction between Jewish law and Israeli law is through direct incorporation. Direct incorporation occurs when the legislator adopts canons of Jewish law into the civil law code as original Israeli legislation. *See Lifshitz*, this note, at 512-23. The Israeli legislator makes no specific reference to the rules of Jewish law but incorporates Jewish law principles. There is no doubt that Jewish law has substantially influenced Israeli statutory law. *See, e.g.*, N. RAKOVER, JEWISH LAW IN THE LEGISLATION OF THE KNESSET (1989) (providing a comprehensive listing and discussion of Israeli laws that have been influenced by Jewish law considerations).

Furthermore, under the Rabbinical Court Law, Rabbinical courts are given exclusive authority in "matters of marriage and divorce of Jews." *See* Rabbinical Court Law, 7 L.S.I. 139, (1953). Accordingly, there is no civil marriage or divorce in Israel.

34. *See, e.g.*, Ruth Halperin-Kaddari, *Redefining Parenthood*, 29 CAL. W. INT'L L.J., 313 (1999); Carmel Shalev, *Halakhah and Patriarchal Motherhood—An Anatomy of the New Israeli Surrogacy Law*, 32 ISRAEL L. REV. 51 (1998).

35. *See* Weldon E. Havins & James J. Dalessio, *The Ever-Ending Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern That Technology*, 48 DEPAUL L. REV. 825, 849-50 (1999); Danny R. Veilleux, Annotation, *Validity and Construction of Surrogate Parenting Agreements*, 77 A.L.R. 4th 70 (1990 & Supp. 1999); *see also* Surrogate Parenting Assocs. v. Commonwealth, 704 S.W.2d. 209 (Ky. 1986) (holding that surrogate contracts were voidable but not void); Doe v. Kelley, 307 N.W. 2d 438 (Mich. Ct. App. 1981) (prohibiting surrogacy agreement because it would violate a statute prohibiting the exchange of money or other consideration in connection with an adoption and related proceedings); *In re* Baby M, 537 A.2d 1227 (N.J. 1988), *remanded to* 542 A.2d 52 (N.J. Super. Ct. Ch. Div. 1988) (determining that surrogacy agreement was void based, in part, on its conclusion that the payment of money to a surrogate mother conflicted with a state statute prohibiting the payment of money in connection with the acceptance of a child and on the basis of public policy); *In re* Baby Girl, 505 N.Y.S.2d 813 (N.Y. Surr. Ct. 1986) (holding that the agreements were not per se void but were voidable depending on the circumstances of the case).

In the widely publicized case of *In re Baby M*,[36] the Supreme Court of New Jersey based its opinion on the unlawfulness of prenatal adoption. In order to terminate parental rights in private placement adoptions, the court must find an "intentional abandonment or a very substantial neglect of the parental duties without a reasonable expectation of a reversal of that conduct in the future."[37] Private prenatal agreements are not enforceable unless the birth mother intentionally abandons her child after birth. Therefore, the surrogacy arrangement, which committed the surrogate mother to surrender her parental rights before she gave birth, was deemed illegal and unenforceable. In addition, the court held that the contract violated societal norms against baby selling and was thereby against public policy.[38]

In two cases that discuss uncontested parentage orders as opposed to disputed custody, courts have held that the surrogacy arrangement should not be considered a void prenatal adoption but rather a prenatal custody arrangement between two parents.[39] However, both cases reserved the possibility that the contracts would be voidable in a contested case where there was undue influence, fraud, or excessive payments.[40] These cases are examples of voluntary relinquishment of the child after the child's birth, and are therefore not at odds with adoption procedures since the birth mother consents to transfer.

On the other hand, the courts discussing the issue of gestational surrogacy in the U.S. have consistently held that the intended mother is the legal mother. However, the opinions are divided as to whether the determining factor should be intent or genetics.

In *Anna J. v. Mark C.*,[41] Mrs. Calvert's ovum was fertilized with the sperm of her husband using *in vitro* fertilization.[42] The fertilized ovum was then implanted into the uterus of Ms. Johnson, the surrogate mother, pursuant to a surrogacy contract in which Ms. Johnson agreed to relinquish "all parental rights" to the child in favor of the Calverts, who were to take the baby into their home "as their child."[43] After the birth, Ms. Johnson refused to relinquish the child to the intended parents and sought custody of the child.[44] The trial court, in a bench ruling, held that the Calverts were the natural parents because they were the genetic parents.[45] The trial court emphasized that the case was not comparable to traditional surrogacy, but rather, characterized Ms. Johnson as more of a caretaker, similar to a babysitter, wet nurse, or temporary foster mother.[46] The

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36. *In re Baby M*, 537 A.2d at 1240.

37. *Id*.

38. *Id*. at 1234.

39. *Surrogate Parenting Assocs*., 704 S.W.2d at 212-13; *In re Baby Girl*, 505 N.Y.S.2d at 817.

40. *Surrogate Parenting Assocs*., 704 S.W.2d at 213; *In re Baby Girl*, 505 N.Y.S.2d at 817.

41. 286 Cal. Rptr. 369, 372 (Ct. App. 1991), *aff'd sub nom.* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), *cert. denied*; 510 U.S. 874 (1993).

42. *Anna J.*, 286 Cal. Rptr. at 372.

43. *Id.*

44. The Calverts refused to pay the remaining payments because they contended that Ms. Johnson had failed to disclose that she had suffered several stillbirths and miscarriages. Ms. Johnson felt that the Calverts had not done enough to obtain the required insurance policy. *Id.*

45. *See id.* at 373.

46. *Id.* at 377-78.

Court of Appeals affirmed the holding that the natural and thus legal mother is the genetic mother.[47] Through a narrow, and arguably contorted, reading of the Uniform Parentage Act,[48] the court reasoned that genetics was the deciding factor in parentage.[49]

The Supreme Court affirmed the lower court's decision but on different grounds.[50] The court stated, "for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible."[51] The court held that the statute relied upon by the lower court was unable to resolve the question of which woman was the natural mother.[52] Rather, the court decided that natural parentage should be determined by contractual intent, even though it determined not to make the decision on the basis of the surrogacy contract itself.[53] Therefore, the court held that the intended mother was the natural mother[54] and that the gestational mother had no rights at all.[55]

The analysis of the court's decision discloses a fundamental difficulty in the interpretation of the concept of nature. Can the natural mother simply be the mother who has the proper intent, or is the natural mother a term denoting something pre-contractual?[56] Professor Kandel explains that even in the legal sphere a difference does exist between a contractual and natural mother,

> The status of natural parent may constrain and limit contracts concerning children, such as child support, but even when a woman relinquishes her child through adoption, or loses it to the state as a consequence of her delinquent behavior, her status as a natural parent does not change. Contract, however, can alter parental rights and obligations, including the child's custody, as frequently evidenced in divorce and separation agreements.[57]

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47. *Anna J.*, 286 Cal. Rptr. at 382.

48. Cal. Fam. Code §§ 7600-750 (West 1994). The Act authorizes the admission of certain biological evidence as sufficient proof of parentage. *See id.* § 7610(a). Pursuant to the Act, parentage can be established by blood test evidence, and maternity "may" be established "by proof of . . . having given birth to the child. . ." *Id.* The court read the Act as establishing a scheme in which blood test evidence, which establishes the genetic relationship, is conclusively more persuasive than childbirth evidence, which establishes gestational relationship. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 897 (Ct. App. 1994) (attacking the appellate court's use of the statute); Kandel, *supra* note 8, at 173-78 (arguing that choosing kinship provides a better model of maternity via dual mothers in the case of surrogacy, then traditional two-parent assumptions).

49. *See Anna J.*, 286 Cal. Rptr. at 374 & n.14 (discussing the purpose of the Act's enactment in California).

50. *Calvert*, 851 P.2d at 787.

51. *Id.* at 781.

52. *Id*.

53. *Id*. at 782-84.

54. *Id.* at 782.

55. *Calvert*, 851 P.2d at 786. For a discussion of why intent can not be a basis for determining "natural" motherhood, *see* Dolgin, *supra* note 8; Jeffrey M. Place, *Gestational Surrogacy and the Meaning of "Mother": Johnson v. Calvert*, 17 HARV. J.L. & PUB. POL'Y 907, 913-14 (1994).

56. Dolgin also explores the complexity of using intent as a means of defining the natural and argues that this is a fundamental fallacy since a contract by definition is not natural. *See* Dolgin, *supra* note 8.

57. Kandel, *supra* note 8, at 177.

Justice Kennard, in his minority opinion, berated the court for its reliance on a contractual standard, arguing that rules derived from tort law, intellectual property law, commercial law or contract law were inadequate to protect the interests of either the child or the gestational mother.[58] He opted to decide the case according to the best interests of the child, and avoided the question of the natural mother altogether.[59]

A number of cases following *Johnson* have relied on the rule of intent.[60] However, there is another line of cases that has based decisions on genetics as opposed to intent.[61] In *Belsito v. Clark*, the Ohio Supreme Court faced a similar task of determining who is the legal mother in gestational surrogate motherhood.[62] One month prior to her marriage to Anthony Belsito, Ms. Belsito had to undergo a hysterectomy due to a bout with cervical cancer, resulting in her inability to carry children.[63] The doctors were able to preserve her ovaries so that she would be able to produce eggs. Carol Clark, Ms. Belsito's younger sister, agreed to carry Ms. Belsito's egg fertilized with Anthony's sperm through *in vitro* fertilization. According to Ohio law, upon its birth, the child was to be registered as the child of Carol Clark, the surrogate mother.[64] Therefore, the Belsitos filed a complaint for declaratory judgment stating that it is unnecessary for them to adopt the child now carried by Carol Clark and that they should be listed as the birth parents on the birth certificate.[65]

The court decided to grant the declaratory judgment in favor of the Belsitos. In his majority opinion, Judge Spicer stated that, "a review of case law leads to the conclusion that the term "natural parent" refers to the child and parent being of the same blood or related by blood.[66] Furthermore, he determined that in modern terminology, blood relationship is the equivalent to genetics.[67] He argued that the Uniform Parentage Act of Ohio, which holds that either birth or DNA tests can determine the mother, has caused confusion in the case of surro-

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58. *Calvert*, 851 P.2d at 795-98 (Kennard J., dissenting).

59. *Id.* at 789.

60. *See, e.g.*, Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (determining the egg providing mother to be the legal mother in accordance with the rule of intent when the child was conceived by anonymous sperm and egg donation); McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994) (stating that the gestational surrogate was the parent since she received the egg from an anonymous donor and was the woman who intended to raise the child). Under the test articulated in *Johnson v. Calvert*, either the gestational surrogate or the genetic parents could be recognized as the natural and legal parents, depending on which party intended to procreate and raise the child.

61. *See* Smith v. Jones, No. 85-53201402 (Mich. Cir. Ct. March 14, 1986) (holding that the intended mother who donated the egg was the legal mother due to her genetic donation and proclaiming the gestational surrogate "a human incubator"). This was the first case of gestational surrogacy to go to court.

62. 644 N.E.2d 760 (Ohio 1994).

63. *Id.* at 761.

64. *Id.* at 762.

65. *Id.*

66. *Id.* Judge Spicer cites Owens v. Bell, 451 N.E.2d 241, 243 (Ohio 1983) and BLACK'S LAW DICTIONARY 172 (6th ed. rev. 1990).

67. Belsito v. Clark, 644 N.E.2d at 763.

gacy and that the law must adapt by eliminating birth as a determining factor.[68] In *Belsito*, the court noted that the *Johnson* rule of intent amounts to selling or transferring the status of natural parenthood before the child's birth, and is therefore a *de facto* recognition of the contract.[69] The court concluded that the *Johnson* rule is an unacceptable violation of public policy.[70]

In addition, Judge Spicer determined that surrendering one's egg or sperm amounts to the surrender of a fundamental right, which necessitates express consent from the donor in order to allow such a transfer.[71] He argued that the intent test alone does not do enough to protect the involuntary use of genes.[72] However, he conceded that these genetic rights can be contracted away, thereby basically supporting the reproductive technologies but with a genetic emphasis. According to Judge Spicer's' test of genetics, a gestational mother who intends to be the parent using an egg donation must follow the laws of adoption and obtain donor waivers of parental rights.[73]

Despite the differences between the genetics standard and the intent standard, all U.S. courts ultimately favor the intended parents in gestational surrogate motherhood arrangements and reject the contract as a legal document in and of itself. Unlike in traditional surrogacy cases where the host mother who is also the genetic mother and the surrogate is generally deemed to be the natural mother, gestational cases focus on the assignment of the status of the "natural" mother. Thus, an obvious focus underlying such decisions is genetic make-up since only the fact that the intended mother is the egg donor distinguishes traditional surrogacy from gestational surrogacy.

2. U.S. Statutes

The federal government of the United States has not regulated the enforceability of surrogate motherhood contracts. A number of states have left the issue of surrogacy contracts to the judicial system, thereby dealing with the issue *de facto*. The majority of states have adopted the Uniform Parentage Act ("UPA"), and applied the act to traditional surrogacy contracts.[74] Under the UPA, a parent can be established by either proving a genetic relationship or by the woman bearing and delivering the child.[75] Applying the UPA to a traditional surrogacy situation, the surrogate and the semen provider are the child's mother and father. However, in the gestational surrogacy context, as discussed above, both

68. *Id.* at 764. Furthermore, he states, " . . . [S]ociety and the law recognize only one natural mother." *Id.* This statement eliminates, through strict statutory interpretation, the possibility that a child might have two mothers. For an argument that such reasoning assumes the answer before delving into the question of natural motherhood ,*see* Kandel, *supra* note 8, at 173-78.

69. *Clark*, 644 N.E.2d at 765.

70. *Id.*

71. *Id.* at 766.

72. *Id.* If an egg is stolen from a woman during removal of other eggs, a question exists as to whether she has a right to refuse to give her eggs to another woman for the other woman to have them implanted in her body. According to the rule of intent, even a woman who uses the eggs without the other woman's consent would be considered the natural mother.

73. *Id.* at 767.

