

# TOWARDS ESTABLISHING PARENTHOOD BY AGREEMENT IN JEWISH LAW\*

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*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.<sup>1</sup>*

## INTRODUCTION

The traditional Jewish family structure, like all other theological family

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1. See Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law*, 29 U. TOL. L. REV. 409, 428 (1998) [hereinafter *Regulating ART*]. For a similar but milder statement that “Halakha has not granted legal validity to the . . . parental relations constituted by human commitment,” see NOAM J. ZOHAR, *ALTERNATIVES IN JEWISH BIOETHICS* 81 (1997); this option “hasn’t been discussed in Jewish legal sources . . . Jewish law does not traditionally recognize the establishment of parental status by intent in any form . . .”; see also Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL’Y 91, 104 (2002) [hereinafter *Gestation*].

structures, consists of a horizontal relationship between spouses and a vertical relationship between parent and child. Elsewhere,<sup>2</sup> I discussed extensively the various dispositive contractual aspects of the spousal relationship. In this article, I will discuss the dispositive elements of the parent-child relationship. It is worth noting at the outset the acute normative gap between these two similar but different relationships; whereas private ordering is feasible in the spousal relationship, in the parent-child relationship it is far more complicated. This is generally the case in all legal systems and particularly in the Jewish (halakhic) legal system.

In a spousal agreement we are dealing with two sovereign adults who have the legal capacity to negotiate their monetary relationship and all other dispositive elements of their status as a married couple. In stark contrast, the parent-child agreement primarily concerns the child, who is obviously the subject of that arrangement. Should the child be bound by that agreement? Or is he only a third-party beneficiary to the parental agreement, thus remaining free to claim his rights while totally ignoring his parents' agreement? Furthermore, the child is often a minor who cannot consent to his parents' agreement, as he lacks the legal capacity to do so. In the vast majority of jurisdictions, a parental agreement should be inspected in light of the best interests of the child, ("BIC") which means that any contract that might damage the BIC should be invalid.<sup>3</sup> How can we validate these private agreements if we do not ensure that they are not detrimental to the BIC and do not deprive him of any of his rights and interests?

The legality and enforceability of any specific parental contractual stipulation, such as who should supply the child's food and basic needs, who should decide where and what he will learn, which medical treatments he will receive, and so on, is problematic in light of the abovementioned shortcomings of the parent-child agreement. Clearly, any agreement for establishing the legal parenthood of individuals who will be considered a child's legal parents, fulfill his various needs, and receive the various parental rights is much more complicated, since its implications are

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2. YEHEZKEL MARGALIT, *THE JEWISH FAMILY: BETWEEN FAMILY LAW AND CONTRACT LAW* 1-134 (2017) [hereinafter *THE JEWISH FAMILY*].

3. For the centrality of the BIC in the American legal system as the main factor for validating any parental agreement, as it regards child custody, see Restatement (Second) of Contracts § 191 (AM. LAW INST. 1981). For practical implementation and an academic discussion of § 191 of the Restatement (Second) of Contracts, see *Commonwealth ex rel. Strunk v. Cummins*, 392 A.2d 817 (Pa. Super. 1978); Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GA. ST. U.L. REV. 343, 345 n.11 (2015).

dramatically far-reaching for the child, his parents, and society as a whole.<sup>4</sup> Nonetheless, such parental agreements, which I define as determining legal parenthood by agreement, (“DLPBA”) are slowly but surely becoming more prevalent, nuanced, and detailed in modern times due to today’s greater social openness and the rapid biomedical developments in the field of reproduction.

As I have elaborated in some of my previous research, the last few decades have witnessed dramatic changes in the institutions of family and parenthood. If, in the past, the family was strongly influenced by the bio-normative, “traditional”<sup>5</sup> theological family structure, defined as a pair of heterosexual parents living together under one roof along with their children, sociological changes have led to a rapid and extreme transformation in the definitions of family, marital relations, parenthood, and the relationship between parents and children. Furthermore, “biomedical procedures, such as artificial insemination, sperm/ova/zygote donation and surrogacy, which have been described by scholars as a “revolution” and as the “Wild West of American medicine,” have separated marital relations and fertility.”<sup>6</sup>

Thus, today, the traditional family structure has lost much of its strength, and greater emphasis has been placed on individual autonomy, choice, and the legitimate ability to DLPBA.<sup>7</sup> This departure from theological marriage

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4. For the importance and consequences of establishing legal parenthood, see Yehezkel Margalit, *To Be or Not to Be (A Parent)? - Not Precisely the Question: The Frozen Embryo Dispute*, 18 CARDOZO J.L. & GENDER 355, 361-63 (2012) [hereinafter *Frozen Embryo Dispute*].

5. For this term, see Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 653-54 (2008).

6. See Yehezkel Margalit, *Bridging the Gap Between Intent and Status: A New Framework for Modern Parentage*, 15 WHITTIER J. CHILD & FAM. ADVOC. 1, 4 (2016); Povarsky, *supra* note 1, at 409-11.

7. For the growing acceptance of DLPBA in recent decades, see *Frozen Embryo Dispute*, *supra* note 4, at 358-61. For leading articles maintaining that, in the modern era, intentional parenthood is the best model for determining legal parenthood, particularly in the context of reproductive technology, see Mary Patricia Byrn & Erica Holzer, *Codifying the Intent Test*, 41 WM. MITCHELL L. REV. 130 (2015); John L. 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, 413–20 (1991); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN’S L.J. 329, 367–99 (1995); Heather Kolinsky, *The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights*, 119 PENN ST. L. REV. 801 (2015); Perri Koll, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parents in Surrogacy Custody Disputes*, 18

and parenthood coupled with the inability of traditional parentage models to satisfactorily address the realities of modern parenthood requires increased reliance on private ordering to determine legal parenthood. This process has already begun to some extent: to bridge the gap between evolving social and technological norms and prevailing normative laws, individuals have sought to privately regulate their familial relationships by private agreement and contracts.<sup>8</sup> This trend will likely continue in the future as the diversity and complexity of the methods for creating a family and/or producing a child increase.<sup>9</sup>

Following the brief discussion above of the sociological and biomedical background for the increasing proliferation of these arrangements and agreements as well as exploring the troubling civil aspects of DLPBA, I wish to examine specific problematic halakhic angles of this issue. As can be deduced from the discussions in my book, the halakhic conceptualization of spousal relations is a rigid status that derives directly from the nearly absolute obligation to marry.<sup>10</sup> Therefore, any contractual stipulation or even a complete explicit contract in this regard would be void, as it falls under the category of “one who stipulates about what is written in the Torah.” The same would apply to the parent-child relationship, because of the first

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CARDOZO J.L. & GENDER 199, 223–24 (2011); Jesse M. Nix, “*You Only Donated Sperm*”: *Using Intent to Uphold Paternity Agreements*, 11 J.L. & FAM. STUD. 487, 494 (2009); Jason Oller, *Can I Get That in Writing?: Established and Emerging Protections of Paternity Rights [In re K.M.H., 169 P.3d 1025 (Kan. 2007)]*, 48 WASHBURN L.J. 209, 220–23, 235–37 (2008); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 227–53 (2012); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 321–98 (1990); Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 192–208 (1986); Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, And the Limits of Family Law*, 34 FLA. ST. U.L. REV. 913, 930–57 (2007); Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL’Y & L. 379, 388–89 (2007); Catherine Villareale, *The Case of Two Biological Intended Mothers: Illustrating the Need to Statutorily Define Maternity in Maryland*, 42 U. BALT. L. REV. 365 (2013).

8. See generally Linda D. Elrod, *A Child’s Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245 (2011).

9. See Yehezkel Margalit, *Artificial Insemination from Donor (AID) – From Status to Contract and Back Again?*, 21 B.U. J. SCI. & TECH. L. 69, 70 (2015) [hereinafter *Status to Contract*].

10. See THE JEWISH FAMILY, *supra* note 2, at 17–18.

commandment, both chronologically and in importance, to be fruitful and multiply.<sup>11</sup>

Thus, *prima facie*, *halakhah* leaves no room for any private ordering of the parent-child relationship because of this relationship's rigid halakhic status,<sup>12</sup> and any private agreement to change any of its implications is rejected from the outset, particularly when the parent's identity is established by DLPBA. Before trying to find tools for implementing this normative model wholly or partially, I will begin the discussion with a review of the old, traditional halakhic modes of determining parenthood in the most common scenarios of the ancient era – a coitally produced child and adoption. As in all other faiths and civil jurisdictions, the halakhic ramifications of determining parenthood are enormous and far-reaching. The determination that a child is Jewish (and therefore, for example, entitled to Israeli nationality under Israeli law) is based on matrilineal descent, whereas his status of *Kohen* (priest), Levite or Israelite is passed down patrilineally.<sup>13</sup>

A man who is defined as the legal father of a child must assume several Jewish and civil parental obligations.<sup>14</sup> In addition to fulfilling the first

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11. For more about this commandment, see *Gestation*, *supra* note 1, at 120-22; DAVID M. FELDMAN, BIRTH CONTROL AND JEWISH LAW: MARITAL RELATIONS, CONTRACEPTION, AND ABORTION AS SET FORTH IN THE CLASSIC TEXTS OF JEWISH LAW 46-50 (1968).

12. Although the secular word "status" is very important and prevalent, it is also amorphous and difficult to define precisely because it is used in different legal fields and contexts. For its basic meanings, see RONALD H. GRAVESON, STATUS IN THE COMMON LAW 33-54 (1953); Carlton C. Allen, *Status and Capacity*, 46 L.Q. REV. 277 (1930); Manfred Rehbinder, *Status, Contract and the Welfare State*, 23 STAN. L. REV. 941 (1971). For a discussion of legal parenthood as a modern status that enables individuals to privately determine who will be regarded as the legal parent(s) of the conceived child, see *Status to Contract*, *supra* note 9, at 94-96; *Frozen Embryo Dispute*, *supra* note 4, at 375-77.

13. For more on the importance of Jewish blood lines, see Pamela Laufer-Ukeles, *The Lost Children: When the Right to Children Conflicts with the Rights of Children*, 8 J.L. & ETHICS HUM. RTS. 219, 245 (2014) [hereinafter *Lost Children*]. For the vast influence of Jewish law on Israeli civil law and for a criticism of this interplay, see Ruth Zafran, *Whose Child are You? The Israeli Paternity Regulation and its Flaws*, 46 HAPRAKLIT 311 (2003).

14. See AVRAHAM STEINBERG, *Parents*, in 2 ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS: A COMPILATION OF JEWISH MEDICAL LAW ON ALL TOPICS OF MEDICAL INTEREST 772-4 (2003) [hereinafter ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS]; *Paternity*, in 3 ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS, *supra* at 775-782.

commandment of procreation, the Babylonian Talmud, Tractate *Kiddushin* states that the father is obligated to circumcise his son, and if the son is the mother's first born, redeem him as part of the *pidyon haben* ritual, teach him Torah and a profession, assist him in getting married, and according to another opinion, even teach him to swim. In addition, he must maintain him and shelter him, and provide for all his other needs. The child, on his part, must respect and obey his father and mother, is prohibited from hitting and cursing them, must mourn them when they die, and has the right to inherit from them.<sup>15</sup> Before exploring the extent to which *halakhah* is unique in its approach of establishing legal parenthood almost exclusively by the "natural order", I wish to briefly review the basic approach of many, if not all, other legal systems, which determine it solely by law. This major disparity is not a modern one, but dates back to ancient times, when *halakhah* stood alone in stark contrast to Roman law and its derivative – common law.