74. *See, e.g.*, CAL. FAM. CODE §§ 7600-7700 (West 1994 & Supp. 1999).

75. *Id.* § 7610.

husband and wife are often genetically related to the child, providing both the intended mother and the surrogate with a claim.

Only one state, Florida, has enacted a statute that specifically allows for commercial gestational surrogacy contracts and denies any rights to the gestational surrogate, similar to the Israeli Surrogate Agreements Law.[76] The gestational contract is held to be binding as long as the surrogate is at least 18 year of age and the intended mother cannot gestate a pregnancy to term, or doing so would be hazardous to her health.[77] According to the law, the gestational surrogate agrees to relinquish any parental rights upon the child's birth and to proceed with the judicial proceedings to transfer parenthood, unless it is determined that neither member of the commissioning couple is a genetic parent.[78] Similar to the Israeli statute, there is no right to withdraw consent.[79] Without the genetic link, the surrogate mother is not considered to have any claims to the child.

Virginia has a statute that permits non-commercial surrogacy agreements.[80] Interestingly, upon the birth of the child the surrogate mother is considered the child's mother, unless the intended mother is a genetic parent, in which case the intended mother is considered the mother.[81]

Other state statutes do not differentiate between traditional and gestational surrogacy, which leaves uncertainty as to whether they apply to gestational surrogate cases. The District of Columbia,[82] Indiana,[83] Michigan,[84] New York,[85] North Dakota,[86] and Utah[87] deny enforcement of all surrogacy contracts. Kentucky,[88] Louisiana,[89] Nebraska,[90] and Washington[91] deny enforcement of commercial surrogacy contracts. New Hampshire makes non-commercial surrogacy agreements enforceable but grants the surrogate mother the right to terminate the agreement, unconditionally, 72 hours after the birth of the child.[92] According to the statute, after approval of a judicial hearing, the rights of the birth mother and her husband are terminated. Arkansas is the only state that has passed legislation providing an unconditional presumption of validity of traditional surrogacy arrangements commercial and non-commercial. The state's statute concludes that a child born to a surrogate mother is the child of the "intended

76. FLA. STAT. ANN. § 742.15 (West 1997).
77. *Id.* § 742.15(2).
78. *Id.*
79. *Id.*
80. VA. CODE ANN. §§ 20-159, 10-160(b)(4) (Michie 1995).
81. *Id.*
82. D.C. CODE ANN. § 16-402 (1997).
83. IND. CODE ANN. § 31-20-1-1 (Michie 1997).
84. MICH. COMP. LAWS ANN. § 722.855 (West 1993).
85. N.Y. DOM. REL. LAW § 22:122 (McKinney 1997).
86. N.D. CENT. CODE § 14-18-05 (1997).
87. UTAH CODE ANN. § 76-7-204 (1995).
88. KY. REV. STAT. ANN. § 199.590 (Michie 1995).
89. LA. REV. STAT. ANN. § 9:2713 (West 1991).
90. NEB. REV. STAT. § 25-21, 200 (1995).
91. WASH REV. CODE ANN. § 26.26.230 (West 1997).
92. N.H. REV. STAT. ANN. § 168-B:21 (1994).

parents" and not that of the surrogate.[93] However, the Arkansas statute preserves the surrogate mother as the legal mother for purposes of registration.[94]

C. Jewish Law

Jewish legal authorities have approached this inquiry with seriousness equal to the U.S. courts and legislators, but with a significantly different emphasis. The court's solution in *Johnson v. Calvert* to the maternity question of gestational surrogacy, based upon the intent of the parties, has not been discussed in Jewish legal sources. Dr. Chaim Povarsky comments, "The notion of establishing a parent-child relationship based upon the intent of the parties who are involved in the production of the child is alien to Jewish thought."[95] This is because, as will be discussed in the following section, Jewish law does not traditionally recognize the establishment of parental status by intent in any form, even by adoption or when all parties agree.[96] Intention is foreign to Jewish law as a basis for determining natural relationships such as motherhood.

Another distinction between the methodology of U.S. law and Jewish law is that secular law is mainly concerned with the custody of the child and the rights of the surrogate mother and the intended parents to the child, whereas Jewish law is mostly concerned with the status of the child established by the identity of its mother.[97] Jewish law authorities who have commented on the identity of the mother, have done so with an emphasis on determining the child's lineage, not the child's care.[98]

In Jewish law, regardless of who cares for the child, lineage has significant consequences. The establishment of parenthood relates to the fulfillment of *halakhic* obligations, issues of personal status and civil law.[99] With regard to religious obligations, the issue of parentage is relevant for matters of the father's obligation to "be fruitful and multiply,"[100] and the obligation of the child to honor its parents. The personal status of the child is relevant for determining the permissibility of certain marriages, i.e., laws against incest. In matters of civil law, parental status may be relevant for matters of inheritance and child maintenance laws. Therefore, the importance of determining motherhood is broader than the issue of who will be entitled to custody.

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93. ARK. CODE ANN. § 9-10-201 (Michie 1998).

94. *Id*. § 9-10-201 (2).

95. Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law*, 29 U. TOL. L. REV. 409. 461 (1998).

96. *See infra* Part IV(B).

97. The issue of how Jewish law would determine custody will be discussed *infra* Part IV(C).

98. *See, e.g.*, Avraham Yitchak Halevi Calev, *Who is the Mother of the Child; the Parent or She who Gives Birth?*, 5 TANCHUMIN 260 (1984). The title itself indicates that despite the fact that the guardian or acting parent of the child is the intended parent, the issue of the natural mother's identity is still important.

99. *See* Yehoshua Ben-Meir, *Legal Parenthood and Genetic Parenthood in Jewish Law*, 12 JEWISH L. ANN. 153 (1993).

100. For a thorough discussion of the commandment to be fruitful and multiply, *see infra* Part IV(a).

Jewish law consists of written law, *The Bible*, and oral law, all of which are both considered to have been revealed to Moses.[101] The cornerstone of the oral law is *The Talmud*, which is considered binding for all followers of Jewish law.[102] Since the issue of gestational surrogacy is only made possible by modern technology, there is no official singular ruling on the matter that can be derived from *The Talmud*. Rather, modern day *poskim* (religious authorities) have issued responsa (answers to individual questions)[103] and Jewish law commentators have issued opinions on the matter based on Talmudic sources.[104] When an issue is not directly discussed either in *The Torah* or *The Talmud*, authorities will base their opinions on analogies with accepted rulings, derive law from Talmudic or biblical sources, or when this is not possible, they may base their opinions on *aggadah*—the homiletic, non-normative portion of *The Talmud*, also known as the philosophy of the law.[105]

Jewish legal authorities disagree as to whether the genetic donor or gestational surrogate is the actual mother. However, the majority of authorities consider the gestational surrogate to be the legal mother of the child.[106] The minority opinion is that the genetic mother is the legal mother of the child.[107] Another

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101. One rabbinic authority explains the oral law as follows:

> It is impossible for the Torah of God to have covered all possible cases that may ever arise, because the new situations that constantly arise in human affairs, in law, and as a result of human enterprise are so manifold that a book cannot encompass them. Therefore, general principles, which the Torah only briefly suggests, were revealed orally to Moses at Sinai, so that *halakhic* authorities of every generation would use them to derive new laws.

MENACHEM ELON, CASE BOOK: JEWISH LAW 6 (1988) (*citing* JOSEPH ALBO, SEFER HA-IKKARIM [THE BOOK OF PRINCIPLES] 3:23).

102. The Talmud was compiled during the end of the 5th century C.E. The Talmud consists of the Mishnah and Gemara. The Mishnah is divided into six orders and although its origins are disputed, the majority view maintains that it was written by Rabbi Judah Ha-Nasi at the end of the 2nd century C.E. The Gemara provides a commentary on these codified laws. There is a Babylonian Talmud [hereinafter B. Talmud] and a Jerusalem Talmud [hereinafter J. Talmud] that use different Gemara. While both Talmuds are used and may be influential, the Babylonian Talmud takes precedence. *See* MENACHEM ELON, JEWISH LAW 224-27, 1091-98 (1994).

103. The responsa literature, or "case law" of the Jewish people, consists of decisions written by diverse legal authorities in the post-Talmudic period in response to individual questions posed to Rabbis. *See* ELON, *supra* note 102, at 1454-528. Responsa is binding only on those who ask a question directly or for those in a community which has chosen to accept the opinions of a religious authority upon them.

104. A commentator gives an opinion that is not binding on any particular individual case while a *posek* gives an opinion in direct response to a question asked. The opinion given is then binding on the person who asks and whomever follows the interpretation of Jewish law by that Rabbi. For a full discussion of authority in Jewish law, *see* THE PRINCIPLES OF JEWISH LAW 96-99, 725-27 (Menachem Elon ed. 1975) [hereinafter PRINCIPLES].

105. *See* ELON, *supra* note 102, at 9-10. *But see* David Bleich, *Maternal Identity Revisited*, *in* JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES 106 (1997) (arguing that Jewish law interpretation and application in new technological situations should be based on analogies to legal and not homiletic sources or Jewish values and ideas).

106. *See* Calev, *supra* note 98, at 260; Zalman Nechemiah Goldberg, *Lineage of Mothers in Transferring a Fetus to the Womb of Another*, 5 TANCHUMIN 248 (1984); Ezra Bick, *Ovum Donations: A Rabbinic Conceptual Model*, *in* JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES 83, 83 (Emanuel Feldman & Joel Wolowelsky eds., 1997).

107. *See* Ya'akov Ariel, *Artificial Insemination and Surrogacy*, COLLECTION OF ESSAYS: MEDICAL ETHICS AND JEWISH LAW 171 (M. Halperin & Y. Primer, eds. 1996); R. Shlomo Goren, *Who is the*

opinion holds that both the gestational mother and genetic mother are considered the "mother" for matters of Jewish law.[108] Still others have held that neither is a mother in the legal sense of the term.[109] Since the emphasis is not on custody, there is less of a need to determine that the child has one mother, as was held in *Calvert*,[110] or for the child to have any legal mother at all.

It is not in the scope of this article to discuss to discuss in detail all of the many decisions that have been given on this issue.[111] However, a discussion of the central reasons given for the different legal determinations is important to an understanding of the issue.

A minority of Jewish law scholars is of the opinion that the genetic mother is the sole mother of a child born of gestational surrogacy.[112] In a much-cited article,[113] Rabbi Shlomo Goren bases his determination on an argument in *The Talmud* in which two voices argue as to the time when souls are given.[114] He concludes that the soul is given from the time of counting or numbering the intended persons and not from the time of their creation. Therefore, at the earliest stage possible, the time of insemination, the identity of the child is already determined by its genetic make-up.[115] He also argues that fatherhood and motherhood are defined in the same manner, from the first drop of seed from both male and female, upon fertilization.[116]

Rabbi Itamar Warhaftig asserts that logically, it is the egg donor and not the surrogate mother who should be considered the mother.[117] His logical basis for this conclusion is that it is the genes of the genetic mother and father that will determine the characteristics of the child and that the womb of the surrogate is nothing more than the place of growth.[118] Furthermore, he argues that concep-

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Mother When Eggs Are Donated? HA-TZOFEH, 7 Adar I 5744 (1984); Joshua Fagenbaum. SHA'AREI TORAH, vol. IV, no. 4); Prof Ze'ev Low, EMEK HALAKHAH, II (Jerusalem, 5749) (1989); Itamar Warhaftig, 5 TANCHUMIN 268 (5744) (1984).

108. *See* Bleich, *supra* note 12, at 47.

109. R. Eliezer Waldenberg, *Responsa Tzitz Eliezer* XV, no. 45 [hereinafter Waldenberg XV]. This responsum originally appeared in 9 *Assia* 1 (Tamuz 5742) (1982)) and is reprinted in 5 *Sefer Assia* 84-93 (Jerusalem, 5746) (1986)), arguing that when an embryo is created through *in vitro* fertilization the result is a complete absence of natural genealogy, thus maternal identity is established only when fertilization occurs while the ovum is yet attached to the mother's body). However, in a later responsum when asked about the genealogy of a child born from a donor egg inseminated with the husband's sperm and gestated by the wife, he decides that the women who gives birth to the child is the mother. R. Eliezer Waldenberg, *Responsa Tzitz Eliezer* XX, no. 49; *see also* R. Judah Gershuni *Kol Tzofayikh* 361-367 (1980)).

110. *See supra* notes 41-59 and accompanying text.

111. For a thorough, though not entirely up to date, collection of *halakhic* authorities' decisions and sources and reasoning they have used, *see* Avraham Shteinberg, ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS 115-50 (1991).

112. *See* Shlomo Goren, *Ha-Tzofeh*, 7 Adar I (1984); Itamar Warhaftig, 5 TANCHUMIN 268-69 (1984).

113. R. Shlomo Goren, *Ha-Tzofeh*, 7 Adar I 5744 (1984).

114. B. Talmud, *Sanhedrin* 91(b).

115. Goren, *supra* note 113.

116. *Id*. He bases this conclusion on a number of Talmudic sources, including *Nidda* 31(a) and *Sanhedrin* 91(b).

117. Itamar Warhaftig, *supra* note 107, at 68-69.

118. *Id*.

tually, if not practically as of yet, gestation could even be done in a laboratory.[119] In his opinion, genes are the only essential human contribution. He makes an analogy to an agricultural dispute discussed in *The Talmud*.[120] *The Talmud* discusses an olive sapling that is washed away by the river to a neighbor's field where it continues to grow.[121] One party claims that it is his olive sapling and thus he owns it. The other party claims that it was his land that facilitated the tree's growth; and therefore, he should be considered the owner. It is determined that there is a preference for the owner of the olive sapling.[122] By analogy the genetic donation of the egg is compared to the contribution of the sapling, which establishes ownership.

The vast majority of opinions, however, claim that the surrogate mother is the legal mother. There are four major sources from which scholars have drawn proof that the surrogate is the legal mother of the child. The first is based on a discussion of conversion of a woman during her pregnancy in *The Talmud*,[123] relied upon by two highly regarded Rabbinical figures: Rabbi Zalman Nechemia Goldberg[124] and Rabbi Eliezer Yehudah Calev.[125] *The Talmud* explains that two twin brothers, who are non-Jews, and subsequently convert, have no obligations in *chalizah* or *yibum*, (levirate marriage), and are not obligated to refrain from marrying each other's wives.[126] Upon conversion to Judaism, all prior familial relationships are legally severed according to Jewish law.[127]

In contrast, twins who were conceived when their parents were non-Jews and were born to a Jewish woman (she converts while she is pregnant), are not obligated in *chalizah* and *yibum* (levirate marriage), but are obligated not to

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119. *Id*.

120. *Id*. (citing B. Talmud, *Baba Metzia* 100(b)).

121. *Id*.

122. Itamar Warhaftig, *supra* note 107, at 68-69.

123. B. Talmud *Yevamot* 97(b).

124. Goldberg, *supra* note 106, at 252.

125. Calev, *supra* note 98, at 260-61. Rabbi Calev uses the same proof text as Goldberg, however he limits the holding to a Jewish egg born to a Jewish woman. If the egg is from a non-Jewish woman, he holds that the fetus would not be converted—for those who believe that the fetus is not part of the mother—if the conversion of the fetus wasn't intended. Therefore, the familial relationship to the birth mother is dependent on the birth mother's intent to convert the fetus. In the case where there is no conversion of the fetus, i.e., in gestational surrogacy where the surrogate mother is Jewish and the egg donor is not Jewish, the natural status of the egg donor as the mother prevails over the Jewish law determination that the surrogate (birth mother) is the mother. In other words, if the egg donor is non-Jewish, the child is considered non-Jewish and, therefore, Jewish law does not determine maternity.

126. B. Talmud, *Yevamot* 97(b). *Chalizah* and *Yibum* are complex religious obligations. If a married man dies leaving no children, Jewish law encourages his widowed wife to marry her deceased husband's brother in order to conceive children that will continue deceased's husband's line. If the brother marries the wife of his deceased brother this is called *Yibum*. If, however, he does not want to marry her he must release her by performing *Chalizah* (removal of the obligation). This obligation is in stark contrast to the strict prohibition on a man from marrying his brother's wife after his brother dies, if the deceased brother did have children with his wife. In contemporary times, *Yibum* is not performed; rather, the Rabbis have mandated that the proper course is *Chalizah*. For a thorough explanation of the concepts of *Yibum* and *Chalizah*, the history of the obligation and an explanation of the way they are practiced today, *see* PRINCIPLES, *supra* note 104, at 403-09.

127. For a full explanation of a theoretical rebirth that severs all previous familial ties upon conversion to Judaism *see* Bleich, *supra* note 108, at 49-50.

marry their brother's wife.[128] Rashi, a commentator on *The Talmud*, suggests that the reason they are not obligated in *chalizah* and *yibum* but are obligated not to marry each other's wives is that the obligation of *chalizah* and *yibum* derives from paternal lineage, and that not marrying a brother's wife, follows from maternal lineage.[129] Since fatherhood is determined at conception, and they are now considered converts, they have severed ties to their father and are exempted from obligations based on their father's lineage. However, since motherhood is established upon birth, the obligations that are derived from lineage to their mother still hold. In conclusion, if motherhood were determined by genetic input or upon conception, the conversion of the mother would have severed her ties to her children and their ties to each other.[130] However, after the twins' birth they are still considered brothers from their maternal lineage in that they are prohibited from marrying each other's wives. If no familial tie existed there would be no marital prohibition because they would not be considered brothers at all.[131] Therefore, in accordance with this source, it has been argued that it is birth that determines motherhood.

Another Talmudic source,[132] cited by Rabbi Calev[133] and discussed by others as well,[134] discusses an *aggadic* interpretation (homiletic tale) of the biblical story of Rachel and Leah.[135] The allegorical source refers to an intra-uterine transfer of Dinah from the womb of Rachel to the womb of Leah and an intra-uterine transfer of Joseph from the womb of Leah to the womb of Rachel. Subsequent references in scripture refer to Dinah as the daughter of Leah and Joseph as the son of Rachel, despite the supposed switch. Ostensibly, this tale indicates that each child has a single mother and that the mother is the birth mother, not the genetic mother. This analogy marks parturition rather than gestation or egg donation as the establishing variable of motherhood.

While some authorities will not use allegory in matters of determining Jewish law,[136] many other authorities have held that if the allegorical interpreta-

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128. B. Talmud, *Yevamot* 97(b).

129. Rashi on B. Talmud, *Yevamot* 97(b).

130. There is considerable disagreement as to whether the children themselves also convert, or whether they do not convert and receive their status upon birth. This disagreement arises from the question of whether a fetus is considered to be part of the mother or a separate entity. For this article it is not crucial to decide this question because the child's relationship to its mother would be severed if motherhood was determined upon conception—because upon her conversion she would no longer be related to her children. For a discussion of this disagreement, *see* Calev, *supra* note 98, and Goldberg, *supra* note 106.

131. *But see* Yehoshua Ben-Meir, *In vitro Fertilization, the Relations of the Fetus to the Surrogate Mother and the Biological Mother*, 41 ASIA 25 (1987) (arguing that this proof is only valid for those who agree that a child is a part of the mother's body, which is not a conclusion accepted by all authorities); Ezra Bick, *Surrogate Motherhood*, 7 TECHUMIN 266 (1984) (arguing that this source only proves a mother-child relationship if the gestating mother is also she who produced the egg).

132. B. Talmud *Tractate Nida* 31(a).

133. *See* Calev, *supra* note 98, at 266-67 (using the example of Rachel and Leah to show that there can only be one mother and she is the one who gives birth).

134. *See* Shteinberg, *supra* note 111, 134-35; R. Moshe Solovethick, OR HA-MIZRAH [LIGHT OF THE EAST] 125 (1981).

135. *See* Targum Yonatan, *Genesis* 30:21.

136. *See* Bleich, *supra* note 12, at 50.

tion does not conflict with other legal sources, it is acceptable to learn from these sources.[137]

A third Talmudic source used to demonstrate the legal standing of the birth mother is an *aggadic* source from the Book of Esther.[138] The Babylonian Talmud, *Megillah* 13(a), notes the redundancy inherent in the phrases of the Book of Esther "for she did not have a father or a mother" and "upon the death of her father and mother." This indicates that the second phrase is designed to emphasize that Esther did not have a father or mother for even a single day. *The Talmud* explains that her father died as soon as her mother conceived and that her mother perished upon her birth; and therefore, she never had a mother or a father.[139]

In his article, Rabbi Nechemiah Goldberg brings the interpretation of this tale by Rabbi Joseph Engel,[140] who concludes from this source that men and women create parental relations in distinct ways.[141] Rabbi Engel argues that a fetus can have a father while it is still in the womb, but the motherhood relationship is not determined until the birth of the child.[142] Rabbi Engel explains that the reason that Esther never had a mother is that during the pregnancy the fetus is considered to be part of its mother.[143] Therefore, only parturition establishes motherhood, in contrast to the determination of fatherhood.[144] He emphasizes that motherhood and fatherhood are essentially different and are established by different factors.[145]

Rabbi Yehoshua Ben-Meir also concludes that the gestational mother is the legal mother under Jewish law and he uses yet another argument to draw this conclusion.[146] He argues that the identity of the mother can be derived from *The Talmud's* determination that during the first 40 days of its formation, the embryo is considered to be only water.[147] He concludes that we can relate to the implant of fertilized eggs "as if it were a medicinal potion given to the woman as a treatment against barrenness—fertilized water."[148] Since the fertilized egg is not

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137. *See* Shevut Ya'akov, Pt. 2:178; Mishneh Halachot, Pt. 2:44. *But see* Ben-Meir, *supra* note 131, at 26 n.8 (bringing other *halakhic* opinions that one should never learn from *aggadic* sources).

138. B. Talmud, *Megillah* 13(a).

139. *Id.*

140. Goldberg, *supra* note 106, at 252 (citing Joseph Engel, BEIT HA'OSAR, erech av [The Treasury] § 12, Pt. 4).

141. *Id.*

142. *Id.*

143. *Id.* (literal translation: "the fetus is the thigh of his mother")

144. *Id.*

145. Goldberg, *supra* note 106.

146. Ben-Meir, *supra* note 99, at 153.

147. *Id.* at 165.

> The daughter of a priest who has relations with an Israelite continues to eat *terumah* [(10% of all vegetation grown given to family members of a Cohen- a priest from the tribe of Cohen); If she is carrying a child of a man from the tribe of Israel, then she is no longer allowed to eat *terumah*. This raises the issue of when the daughter of a Cohen is considered to be carrying the child.] According to Rav Hisda: 'She should immerse herself and then eat *terumah* until the fortieth day after conception . . . for if she is pregnant, it is considered to be mere water until the fortieth day.'

Id. (citing B. Talmud, *Tractate Yevamot* 69(b)).

148. *Id.* at 165-66.

considered to have an identity until the 40th day and *in vitro* fertilization will occur before that time, the birth mother has the legal status of mother.

Rabbi David Bleich summarizes and discusses the Jewish law decisions issued in the last decade. Rabbi Bleich concludes that, "the preponderance of the evidence adduced from Rabbinic sources demonstrates that the consensus of Rabbinic opinion is that a maternal-filial relationship is generated between the gestational mother and the child, despite the absence of any genetic relationship, by virtue of parturition alone."[149] Rabbi Bleich argues, however, that while the majority of sources hold that the birth mother is the legal mother, it is necessary to be cautions in the face of uncertainty. He therefore believes that both mothers should be considered legal mothers.[150]

Rabbi Ezra Bick argues that this issue cannot be determined definitively from the sources; rather, he maintains that the whole issue demands a more broad conceptual approach.[151] He argues, "Essentially, this question is not susceptible to the classic *halakhic* approach of analogy with an existent *halakhic* ruling. Not only does a "preponderance" of *halakhic* sources not exist in favor of parturition as the maternal determinant, practically speaking, no *halakhic* sources exist for this or any competing candidate for the determinant."[152] He argues that while the sources may relate to the issue of determining motherhood, they do not do so conclusively and the laws derived are speculative.[153] Rabbi Bick instead turns to deriving the identity of the mother, "from the general conceptual framework of the Sages concerning conception, on the assumption that, in the absence of negative evidence, the proper legal definition of conception in regard to the determination of parenthood will be congruent with that general framework."[154] This method of deriving law is contested,[155] but does find support in Jewish thought, particularly when dealing with ethical issues for which no legal precedent is readily available.[156]

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149. *Id.*

150. Bleich, *supra* note 12, at 166.

151. Bick, *supra* note 106, at 85.

152. *Id.* at 84.

153. *Id.* at 84-88. Rabbi Bick argues that the analogies used are imperfect and points out a number of logical flaws, such as the major proof used about the women who converts while carrying twins. Bick argues that this proof is flawed because in the case of a pregnant convert, the determinant of conception has been annulled by the conversion (because conversion annuls all familiar relations). No such annulment occurs in surrogacy. He also argues that the case of the pregnant convert only proves that familial relations are determined at birth, not that birth determines familial relations. The maternal relationship could have been caused by conception but only becomes established when the child is born. In addition, even if birth alone determines maternity, it might be argued that genetic continuity is a necessary condition for such a determination. *Id.* at 84-87. He also argues that the proof from the story of Rachel and Leah is not only dubious because it is from an *aggadic* source, but also because it is not clearly discussed in the text of Genesis whether Dina was considered the legal daughter of Leah or whether she was known as such because Leah raised her. Surely, Leah and Rachel were unaware of this theoretical intrauterine transfer. *But see* BLEICH, *supra* note 105 (defending the traditional *halakhic* analogies).

154. Bick, *supra* note 106, at 96.

155. *See* BLEICH, *supra* note 105, at 114 (responding to Bick's article *supra* note 106).

156. This method is similar to basing a decision on *aggadah*, which is commonly used when there are a lack of legal sources. However, it can be differentiated because it encompasses a second level of abstraction. Rabbi Bick is not only basing the determination on a homiletic source, he is going

Rabbi Bick explores a more general approach to childbirth and the roles of men and women in creating children to determine the Jewish approach to the issue.[157] Ultimately, he adopts the view that the surrogate mother is the legal mother.[158] Rabbi Bick first explains that the easiest conceptual solution to the problem would be biological, based on the scientific knowledge that both a woman and a man contribute seed to the creation of a child.[159] However, since the Talmudic sources do not mention the female ovum, to the degree that the Rabbis of *The Talmud* had a concept of motherhood, such a concept must be definable without reference to the ovum.[160] Instead, he shapes what he terms the "agricultural model" with references in rabbinic literature to the principle that the female is identified with receptivity. One such example is as follows:

> R. Levi said: the upper waters are male and the lower female. The one says to the other, "Receive us; you are God's creatures and we are His messengers." Immediately, they receive them, as is written (Isa. 45:8), "[Drop down, heavens, from above, and let the skies pour down righteousness,] let the earth open"—as a female opening herself to a male—"and be fruitful with salvation"—they procreate.[161]

This excerpt is an interpretation of Genesis, which clearly views woman as a receiver, who by receiving becomes fruitful.

Ultimately, Rabbi Bick asks: "What is the difference between an 'agricultural' model and a 'biological' model of motherhood?"[162] His answer neatly sums up the most significant difference between the secular law resolutions on the issue of motherhood discussed above, and the Jewish resolution on the issue:

> The latter (biological model) either denies or at least attaches no importance to the differences between male and female. They both donate genetic material and together they constitute the embryo. Maternity and paternity are identical; simply the different names we give to the same position when filled by members of the two sexes, . . . The former model (agricultural model), while positing parallel roles, it is only through the joint participation of the two that an embryo

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further by first deriving general principles from these sources and then applying them to an entirely new scenario—and the two methods are certainly comparable. There are many circumstances in which the only source for *halakhah* is reason or the consent of the people. There are also instances where the source of the law is simply equity, an understanding of justice. *See* AVI SAGI, JUDAISM: BETWEEN RELIGION AND MORALITY 116-20 (1999) (arguing that Jewish law is derived not from a singular but from a variety of conceptual sources including reason and consent).