In ancient Roman law, the husband/father was the head of the family (*patria potestas* [Latin: power of a father]). His wife and children were his property and he alone decided who was to be regarded as his legal child and thus inherit him, and who would not be defined as his legal child, even if the child was his own biological son. In other words, the father had the social and legal power to adopt a child and define him as his legal child and successor.<sup>16</sup> Later on, this approach of determining legal parenthood by law rather than biology and/or genetics was adopted by Roman law's successors, mainly Common law,<sup>17</sup> Christian law<sup>18</sup> and Islamic law.<sup>19</sup> In its new guise,

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15. See BT *Kiddushin* 29a.

16. For this notion, see HERBERT F. JOLOWICZ & BARRY NICHOLAS, A HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 118, 119 (1972); John Crook, *Patria Potestas*, 17 THE CLASSICAL QUARTERLY 113 (1967); Walter Kirkpatrick Lacey, *Patria Potestas*, in THE FAMILY IN ANCIENT ROME: NEW PERSPECTIVES 121 (Beryl Rawson ed., 1987).

17. See JENNY TEICHMAN, ILLEGITIMACY: AN EXAMINATION OF BASTARDY 72-73 (1982). For a discussion of illegitimacy from a Jewish perspective, see *Regulating ART*, *supra* note 1, at 424-30. See generally HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971).

18. See MERRY WIESNER-HANKS, CHRISTIANITY AND SEXUALITY IN THE EARLY MODERN WORLD: REGULATING DESIRE, REFORMING PRACTICE 153 (2010); JOHN WITTE, THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED 62-63 (2009).

19. See generally Ebrahim Moosa, *The Child Belongs to the Bed: Illegitimacy and Islamic Law*, in QUESTIONABLE ISSUE: ILLEGITIMACY IN SOUTH AFRICA (Sandra Burman & Eleanor Preston-Whyte eds., 1992); Mudrasa Sabreen, *Parentage: A Comparative Study of Islamic and Pakistani Law*, 1 FRONTIERS L. RES. 21 (2013). To obtain a sense

any child conceived out of wedlock, even when there was no explicit betrayal in the sexual act, was defined as a bastard and illegitimate, as he was not part of a legally intact marriage (*filius nullius* [Latin: “child of nobody”]). This child was indeed a child of nobody, for his biological father and mother were not recognized as his legal parents, and he was thus deprived of all his basic needs and rights, most importantly his right to maintenance and his ability to inherit.<sup>20</sup>

## I. DETERMINING HALAKHIC PARENTHOOD IN THE ANCIENT ERA

### A. Coitally Produced Child

Normatively speaking, if a child is born into an intact marriage in which his two parents are Jewish and married to one another, the child is considered their legal child,<sup>21</sup> he can marry any Jewish woman, and he has all of the obligations and rights that pertain to both his parents. But, if the child is born to parents who could not be married at the time of his conception, because their marriage was prohibited by the Torah and would be regarded as invalid according to *halakhah*, or alternatively, when a married woman has sexual relationships with another Jew, the offspring is regarded as a *mamzer* (bastard).<sup>22</sup> The *mamzer* remains the legitimate child of his parents (as opposed to being regarded as an illegitimate child in other religions and legal systems), and therefore still has the right to be maintained by them, to carry their family name, and to inherit from them after their death. He and all his

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of the extent to which this problem is still relevant today, see Christian Reus-Smit, *International Crises of Legitimacy*, 44 INT’L POL. 157 (2007); Symposium, *The New “Illegitimacy”: Revisiting Why Parentage Should Not Depend on Marriage*, 20 AM. U. J. GENDER SOC. POL’Y & L. 349-701 (2012).

20. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 458, 459 (1962); Richard H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 446-48 (1977); Mary K. Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. V. Gerald D.*, 65 TUL. L. REV. 585, 587-95 (1991).

21. For an elaboration of this issue, see Ruth Halperin-Kaddari, *Redefining Parenthood*, 29 CAL. W. INT’L. L.J. 313, 316-17 (1999); Pinhas Shifman, *The Status of the Unmarried Parent in Israel Law*, 12 ISR. L. REV. 194, 194-95 (1977).

22. See Ben Zion Schereschewsky, *Mamzer*, in THE PRINCIPLES OF JEWISH LAW, 423-30 (Menachem Elon ed., 1975); *Lost Children*, *supra* note 13, at 242-45. For the concept and importance of purity and holiness that should be part of the conjugal relationship, see *Regulating ART*, *supra* note 1, at 413-16. For a social anthropological criticism of the politics of *mamzerut*, see SUSAN M. KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 78-80 (2000).

descendants, however, cannot marry a Jewish woman unless she herself is a *mamzer* or proselyte. If a child is born to a single mother who is legally able to be married to the father but did so only after the child was conceived, the child is halakhically legitimate, as he was born to married parents, and he does not face the stigma of bearing the status of *mamzer*.<sup>23</sup> In the latter scenario involving a single mother, where the putative father denies his paternity, there are no halakhic constraints to proving the genetic connection by means of a paternity test.

Similarly, there is no validity to any private agreement between the parents to release the man from his paternity, even if they signed a contract to the effect that he is not to be regarded as the halakhic father of the conceived child. But, in the case of a married woman, where there is concern that any inquiry into the true genetic connection may result in the possibility that the child will be labeled a *mamzer*, extensive halakhic efforts are made to avoid this conclusion to preserve the child's basic right not to suffer the stigma of being labeled a *mamzer*.<sup>24</sup> This religious-civil desire to avoid declaring a child a bastard (*mamzer*) in the Jewish-Israeli context is reflected in some of Israel's civil laws as well as in Israel's Population Registry Law, 5725-1965 § 22, which dictates that "Save under a judgment of a competent civil or religious court, a man shall not be registered as the father of the child of a woman who had been married to another man within 300 days prior to the date of the birth of the child" (the author's own translation). The meaning of this legislation is that under such circumstances, legal paternity cannot be registered in Israel's population registry following a declaration of the parties due to the halakhic problem of being regarded a *mamzer*. In this unique case, only a court decree may permit this registration, taking into consideration, amongst other things, the BIC and the far-reaching Jewish and civil consequences of such a problematic registration.<sup>25</sup>

Similarly, and unique to Israeli civil law, is concern over the possibility of

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23. See Schereschewsky, *supra* note 22, at 424-29.

24. For the difference between determining legal paternity when the child is born to a single mother and to a married mother, a difference that is well-rooted also in Israeli civil law, see Ruth Zafran, *More Than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple – the Israeli View*, 9 GEO. J. GENDER & L. 115, 119 n.13 (2008). For parallel secular efforts not to define a child as illegitimate, as the marital presumption, see Traci Dallas, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 379-87 (1988); Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 563 (2000).

25. See Zafran, *supra* note 24, at 153-54.

bastardy should paternity tests be conducted on a regular basis for minors, whether Jewish, Christian or Muslim.<sup>26</sup> That is the reason why the Genetic Information Law, 5761-2000, following its amendment in 2008, states that a paternity test is allowed only by court order. A paternity test may be conducted only after receiving explicit permission from the child's chief religious authority and must be reaffirmed by the attorney general, ensuring that there is no fear of bastardy in this case, which would obviously be detrimental to the BIC, and which was bitterly criticized in the scholarly literature.<sup>27</sup> As can be deduced from the above discussion, the rule of thumb in *halakhah*, and subsequently in Israeli civil law,<sup>28</sup> is that legal paternity is determined almost solely on the basis of genetics and the natural order, without taking into account the legal definition of the parents' marital status. Of course, one of the major exceptions to this is the fear of the *mamzer* status, as explained above, in addition to other social-halakhic exceptions, as I will explore in section 4.<sup>29</sup>

### B. Adoption

Adoption, one of the most well-known parent-child relationships, is deeply rooted in ancient common law, and is still prevalent today. Judaism's attitude towards adoption is ambivalent at best, and hostile at worst.<sup>30</sup> This

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26. For a secular Israeli call to conduct paternity tests on a regular basis to avoid any ambiguity concerning the putative father's identity, see Talia Agmon, *Genetic Testing of Children – Why Not? Questions Regarding the Legislation on Genetic Testing of Children in Israel*, 6 L. & BUS. 295 (2007).

27. For the English version of the law, but unfortunately without the relevant 2008 amendment no. 3, see *Genetic Information Law, 5761-2000\**, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/jsource/Health/GeneticInformationLaw.pdf>, (last visited June 23, 2018); see also Shahar Lifshitz, *Neither Nature nor Contract: Toward an Institutional Perspective on Parenthood Essay*, 8 J. L. ETHICS & HUM. RTS. 297, 305 (2014).

28. For this contention concerning the Israeli system's rule of thumb, see Zafran, *supra* note 24, at 118-19; *Gestation*, *supra* note 1, at 104-5.

29. For a brief discussion of halakhic exceptions which ignore the basic theme of nature and genetic as the sole factor in establishing legal paternity, see Michael Corinaldi, *The Legal Status of a Child Born of Artificial Means from a Sperm Donor or an Egg Donor*, 18-19 SHNATON HA-MISHPAT HAIVRI 295, 304-8 (1992-4); ZOHAR, *supra* note 1, at 69-71, 74-76 (concluding that “– the affirmation of biological parenthood and the concomitant invalidation of parenthood by consent reflect a value-commitment rather than an inevitable necessity”); Zohar, *supra* note 1, at 82; *Status to Contract*, *supra* note 9, at 250-52.

30. See generally BRIAN MILNE, RIGHTS OF THE CHILD: 25 YEARS AFTER THE

ambivalence has its roots in biblical sources, where there are many verses in both the Pentateuch and the Prophets that can be interpreted as referring to a form of adoption, but all are so vague as to be unreliable for serving as a cornerstone for any ancient recognition of this legal mechanism.<sup>31</sup> Even later on, in the Tannaitic and Amoraic literature, only *aggadic* and non-halakhic sources endorse the adoption of a Jewish child by a foreign Jewish couple. For example, there is a *midrash* about a guardian who married off the female orphan he raised as his own child. When asked her father's name for recording in her marriage contract, she remained silent for a while and then replied, "he that brings up a child is called a father, not he that begets . . ."<sup>32</sup>

Adoption involves three groups of people – the adopted child; the adopting parents, who are usually infertile and have no other opportunity to become parents; and the natural parents, who often decide to give away their own child because of economic constraints. But, practically speaking, throughout the ages, the only factor which Jewish halakhic authorities have taken into account in deciding whether to authorize an adoption has been the BIC.<sup>33</sup> If

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ADOPTION OF THE UN CONVENTION (2015); KERRY O'HALLORAN, THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY AND PRACTICE 78-80 (2015); HEIDI SCHWARZWALD ET AL., INTERNATIONAL ADOPTION AND CLINICAL PRACTICE (2015).