Rabbi Bick offers another example of what he considers deriving a law from a determination of what Talmudic Sages might have said: "The different opinions concerning the use of electricity on Shabbat reflect such as process. Although the definition of *boneh* (building) may be derived from the Talmud, the Hazon Ish's extension of it to electricity is based on a completely new conceptualization of the nature of an electric current, which obviously has no basis in the Talmud itself. The Hazon Ish has a model for electricity and tries to decide what the Talmud Sages would have said about it." Bick, *supra* note 106, at 105 n.19.

157. Bick, *supra* note 106, at 89-96.

158. *Id.*

159. *Id.* at 89.

160. *Id.*

161. JACOB NEUSNER, GENESIS RABBA: A JEWISH COMMENTARY TO THE BOOK OF GENESIS: A NEW AMERICAN TRANSLATION 13:13 (1985).

162. Bick, *supra* note 106, at 101.

> can be formed, nonetheless defines the roles in a radically different, almost opposite way.[163]

Rabbi Bick concludes that a conception of the relationship between man and woman, which recognizes the biological differences of men and women, corresponds most accurately to Jewish legal philosophy.[164] Therefore, it makes sense to denote parturition as that which defines motherhood and seed as that which defines fatherhood. He argues that it makes sense to give status to that which makes a man different from a woman, since such differences are given much credence in Jewish law.

Rabbi Bick offers a conceptual orientation to the issue from a broad overview of Jewish law. He posits that Jewish law should give special consideration to the legal status of the surrogate as the birth mother due to the law's sensitivity to, and emphasis on, the differences between men and women. This understanding provides a broader, philosophical background to the more legalistic determinations that have been made.

III. ENFORCEABILITY OF THE ISRAELI SURROGATE MOTHERHOOD AGREEMENTS LAW

A. The Jewish Law Determination of Motherhood and the New Israeli Surrogacy Law

The Surrogate Agreements Law contains many provisions that attempt to incorporate aspects of Jewish law in order to avoid problems that might arise with the religious communities in Israel. Specifically, the law takes into consideration the Jewish stigma of *mamzer*.[165] A *mamzer* is a child born as a result of an adulterous relationship between a married woman and a man who is not her husband or through incestuous relations.[166] If a child is deemed a *mamzer*, the child is not permitted to marry under Jewish law except to another *mamzer*. Since the Rabbinical courts have jurisdiction over personal status in Israel, including marriage, a *mamzer* would not be able to marry in Israel. Furthermore, if the person attempts to marry in some other forum, it would create tension between the religious and secular communities in Israel.

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163. *Id*. at 101.

164. *Id*. at 102; *see also infra* Part VI for a discussion of gender difference in Jewish law.

165. It should be noted that incorporating religious considerations into Israeli law in the related area of artificial insemination by a donor (AID) has not been so readily accepted. According to Jewish law, if the procedure is permitted at all, which is a matter of serious disagreement, the sperm donor's identity would certainly have to be made public. However, such information is not public, and there is a considerable threat of *mamzerut* due to the widespread use of the procedure. The only regulation that has been passed in this area is The Public Health (Sperm Bank) Regulations, 1979, K.T. 39996, 1448. Artificial insemination is practiced regularly in Israel, although the law does not mandate public registration of the male donor. *See* Michael Korinaldi, *The Legal Status of a Child Born of Artificial Insemination from a Donor or from an Egg Donor*, 18 SHNATON HAMISHPAT HAIVRI 295 (1995); Halperin-Kaddari, *supra* note 34, at 334-35.

166. The stigma of *mamzerut* does not derive from relationships of a married man with another woman because according to Jewish law, before it was outlawed by a rabbinic decree a man could marry more than one woman. *See* PRINCIPLES, *supra* note 104, at 435; NOAM ZOHAR, ALTERNATIVES IN JEWISH BIOETHICS 78-80 (1997).

Furthermore, due to Jewish law's general opposition to artificial insemination by a donor, the use of a donor sperm is prohibited and the father must be the genetic father of the child.[167] In addition, the surrogate mother and the ovum donor must be of the same religion as the intended mother in order to accommodate those Jewish law authorities that have expressed uncertainty as to the religion of the child born from a surrogate, whether the child takes on the religion of the ovum donor or the surrogate.[168] A number of commentators have explored and analyzed the effect that these *halakhic* caveats have had on the Surrogacy Law.[169]

However, the law does not reflect consideration for the majority Jewish law position that the surrogate mother is the legal mother. As discussed in depth above, the intended parents are considered the legal parents.[170] The surrogate mother's identity must be officially recorded according to the Israeli law, but she does not retain any rights to the child that would necessitate an adoption, nor does she have more than a very narrow right of withdrawal from the contract.[171]

More significant than the Israeli law's lack of consideration for the Jewish perspective on this matter is the religious authorities' own antipathy. It seems reasonable to assume that since the majority view in Jewish law is that the gestational mother is the legal mother, Jewish authorities would object to surrogate agreements that forcefully alienate the legal mother from her natural child.[172] This is especially the case considering Jewish law's emphasis on biology and status.[173]

A number of rabbinic authorities have voiced objections to the surrogate motherhood process due to misgivings about alienating child-rearing from the sanctity of marriage and the marital bed,[174] out of concern about the technology that facilitates it.[175] However, published responsa have not raised objections to the surrogate motherhood process based on the alienation of the natural mother. In Israel, surrogate motherhood has been expressly permitted by some of the most respected rabbinic authorities. Both the Sephardic Chief Rabbi, Rabbi Bak-

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167. *Id.*; Surrogate Agreements Law, 1996 S.H. 1577 §2(4); *see infra* Part VI for an explanation of AID and Jewish law's opposition to it.

168. *See supra* note 125 for a discussion of this concern. This was confirmed as a *halakhic* consideration by Dr. Halperin. *See infra* note 193.

169. *See* Shalev, *supra* note 34, at 64-76; *see also* Halperin-Kaddari, *supra* note 34, at 333-35.

170. *See* Surrogate Agreements Law, 1996 S.H. 1577, §10(a).

171. *Id.* § 13a, 29. Section 13(a) discusses the limited right to withdraw from the contract, and section 29 addresses the requirement to register the birth mother for purposes of lineage. The repercussions for not accounting for the status of the birth mother in Jewish law are less precarious than the other religious considerations because it will not create problems of illegitimacy, as long the identity of the birth mother is recorded and can be checked, which is required by the law.

172. *See* Noam Zohar, *Artificial Insemination and Surrogate Motherhood*, 2 S'VARA [Reason] 13, 18 n.10 (1991).

173. *See supra* notes 97-100 and accompanying text.

174. *See, e.g.*, Moshe Tendler, *Infertility Management: Cure or Ill*, 17 / 334 SH'MA 109-10 (1987).

175. *See, e.g.*, Waldenberg XV, *supra* note 109; *see also* Avraham Sofer Avraham, NISHMAT AVRAHAM Eben Ha'ezer [THE LAWS OF PROCREATION] § 5, at 184 (1982) (citing Rav Shalom Elyashiv and Rav Shlomo Zalman Auerbach as condemning in vitro fertilization and surrogate motherhood).

shi Doron, and Rabbi Zalman Nechemia Goldberg, a Rabbinical court judge and highly regarded *halakhic posek*, have given their approval to the law.[176]

In a private meeting with the Surrogate Agreements Approvals Committee appointed by the law, Rabbi Zalman Nechemia Goldberg explicitly condoned the law and made no mention of the surrogate mother's rights or claims to the child.[177] When asked by the committee who is the mother in a case of gestational surrogacy where the intended mother has donated her ovum, Rabbi Goldberg responded that this is a new issue and must be determined on the basis of analogies to related sources of *halakhah*, but cannot be determined with full certainty.[178] Therefore, he insisted that both mothers need to be treated as mothers for the sake of lineage to avoid any determination of *mamzerut*.[179] When asked whether he would permit a woman that sought his approval to use a surrogate mother, he answered that he would allow it if a woman could not have a child otherwise.[180] Rabbi Borshtein, Director of the Puah Institute of Halakhah and Reproductive Technology in Jerusalem, has stated that under his guidance a number of women have received private permission from various Orthodox *halakhic* authorities, permitting the procedure and contract as it is designated in the Israeli law.[181] In fact, the first couple to use the Israeli Surrogate Contracts law was a religious couple.[182]

While Rabbi Zalman Nechemia Goldberg's conversation with the Approvals Committee is the only written acceptance of the Israeli law by a renowned authority of Jewish law, there is an understanding among the religious communities that such procedures may be permissible, depending on a couple's specific circumstances and with direct approval of a Rabbinic authority.

In U.S. courts, the defining factors of motherhood have direct bearing on the legal determination of who has rights to the child. In traditional surrogacy, where the surrogate mother is considered the legal mother, the courts and many state legislatures have made such contracts illegal or void as against public policy, provided an option for no cause withdrawal, or required a custody hearing, as was the case in *In re Baby M*.[183] In gestational surrogacy, where the intended

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176. Telephone Interview with Dr. Avraham Shteinberg, author of THE ENCYCLOPEDIA OF HALAKHA AND MEDICINE (1998) and Israel Prize Winner (June 15, 2000). There is no official recording of the approval by Rabbi Bakshi Doron, but the law passed with the consent of the Chief Rabbinate of Israel. Zalman Nechemia Goldberg, *On Donating Eggs, Surrogacy, Frozen Sperm of a Single Man, and Using Sperm of the Dead*, 17 ASIA A-B 45 (Spring 1999).

177. Goldberg, *supra* note 176, at 45-47 (1999).

178. *Id* at 45-46.

179. *Id*.

180. *Id* at 46-47.

181. Telephone Interview with Rabbi Borshtein, Director of the Puah Institute of Halakhah and Reproductive Technology (June 16, 2000).

182. *Id*. The identities of the participants in the surrogate motherhood agreements are kept largely confidential in accordance with the Surrogate Agreements Law, *supra* note 15, § 19(c). In fact, § 19(c) dictates that "if any person makes public anything said at sessions of the Approvals Committee or any documents presented to it, or the name, identity or anything else likely to let the birth mother, the intended parents or the child be identified" without a court order, he may be imprisoned for one year.

183. *See supra* notes 36-37 and accompanying text.

mother is considered the legal mother, U.S. courts and legislators have not created the same impediments.

While in U.S. law, the identity of the mother is directly connected to the permissibility of surrogate motherhood, Jewish law authorities, in contrast, have not focused on the problem of subjugating a natural determination of motherhood and on the lack of provisions for the legal mother in Jewish law in gestational surrogate motherhood. Rather, they have condoned the law or condemned it for other reasons.

The next sections will explore possible reasons for this difference. One possible reason for the lack of relevance of the natural mother in Jewish law is that Jewish law, unlike U.S. law, would uphold and enforce surrogate motherhood agreements that allow the legal mother to waive her motherhood rights before the birth of the child. The acceptance of the contract would make the issue of who is the legal or natural mother prior to the contract irrelevant, except for purposes of recording the natural mother's identity. Custody of the child would then be legally transferred to the intended parents under Jewish law. Although exploration of this contractual option is necessary to fully understand why surrogacy has been accepted despite the mother's legal rights under Jewish law, it is important to note that the legal authorities who have permitted such contracts have not provided the validity of the contract as a basis for their affirmation.

The next section will consider whether Jewish contract law would allow a surrogate motherhood contract to be enforced despite the surrogate's legal status of mother. Part IV will discuss other aspects of Jewish law that might lead authorities to overlook the rights of the legal mother.

B. Is the Surrogacy Agreement Obligating the Birth Mother to Transfer the Child to the Intended Mother Binding Under Jewish Law?

1. Renting a Womb or Baby-Selling

In considering whether or not a contract for the transfer of a child is binding under Jewish law, one must first characterize the nature of the contract. This article assumes that the contract is commercial as is set forth in the Israeli Surrogacy Law.[184] One option for characterizing the contract is as an obligation of the birth mother to surrender her rights to raise the child and to agree to the adoption of the child by the intended parents. Alternately, the contract can be viewed as renting the womb of the surrogate mother as an incubator for the intended parents' child.

However, this second characterization of the contract is not consistent with the Jewish law view of motherhood. The surrogate mother is more than just a womb for rent according to Jewish law. As stated by the majority opinion, she is in fact the legal mother, and therefore the child in her womb does not simply belong to someone else while she temporarily nurtures it to viability.

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184. Surrogate Agreements Law, *supra* note 15, at § 6. Other jurisdictions have permitted only voluntary non-commercial agreements. Non-commercial agreements avoid the ethical complications of selling babies or renting a womb, while maintaining the potential for surrogate motherhood in the framework of an altruistic agreement. *See, e.g.*, VA. CODE ANN. §§ 20-159, -160(B)(4) (Michie 1995).

In Jewish law, baby-selling law may be less problematic than in other legal systems. Prohibitions against the selling of a person in Jewish law relate to the selling of a person into servitude.[185] In surrogacy arrangements, the child is not sold into slavery; rather, the right to raise the child is transferred. The difference in sensibilities between Western ethics and Jewish law should be understood in the context of a different perspective on parenting. Raising a child is viewed as an obligation and not a right under Jewish law, so it is not expected that one would pay for this duty.[186] Ostensibly, the prohibition against receiving money for the sale of persons is based on a fear of control over another human being in slavery and not a blanket prohibition against transferring a child for consideration.[187]

Rabbi David Bleich argues that baby selling is not prohibited under Jewish law.[188] He brings an example to illustrate this point from *Sefer Hasidim*.[189] *Sefer Hasidim* advises parents that have lost a previous child to change their names and thereby their identities in order to divert the negative heavenly decree on their persons.[190] The procedure he recommends is to conceptually sell their infants who have died to a friend for a nominal fee, thereby diverting the negative history from them.[191] This recommendation assumes the permissibility of selling of a child.

Western morality tends to view a surrogacy contract as a contract for services, whereas Jewish law is more apt to view the contract as one for the transfer of the child, as the gestational mother is the legal mother and baby selling is not as legally problematic.

2. A Contract for That Which is Not Yet in Existence

Characterizing the surrogacy contract as an obligation to surrender the child to adoption before its birth does create a number of legal problems in Jewish law. The first is the concept of "*dvar shelo ba le'olem*" ("things that do not exist in the world"). Contracts for objects or items of value that do not yet exist, or are not yet in the possession of the seller, are not recognized under Jewish law.[192] In his capacity as advisor to the Ministry of Health, Rabbi Dr. Mordechai Hal-

185. *See Leviticus* 25:39-42 ("If thy brother who dwells by thee be grown poor, and be sold to thee, thou shalt not compel him to serve as a bondservant . . . he . . . shall serve thee until the year of the Jubilee, and then shall . . . he return to his own family. For they are my servants, whom I brought out of the land of Egypt; they shall not be sold as bondsmen.").

186. *See infra* Part V(C) (child custody).

187. *See* Povarsky, *supra* note 95, at 454.

188. David Bleich, *Surrogate Motherhood*, *in* JERUSALEM CITY OF LAW AND JUSTICE 406-07 (1996) (citing RABBI *Sefer Hasidim* No. 245 (Jerusalem, 5720) (1960)).

189. *Id*.

190. *Id*. The theory is that as a different person, the parent is entitled to a new hearing against the heavenly decree. On rehearing, the heavenly court may find some new merit, presumably not of sufficient strength to abrogate an already-entered judgment, but possibly sufficient to prevent the entry of a newly-formed unfavorable decree. *Id.*

191. *Id*.

192. *See, e.g.*, B. Talmud, *Bava Metzia* 33(b); Moses Maimonides, MISHNEH TORAH, SEFER KINYAN [The Book of Acquisition] 22:1; CHOSHEN MISHPAT, SHULCHAN ARUCH 209:4 (relating to civil law and business ethics); *see also* PRINCIPLES, *supra* note 104, at 248-49; GOLD, *supra* note 205, at 122.

perin believes that this concept would nullify a surrogate motherhood agreement in Jewish law.[193]

However, most Jewish authorities believe that something not yet in existence can be charged as an obligation or lien on a person in favor of the obligee, rather than a transfer of rights to the object itself, which is not yet in existence.[194] Since the lien is not on the object but an obligation on a person, who does exist, it is considered valid. Dr. Chaim Povarsky recommends viewing the surrogacy agreement not as an obligation to transfer a child not yet in existence, but rather as an obligation on the part of the surrogate mother to transfer the child to the father's sole custody, thereby avoiding the problem of the impermissibility of contracting for things that are not yet in existence (*dvar shelo ba le'olam*).[195]

3. Contracts for Personal Services

However, an obligation upon the mother to relinquish the child to the sole custody of the father and his wife is fraught with further difficulty. Since the contract can not be characterized as a right upon the child itself, but rather, as an obligation upon the mother, such an obligation must be characterized as one for personal services, the service of providing the child. Unlike tangible goods or money to which a person has a right of property, the gestational mother does not have a similar right to a child; she has a duty to raise the child.[196] Therefore, in a contract for a child, unlike an obligation for goods, she is obliging herself to perform a service, such as the transfer of the child, not a relegation of her rights to the child, because the intended parents cannot place a lien on a right to something the mother does not have.

However, a future obligation to perform personal services or physical acts is of questionable validity under Jewish law. In western legal systems, a promise to perform a service, if there is consideration, would be valid as a right to sue a person to perform, or pay damages where specific performance is not permitted. Dr. Povarsky explains that in Jewish law, it is generally accepted that an obligation to work or perform a service or a physical act does not establish a lien against a person of the obligor, as does a proprietary obligation or debt.[197] This

193. Mordechai Halperin, *Surrogate Mother*, 7 REFUAH U'MISHPAT [MEDICINE AND LAW] 47 (1997).

194. An obligation on a person is called *shiabud haguf* (a lien on a body) as opposed to a right to property. *See* Shulchan Aruch, CHOSHEN MISHPAT 60:6; Tosafot on B. Talmud, *Ketubot* 54(b); Asher (Rosh) on B. Talmud, *Ketubot* 54(b); Moses Sofer (Chatam Sofer) on B. Talmud, *Ketubot* 54(b). For secondary sources explaining this matter *see* Povarsky, *supra* note 95, at 457-58; PRINCIPLES, *supra* note 104, at 249-50.

195. Povarsky, *supra* note 95, at 452.

196. *See infra* Part IV(C) on custody in Jewish law.

197. *See* Povarsky, *supra* note 95, at 452. An obligation to perform a certain act may refer either to the service involved in the performance of the act or to the carrying out of the act itself. Insofar as the obligation refers to the service, the obligation does not establish a lien against the person of the obligor because a lien for performing services is regarded as a kind of slavery. This principle is based on the talmudic ruling in which an employee is allowed to quit his work at any time, subject to damages he might have to pay the employer for actual losses the latter suffered as a result of the employee's resignation. The Talmud quotes Scripture stating, "For the children of Israel are slaves unto me, they are my slaves. . . ." *Leviticus* 25:55. The repetitious statement "they are my slaves" was interpreted to mean, "They are my slaves but not slaves to other slaves"; that is, Israelites are required not to enslave themselves [hereinafter the Slavery Argument]. *See* B. Talmud, *Bava Metzia* 10(a); Asher (Rosh) on *Bava Metzia* 10(a). There is a general attitude in Jewish law that any engage-

is because a lien against a person to perform an act is considered a kind of slavery, which cannot be undertaken through such a contract.[198] A contract that does not create a proprietary obligation is considered *kinyan devarim* ("the appropriation of words") and is invalid. In an agreement between two parties to perform some specific service, or a certain action, either side can back out of the agreement until the moment of its performance.[199]

However, it is contested whether an independent contractor is included under those who cannot make a binding contract for personal services.[200] The surrogate mother would presumably be considered an independent contractor because she is hired to perform a specific service, not for a period of time. According to Rabbi Yaakov, a prominent 12th century Tosafist scholar also known as Rabbeinu Tam, an independent contractor—as opposed to an employee—cannot retract from his obligation to perform services because an independent contractor is not regarded as a slave.[201] The Rosh, another medieval *halakhic* authority, argues that such a contract cannot be binding on an independent contractor or an employee.[202] Other scholars have agreed with the Rosh.[203]

The majority of authorities would agree that an employee might back out of his contract without consequence if the employer will not suffer irretrievable loss. There is, however, disagreement about the ability of an independent contractor to back out of a contract.[204] It is therefore not clear whether a surrogate mother's obligation to transfer the child would be binding upon her. It is a difficult question that necessitates extensive rabbinical analysis.

4. Meeting of the Minds

In addition to the problems with the surrogacy contract stated above, there is a further question of whether this contract is truly a meeting of the minds, or in Hebrew, "*asmachta*." According to Jewish law, a contract is only valid if it can

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ment of a laborer, even of his own free will, is a form of restraint on personal liberty, thus the laborer has special rights for his protection, B. Talmud, *Bava Metzia* 10(a); 77(a)

198. *See* discussion *supra* note 197 (regarding *Leviticus* 25:55).

199. In the Talmud, the following example is given: if two neighbors share a fence and want to divide it between themselves, they must make a mutual agreement. If they agree to divide the fence on the following day according to an agreed-upon measurement, they have not created any obligation until they act upon the agreement. *See* B. Talmud, *Baba Batra* 3:1.

200. For employees, labor laws under Jewish law provide that if something will definitely be lost if the worker does not fulfill his obligation under the labor agreement then the worker, whether an employee or independent contractor, will be liable for damages. However, if the worker backs out and the employer does not have to lose any money, but only loses out on the contract, it is generally agreed upon that an employee does not have any obligation to the employer. B. Talmud, *Bava Metzia* 77(a).

201. *See* Povarsky, *supra* note 95, at 453 (citing Tosafot, *Bava Metzia* 48(a)). The surrogate mother would be considered an independent contractor because she is hired not for a specified period of time, but to complete a specified "project." *See* PRINCIPLES, *supra* note 104, at 310 (citing *Maggid Mishneh Sekhirut* 9:4).

202. Piske HaRosh, B. Talmud, *Baba Metzia* 77(a).

203. Other scholars who have agreed with the Rosh include Rabbi Itzhak (one of the Tosafist scholars known as the "Re"), cited by Rabbi Nissim ("Ran") in his commentary on *Bava Metzia* 48(a); Rashba and Ran, cited by Nimukei Yoseph in his commentary on Rabbi Alfasi's codification, Bava Metzia, ch. 4 (with reference to the talmudic discussion in B. Talmud *Bava Metzia* 48(a)).

204. *See* Povarsky, *supra* note 95, at 451-53.

be reasonably presumed that the intentions of both parties are serious, deliberate, and final.[205]

The Israeli Surrogate Agreements Law is careful to provide safeguards for full and meaningful agreement.[206] The Committee must make certain, before approving the surrogacy agreement, that all parties entering the agreement have done so of their free will, and understand its significance and consequence. Additionally, there must be no misgivings about the health of the birth mother, or the child that will be born, or the rights of either of the parties.[207]

Despite safeguards, it is reasonable to doubt that a true meeting of the minds can occur with regard to the transfer of a child not yet born. Rabbi Gold argues that due to the vast difference in the psychological perspective of a mother before a baby is born and after it is born, the doctrine of *asmachta* would likely invalidate the contract.[208] Doubts have been expressed by Dr. Halperin, a member of the Aloni Commission, as to the possibility of fulfilling such conditions.[209] In interview for an Israeli newspaper, he states that he is not sure that there is even a possibility of ascertaining whether people really understand all the consequences and significance of the surrogacy contract.[210] There also can be no guarantees against mental or physical harm.[211] He goes on to imply that under the standards of the Israeli law itself, it is unlikely that any surrogacy contract could be approved.[212] Despite the safeguards, it is possible that the strict Jewish law requirement of a full meeting of the minds would preclude the enforceability of contract to surrender one's own child made before its birth.

In conclusion, it is not simple to assert the enforceability of a contract to transfer custody of a child born of a surrogate mother but it is possible. In making decisions about whether to hold these contracts enforceable, Jewish legal authorities may be inclined to characterize the contract in a more intuitive way, either as a contract for gestational services, or as a contract for the baby that does not yet exist—both of which would not be enforceable under Jewish law. In addition, ensuring true consent on the part of the mother is exacerbated by the fact that she is the legal mother under Jewish law, and her consent is questionable under the doctrine of *asmachta*. Based on the aforementioned legal obstacles to approving such agreements, those commentators who have discussed the matter have surmised that such contracts would not be enforceable.[213]

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205. MICHAEL GOLD, AND HANNAH WEPT 122 (1988). For an in depth discussion of "Asmachta," *see* BARYAHU LIFSHITZ, PROMISE: OBLIGATION AND ACQUISITION IN JEWISH LAW (1988).

206. Surrogate Motherhood Law § 4: 3,4 (1996).

207. *Id.* § 5.

208. *See* GOLD, *supra* note 205, at 122-23; *see also* David Feldman, *Determining When We Have Gone Too Far* 17/334 Sh'ma 108 (1987) (arguing that, after giving birth, a woman is never of the same state of mind as before birth).

209. Orna Landau, *Comprehensive Law, Version 2000*, HA'ARETZ D1 (March 12, 1998).

210. *Id*.

211. *Id*.

212. *Id*.

213. *See* MENACHEM ELON, JEWISH LAW (MISHPAT IVRI) CASES AND MATERIALS 743-44 (1999); Hlomit Joy Oz, *Genetic Mother vs. Surrogate Mother*: *Which Mother Does the Law Recognize? A Comparison of Jewish Law and American Law and England's Law*, 6 TOURO INT'L L. REV. 438, 448-49 (2000); Noam Zohar, *Artificial Insemination and Surrogate Motherhood*, 2 S'VARA 13, 18 note 10 (1991); *see also* GOLD,

While not conclusive, such analyses are indicative of the substantial Jewish law basis for a determination that surrogate motherhood contracts should not be legal. In any event, careful analysis would be needed to explain how the enforceability of the surrogacy arrangements justifies permitting the waiving of maternal affiliation.

The following section will discuss some additional principles of Jewish law that might lead authorities to permit surrogate motherhood agreements, whether they are willing to state definitively that such contracts in and of themselves are valid under Jewish law. Such justifications go farther to explain why legal authorities have condoned the Israeli Surrogacy Agreements Law despite the Jewish identification of the birth mother as the mother.

IV. FURTHER PRINCIPLES OF JEWISH LAW RELEVANT TO THE DETERMINATION OF THE ACCEPTABILITY OF THE ISRAELI SURROGATE AGREEMENTS LAW PROVISIONS UNDER JEWISH LAW

Besides the potential enforceability of the surrogate motherhood contract, there are other reasons that might underlie a Jewish legal acceptance of surrogate motherhood arrangements. These principles include: the command to be fruitful and multiply incumbent upon men, the absence of the concept of adoption in Jewish law, and Jewish law's focus on obligations as opposed to rights in matters of custody.

A. The Commandment to be Fruitful and Multiply

The Commandment to be fruitful and multiply is derived from passages in Genesis.[214] The Rabbis have interpreted this commandment to be applicable only to men and to be fulfilled with the birth of two children.[215]

In a certain form, surrogate motherhood was practiced in biblical times. Abraham's wife Sara and Jacob's wives, Rachel and Leah, all enlisted other women on their quests to have children. Rachel said to her husband Jacob, "Behold my maid, Bilhah, go in unto her, and that she may bear upon my knees, and I also obtain children by her."[216] However, the difference between these scenarios and modern day surrogate motherhood is that under biblical law, a man could have many wives or concubines; the term adultery in *The Bible* refers exclusively to infidelity committed by a married woman. In these biblical stories, the surrogate mother was herself part of the household of the male with whom she slept. Therefore, the woman was a surrogate wife, not a surrogate by contract. She did not have to give up her child; rather, she agreed to raise the children in the household of the father and his primary wives.

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supra note 205, at 120-27 (concluding that Jewish tradition would likely not consider a surrogacy contract legally binding, but would consider it morally binding).