31. For a detailed discussion of those verses, see *Encyclopedia Judaica: Adoption*, JEWISH VIRTUAL LIBRARY, [http://www.jewishvirtuallibrary.org/jsource/judaica/ejud\\_0002\\_0001\\_0\\_00486.html](http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0001_0_00486.html), (last visited June 23, 2018). For a more general description of various biblical parent-child relationships, see JOSEPH FLEISHMAN, FATHER-DAUGHTER RELATIONS IN BIBLICAL LAW 6-9, 136-39 (2011).

32. And similarly, "Whoever brings up an orphan in his home, it is as though he gave birth to him," BT *Sanhedrin* 19b. See also MICHAEL GOLD, AND HANNAH WEPT: INFERTILITY, ADOPTION, AND THE JEWISH COUPLE 153-61 (1988).

33. For the superiority of this doctrine in secular law and in Jewish law, see JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD (1979); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1980); JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996); Michael J. Broyde, *Child Custody in Jewish Law: A Pure Law Analysis*, JEWISH L. ASS'N. STUD. VII: PARIS CONF. VOLUME 1 (2002); Yehiel S. Kaplan, *Child Custody in Jewish Law: From Authority of the Father to the Best Interest of the Child*, 24 J.L. & RELIGION 89, 121 (2008). For reservations with regard to this theme in the Jewish context, see Israel Z. Gilat, *Is the 'Benefit of the Child' a Major Criterion according to Jewish Law in a Parental Conflict of the Child?*, 8 BAR ILAN L. STUD. 297 (1990). For the interplay between this doctrine and the religion of the adopted child, see Laura J. Schwartz, *Religious Matching for Adoption: Unraveling the Interests Behind the "Best Interests" Standard*, 25 FAM. L.Q. 171, 185-89 (1991); Daniel Pollack et al., *Classical Religious Perspectives of Adoption Law*, 79 NOTRE DAME L. REV. 693, 746-47

the BIC requires that a child be removed from his natural home, i.e. when a child has been orphaned, abandoned, or neglected by his natural parents, he may be adopted by others. The child was never treated as goods to be handed from his parents to others, but rather as an independent, autonomous person whose natural or adoptive parents have the duty, and not the right, to care for him and fulfill all his needs. Even after he is adopted by others, his natural and legal relationship with his natural family is never actually abolished.

Even a superficial glance at the Jewish literature that deals with adoption clearly shows the extent to which Judaism prefers natural parenthood and genetic lineage over any social and/or psychological parenthood of adoptive parents.<sup>34</sup> In social or psychological parenthood, an individual can be determined as a legal parent, despite not being the biological parent of the child. While some *halakhists* recognize this institution, it is safe to assume that the vast majority reject such recognition and hold that “adoption is not known as a legal institution in Jewish law.”<sup>35</sup> That is because in Jewish law, and therefore also in Israeli civil law,<sup>36</sup> legal parenthood is defined as natural parenthood, and no implied or explicit agreement, or even a judicial decree and legislation can change this axiom.<sup>37</sup> The only possible recognition in

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(2004).

34. In the modern context, the doctrine of social and/or psychological parenthood is used to establish or terminate legal parenthood and/or resolve any dispute with the natural parents over child custody. See Carolyn Curtis, *The Psychological Parent Doctrine in Custody Disputes Between Foster Parents and Biological Parents*, 16 COLUM. J.L. & SOC. PROBS. 149, 192 (1980); Vanessa L. Warzynski, *Termination of Parental Rights: The “Psychological Parent” Standard*, 39 VILL. L. REV. 737, 770-71 (1994); Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 369-70 (1996).

35. See *Encyclopaedia Judaica: Adoption*, *supra* note 31; GOLD, *supra* note 32, at 157; *Gestation*, *supra* note 1, at 104, 122-23.

36. For a list of several prominent Israeli Supreme Court verdicts that support the notion that legal parenthood is defined as natural parenthood, see Lifshitz, *supra* note 27, at 299 n.5.

37. That is the reason why Israel’s 1981 Adoption of Children Law §16 defines the adoption relationship as, “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 . . . .” This means that the adoption law does not permanently and totally terminate the natural lineage of the adopted child’s natural family and does not establish a full and new relationship with his adoptive family, due to *halakhah*’s basic premise that the new lineage cannot fully substitute the natural one. For an overview of Israeli adoption regulations and the massive influence of Judaism on it, see Zafran, *supra* note 24, at 131-35; *Gestation*, *supra* note 1, at 104, 123-28.

adoption is the recognition, to varying degrees, of the new relationship as additional and supplemental to the still-existing natural lineage, but not fully replacing it.<sup>38</sup>

What is crucial for the continuation of our discussion is the fact that even those who hold that adoption cannot sever the adopted child's natural lineage with his natural parents are likely to agree that there is enough room in *halakhah* for regarding the adoptive parents as at least "semi-parents." There is a possible Talmudic precedent for a legal guardian (*apotropos*)<sup>39</sup> to be recognized as the child's legal parent. This legal recognition involves many parental obligations and rights that are similar to those of the natural parents, as I will discuss again in the conclusion of this article. Another option for granting recognition to adoptive parents is to entrust the administration of the child's property to the adopter, which places the child in the same position as the adopter's natural children, and includes his right to be maintained by the heirs after the adopter's death. The latter option is only relevant to financial obligations, while the former includes a wider range of parental responsibilities, such as taking responsibility for the child's physical and mental welfare.<sup>40</sup>

In the age-old traditional approach of *halakhah*, it is possible to divorce your spouse by mutual agreement, but it is impossible to "divorce" your child that has been adopted in the modern era according to some secular legal thinkers.<sup>41</sup> For example, one radical feminist maintains that the vertical parent-child relationship should be regarded as the pillar of the modern family because the horizontal spousal relationship has become too weak and shaky as a result of the skyrocketing divorce rate. Alternatively, there is the

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38. ALEX J. GOLDMAN, JUDAISM CONFRONTS CONTEMPORARY ISSUES, 63-73 (1978); Mark Goldfeder, *The Adoption of Children in Judaism and in Israel: A Conceptual and Practical Review*, 22 CARDOZO J. INT'L & COMP. L. 321, 353 (2014).

39. BT *Bava Kama* 39a-40a, 44b; BT *Bava Metzia* 38a, 39a-b, 42b; BT *Bava Batra* 42a, 131b-132a. For the institution of the *apotropos* in Jewish law, see Ben Zion Schereschewsky, *Apotropos*, in THE PRINCIPLES OF JEWISH LAW 219, 221-22 (Menachem Elon ed., 1975); Charla Murakami, *Parent-Child Relations: A Comparison of Jewish and California Law*, 1 U.C. DAVIS J. INT'L L. & POL'Y 107, 109-15 (1995); Kenneth B. Orenbach, *The Religiously Distinct Director: Infusing Judeo-Christian Business Ethics Into Corporate Governance*, 2 CHARLOTTE L. REV. 369, 403-4 (2010).

40. For an overview of these two options, see *Encyclopaedia Judaica: Adoption*, *supra* note 31. For *apotropos* as an alternative to adoption, see *Gestation*, *supra* note 1, at 104, 124.

41. For a unique secular exception and for the option of divorcing one's parents, see *Kingsley v. Kingsley*, 623 So. 2d 780, 790 (Fla. Dist. Ct. App. 1993).

child-centered approach, whereby the BIC rather than parental rights should be the central factor in day-to-day family life.<sup>42</sup>

## II. DETERMINING HALAKHIC PARENTHOOD IN THE MODERN ERA

### A. General

The Jewish nation as a whole, and Israeli society in particular, hold childbearing in high esteem for historical, religious, demographic, and security reasons.<sup>43</sup> To begin with, this is the first biblical commandment for every Jew, and the Talmud states that the messiah will come when all the unborn souls are born.<sup>44</sup> The tragedy of the Holocaust, which destroyed a third of the Jewish nation, the fragile and problematic security and demographic situation in the Middle East, where the Jewish state is surrounded by enemy states that have repeatedly gone to war against it, coupled with the Israeli-Palestinian conflict, create a strong desire in Jewish and Israeli society to “fill the void.”

The above phenomenon has been referred to as Jewish and Israeli pronatalism, that is, the encouragement of procreation, childbearing and an emphasis on the advantages of raising children.<sup>45</sup> Moreover, since procreation is one of the central Jewish commandments and a socio-religious taboo, the other side of the coin is the sad situation of infertile individuals or couples. Numerous articles and books have been written about the sensitive status of those who are infertile and how to overcome it.<sup>46</sup> The cry of the

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42. See MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 118-19 (1995); Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1754-71 (1993).

43. See *Fundamental Principles of Jewish Law in Relation to Technological Advances*, in 2 ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS, *supra* note 14, at 586-92. For the general Jewish ethic, especially concerning childbirth, see *Jewish Ethics*, in 2 ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS, *supra* note 14 at 380-89; *Child Birth*, in 1 ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS, *supra* note 14 at 166-94.

44. See BT *Nida* 13b.

45. For this notion and for a survey of its main causes and ramifications, see Yeheakel Margalit, *Scarce Medical Resources – Parenthood at Every Age, In Every Case and Subsidized By the State?*, 9 NETANYA ACAD. COLL. L. REV. 191, 193-207 (2014) [hereinafter *Scarce Medical Resources*]; *Lost Children*, *supra* note 13, at 220-24, 234-40.

46. See Gideon Weitzman, *Give Me Children or else I am Dead: Orthodox Jewish Perspectives on Fertility*, in FAITH AND FERTILITY: ATTITUDES TOWARDS REPRODUCTIVE PRACTICES IN DIFFERENT RELIGIONS FROM ANCIENT TO MODERN TIMES 205, 262 (Eric

barren biblical Rachel to the patriarch Jacob, “give me children, or I shall die,” which the sages interpreted to mean that a childless person is accounted as blind and even dead, has echoed down through the generations, and it is only now that advanced bio-medical innovations offer some comfort for those in this situation.<sup>47</sup>

While clearly the advent of “new” assisted reproduction technologies, (“ART”) have successfully solved many fertility problems, these technologies have also threatened and even endangered the Jewish bionormative perceptions of proper and desired spousal and parental structures.<sup>48</sup> When you unravel the Gordian knot that used to exist between marriage, sexuality, and procreation, and add a third player to the dual spousal conjugal relationship – such as a sperm and/or ova donor and/or surrogate mother – the necessity for marriage decreases.<sup>49</sup> I will argue later on that at the end of the day this is the real reason why some *halakhists* have strongly opposed ART, even in the very justified scenario of using the husband’s sperm to artificially inseminate his wife.

#### B. *Artificial Insemination by Husband (AIH)*

The most prevalent, and seemingly less controversial and simplest ART, is the use of the husband’s sperm to impregnate his wife. Generally speaking, there are a variety of types of artificial insemination.<sup>50</sup> The

Blyth & Ruth Landau eds., 2009); RICHARD V. GRAZI, *BE FRUITFUL AND MULTIPLY: FERTILITY THERAPY AND THE JEWISH TRADITION* (1994); RICHARD V. GRAZI, *OVERCOMING INFERTILITY* (2005).