214. *Genesis* 1:28, "And God blessed them and said to them be fruitful and multiply. . . ."

215. *Mishnah Yevamot* VI: 6; B. Talmud, *Yevamot* 61(b); *Sefer Hachinuch*, Commandment 1 (based on Genesis 1:28, "And God blessed them and said to them be fruitful and multiply.") The details of this commandment, how many children and of what sex, is discussed in the B. Talmud, *Tractate Yevamot*, 6: 61, p. 2 and in *Berachot*, 15:1.

216. *Genesis* 30:3.

Professor Pinhas Shifman stresses the importance of the obligation to procreate in the Jewish authorities' discussions of new reproductive technologies.[217] According to *The Talmud*, if a man marries a woman who fails to give birth within ten years, he must take additional steps to fulfill his duty of procreation.[218] He is required either to divorce his first wife or to take a second wife.[219] However, in 1028, Rabbeinu Tam prohibited polygamy, as well as divorce without the consent of the woman.[220] Therefore, according to the tenets of modern Judaism, it is no longer acceptable to take another wife in order to fulfill the commandment to be fruitful and multiply, nor is it acceptable to have extramarital relations.[221] However, using artificial insemination or *in vitro* fertilization to fulfill this command may be not only acceptable, but even a religious duty.[222] Prof. Shifman postulates that according to this analysis, "[T]he procurement of surrogate motherhood would be looked upon as a religious duty."[223]

Regardless of whether such treatments are able to help fulfill this commandment or whether some might even say they are mandatory, it might motivate Rabbis to permit the procedure, despite some other problems with the legality of the arrangements.

Rabbi Goldberg's discussion with the Surrogate Motherhood Approvals Committee reveals his own reliance on the importance of procreation in Jewish law.[224] He specifically says that he would likely recommend that a woman engage in a surrogate agreement in accordance with the Israeli law for her first child, but would not *a priori* recommend it for the second child.[225] He explains that while the fulfillment of the command to be "fruitful and multiply" is contingent upon having two children, only if a couple does not have any children must the husband go to extremes to produce a child, including asking for a divorce.[226] However, if the couple has one child, even without complete fulfillment of the commandment there is no necessity for divorce.[227] Rabbi Goldberg's explanation demonstrates that his acceptance of the use of surrogate motherhood is influenced by the need to have at least one child. He emphasizes the importance of the commandment to procreate, even to the point of overriding other potential prohibitions.[228]

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217. *See* Pinhas Shifman, *A Perspective on Surrogate Motherhood in Jewish Law*, *in* FRONTIERS OF FAMILY LAW (1993); *see also* Pinhas Shifman, *New Reproductive Technologies and Jewish Law*, 12 JEWISH L. ANN. 127, 133 (1997).

218. B. Talmud, *Yevamot* 64(a).

219. *Id.* at Commentary of Rashi.

220. *See* FELDMAN, BIRTH CONTROL AND JEWISH LAW 37-41 (1968).

221. *Id.*

222. *See* Pinhas Shifman, *New Reproductive Technologies and Jewish Law*, *supra* note 217, at 133. However, there is vast disagreement as to whether these methods of reproductive technology are permissible and, if they are, whether they actually fulfill this command in any event. *See* Shteinberg, *supra* note 111, vol. II 138-141 and vol. I 148-150.

223. *See* Shifman, *supra* note 217, at 235.

224. Goldberg, *supra* note 176, at 46-47.

225. *Id.* at 47.

226. *Id.*

227. *Id.*

228. *But see* Bleich, *supra* note 188, at 391. Rabbi Bleich argues that the commandment to procreate is fulfilled when a man engages in coital activity with the prescribed frequency, "and the birth of

The desire to have men use this procedure to fulfill the commandment of procreation is, in all likelihood, at least a partial reason that there is less attention given to the potential problems of the contractual arrangement. Insisting that a gestational mother must consent after the child's birth would likely discourage such procedures.[229] But while this may be an explanation, it does not justify ignoring the maternal affiliation of the birth mother and of the child. It is problematic to ignore the legal status of the birth mother in order allow men to fulfill a commandment. There is significant precedent for putting less emphasis on this commandment in order to preserve the honor and status of the women concerned.[230] Authorities have cautioned men against divorcing their wives to fulfill the commandment, in deference to their wives' feelings.[231] Similar consideration might be applicable in the case of surrogate motherhood, where the status of the birth mother is denigrated.

B. Adoption under Jewish Law

A likely explanation for Jewish authorities' lack of insistence that surrogacy contracts provide for formal adoption of the child, instead of an immediate transfer of parental rights, is that Jewish law does not recognize the concept of legal adoption.[232] *De facto* adoption was common in biblical times, e.g., the adoption of Moses by Batya, the daughter of Pharaoh, and other examples of a child being born to one set of parents and then raised by another.[233] Despite

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the children is merely the *terminus ad quem* beyond which sexual activity within the context of a marital relationship yields the conclusion that no form of assisted procreation is mandatory." *Id.* He cites as proof the fact that artificial reproduction is not considered mandatory by the vast majority of Jewish Law authorities. *See also* Bleich, *Sperm Banking in Anticipation of Infertility*, 29/4 TRADITION 47, 53-36. However, not mandating artificial reproduction can also be explained by Jewish law opinions that forbid or take issue with such procedures. *See supra* notes 184-85. Even if these procedures are acceptable to one Rabbi, he may not want to mandate that which is questionable according to other respected authorities. In addition, such procedures can be difficult emotionally and complicated physically. Rabbi Bleich does not account for the legal Jewish precept, discussed above, which orders a man to make other arrangements to fulfill the commandment to procreate after ten years of cohabitating with his wife. *See* B. Talmud, *Yevamot* 64(a). There is much discussion related to what a husband's responsibilities are after the ban, with much disagreement as to the proper recourse. *See* DAVID FELDMAN, BIRTH CONTROL IN JEWISH LAW 36-41 (1968). Rabbi Bleich is in the minority because according to most Jewish law authorities, the act of regular intercourse with one's wife does not fulfill the commandment.

229. *See* ALONI COMMISSION, *supra* note 17, at 45.

230. *See, e.g.*, Feldman, *supra* note 220, at 40 (citing R. Jacob Tannenbaum, *Responsa Naharei Afars'mon*, E.H. no. 18 (1983) (arguing that divorce against a woman's will should not be permitted even to fulfill the commandment of procreation as not to hurt his wife)) and 41R (citing Hayyim Yehudah Lev, *Responsa Sha'arei Deah*, No. 117 (arguing that divorcing one's wife against one's will would be a violation of wronging another)). Therefore, there is precedent for arguing that the commandment is not absolute and that the honor and effect to the third-party woman should be considered.

231. *Id*.

232. *See* GOLD, *supra* note 205, at 153.

233. *See Genesis* 15:2-3, wherein Abraham appoints his servant Eliezer as his legal heir in absence of a natural heir; B. Talmud *Sanhedrin* 19b (discussing various places in *The Bible* where a child is raised by another family and is thus considered to be the son of the parents' who raised him). However, in none of these cases is the biological link severed nor an adoption arranged; rather, the additional parental relationship results from *the de facto* care of the child.

these *de facto* arrangements, adoption as a legal institution is not acknowledged in Jewish law. Adoption in scripture was informally arranged because a child was orphaned and needed the help of others.[234] Similarly, this *de facto* arrangement would be carried out when parents had no heirs and therefore granted their possessions as inheritance to an "adopted" child.[235] When a child is adopted *de facto*, the adoptive parents give him her name and identity.[236]

The importance of biological lineage in Jewish law explains the absence of adoption as a legal procedure in Jewish law.[237] Jewish law places great importance on a child's biological identity and status. It is birth that establishes the lineage and status of the child; who he can marry, the laws of inheritance, obligations to parents, etc.[238] Such identity is permanent and cannot be changed by a legal procedure such as adoption. The transferring of the status of children is not part of the Jewish legal system, not for adoption and therefore is not a natural concept to be used for surrogate motherhood either.

Adoption as a legal procedure was first established in Justinian Roman Law, where establishing heirs were very important and little emphasis was placed on bloodlines.[239] In contrast, the English common law system did not acknowledge adoption.[240] English common law, like Jewish law, placed such a strong emphasis on bloodlines for inheritance and property titles that adoption was forbidden in England.[241] Informal adoption was common, but adoptive children were left in a legal limbo under the common law.[242]

Due to the Israeli legislature's putative desire to accommodate Jewish law in adoption proceedings, among other laws, the Surrogate Motherhood Agreements Law is the one and only case of transferred parental identity in Israeli law, if one considers the gestational mother the legal mother.[243] Therefore, for those Jewish legal theorists who believe that the gestational mother is the legal mother of the child, the Israeli law is a unique deviation from the norms of Jewish law.

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234. *See Esther* 2:7 ("He [Mordechai] was foster father to Hadassah – Esther—his uncle's daughter, for she had neither father nor mother.").

235. *See Genesis* 15:2 (Abraham says to God; "Since you have granted me no offspring, my steward will be my heir.").

236. *See* GOLD, *supra* note 205, at 154-56. The Talmud discusses the relations between de facto adopting parents and their adopted children in B. Talmud, *Sanhedrin* 13(b).

237. *See* GOLD, *supra* note 205, at 157.

238. *Id*.

239. *Id.* at 158; *see also* MENACHEM ELON, MISHPAT HAIVRI 670 (1973).

240. *See* GOLD, *supra* note 205, at 158.

241. *Id.* at 158 (citing EDMUND BLAIR BOLLES, THE PENGUIN ADOPTION HANDBOOK 23 (1984)); C. M. A. McLauliff, *The First English Adoption Law and Its American Precursors*, 16 SETON HALL L. REV. 656, 659-60 (1986).

242. *See* GOLD, *supra* note 205, at 158.

243. In recognition of the Jewish law, and unlike the Surrogate Agreements Law, the Israeli adoption law transfers only the obligations of custody to the adoptive parents, creating a synthesis between the common law system and the Roman system. Careful records are kept for the sake of personal status, inheritance laws and marriage eligibility. *See* Israel Adoption Law, 1996 A.G. 21 § 29. *See* Mordechai Halperin, Protocol 3 of the Public Professional Committee to Decipher the Case of Egg Donations (May 17, 2000) (unpublished, on file with the author).

In the sole minority opinion of the Aloni Commission Report, Dr. Halperin includes in his recommendation for surrogacy contracts a formal adoption procedure in compliance with Israeli Adoption Law (1981). He concedes that it would be an expedited procedure because it is an adoption between family relations, as the intended father is also the legal father.[244] However, as in keeping with the Jewish law understanding of the establishment of motherhood, a formal adoption procedure would have to be undertaken.

There is precedent in Jewish law that can be used as a foundation for the adoption relationship. The concept of an *apotropos*, (legal guardian), who has legal responsibility for the child and legal authority over the property of the minor is discussed in *The Talmud*.[245] However, the child maintains his biological identity and natural rights and responsibilities as pertain to the child of natural parents. This *apotropos* is similar to the formulation of the adoptive parent provided in the Israeli adoption law, except that adoption is arranged in advance as opposed to a *de facto apotropos*. Since rabbinic authorities have already accepted this form of adoption, and since similar arrangements were valid under Jewish law, there is room for rabbinic authorities to insist that adoption occur in the gestational surrogate motherhood. Such insistence would validate the surrogate mother's status and give her the leverage of having to agree to the transfer upon the child's birth, which would go far to prevent exploitation and violation of her status and rights as the natural mother.

C. Custody as a Function of Duty as opposed to Rights

An important element of these surrogacy agreements is that regardless of the identity of the mother, the father also has claims to the child. Ultimately, even if the surrogate mother is considered the legal mother, it remains to be determined who has custody of the child.

The significance of the issue of custody was demonstrated in the case of *In re Baby M*.[246] In *Baby M*, Mary Beth Whitehead, a married mother of two, agreed to be artificially inseminated with the sperm of William Stern, and to give up the child to him for a fee of $10, 000.[247] Three days after the baby was born, Mrs. Whitehead gave the baby to the Sterns. Mrs. Whitehead then changed her mind about the baby, convinced the Sterns to return the baby to her temporarily, and then ultimately informed the Sterns that she had decided to keep the child. After a long and bitter dispute between Mrs. Whitehead and the Sterns, the case ended up in court. The trial court determined that the surrogacy contract was valid and that the child therefore should be given to the Sterns.[248] The decision was appealed to the New Jersey Supreme Court, which determined unanimously that the surrogacy contract was invalid and that Mrs. Whitehead was the legal mother and therefore retained parental rights as the child's legal mother.[249]

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244. ALONI COMMISSION, *supra* note 17, at 93.
245. *See* B. Talmud, *Sanhedrin* 13(b), 19(b).
246. *In re* Baby M, 537 A.2d 1227, 1227 (N.J. 1988).
247. *Id*. at 1235.
248. *Id*. at 1237.
249. *Id*. at 1240.

However, even after a long struggle by Mrs. Whitehead, the court held that the issue of custody was to be determined solely by the child's best interests, and it agreed with the lower court that the best interests of the child dictated that the father should have sole legal and physical custody.[250] Therefore, even though Mrs. Whitehead was determined to be the legal mother of the child, the court determined that custody should be awarded to the father.

In the U.S., the right to conceive and to raise one's own children has been deemed "essential" by the U.S. Supreme Court.[251] Raising one's own child is a matter of rights to the child, even if custody is ultimately decided according to a 'best interests' standard. As between parents, both parents have standing to assert their rights to the child and have rights to visitation.[252]

In Jewish law the issue is complicated by the ethical elements that a religious legal system entails. Moshe Silberg, a former associate Justice of the Supreme Court of Israel, gave a paper that stresses the dichotomy between rights and duties in Jewish law.[253] Silberg writes, "[I]n Jewish law it is very difficult to mark the border between the utilitarian and the moral considerations of the legislator and determine the nature of the *res* which a certain provision of the law seeks to protect."[254] He discusses the inextricable relationship of law and morals in Jewish law; the law itself does not only order relationships between man and man but also between man and God. The system in its entirety is religious in origin and therefore involves obligations to God.

In order to demonstrate this thesis he asks the question, "Why should a man pay his debt or fulfill an obligation which he has undertaken?"[255] Secular jurists would presumably respond that the obligation corresponds with the right of an individual to hold property. However, in Jewish law the issue is more complicated. There is a disagreement as to whether the payment of an obligation is a civil legal duty owed to the second party stemming from the right to hold property, or whether it is a religious moral duty requiring the debtor to repay his debt. *The Talmud* states, "The paying of the debt is a precept [religious duty] and minors are not obliged to fulfill the precepts."[256] The consequence of this determination is that when a person refuses to pay his debt, "he is physically coerced to fulfill his religious obligation to pay."[257] Silberg relates, "The

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250. *Id*. at 1258.

251. Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that the right to conceive and raise one's own children is among the "basic civil rights of man.")

252. Only in exceptional cases are visitation rights of biological parents not granted. *See, e.g.*, Kemp v. Kemp, 399 A.2d 923, 927-28 (Md. App. 1979) (stating that visitation rights would be denied only where any interaction with a parent would be "so detrimental to the child as seriously to endanger his well-being"). This distinction between duties and rights is also present in the area of procreation, whereas in Judaism there is an obligation to procreate; in the U.S. there is a right to procreate. *See* Oklahoma, 316 U.S. at 535.

253. Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306 (1961) (English translation of a paper given at the Third J. L. Magnes Memorial Lecture at the Hebrew University in Jerusalem, 1951).

254. *Id.* at 311.

255. *Id*.

256. *Id.* at 312, *quoting* Rabbi Papa, *in* B. Talmud *Tractate Arakin* 22(a).

257. *Id*.

concern of the court is not the creditor's debt, his damages, but the duty of the debtor, his religious-moral duty, the fulfillment of the precept by him. The creditor receives his money incidentally, as a secondary result of the performance of this duty."[258] Silberg stresses the emphasis on duty as opposed to rights, and the indelible place the concept of duty has in Jewish law.

Likewise, the matter of the custody of a child is primarily a duty rather than a right, governed by the principle of the child's best interests.[259] The overriding principle is that the parents have only duties while the children have rights to have their custody determined on the basis of their best interests. A parent is allowed to sue for custody, but not by asserting her rights, only based on the child's interests, regardless of any prior custody agreements.[260]

Michael Broyde writes that although Rabbinic discussions on surrogate motherhood have centered on the definition of the legal mother for various ritual obligations, he argues that these ritual issues tend not to be the crucial ones to the couple or surrogate mother seeking such children.[261] He argues that when maternal identity is legally in doubt or in dispute and paternal identity is established, maternal custody should be granted to the wife of the father regardless of who is determined to be the legal mother under Jewish law.[262] He offers two basic rationales for this determination.[263]

First, the obligation to financially support children is assigned only to men.[264] Upon analysis of Rabbi Asher's decisions on custody, Michael Broyde states that he adopts the theory that the father is the presumptive custodial parent of his children.[265] The presumption of paternal custody is based on the father's obligations to support the child and his rights as a natural parent, subject

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258. *Id*. at 312-13.

259. *See, e.g.*, S. Aderet, *Responsa Rashba* (related to Ramban) 38; D. Ben-Zimra, *Responsa Radbaz* 1:123; Moshe Iserles, *Even Haezer* 82:7; Avraham Z.H. Eizenshtadt, *Pitchei Teshuva, Even Haezer* 82:7 (stating that the custody of children is in the court's discretion and is determined based on the child's best interests); *Responsa Rashdam, Even Ha'ezer* 123 (noting that the principle that a daughter's custody is generally granted to the mother is based on the daughter's rather than the mother's rights); File 226/53-54, 1 P.D.R. 145, 157-158 (child custody laws are not concerned with the parents' benefits but rather with the child's; parents have no rights, but only duties); Appeal 170 58-59, 3 P.D.R. 353, 359 (ruling that child custody is determined by the child's best interests rather than the parties' consent); *see also* B.D.M. 1/81, Nagar v. Nagar, P.D. 38(1) 365 (1981); E. Shochetman, *Jewish law Regarding Custody of Children*, 5 SHNATON HA-MISHPAT HA-IVRI 285, 292 (1978).

260. *See, e.g.*, Be'er Heitev, *Even Haezer* 82:6, File 3301/54-55, 2 P.D.R. 298, 300 (citing 2 *RESPONSA MABIT* 62). Furthermore, even if the court approved the agreement, it is subject to change if the child's interests require it. *See* File 43/ 77-78, 11 P.D.R. 153, 161 (stating that the interests of the child are subject to change as are the court's decisions in custody matters).

261. Michael J. Broyde, *Child Custody and Jewish Law: A Pure Law Analysis*, 7 JEWISH L. ASS'N STUD. 1, 18-19 n.69 (1988).

262. *Id*.

263. *Id.*

264. *See* B. Talmud, *Ketubot* 49(b), 65(b); Moses Maimonides, *supra* note 192, The Book of Women, The Laws of Marriage 12:14; Shulchan Aruch, *Even Haezer* 71:1. Although the parties may agree to assign the mother the duties toward the children, the agreement would not affect the children, who are entitled to sue only the father. *See* Appeal 152/58, 3 P.D.R. 170, 171.

265. Broyde, *supra* note 261, at 3.

to the limitation that even a natural parent cannot have custody of his children if he is factually unfit to raise them.[266]

Second, he explains that another basic principle of custody law as explained by Rabbi Solomon ben R. Aderet (Rashba), is that child custody should be determined according to the best interests of the child.[267] Given the reality in surrogate motherhood that the intended parents are those of greater means and have initiated the conception of the child, Broyde argues that it would almost always be in the child's best interest for the intended parents to have custody. This analysis might support the Surrogate Agreements Law, which presumptively gives custody to the intended parents, but which can be overturned if the surrogate mother can show significant change in circumstances.

While the basic principles stated by Broyde above may be substantial enough to always lead Rabbinical figures to give custody of the child to the father, it should be pointed out that the presumptions of the Talmud are that under certain situations the legal mother would have sole custody of the child. The Talmud embraces three rules that generally govern child custody, which are adjusted according to factual findings of best interests of the child.[268] First, custody of all children under the age of six is to be given to the mother; second, custody of boys over the age of six is to be given to the father; and third, custody of girls over the age of six is to be given to the mother.[269]

Broyde's claim that the best interests of the child will always be with the intended parents is controversial from an empirical perspective and undermined by the Talmudic presumptions.[270] In many instances, it would be reasonable to argue that a mother's care is more important than a father's means or vice versa. Presuming that the father is the better parent because the woman engaged in surrogate motherhood agreements only serves to further denigrate the woman who took part in the agreement.[271]

Therefore, despite the fact that the duty for childcare lies with the father and that custody is a matter of duty and not right, the mother does have a valid claim that the best interest of her child is to be raised with her. At the very least, there is room for discussion and factual findings on the matter in a Rabbinical Court, as opposed to an unquestioned delegation of custody to the father.

D. Explanations Without Justifications

Ultimately, the above-mentioned principles, the commandment to men to procreate, the lack of legal recognition of adoption, and the notion of custody as

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266. *Id.* at 4.

267. *Id.*

268. B. Talmud, *Eruvin* 82(a); B. Talmud *Ketubot* 65(b), 122(b)-123(a).

269. *Id.* For a detailed discussion of these sources, *see* Basil Herring, *Child Custody*, *in* JEWISH ETHICS AND HALAKHAH FOR OUR TIMES II 177 (1989).

270. *See, e.g.*, Bonnie Steinbock, *Surrogate Motherhood as Prenatal Adoption*, 16/1 LAW, MED. & HEALTH CARE 44, 46 (1988) (arguing that the assessment of surrogate mother's ability to be a good mother is biased by middle-class prejudices); *see also* Rothman, *supra* note 8, at 242-45 (arguing that pregnancy and interpersonal relationships determine fitness to parent and not genetic ties or intent) (1989).

271. *See id.*

a right rather than an obligation all provide reasons for the Rabbinical authorities tendency to condone the Israeli Surrogate Motherhood Agreements Act, despite the gestational surrogate's status as the legal mother of the child. However, none of these principles provides a definitive justification for overriding the surrogate mother's legal status. Allowing the waiver of familial status in Jewish law is unprecedented and seems worthy of some formal pronouncement or explanation. Jewish law should at least provide that a gestational surrogate mother be afforded some protection, either by establishing an obligatory adoption procedure after the child is born, in which the mother can freely waive her parental duties and rights, or, alternately, by granting the gestational mother a custody hearing in accordance with the dictates of Jewish law, if she so desires. Furthermore, due to the abrogation of the birth mother's status, it might also be reasonable for Jewish law to outlaw these surrogate contracts altogether.

V. FROM GENDER DIFFERENCE AND GENDER NEUTRALITY TO PATRIARCHY

The majority opinion in Jewish law is that gestation is the defining characteristic of motherhood. Defining motherhood by that which is unique to mothers, as discussed by Rabbi Engel,[272] and more explicitly by Rabbi Bick,[273] is based on the Jewish law recognition of differences between men and women.

Gender difference in Jewish law is founded upon the biblical passage in Genesis: "And the Lord God said, it is not good that Adam is alone, let Me make for him a helper opposite him (*ezer ke-negdo*)."[274] This biblical passage points to the differences between men and women—they are not both just humans but complements to one another.[275]

A basic legal distinction is made between men and women: positive commandments whose performance is limited to a specific time are binding only on men, whereas positive commandments not limited to a specific time of performance are binding on both women and men.[276] There are many reasons provided for this legal doctrine,[277] the most cogent of which is that the respective roles of

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272. *See supra* notes 149-45 and accompanying text.

273. *See supra* notes 157-63.

274. *Genesis* 2:18. There is much discussion as to the meaning of the phrase "*ezer ke negdo*," literally a helper opposite him, or against him. Rashi contends that the phrase alludes to two potential relationships: "If he is meritorious, she will be a help; if he is not meritorious [she will be] against him to fight." Rashi to *Genesis* 2:18. An interpretation that better fits with the flow of the text is to understand 'opposite him' as next to or beside him.

275. *See* AVRAHAM WEISS, WOMEN AT PRAYER 1-12 (1990).

276. *See* B. Talmud, *Kiddushin* 29(a). There are numerous exceptions to this rule. Rabbi Saul Berman's analysis of the laws women are exempt from reveals that the number of commandments which are exceptions to his rule is greater than the number following the rule. Saul Berman, *The Status of Women in Halakhic Judaism*, 14 TRADITION no. 2, 5-28 (1973).

277. One reason offered is that because a woman is obligated to fulfill the needs of her husband, she is not mandated to perform obligations fixed by time because it would create conflict between her duties to her husband and her duties to God (*Sefer Abudarham ha-Shalem, Seder Tefillot she Hol, Ha-sh'ar ha Shelishi, Birkhot ha-Mitzvot*). *See* Weiss, *supra* note 275, at 5-6. *But see Akedat Yizhak* to *Genesis* 30:1-2 (citing, in English, Nehama Leibowitz, STUDIES IN THE BOOK OF GENESIS 334 (1990) (arguing that a woman's obligations to her husband are only secondary to her obligations to God)). Rabbi Aharon Solobveichick maintains that women are exempt from some positive commandments fixed by time since they are intrinsically aware—by virtue of their innate spiritual superiority—of the

men and women are considered to be distinct.[278] Women are primarily obligated to fulfill laws pertaining to private Jewish ritual, centered in the home, while men are obligated to fulfill and maintain the public performance of Jewish ritual. This understanding of role differentiation is based on the verse, "The king's daughter is all glorious within. . ."[279] Since different roles are attributed to the two genders in Jewish law, extending this difference to the area of motherhood is a natural progression. It is consistent with the underlying principles of Jewish law that motherhood is established in a manner distinct from fatherhood.[280]

In Jewish law, the recognition of gender difference leads to a finding that gestation, the distinctly feminine aspect of motherhood, is the defining characteristic of motherhood. In Jewish law there is no suspicion of treating gender as a reason for difference as there is in the U.S. under equal protection analysis.

The tendency to regard genders differently need not be negative (although it often accounts for too much); it could lead to valuing and protecting those aspects of womanhood, such as gestation, that are simply different. The emphasis on gender difference in Jewish law could potentially serve as a solid platform to protect surrogate mothers by giving credence to the importance of pregnancy and childbearing, the biological domain of women. Providing the gestational mother substantive legal protection against the fear of financial exploitation and, at least, granting her the ability to withdraw from the contract if she feels she does not want to surrender the child she has carried for nine months, would honor the status of motherhood in Judaism by elevating it above the level of contract.

However, Jewish law's sensitivity to gender difference is not neutral. It is patriarchal in that men occupy a dominant position in its interpretation and application. It is not only the spheres of influence that are separated in Jewish law. The basic familial structure is not based only on role differentiation; it is also hierarchical. The man is the leader of the household and has significant power and control over the women and children in his family. The obligation to have children, the importance of seed and heritage, the duties of support and the rights of custody, as well as the laws of inheritance, all lie with the male and his progeny.[281]

This hierarchical structure is demonstrated forcefully in the different weight that is placed on the status of motherhood and fatherhood in Jewish law. The asymmetry of the sexes under Jewish law is clearly highlighted in the ultimate rejection of overriding paternity in the case of artificial insemination by donor (AID). AID raises similar problems of Jewish law to surrogate motherhood. In Jewish law, the child of a woman inseminated by AID is considered to be the biological child of that woman and the sperm donor.[282] The question of

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message these laws convey. Rabbi Aharon Soloveichick, *The Attitude of Judaism Toward the Woman*, *in* MAJOR ADDRESSES DELIVERED AT MID-CONTINENT CONCLAVE AND NATIONAL LEADERSHIP CONFERENCE, UNION OF ORHODOX JEWISH CONGREGATIONS 21-32 (1969).

278. *See* Berman, *supra* note 276, at 16-18.

279. *Psalms* 45:13.

280. *See supra* notes 140-45, 157-63 and 275-80 and accompanying text.

281. *See infra* Part V(a).