47. See *Genesis* 30:1; BT *Nedarim* 64b. See also Gideon Weitzman, *Technology in the Service of the First Mitzvah*, 6 *HAKIRAH, FLATBUSH J. JEWISH L. & THOUGHT* 259 (2008).

48. For a discussion of this threat and the general interplay of ART and the “traditional” and “new” family, see Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 *HASTINGS L.J.* 951, 964 (1996); John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 *HASTINGS L.J.* 911, 927-8 (1996).

49. See generally Jonathan B. Pitt, *Fragmenting Procreation*, 108 *YALE L.J.* 1893, 1896-7 (1999); Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 *AM. U. J. GENDER SOC. POL’Y & L.* 379, 381 (2007). For the Jewish perspective on fragmenting sex and procreation and for a feminist critique of it, see RONIT IRSHAI, *FERTILITY AND JEWISH LAW: FEMINIST PERSPECTIVES ON ORTHODOX RESPONSA LITERATURE* 25-200, 203-75 (Joel A. Linsider trans., 2012) [hereinafter *FERTILITY AND JEWISH LAW*].

50. See Brent J. Jensen, Comment, *Artificial Insemination and the Law*, 1982 *BYU*

artificial insemination process involves the injection of sperm into a woman's cervix. The procedure may be done either by a licensed physician in an official medical facility or by the woman, at home. Homologous insemination occurs when the husband donates the sperm that is injected into his wife. Homologous insemination is alternatively known as artificial insemination by the husband, hereinafter "AIH". It has been applied successfully since at least the eighteenth century.

From the early 1930s, the possibility that a woman could be fertilized not in the "old fashioned way" ushered in a new era in which thousands of children were born by this procedure. It is most relevant when the husband's sperm is medically problematic or when he must undergo medical treatment that will impair or carry a risk of impairing his ability to procreate.<sup>51</sup> Although this simple "technology," *prima facie*, does not involve any particular ethical or legal problems, in the conservative Victorian era it was regarded as adultery and the child was stigmatized as a bastard or illegitimate. Slowly but surely, the approach to this procedure changed, and today all societies recognize that its advantages outweigh its disadvantages.<sup>52</sup>

Thus, unless there is reason to suspect that the husband's sperm will be mixed with, or intentionally or even unintentionally replaced by, someone else's sperm, it should be permitted. Nonetheless, the Catholic Church is its strongest opponent, maintaining that any human involvement in the most intimate and divine process of procreation is prohibited. It views any such human involvement as "playing God" and hubris, and demands that it be completely banned.<sup>53</sup> This stringent Catholic approach towards ART has been regarded by some as naturalism, that a human being may not interfere

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L. REV. 935, 935-37 (1982).

51. See *AIH*, in 1 ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS, *supra* note 14, at 58-73; DANIEL B SINCLAIR, JEWISH BIOMEDICAL LAW: LEGAL AND EXTRA-LEGAL DIMENSIONS 68-76 (2003).

52. For a description of the shift from regarding this procedure as problematic and worthy of rejection to more accepted and legitimate, see WILFRED J. FINEGOLD, ARTIFICIAL INSEMINATION 56-75 (1964); Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1060 (2002); *Status to Contract*, *supra* note 9, at 77-80.

53. See U.S. CATHOLIC CONFERENCE, CONGREGATION FOR THE DOCTRINE OF THE FAITH, DONUM VITAE: INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION 7 (1987); Shultz, *supra* note 7, at 329-30. For the approach of Islamic law, which generally permitted AIH with certain precautionary measures, similar to the Jewish approach, see VARDIT RISPLER-CHAIM, ISLAMIC MEDICAL ETHICS IN THE TWENTIETH CENTURY 18-27, 204 (1993).

in the divine desire and destiny that a given believer will or will not have children.

One of the most fascinating halakhic aspects of this issue is the old, traditional approach of dealing with the status and consequences of a child who was conceived in non-coital reproduction. There is a discussion in the Talmud of the possibility of a virgin conceiving after bathing in a bathtub in which a man had previously ejaculated.<sup>54</sup> Similarly, there is a parallel *aggadic* source which states that Ben-Sira was simultaneously the son and the grandson of Jeremiah, as his daughter was impregnated by Jeremiah's sperm after he was forced to ejaculate in the water of a bathhouse.<sup>55</sup> Later on, in the thirteen century, Peretz ben Elijah of Corbeil, in his halakhic work *Haggahot Semak*, cautions married woman not to lie on the bedsheets of a man who is not her husband, for fear that the man may have ejaculated on them. The reason was that if she became pregnant, no one would know that the fetus is not that of her husband, and there is concern that the child might marry his biological sister.<sup>56</sup> It may be deduced from these more or less reliable sources that even though a child is conceived by his father's sperm in non-coital reproduction, he is nonetheless regarded as his legitimate child and probably in every respect.

This old and deep-rooted halakhic tradition fits the basic natural order that a child is the legal son of his biological progenitor.<sup>57</sup> While some *halakhists* even hold that the father fulfills his biblical, or at least rabbinic, obligation to procreate<sup>58</sup> via artificial means, there is still a minority of rabbinic authorities who argue that a child conceived by artificial means, such as AIH, should not be treated as the biological son of his father.<sup>59</sup> There are a number

54. See BT *Hagigah* 14b-15a.

55. See Joshua H. Lipschutz, *To Clone or Not to Clone--A Jewish Perspective*, 25 J. MED. ETHICS 105 (1999); Daniel B. Sinclair, *Assisted Reproduction in Jewish Law*, 30 FORDHAM URB. L.J. 71, 79 n.31 (2002).

56. See *Regulating ART*, *supra* note 1, at 430-31.

57. This is also common sense and is well-accepted in other jurisdictions. See *Regulating ART*, *supra* note 1, at 435 (explaining that in cases of AIH no question of paternity has ever been raised in American law).

58. For a discussion of this, see *Regulating ART*, *supra* note 1, at 436-37. For a general scholarly discussion of fulfilling this commandment by means of the various ART procedures, see FERTILITY AND JEWISH LAW, *supra* note 49, at 25-52.

59. This is in addition to other possible halakhic problems concerning the prohibition of destruction of the seed, see FELDMAN, *supra* note 11, at 109. There are additional concerns of replacing the husband's sperm with someone else's sperm and turning childbearing into a 'mechanical' act, as claimed in IMMANUEL JAKOBOVITS, JEWISH

of formalistic justifications for this determination, but I would argue that they are based on meta-halakhic<sup>60</sup> considerations rather than hard core *halakhah*. These considerations incline towards some form of Christian naturalism, or soft naturalism,<sup>61</sup> and they conceptualize ART as a threat to the Jewish bionormative family structure, therefore even prohibiting AIH, the simplest form of such artificial treatments.

One of the most effective theological methods for reinforcing the prohibition against artificial treatments and maintaining the concept of naturalism, which prohibits procreation by non-natural means, is to define this procedure as illegitimate. One of the main ramifications of this sad conclusion is that the conceived child is defined as an orphan, or “a child of no one,” and is not the legitimate child of his biological progenitors. One of the most important conclusions to be drawn from this discussion is that *halakhah* should apply its capacity to disengage itself from its basic approach – that a child is defined as its parents’ child only if the child is the parents’ biological child – in view of other halakhic considerations. In section 4, I will discuss some additional halakhic exceptions to the natural order.

### C. *Artificial Insemination by Donor (AID)*

When artificial insemination involves using a donor’s sperm without the woman having a sexual relationship with the donor, it is referred to either as heterologous insemination or artificial insemination by donor, (“AID”).<sup>62</sup> This procedure is performed when the husband is infertile for physiological or psychological reasons. Some halakhic authorities even sanction this procedure in the case of single or lesbian women, or when sperm enhancement/eugenics is necessary.<sup>63</sup> While AID is the most common ART

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MEDICAL ETHICS: A COMPARATIVE AND HISTORICAL STUDY OF THE JEWISH RELIGIOUS ATTITUDE TO MEDICINE AND ITS PRACTICE 248-49 (1959). For addressing and refuting all the above-mentioned concerns, *inter alia*, because of the husband’s intention to procreate and not to discard his sperm, see Sinclair, *supra* note 51, at 68-76.

60. For a discussion of this notion, see Alexander Kaye, *Eliezer Goldman and the Origins of Meta-Halacha*, 34.3 MODERN JUDAISM 309 (2014).

61. For the notion of halakhic naturalism and for casting doubt on whether *halakhah* does indeed channel parenthood into a true natural order, see Sinclair, *supra* note 51, at 68-76; ZOHAR, *supra* note 1, at 69-78.

62. See Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 957-58 (2009). For a more comprehensive definition of the various artificial insemination procedures, see GOLDMAN, *supra* note 38, at 74-86.

63. See AIH, in 1 ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS, *supra* note 14, at 58-

procedure, it perhaps constitutes the most direct and troubling conflict between the secular and halakhic concepts of who should be recognized as the legal father of the conceived child.

I believe that this conflict is the reason why in modern-day Israel, AID regulation remains the only law concerning the determination of legal parenthood that is lacking, after the 1996 surrogacy law and the 2010 eggs donation laws were enacted. The background for this inevitable clash between *halakhah* and Israeli civil law is the fact that, on the one hand, according to civil law the entire point of AID legislation is to release the sperm donor from any parental obligations and rights. This release occurs at the expense of transferring the donor's legal fatherhood to the husband of the inseminated woman, who intended and agreed, for all intents and purposes, to become the legal father of the resulting child. *Halakhah*, on the other hand, clings to its fundamental notion of natural parenthood, which means that an agreement between two people cannot change the basic concept that legal fatherhood is determined according to the biological father.<sup>64</sup>

There is an extensive early discussion about whether the above procedure renders the resulting child a *mamzer*. The dispute is rooted in the interpretation given to the somewhat vague biblical prohibition of placing a man's seed in the womb of another person's wife. The verse states, "And you shall not lie carnally for seed with your neighbor's wife."<sup>65</sup> It is unclear whether this prohibition is due to the illicit sexual relationship that traditionally precedes the placing of a stranger's seed in a married woman's womb or whether the issue is the problematic outcome of placing a man's seed in a strange woman, even without engaging in any prohibited sexual intercourse. The clear distinction between these two interpretations finds expression in modern ART, in which a stranger's sperm can be placed in the cervix of the donee without their engaging in any problematic sexual relationship.<sup>66</sup> In his stringent approach, Yoel Teitelbaum regards this as

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64. See *Gestation*, *supra* note 1, at 130-31 ("Most significantly, 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."). For a description of this inevitable clash, see Pinhas Shifman, *Establishing Parenthood for a Child Born through Artificial Insemination*, 10 HEBREW U. L.J. 63, 65-77 (1980); Zafran, *supra* note 24, at 121-23; *Artificial Means*, *supra* note 29. For aspects of the erosion of natural parenthood in AID, see Lifshitz, *supra* note 21i7, at 306-10.