282. *See* B. Talmud, *Yebamot* 2:5; Maimonides, Mishneh Torah, *Isurei Bi'ah* 12:7; *see also* GOLD, *supra* note 205, at 106-115; Ben Meir, *supra* note 99, at 153; Zohar, *supra* note 166, at 71-75.

whether AID can be used by infertile couples under Jewish law implicates the problem of waiving the paternity of the sperm donor just as gestational surrogate motherhood leads to a waiver of the maternity of the surrogate under Jewish law.

AID in Jewish law has been the subject of considerable debate.[283] The majority of authorities do not permit AID by a married woman at all, and there is no authoritative opinion that permits AID from the sperm of a Jewish man.[284] There are a number of reasons given for the prohibition. One is the fear of *mamzerut*, which has been rejected by the majority of rabbinic authorities as irrelevant in AID.[285] Another is the importance of preserving the lineage of the child, also a factor in surrogate motherhood, which is ultimately dispositive in most of the strong objections to this procedure by rabbinic authorities.[286] A third is the fear that such an arrangement would alienate the husband, who would have to raise another man's child in his home.[287]

The Rabbinical courts in Israel have not sanctioned artificial insemination. In fact, they have found the wife's use of AID to be legitimate grounds for divorce.[288] As one Israeli commentator noted, "Whereas according to the secular outlook, the desire to help the childless couple to build a family is the primary concern, the Religious Court goes to great lengths to discourage the couple from adopting this path, e.g., by declaring the wife a quasi-adulteress."[289] Most sig-

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283. *See, e.g.*, D.M. Kreuzer, *Hazar'ah Melakhutit—Berur Habe'ayah*, 1 NO'AM 111-128 (1958); S.Z. Auerbach, *Hazar'ah Melachutit* 1 *No'am* 146-158 (1958); Mosheh Feinstein, *Responsa Iggrot Moshe*, EVEN HA'EZER 71 (1959); Mosheh Feinstein, *Responsa Iggrot Moshe, Even Ha'ezer* 2:11 (1962); Eliezer Waldenberg, *Responsa Tzits Eliezer* III, no. 27 (1951); Eliezer Waldenberg, *Responsa Tzitz Eliezer*, IX, no. 51:4 (1967) [hereinafter Waldenberg IX]; Avraham Shteinberg, *Hazar'ah Melakhutit Le'or Hahalakhah*, 1 *Sefer Assia* 128-141 (1976); Yizhak Ya'akov Weiss, *Responsa Minhat Yizhak* IV:5 (1964).

284. *See id.* As Rabbi Waldenberg summarizes, "It is forbidden to fertilize a married woman with the seed of another man by means of artificial insemination; such a deed is a great abomination and very evil. Indeed, some tend towards the view that a married woman who does so is even forbidden to her husband." Waldenberg IX, *supra* note 283, at no. 51:4(2). *But see* Rabbi Moses Feinstein, *Responsa Iggerot Moshe*, EH #71 (1959) (allowing AID with the sperm of a non-Jewish man but only with the consent of the husband).

285. The concern is that mixing a married woman's egg with a man's seed would be an act of adultery causing the labeling of the child as illegitimate. However, the majority of sources have held that it is the act of intercourse and not the mixing of seeds that causes illegitimacy in children. *See* MENACHEM ELON, JEWISH LAW CASES AND MATERIALS 626 (1999) (citing Bayit Hasash to Tur YD ch. 195); Moses Feinstein, *Responsa Iggerot Moshe*, II:11 (1962) (explaining that AID does not constitute prohibited intercourse and thus there is no fear of *mamzerut*); Avraham Shteinberg, ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS I:154 (1991) ("[T]he majority of the decisors reason that the violation of adultery is in the physical act of sexual intercourse and its enjoyment.").

286. *See Genesis* 17:7; B. Talmud, *Yevamot* 41(a); Rashi's commentary to B. Talmud *Yevamot* 41(a).

287. *See* Waldenberg IX, *supra* note 283, at no. 51:1-3.

288. *See* Eliav Shochetman, *Paternity of the Children Born By Artificial Insemination*, 10 Mishpatim 63 (1980); *see also* Pinhas Shifman, *Family Law in Israel: The Struggle Between Religious and Secular Law*, 24 ISRAEL LAW REVIEW 537, 543 n.31 (1990) (citing the decision of the Supreme Rabbinical Court in App. 49/5745 of 4 TEVET, 5746 (1986)). The court determined that even when the husband encourages the wife to undergo artificial insemination from a donor who is not her husband, he is exempt from maintenance of the child, "and even though he acted improperly, in any case she too is held responsible for her actions, and she ought to have objected to his suggestion that she undergo artificial insemination from a donor, thus causing an outrage in Israel." *Id.* Rabbi Yosef determined that no child support was due to this child because he had no legitimate place in Israel.

289. Shifman, *supra* note 288.

nificantly, despite decades of use in Israel, a national law has not been passed in Israel to regulate AID due in part to significant objection to such a procedure by the Jewish law authorities in Israel.[290]

Paternity in Jewish law is an unshakeable status in which there are embedded many responsibilities and duties. Ultimately Jewish law does not exhibit the same tolerance for overriding paternity as it has shown for overriding maternity. It is distressing that the consideration for the importance of parental status when applied to men leads rabbinical authorities to outlaw AID, and when applied to women is overridden by concern for men's obligations and respect for men's responsibilities. Motherhood and fatherhood are different, and therefore it is legitimate to define them differently as they entail different processes. However, both motherhood and fatherhood are essential biological determinations and are worthy of equal protection and recognition. The fact that motherhood can be overridden according to Jewish law authorities, while fatherhood cannot, is cause for serious concern.

Furthermore, Rabbi Goldberg's rationale for overriding the status of motherhood—to allow men to fulfill their obligation to procreate—is disconcerting when viewed from a broader perspective. Given that the majority opinion in Jewish law is that the surrogate is considered the legal mother, this reasoning subjugates mothers to men for the purpose of providing children: exactly the way in which many have characterized the danger of surrogate motherhood.[291]

While gender difference goes so far as to marginalize and alienate women in Jewish law, U.S. law has not done enough to recognize physiological differences in gender. U.S. courts have perceived gestational surrogates as little more than wombs for rent and have not acknowledged the body of literature that demonstrates the considerable attachment and physical intimacy that develop during pregnancy.[292] The actual effects of the gestational mother's conduct on the fetus and the real responsibility and influence the gestational mother has on the fetus is also left unrecognized.[293] In various U.S. jurisdictions, the application of gender difference to surrogate motherhood has been seriously challenged. One court has held, and a number of legal commentators have argued, that defining motherhood and fatherhood on the basis of different principles, i.e., motherhood on gestation and fatherhood on genetic input, is a violation of the

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290. For a discussion of this matter, *see* Pinhas Shifman, *Determining Fatherhood in a Child Born of Artificial Insemination*, 10 Mishpatim 197 (1980) (Hebrew, translated by the author); *see also* Michael Korinaldi, *The Legal Status of a Child Born of Artificial Means from a Sperm Donor or an Egg Donor*, 18 SHNATON MISHPAT HAIVRI 115 (1985).

291. ROTHMAN, *supra* note 8, 29-48, 229-46. For a futuristic rendition of this fear, *see* MARGARET ATWOOD, A HANDMAIDEN'S TALE (1986).

292. *See, e.g.*, George J. Annas, *Redefining Parenthood and Protecting Embryos: Why We Need New Laws*, 14 HASTINGS CTR. REP. 50 (1984); Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 329-30 (1988).

293. *See, e.g.*, L.W. Sontag, *Parental Determinants of Postnatal Behavior*, *in* FETAL GROWTH AND DEVELOPMENT (1970); Dennis Scott, *Follow-up Study from Birth of the Effects of Prenatal Stresses*, 15 DEVELOPMENTAL MEDICINE AND CHILD NEUROLOGY 770, 770-87 (1973); B. R. H. Van den Bergh, *The Influence of Maternal Emotions During Pregnancy on Fetal and Neonatal Behavior*, 5 J. PRENATAL & PERINATAL PSYCHOL. & HEALTH 127 (1990).

equal protection clause.[294] The basis for this holding is that in the area of defining parenthood the state has no legitimate interest in using gender classification.

However, the equal protection clause only affords equality to those who are similarly situated. Since women are unique in their childbearing capabilities, the equal protection clause should not dictate that gestation cannot be used as a determinant of motherhood. The fact that a woman undergoes the process of pregnancy is a fact of nature and to recognize it is hardly a violation of the equal protection clause. Rather, ignoring this important feature of motherhood in favor of sole consideration of genetic input or intention is to use male criteria to define motherhood, a female category. Thus, U.S. law, like Jewish law, is patriarchal in its sole use of male categories to define that which is inherently female.

Furthermore, the U.S. courts' understanding of the concept of the natural mother as a gender-neutral, objective person is misleading. Given that both gestation and ovum donation are biological, natural contributions to the production of a child, it is perplexing to call the genetic mother the natural mother. Designating the intentional mother as the natural mother because she is the one who wants the child is an even more confounded use of the term natural. The fact is that nature is not gender-neutral, and to pick and choose the natural mother based on that which is the male contribution of genes, or on a modern concept of intent, is artificial. U.S. courts must either be more gendered in defining natural motherhood or ignore such an inquiry altogether and choose a new means of determination. But the artifice so far used by U.S. courts betrays the concept of nature and the complexity of female reproduction.

VI. CONCLUSION

Separating gestation from genetics allows us to ask new questions about the nature and defining characteristics of motherhood. Developing a legal response to such a question reveals much about the relevant legal framework. In the U.S., reproductive technology is viewed as a means to achieve the end of having genetically-related children or, in egg donation, as a means of experiencing a pregnancy which would otherwise not be possible. Due to this approach, the U.S., on the whole, is inclined to define motherhood by intent or genetics and to permit the surrogate contract as long as there is some physiological connection between the intended parents and their child.

Jewish law is faced with a more ancient and less flexible legal structure, due to its self-identification as divinely ordained. Jewish law uses traditional sources to try to determine a very elusive modern phenomenon, and in the case of gestational surrogacy, arrives at a very different result than the more future-oriented, utilitarian secular systems of law.

The U.S. legal system can learn a number of lessons from Jewish law. The concept of natural in Jewish law is much more rigid and well-defined. While the term "natural" is tossed often used loosely in U.S. case law and policy papers, Jewish law has exact definitions of the meaning of natural, and such definitions could help U.S. lawmakers and jurists to clarify what they mean by natural.

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294. *See* Soos v. Soos, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994); *see, e.g.*, Schultz, *supra* note 8.

Specifically, it might serve as a lesson of when the concept of natural ought to be avoided or overridden when it reflects outdated concepts of the sacredness of lineage, impurity of seed, and paternal control of offspring. U.S. courts ought to consider dismissing the notion of a single natural mother and being more honest about the conceptual difficulties they are encountering, and the need for protection for all who are parties to the artificial agreement of surrogate motherhood.

In addition, when U.S. jurists use the concept of the natural mother, or when they simply look to designate a legal mother, they can look to a more traditional system to understand the implications of such a status—namely the importance of gender difference and the separate roles of men and women in reproduction. Such separation is a practical understanding of the importance that gestation and child-rearing has traditionally played in women's lives. These elements of a woman's life must be recognized before the gestational mother's status is completely marginalized in favor of the intended mother. The fact that gestation determines motherhood in Jewish law may alert secular jurists to the traditional importance placed on the act of giving birth and weaning a child. To ignore these feminine aspects of motherhood is patriarchal in that it uses male standards for inherently female categories.

The developed jurisprudence of surrogate motherhood in U.S. law provides many insights into Jewish law. Most significantly, it emphasizes the irregularity of defining the gestational surrogate as the legal mother while allowing gestational surrogacy without any formal adoption proceeding or mandatory consent from the mother. In U.S. jurisprudence, which is more flexible in defining motherhood, defining the mother has real consequences in terms of how feasible gestational surrogate motherhood is as a legal process. This discrepancy necessitates a more intense analysis of what makes Jewish legal theorists permit surrogate motherhood. Furthermore, contrasting Jewish law's understanding of contracts, reproduction, adoption and custody with U.S. law's basic theories of these legal and ethical issues reveals that which is significant and distinct about each system. The effects of these different theories have led to different approaches to this complicated issue.

Under Jewish law, the definition of the gestational mother as the legal mother might have afforded surrogate mothers a protected status in Judaism by designating gestational surrogates as legal mothers. This status could thereafter be waived or asserted or, alternately, could lead to either the prohibition or unattractiveness of the procedure as a whole. However, due to overarching considerations based on the dominant role of men in Jewish law, the push toward using technology and creating children has overtaken even the important concept of status. The question is whether Judaism is being progressive in allowing couples who cannot have children to simulate some process of natural childbearing, or whether it is being overwhelmingly patriarchal, subsuming the rights of women in order to allow men to fulfill their obligations. This article argues that the latter is the underlying issue, because a similar procreative emphasis has not been permitted in AID when it is fatherhood that would be overridden. Where similar considerations that lead rabbinic authorities to outlaw AID to preserve the place of fatherhood are not used to dignify motherhood, the picture of the society imbued is one in which, ultimately, children are important as regards paternal lineage and motherhood is secondary in nature.

Ultimately, both the U.S. legal system and Jewish law approaches to gestational surrogate motherhood are patriarchal in that they use male standards and male interests to supercede female standards and interests. One might conclude from this analysis that promoting any means of surrogate motherhood would be patriarchal in that it ignores the gendered nature of pregnancy. However, this is not necessarily the case. While the option of dual motherhood is not open to Jewish law, it is a possibility for U.S. law.

Even if, for policy reasons, having two mothers is considered dangerous, protecting the rights of both mothers by mandating adoption or withdrawal procedures would not be dangerous. Undoubtedly, such provisions might make gestational surrogate motherhood less attractive for infertile couples. While it is likely that this would be the case, the utility of such contracts should not override the fundamental rights of surrogate mothers. The promotion of gestational surrogate motherhood can only avoid being patriarchal by taking seriously the status and rights of the gestating mother.