65. *Leviticus* 18:20. For an overview of the possible interpretations of this prohibition, see SINCLAIR, *supra* note 51, at 82-83.

66. For a discussion of the claim that most sources endorse the former interpretation,

adultery *per se* and therefore, like any other adulterous relationship, it is completely prohibited. According to Moshe Feinstein's lenient approach, on the other hand, as long as there is no prohibited relationship between the donor and the donee, the method does not pose any particular halakhic problem; the resulting child can marry any Jewish woman and this artificial means has no negative implications for him.<sup>67</sup>

I will now focus on the major dilemma of who is to be regarded as the legal father of the conceived child. Should it be the sperm donor, as prescribed by natural lineage?<sup>68</sup> Or are there perhaps other halakhic considerations which can change this determination, such as, on the one hand, conferring legal fatherhood on the donee's husband or, on the other hand, releasing the donor from his legal paternity, thus leaving the child without any legal father? The vast majority of *halakhists* maintain that paternity should be determined by the natural order in the AID context as well, thus making the sperm donor the legal father of the resulting child in all respects.<sup>69</sup> This dichotomous determination produces two additional major problems.

Practically speaking, the sperm donor's anonymity calls into question the legitimacy of the conceived child, as there is no guarantee that the donor himself is not a *mamzer*, in which case the resulting child will also be stigmatized as such. Moreover, since the donor's identity is unknown, the conceived child is defined as a *shtuki*, or a "possible *mamzer*." On the one hand, a *shtuki* is prohibited from marrying a female *mamzer* since he himself might not be a *mamzer*; on the other hand, he cannot marry a "regular" woman, as there is a chance that he may indeed be a *mamzer*. The only option available to him is to marry a woman who has converted to Judaism.<sup>70</sup>

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*see* MENACHEM ELON, *JEWISH LAW CASES AND MATERIALS* 626 (1999). For the disturbing consequences of the latter interpretation, *see Lost Children, supra* note 13, at 247.

67. For a summary of these arguments as well as for a review of the other halakhic justifications for prohibiting this practice, *see Regulating ART, supra* note 1, at 422-24; Sinclair, *supra* note 51, at 77-94.

68. For a summary of the views of those authorities who claim that the sperm donor should be regarded as the legal father of the child in all respects, *see Regulating ART, supra* note 1, at 436-37.

69. Others contend that legal fatherhood is determined only for stringent considerations ("*lechumra*"), such as the prohibition against biological siblings marrying, and not for rights, such as inheritance rights. *See* the sources listed in SINCLAIR, *supra* note 51, at 90 nn. 81-82.

70. *See* KAHN, *supra* note 22, at 55; *Lost Children, supra* note 13, at 244-45. For the

In addition, there is the problem of unintentional incest. If the sperm donor donated his sperm to a number of sperm banks, there is the possibility that a brother might unwittingly marry his sister, not knowing that they are biological siblings.<sup>71</sup> This problem is far more serious in Israel, in which there are only seventeen accredited sperm banks in the entire country.<sup>72</sup>

These two major problems can be resolved by more careful and thorough regulation of the entire sperm donation process. Maintaining adequate records and/or conducting accurate registries that list and document the identities of both donors and donees will go far to alleviate these two grave concerns. In 2010, Israel enacted a new Egg Donation Law which launched the establishment of a complete confidential registry with the identifying information of both egg donors and donees to avoid any problems of *mamzerut*.<sup>73</sup> In my opinion, this constitutes the first urgently required step in resolving the drawbacks of donating anonymous gametes. There is no choice but to allow a representative of the rabbinical courts to access this registry before any artificially conceived child marries, to ensure that incest does not occur.<sup>74</sup>

Alternatively, an even better, but very surprising and even ironic, solution is to use the sperm of non-Jewish donors. There is a halakhic fiction of nullifying the seed of a gentile, which means that, halakhically, a gentile donor's sperm and descendants are not regarded as belonging to him. The outcome of this astonishing determination is that biological siblings born from a Gentile's sperm are not defined as siblings and thus there is no

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assertion the majority of *halakhists* hold: that AID is prohibited for a married woman and that there is no authoritative opinion that permits using the sperm of a Jewish donor, see *Gestation*, *supra* note 1, at 130-31.

71. See my previous caveat that AID should be completely abolished if it turns out that it has marked negative effects on the children conceived by these artificial means. Such halakhic problems can fuel this cry, see *Status to Contract*, *supra* note 11, at 99-100.

72. One of the Israel's foremost IVF experts recently told me that while there is no official regulation of the sperm donation process, there is a new non-official, self-regulation ethic that restricts the possible number of donations to only two to three live births from the same donor.

73. For those two suggestions, see *Lost Children*, *supra* note 13, at 249-51; SINCLAIR, *supra* note 51, at 90.

74. For the media news that the Israeli Health Ministry Regulations from 2008 - Guidelines for the Administration of Sperm Donation of the Ministry of Health, Nov. 8, 2007 (to be effective June 1, 2008), to some extent contemplated these problems, see *Lost Children*, *supra* note 13, at 251 n.137.

problem of incest in the unlikely eventuality that they should marry. Similarly, there is no problem of the child being a *mamzer* or a *shtuki*, as those problems relate only to Jewish sperm.<sup>75</sup> In 2015, an Israeli rabbinical court rendered an explicit ruling that a child who was artificially conceived with non-Jewish sperm is to be regarded as a legitimate child, and the child is even eligible to marry a priest (*Kohen*).<sup>76</sup>

But let us return to the dilemma at hand: Are there any halakhic considerations that could change the determination that the sperm donor should be regarded as the legal father of the resulting child? Let us recall those halakhic authorities, mentioned above in the discussion of AIH, who argue that the artificialness of the process should change the basic approach of *halakhah* to natural parenthood, and the conceived child should not be determined as the legal child of his biological progenitor. That should apply in the case of AID as well, where the “donor” “donated” his sperm and received full payment in return for his “donation.”<sup>77</sup> Thus, philosophically and halakhically, the donor has abandoned his sperm and has in fact disconnected himself from his genetic material, which therefore is no longer considered his, and the resulting child is no longer to be treated as his son for all intents and purposes.<sup>78</sup>

The most interesting and important discussion, however, revolves around the possibility of *halakhah* conferring, to varying degrees, legal fatherhood on the donee’s husband. If we could find accepted halakhic tools in this regard, we would be able to resolve, if even partially, the major problem of bridging the gap between the secular and religious conceptions of who should be determined as the legal father of the conceived child. This conferring of legal fatherhood on the donee’s husband is of course a very problematic option, as, *prima facie*, it contradicts the natural order of determining legal fatherhood. This option was considered decades ago in

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75. See *Lost Children*, *supra* note 13, at 252 (discussing the advantages and disadvantages of this determination).

76. See File No. 1051202/1 Rabbinical Court (Ashkelon), Anonymous (Nov. 1, 2015), <http://www.daat.ac.il/daat/psk/psk.asp?id=1278> (in Hebrew) (Isr.).

77. In Israel, the average payment for a single sperm donation is approximately NIS 700-750, the equivalent of \$180 each.

78. See MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED 1:72 (Chaim Rabin trans., 1995); Mordechai Halperin, *The Definition of Parenthood and the Right to Find Biological Roots*, in MORAL DILEMMAS IN MEDICINE 161, 167 (Raphael Cohen-Almagor ed., 2002); Menachem M. Kasher, *Artificial Insemination*, 1 NOAM 125, 125-26 (1958).

the Haifa rabbinical court.<sup>79</sup> In that AID case, the court ruled that the donee's husband had agreed to his wife's insemination, and is therefore obligated to pay the resulting child's support, because by agreeing to the insemination, he became a guarantor (*arev*) of the donee and must therefore pay the child's maintenance.

The most important AID ruling of Israel's civil Supreme Court was based on the precedent of the above rabbinical court decision to obligate the donee's ex-husband to continue paying child support even after they had separated because of his initial oral agreement.<sup>80</sup> Based on this precedent, one may again deduce that *halakhah* has its own tools for deviating from the natural order of bestowing legal paternity purely on the grounds of genetics and for recognizing, to varying degrees, the donee's husband, even if only for monetary purposes, as I will explore more extensively in section 5. As mentioned earlier, in section 4 I will list some additional circumstances in which *halakhah* deviated from natural to intentional parenthood as a basis for supporting this essential compromise between the civil and religious legal systems.

#### D. Egg Donation

Egg donation is intended to enable women who are unable to conceive with their own ova, but can gestate a fetus to term, to give birth to children by receiving egg donations from other women. In assisted reproduction, egg donation typically involves in vitro fertilization ("IVF") technology, whereby the eggs are fertilized in a laboratory with the husband's sperm or with donated sperm. After fertilization, the fertilized egg is implanted in the womb of either the donee or a surrogate mother. The typical donation is a commercial one in which an anonymous donor agrees that, for monetary consideration, her ovum may be used by an anonymous donee. The donee

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79. See Rabbinical Court (Haifa), *Anonymous v. Anonymous* (July 21, 1977) (unpublished), discussed in CA 449/79 *Salameh v. Salameh* 34(2) PD 779, 782 (1980) (Isr.). Unfortunately, this unique precedent was later overruled on appeal, *inter alia*, on the grounds of semi-adultery. See File No. App. 49/5745 High Rabbinical Court (Jer), *Anonymous* (Dec. 16, 1985) (unpublished). For discussions of this problematic ruling, see Pinhas Shifman, *Family Law in Israel: The Struggle Between Religious and Secular Law*, 24 ISR. L. REV. 537, 543 n.31 (1990); *Gestation*, *supra* note 1, at 130-31. It is pity that the long-term consideration of discouraging couples from using AID overrode the short-term consideration of providing child maintenance, which badly affected the BIC.

80. See CA 449/79 *Salameh* (1980). For a discussion of this precedent, see Lifshitz, *supra* note 27, at 299 n.10.; Amos Shapira, *Normative Regulation of Reproductive Technologies in Israel*, 13 NOVA L. REV. 609, 611-12 (1989).

is the gestational mother but not the genetic mother.<sup>81</sup> Nowadays, the use of egg donations has become very common and is employed in a variety of circumstances: married couples; lesbian couples, where one spouse donates her egg to her female partner, and after the egg has been fertilized by a donor's sperm, this partner carries the fetus to term; handicapped single women who wish to bring a child into the world, using a triple donation – egg, sperm and surrogacy.

The Latin dictum *mater est quam gestatio demonstrat* (motherhood is demonstrated by gestation)<sup>82</sup> traditionally expressed the fact that in the past, before the advent of ART, the three basic components of motherhood – the genetic contribution, the gestational contribution and the social/psychological contribution – overlapped in the same woman. This axiom was so strong, that legislators and courts have assumed that the woman who gives birth is obviously always the mother of the conceived child in all the above aspects of motherhood, and there was no need for this axiom to be anchored either in legislation or a judicial decree.<sup>83</sup> But, the first test tube baby, Louise Brown, who was born in northern England in 1978, and the advent of egg donations, unraveled this Gordian knot into its three basic components, and totally blurred this simple working premise.<sup>84</sup> Today, the dilemma of who should be determined the legal mother of a child conceived by egg donation has become a very concrete, sensitive and confusing issue. Should the egg donor be regarded as the legal mother due to her enormous influence on the child's genetic makeup and perhaps even on his behavioral character,<sup>85</sup> or should the gestational mother be regarded

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81. See *IVF*, in 2 ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS, *supra* note 14, at 571-86.

82. See Rita D'alton-Harrison, *Mater Semper Incertus Est: Who's Your Mummy?*, 22 MED. LAW REV. 357, 359 (2014).

83. See U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 282 (1988); Unif. Parentage Act, Art. 3, 9B U.L.A. 287, 298 (1973).

84. For what is perhaps Judge Marianne O. Battani's most well-known statement – "We really have no definition of 'mother' in our law books . . . 'Mother' was believed to have been so basic that no definition was deemed necessary," see *Smith v. Jones*, No. 85-53201401 (Mich. Cir. Ct. March 14, 1986), discussed in Scott B. Rae, *Parental Rights and the Definition Of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN'S STUD. 219, 223 (1994).

85. For the reason to prefer the genetic contribution over the gestational contribution, see Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L. J. 597, 603-22 (2002); Yehezkel

as the legal mother, as a result of her critical contribution in bearing him to term and her massive influence on him during the pregnancy?<sup>86</sup>

Despite this acute and confusing dilemma, and despite the great similarity between egg donation and sperm donation in terms of the mechanism they use and their merits and drawbacks, egg donation has not generated much intensive discussion in the contemporary scholarly literature.<sup>87</sup> In my opinion, this is either because this dilemma has merged with the broader and more complicated issue of establishing legal motherhood in surrogacy, or perhaps, because it is similar to sperm donation in that the accepted conclusions for determining the legal father can be applied in the above circumstance as well.<sup>88</sup> In stark contrast to the paucity of the discourse in academic circles, the Jewish legal literature contains several relevant Talmudic discussions dating back to the fifth century. Thus, the determination of who should be regarded as the legal mother can be deduced only from several related, theoretical, and mainly *aggadic*, sources. For example, the Talmud states that there are three partners in the creation of a fetus – the Almighty and the two parents. While the Almighty supplies the spirit, the father supplies the “semen of the white substance,” out of which all the white organs – “the child’s bones, sinews, nails, the brain in his head and the white in his eye” – are formed, and his mother supplies “the semen of the red substance out of which are formed the child’s skin, flesh, hair, blood and the black of his eye.”<sup>89</sup> This means that the mother’s contribution

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Margalit, *The Rise, Fall and Rise Again of the Genetic Foundation for Legal Parentage Determination*, 3 J. HEALTH L. & BIOETHICS 125 (2010) [hereinafter *Genetic Foundation*].

86. For legislative, judicial and academic references that endorse the gestational component, see UPA § 201(a)(1), 9B U.L.A. 309 (2001); *Andres A. v. Judith N.*, 591 N.Y.S.2d 946, 948 (NY Fam. Ct. 1992); George J. Annas, *Redefining Parenthood and Protecting Embryos: Why We Need New Laws*, 14 HASTINGS CTR. REP. 5, 50-51 (1984); MARSHALL H. KLAUS, MATERNAL-INFANT BONDING 1-15 (1976); Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements*, 1992 FAM. L.Q. 275, 277-79 (1992).

87. For the lack of any comprehensive discussion of this dilemma, see Lynn M. Squillace, *Too Much of a Good Thing: Toward a Regulated Market in Human Eggs*, 1 J. HEALTH & BIOMED. L. 135 (2005); Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 123 (2001); Anne Schiff Reichman, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 271 (1995).

88. See *Bridging the Gap*, *supra* note 6, at 52-49.

89. See THE JEWISH FAMILY, *supra* note 2, at 155.

to the resulting child's makeup is similar to that of the male's, and thus grants her legal motherhood.<sup>90</sup>

On the other hand, there are halakhic sources that tend to recognize the gestational rather than the genetic mother as the preferred legal mother. The Talmud relates to Mordechai who took Esther as his foster daughter and inquires into the meaning of the redundancy in the verse, "For she had neither father nor mother and when her father and mother died . . ." On the surface, the verse appears to be telling us twice that Esther was orphaned from both parents. What is the meaning of this repetition? "Rav Aha said: When her mother became pregnant with her, her father died; when she was born, her mother died." Rashi explains, "When her mother became pregnant, her father died – leaving her fatherless from the time it would have been fit to call him 'father'. And when her mother bore her, she died – and was not (ever) fit to be called 'mother.'"<sup>91</sup> In other words, Esther was "totally" orphaned: from the very first moment that she could have had a father – the conception – he passed away, and from the very moment that she could have had a mother, the mother too died. Literally, this means that while conception determines halakhic fatherhood, gestation establishes motherhood.<sup>92</sup>

After the advent of IVF and the birth of the first test tube baby, the halakhic discourse became far more extensive. Until these amazing bio-medical innovations made their appearance, there had been no dilemma whatsoever, as all three maternal components completely overlapped. It was only with the advent of IVF, egg donation and surrogacy that, for the first time in Jewish history, halakhic authorities had to confront a situation wherein the

90. See BT *Niddah* 31a (concluding that the parallel genetic raw material of both the mother and the father should be the main factor in establishing halakhic parenthood was supported by important contemporary *poskim*).

91. See *Esther* 2:7; BT *Megillah* 13a. This conclusion is not entirely logical, as the redundancy can easily be explained as simply providing the accurate timing of when she was taken to her foster home, which was when her father and mother died.

92. For a fuller discussion of the various Talmudic sources, such as the plant grafting case; a fetus is part of its mother's body; the twin brothers case; the *aggadaic* tale concerning the interchanged fetuses, the fetus' ownership and inheritance rights etc., see *Regulating ART*, *supra* note 1, at 463-80; *Gestation*, *supra* note 1, at 107-10. For the inevitable conclusion that there is no definite consensus in the Talmud as to who should be regarded as the legal mother, see Ezra Bick, *Ovum Donations: A Rabbinic Conceptual Model of Maternity*, in *JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES* 83, 89 (Emanuel Feldman & Joel B. Wolowelsky eds., 1997) ("were there to exist absolutely no Talmudic guidance for our question, neither in halakhic or *aggadic* sources"); *Gestation*, *supra* note 1, at 105 ("there is no official singular ruling on the matter that can be derived from the Talmud").

genetic component had been separated from the gestational one. One of the key characteristics of Jewish law is the major importance of halakhic tradition, and in these new circumstances, it was sorely missing. Moreover, even *halakhah's* traditional adherence to the natural order was confusing in this dilemma, as what is the natural order in this case – the gestational or the genetic component? In this circumstance, natural lineage is thus blurry and useless. Furthermore, due to the far-reaching ramifications of the legal determination of halakhic maternity, coupled with the halakhic and sociological sensitivities of this issue, all of the options for determining halakhic maternity are open. Until recently, it was commonly assumed that the majority of halakhic decisors regarded the gestational mother as the legal mother<sup>93</sup> and only a minority held the genetic mother to be the legal mother.<sup>94</sup>

In recent years, however, there has been a distinct shift in this regard, and today the opposite is true – the majority of halakhic decisors lean towards defining the genetic rather than the gestational mother as the legal mother. Furthermore, according to two minority opinions, both mothers should be regarded as the legal mother – the concept of dual maternity.<sup>95</sup> Others argue

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93 . For an exhaustive overview of the different opinions updated to 2010 that reach this conclusion, see *Bridging the Gap*, *supra* note 6, at 244-45; SINCLAIR, *supra* note 51, at 103 n.126. See also the following definitive conclusion from almost 15 years ago: “Jewish law, for the most part, has endorsed the criteria of birth as the defining factor of motherhood” *Gestation*, *supra* note 1, at 94. For several seminal English and Hebrew sources that endorse the gestational mother as the legal mother, see Michael J. Broyd, *The Establishment of Maternity and Paternity in Jewish and American Law*, 3 NAT’L JEWISH L. REV. 117, 131-40 (1988); Ezra Bick, *Ovum Donations: A Rabbinic Conceptual Model of Maternity*, 28 TRADITION 28 (1993) and the other sources listed in *Gestation*, *supra* note 1, at 105 n.106; SINCLAIR, *supra* note 51, at 103-06. For a more specific discussion of distinguishing parturition from gestation and which one is the superior factor in determining the gestational mother as the legal mother, see *Regulating ART*, *supra* note 1, at 461 n.277; J. David Bleich, *In Vitro Fertilization: Questions of Maternal Identity and Conversion*, in JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES 46, 49-52 (Emanuel Feldman & Joel B. Wolowelsky eds., 1997).

94. For the sources that endorse determining the genetic mother as the legal mother, see *Regulating ART*, *supra* note 1, at 482 (“By contrast, the genetic factor is absolutely clear and definite, creating the strongest biological bond between the genetic mother and the child. A mother’s parent-child relationship is most likely based upon a clear and definite factor.”). See also Gedalia Orenstein, *In Vitro Fertilization – Lineage of the Child and Fulfilling the Mitzvah of Procreation*, 24 TECHUMIN 156, 159 (2004). For other Hebrew sources that endorse determining the genetic mother as the legal mother, see *Gestation*, *supra* note 1, at 106-07 especially n.107.

95. For this unique notion of Jewish dual maternity, see David J. Bleich, *In Vitro Fertilization: Questions of Maternal Identity and Conversion*, 25 TRADITION 82 (1991).

that neither should be designated the legal mother, due to the artificial nature of the process, which means that at least officially, the conceived child is unrelated to both parents.<sup>96</sup> I myself am not aware of any similar halakhic shift in such a short period of time, especially with regard to an issue that is so sensitive and important. Thus, there appears to be no agreed determinative factor in establishing halakhic maternity.

This indeterminate situation produces two important intertwined observations for the continuation of our discussion. First, the fact that there is no clear determination as to who should be recognized as the legal mother makes it much easier to confer halakhic validity on a surrogacy agreement. This is because it is less problematic to transfer halakhic maternity from the gestational mother to the intended mother, who is also the genetic mother, as both of them may be determined the legal mother, than it is to make the dichotomous determination that only the gestational mother can be recognized as the legal mother, where she, and not the genetic mother, is the only one who can be determined as such.

Second, since there are two possible factors in establishing legal maternity – genetic and gestational – there is more room for applying my normative model of DLPBA in determining halakhic maternity. Therefore, for a better understanding of the possible implications of determining maternity, I will now explore the surrogacy arrangement and how the concept of intentional parenthood is applied in transferring legal motherhood from the gestational mother to the genetic mother.

### *E. Surrogacy*

One of the most ancient and reliable sources that documents the practice of surrogacy is the Bible. In the era of the patriarchs and matriarchs, it was common for the mistress of the house to give her female slave to her husband

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For a discussion and refutation of this conclusion, see SINCLAIR, *supra* note 51, at 106-08; *Regulating ART*, *supra* note 1, at 481-82 (“In the absence of evidence, this theory cannot be considered in determining a mother’s parental status under Jewish law.”).

96. See, for example, the following harsh statement – “Even for a creature such as this that is the object of our discussion, that is formed and takes shape in a place where there is no relation [and likewise in this context, where the entire pregnancy was conceived in a test tube, as if the child is an orphan from both father and mother] and it pertains even more so to our case . . . ,” ELIEZER Y. WALDENBERG, 15 RESP. TZITZ ELIEZER ch. 45 (1984); Yitzhak A. Liebes, *Regarding Limb Transplants*, 14 NOAM 28 (1971). For the history of this statement, see *Gestation*, *supra* note 1, at 106 n.108. For a broader exploration and a refutation of this stringent approach, see SINCLAIR, *supra* note 51, at 95-102.

for the purpose of having the conceived child regarded as that of the mistresses. This arrangement was practiced by both barren and fertile women, as demonstrated in the cases of Sara and Hagar, and Leah, Rachel and their maidens, Bilhah, and Zilpah.<sup>97</sup> Whereas Sara and Rachel were infertile and were compelled to use their slaves to procreate, Leah also gave her slave to her husband, despite being fertile and bearing children of her own. That the mistress was recognized as the legal mother, and not the slave, can be deduced from the fact that it was the former rather than the latter who named the resulting offspring.<sup>98</sup>

In the modern era, surrogacy basically means that the surrogate mother receives a fertilized ovum from the intended parents and, through a surrogacy agreement, agrees to carry the fetus to term and hand the child over to the intended parents immediately after the delivery. There are two types of surrogacy – traditional and gestational. In traditional surrogacy, the surrogate mother provides two components of motherhood – the genetic material of the ovum and the gestational contribution.<sup>99</sup> “The gestational surrogate provides only one component of motherhood: the gestational contribution.” Both types of surrogacies may be either commercial or altruistic. In commercial surrogacy, monetary consideration generally incentivizes the surrogate mother. In altruistic surrogacy, the surrogate mother is generally motivated by a desire to help desperate infertile couples.<sup>100</sup>

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97. See *Genesis* 16:1-4; 30:1-13. For a summary of these biblical surrogacy stories, see JULIA J. TATE, SURROGACY: WHAT PROGRESS SINCE HAGAR, BILHAH, AND ZILPAH! (1994). For the claim that the story of Sara and Hagar is actually the first story of a cross-border reproduction service, see DAPHNA HACKER, LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION 117-148 (2017).

98. As was claimed by PINHAS SHIFMAN, FAMILY LAW IN ISRAEL Vol. 2 158 n.74 (1989). But, of course, this conclusion is problematic, as the notion of biology, with regard to both genetics and gestation, and the surrogate mother’s contribution, was not known in the ancient era. Moreover, in any event the fact that the maid is her master’s possession infers that even her child belongs to them and not to her. For a more general rejection of the analogy between modern surrogacy and the biblical stories, and for the claim that biblical surrogacy bears little resemblance to contemporary surrogacy arrangements, see Richard Storrow, “*The Phantom Children of the Republic*”: *International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER, SOC. POL’Y & L. 561, 609 (2012).

99. See Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423, 426 (2014); see also Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN’S L.J. 245, 247 (2012).

100. See Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International*

Following the discussion on egg donation above, the main halakhic issue in a typical gestational surrogacy is who should be designated the legal mother – the intended mother, who is also the genetic mother, or the surrogate mother because of her gestational contribution. There are numerous other halakhic-ethical issues in these sensitive and complicated arrangements. First and foremost is the legality, validity and enforceability of these agreements. Other halakhic-ethical issues include: lack of concern for the husband's "procreational infidelity" and the endorsement of male reproductive freedom; termination of the parent-child relationship; transferability of custody rights; a non-proprietary agreement; "baby selling"; enforceability of an illegal act; neglect of duties by the surrogate mother; and execution of a transaction regarding an object not yet in existence.<sup>101</sup> Last but not least, even if we validate the surrogacy arrangements, there is an acute need to take necessary precautionary measures to protect the surrogate mother from any unwarranted inducement, coercion, exploitation and so on, in addition to other intrinsic internal contractual problems, such as the unequal power of the contracting parties, change of heart, and changed circumstances.<sup>102</sup>

A general criticism expressed by modern scholars and feminists is that *halakhah* is more concerned with enabling the male intended parent to procreate than with the welfare and interests of the female surrogate mother.<sup>103</sup> They reinforce their criticism by comparing this issue with sperm donation: Whereas halakhically it is almost impossible to transfer legal fatherhood from the donor to the donee's husband, there is no problem with transferring legal motherhood in the case of surrogacy. They claim that this may be understood as giving preference to the male fulfillment of the obligation to procreate over the welfare and the vulnerability of the surrogate mother.<sup>104</sup> In my opinion, the main issue was, and remains, the determination

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*Surrogacy Agreements*, 24(1) J.L. & POL'Y 41, 45 (2016).

101. See ZOHAR, *supra* note 1, at 80; *Regulating ART*, *supra* note 1, at 449-58.

102. For an exploration of these problems and a refutation of them one by one following modern contract theory, see *Frozen Embryo Dispute*, *supra* note 4.

103. For an up-to-date overview of this critique, see FERTILITY AND JEWISH LAW, *supra* note 49, at 264-68. For the statement that generally there is a shift in *halakhah* concerning IVF and surrogacy from moral rejection to qualified legal acceptance, see SINCLAIR, *supra* note 51, at 103. See generally FERTILITY AND JEWISH LAW, *supra* note 49, at 25; Ronit Irshai, *Toward a Gender Critical Approach to the Philosophy of Jewish Law (Halakhah)*, 26 J. FEMINIST STUD. IN RELIGION 55 (2010); INBAR REVEH, FEMINIST REREADINGS OF RABBINIC LITERATURE (Kaeren Fish trans., 2014).

104. See also *Lost Children*, *supra* note 13, at 238 (stating, "the importance of genetic

of who should be regarded as the legal mother of the resulting child, due to the far-reaching ramifications of this determination. The claim that *halakhah* has no concern for the welfare and interests of the surrogate mother is oversimplistic and an over-generalization.

Moreover, the comparison and subsequent criticism between sperm donation and surrogacy, may be justified with regard to the earlier determination by the majority of *poskim* (halakhic decisors) that the surrogate mother should be recognized as the legal mother. However, in view of the above-mentioned shift in the majority opinion of contemporary halakhic authorities that the intended genetic mother should be designated the legal mother, it is far less problematic to transfer legal motherhood from the surrogate mother to the intended mother, as quite often the intended and the genetic mothers are the same. This conclusion is logical, because in the vast majority of cases this woman is also married to the intended and genetic father, which means that, in fact, the two intended parents are the genetic parents.

Therefore, *a priori*, there is no particular problem in determining the intended parents, who in most cases are also the genetic parents, as the legal parents of the resulting child. In my opinion, and as I explained briefly at the end of the previous subsection, since there is no definitive halakhic determination as to who should be designated the legal mother in cases of IVF and surrogacy, there is more room for applying DLPBA as a means for recognizing the intended and genetic mother as the legal mother due to her initial agreement to serve as the legal mother of the conceived child. This enables both of the intended parents to fulfill, to varying degrees, their halakhic obligation to procreate and to receive their parallel civil parental rights.

### III. DETERMINING HALAKHIC PARENTHOOD IN THE FUTURISTIC ERA

The history of bio-medical innovations clearly demonstrates the speed with which yesterday's science fiction has become today's reality and how current complicated dilemmas, such as how to determine the legal

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reproduction outweighed according to such scholars (important Rabbinical authorities – Y.M.) is the woman's legal status as mother"). See *generally Gestation, supra* note 1, at 94 ("identifying the birth mother as the legal mother has not prevented a number of prominent Jewish law authorities from condoning gestational surrogate motherhood agreements . . . sublimating the woman's rights for the sake of the biological father and his wife . . . ignor[ing] the rights of the surrogate mothers because of patriarchal considerations.").

parenthood of artificially conceived children, will be dwarfed by much more confusing and challenging futuristic dilemmas. In the previous subsection on establishing legal maternity, I explored how the halakhic natural order of motherhood determination becomes blurred when the genetic and the gestational components are separated. Presumably, such issues will become far more complicated even in the foreseeable future when we are confronted with the newest advanced bio-medical developments.<sup>105</sup> Whereas in an article written in 2010, I explored the rise, fall and rise again of the genetic component in determining legal parentage, in 2014, in light of recent innovations, I presented a comprehensive elaboration of the recent fall of the genetic component as the most clear-cut, solid and easily proven component.<sup>106</sup> I summarized it as follows:

. . . these innovations require a more nuanced view of the roles of biology and intent in determining parentage. For example, where a child is created by way of complex genetic engineering, resulting in a child who possesses genetic material from several individuals, there is little guidance in the law as to whether biology should trump intent, which of the genetic contributors should be deemed parents, and how to delineate the various rights and obligations of the parties.<sup>107</sup>

The inadequacy of natural order is obvious in multiple parentage

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105. For some future directions of *halakhah* concerning cloning, cytoplasmic transfer, nuclear transfer and oocyte cryopreservation, see Joel B. Wolowelsky & Richard V. Grazi, *Future Directions*, in RICHARD V. GRAZI, *OVERCOMING INFERTILITY* 425-40 (2005).

106. See *Genetic Foundation*, *supra* note 85, at 125; Yehezkel Margalit & John Loike, *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107, 136-39 (2014).

107. See Margalit & Loike, *supra* note 106, at 111.

scenarios<sup>108</sup> – when conception can be engineered<sup>109</sup> from more than two parents, and even up to six different genetic male donors; or conversely, when it can be engineered from male or female genetic contributions, using an artificial womb rather than a human womb.<sup>110</sup> Alternatively, the option of human reproductive cloning,<sup>111</sup> makes it possible to create a child with the

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108. See (Tel-Aviv family court) 14-03-37745 Nili in re the Minors A. and B. V. Alon (not published, 27.04.14); Jacob v. Shultz-Jacob, 923 A.2d 473, 477-78 (Pa. Super., 2007); A.A. v. B.B., [2007] 220 O.A.C. 115, 14 (Can.); J.R. v. L.R., 902 A.2d 261, 261-66 (N.J. 2006); In re Jesusa V., 85 P.3d 2, 6 (Cal. 2004); In re Nicholas H., 46 P.3d 932, 935 (Cal. 2002); LaChappelle v. Mitten, 607 N.W.2d 151, 157 (Minn. Ct. App. 2000); T.D. v. M.M.M., 730 So.2d 873, 874-75 (La.1999); State v. Mendoza, 481 N.W.2d 165 (Neb. 1992); Smith v. Cole, 553 So.2d 847 (La.1989); Ritesh R Jaiswal, *Three Parent IVF / Three Parent Baby*, THE SCIENCE (Feb. 19, 2015), <http://thescience.co.in/tag/three-parents-ivf/>; Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J. L. FAM. STUD. 231, 231-32 (2007); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. FAM. STUD. 309, 312-14 (2007); Padmini Cheruvu, *Three-Parent IVF and Its Effect on Parental Rights*, 6 HASTINGS SCI. & TECH. L.J. 73, 75-76 (2014); Jacques Cohen & Mina Alikani, *The Biological Basis for Defining Bi-Parental or Tri-Parental Origin of Offspring From Cytoplasmic and Spindle Transfer*, 26(6) REPRODUCTIVE BIOMEDICINE ONLINE 535, 535-36 (2013), <http://www.sciencedirect.com/science/article/pii/S147264831300134X>; Michael Legge et al., *Numerical Identity: The Creation of Tri-Parental Embryos to Correct Inherited Mitochondrial Disease*, 126(1385) N.Z. MED. J. 71 (2013).

109. See Sarah Pritchard, *Why the UK Should be Leading the Discussion on Embryo Engineering*, BIONEWS 834, (Nov. 1, 2016), [http://www.bionews.org.uk/page\\_603809.asp](http://www.bionews.org.uk/page_603809.asp); Yehezkel Margalit & John Loike, *Follicular Transplants and Motherhood* (unpublished manuscript, on file with author); Kristine S. Knapland, *Synthetic Cells, Synthetic Life, and Inheritance*, 45 VAL. U. L. REV. 1361, 1361-62 (2011); Michael J. Broyde, *Genetically Engineering People: A Jewish Law Analysis of Personhood*, 13 ST. THOMAS L. REV. 877, 878-79 (2001).

110. See Jessica H. Schultz, *Development of Ectogenesis: How Will Artificial Wombs Affect the Legal Status of a Fetus or Embryo?*, 84 CHI.-KENT L. REV. 877, 877 (2010); Gregory Pence, *What's So Good About Natural Motherhood? (In Praise of Unnatural Gestation)*, in ECTOGENESIS: ARTIFICIAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTION 77, 77 (Scott Gelfand & John R. Shook eds., 2006); Hyun Jee Son, *Artificial Wombs, Frozen Embryos, and Abortion: Reconciling Viability's Doctrinal Ambiguity*, 14 UCLA WOMEN'S L.J. 213, 214-15 (2005); Fred Rosner, *In Vitro Fertilization, Surrogate Motherhood, and Sex Organ Transplants Symposium: Reproductive Rights*, 25 CREIGHTON L. REV. 1669, 1669-70 (1991-2).

111. See *Human Cloning*, in 2 ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS, *supra* note 14, at 509-73; Michael Broyde, *Cloning People: A Jewish Law Analysis of the Issues*, 30 CONN. L. REV. 503, 508-10 (1998); Dena S. Davis, *Religious Attitudes toward Cloning: A Tale of Two Creatures*, 27 HOFSTRA L. REV. 509, 510 (1999); Elliot N. Dorff, *Human Cloning: A Jewish Perspective*, 8 S. CAL. INTERDISC. L.J. 117, 118-19 (1998); Jessica S.

genetic contribution from one gender, without using any seed or ovum. But, even in current advanced bio-medical practice, the insufficiency of the natural order is clear in dealing with ovary transplantation,<sup>112</sup> mitochondrial donation/ replacement, stem cell technology, and uterine transplantation.<sup>113</sup>

In all these cases, the natural is no longer “natural” and relying solely on the genetic, or even the gestational, component can easily lead to different, and sometimes even contradicting conclusions as to who should be regarded as the legal parent. I am confident that the following conclusion, written almost one-and-a half decades ago with regard to the dilemmas raised by AIH, AID, IVF, and surrogacy is far more applicable to upcoming biomedical challenges: “In the biomedical context, however, the fast pace of scientific technological development has produced a situation in which there is simply not enough purely legal material upon which to base halakhic decisions.”<sup>114</sup> Therefore, I feel confident that implementing my normative model, DLPBA, may be very helpful also to halakhic authorities in establishing or determining legal parenthood, as they struggle to discover what the “natural” order should be in these imminent breathtaking

Sackin, *The Halakhic/Constitutional Argument for Human Reproductive Cloning in America*, 7 GEO. J. L. & PUB. POL’Y 627, 630-32 (2009); Stephen J. Werber, *Cloning: A Jewish Law Perspective With A Comparative Study Of Other Abrahamic Traditions*, 30 SETON HALL L. REV. 1114, 1114-17 (2000).

112. See Edward Reichman, *The Halakhic Chapter of Ovarian Transplantation*, 31(1) TRADITION 31, 33 (1998); Zvi Ryzman, *A Halachic Discussion of Ovarian Transplants* (2009), [http://olamot.net/sites/default/files/ratz\\_katzvi/pdf/Ovarian%20Transplants.pdf](http://olamot.net/sites/default/files/ratz_katzvi/pdf/Ovarian%20Transplants.pdf); Sherman J. Silber, *Judaism and Reproductive Technology*, 156 CANCER TREATMENT RES. 471 (2010); Richard V. Grazi & Joel B. Wolowelsky, *On Foetal Ovary Transplants* 40 LE’ELA (1995), [http://www.daat.ac.il/daat/english/ethic/transplants\\_1.htm](http://www.daat.ac.il/daat/english/ethic/transplants_1.htm).

113. See Rebecca Dimond, *Social and Ethical Issues in Mitochondrial Donation*, 115(1) BRIT. MED. BULL. 173, 174 (2015), <http://bmb.oxfordjournals.org/content/115/1/173.short-corresp-1>; Caroline Jones & Ingrid Holme, *Relatively (im) Material: Mtdna and Genetic Relatedness in Law and Policy*, 9:4 LIFE SCIENCES, SOCIETY AND POLICY (2013), <http://link.springer.com/article/10.1186/2195-7819-9-4#page-1>; Masahito Tachibana et al., *Towards Germline Gene Therapy of Inherited Mitochondrial Diseases*, 493(7434) NATURE 627, 627 (2013), <http://www.nature.com/nature/journal/v493/n7434/abs/nature11647.html>. See also J. David Bleich, *Mitochondrial DNA Replacement: How Many Mothers*, 48(4) TRADITION (2015); Akiva Dershowitz, *Triple Parent IVF*, TVUNAH (last visited June 26, 2018), <http://en.tvunah.org/2013/12/29/triple-parent-ivf/>. An Israeli expert committee, the Mor-Yossef Commission, arrived at a similar conclusion, that due to the minute influence of mitochondrial DNA on a fetus’ genetic makeup, the former woman rather than the latter one should be determined as the legal mother.

114. See SINCLAIR, *supra* note 51, at 112.

developments. As I concluded previously:

Examining the crucial role of intent where a child has multiple biological parents demonstrates that validating the intent of the parties should play a larger role in the more common surrogacy context of three biological parents . . . we argue that, where the biological paradigm is insufficient . . . The benefits of using contractual/intentional parenthood in traditional ART are also present in the context of advanced ART.<sup>115</sup>

#### IV. ADDITIONAL HALAKHIC EXCEPTIONS TO NATURAL LINEAGE

In the previous section, I explored the inadequacy and insufficiency of both the genetic and gestational halakhic natural order as the sole means for establishing legal parenthood. I therefore suggested adding DLPBA to the equation to assist *poskim* to re-conceptualize the “natural order” in confronting futuristic complicated dilemmas and challenges. In section 5, I will elaborate on how *halakhah* can adopt my innovative proposal by moving from the traditional and “natural” order of establishing legal parenthood towards a more nuanced, sensitive and delicate order that involves some aspect of intentional parenthood.

But first, I will briefly explore some additional halakhic exceptions to the natural order, besides the above main exception of an artificially conceived child, especially one born by means of AID,<sup>116</sup> who, according to some *poskim*, is not recognized as the legal descendant of his progenitors despite the fact that their reproductive material brought him into the world.<sup>117</sup> The unique exceptions presented below demonstrate the extent to which *halakhah* has its own devices for ignoring natural-biological reality and uses various halakhic-sociological justifications to determine that other persons are the legal parents of a given child. In my opinion, if *halakhah* wishes to retain its massive influence and, more importantly, its relevance in this steadily and rapidly developing field, the already existing exceptions are of great importance for building the required legal infrastructure, and for answering the urgent need for finding halakhic precedents for any new halakhic issue.

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115. See Margalit & Loike, *supra* note 106, at 138.

116. See YOSI GREEN, CREATION IN THE MODERN ERA: LEGAL AND HALACHIC PERSPECTIVES 155-8 (2008). See, e.g., Kasher, *supra* note 78, at 126.

117. See generally Moshe Sternbuch, *Test-Tube Baby*, 8 BI'SHVILEI HA'REFUAH 29, 30 (1987); Ezra Bick, *Surrogate Motherhood*, 7 TECHUMIN 266, 270 (1986).

A. *The Jewish Presumption of Paternity*<sup>118</sup>

As in Christianity and Islam, there is a presumption in *halakhah* that any child conceived in an intact marriage is the legal child of the husband. The reason behind this well-known marital presumption of the husband's paternity in *halakhah* was to protect the BIC and his welfare from the harsh consequences of being labeled an illegitimate child or *mamzer*.<sup>119</sup> The presumption that a child is conceived by the husband and not as a result of infidelity is well-rooted in the Amoraic period in the Talmud and also in the authoritative halakhic codices, and is particularly difficult to negate. This presumption is so strong that halakhically it is applied also in the case of a mother who is a prostitute, where it is reasonable to assume that the father of her child is one of her clients. But if she was "too involved" in sexual relationships with her clients instead of her husband, there is no choice but to realize that it is impossible that the child still be assumed to be the biological son of his father, and he is labeled an illegitimate child/*mamzer*.<sup>120</sup> This presumption is a good illustration of my claim that given a good halakhic-sociological justification, *halakhah* can depart from its traditional reliance on the natural order and totally ignore genetic truth and biological reality to achieve a much more desirable and less harsh determination.

B. *Annulment of the Lineage of Gentile Sperm*<sup>121</sup>

As mentioned earlier,<sup>122</sup> there are distinct advantages to using Gentile rather than Jewish sperm to avoid problems of incest and "possible *mamzer*"/*shtuki* status. *Halakhah* does not validate intermarriage with a non-Jew. Moreover, in intermarriage, the child resulting from the conjugal

118. For an initial and partial overview of those exceptions, see ZOHAR, *supra* note 1, at 69-71, 74-76; *Artificial Means*, *supra* note 29, at 304-8; *Status to Contract*, *supra* note 9, at 250.

119. See Linda L. Chezem & Sarah L. Nagy, *Judicial Abrogation of a Husband's Paternity: Can a Third Party Seek to Establish Paternity over a Child Born into a Marriage While That Marriage Remains Intact*, 30 IND. L. REV. 467, 468-69 (1997); Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 35-37 (2003); Diane S. Kaplan, *Why Truth is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 70-71 (2000); Brenda J. Runner, *Protecting a Husband's Parental Rights When His Wife Disputes the Presumption of Legitimacy*, 28 J. FAM. L. 115, 115 (1989-1990).

120. See 24 TALMUDIC ENCYCLOPEDIA 131-48 (Slomo Y. Zevin et al. eds., 1999).

121. *Lost Children*, *supra* note 13, at 18.

122. *Id.*

relationship is not defined as the legal offspring of his father but only of his mother. Thus, if the father is Jewish and the mother is not, the child, because of being regarded as the child of his mother, is defined as a non-Jew, and vice versa, if the mother is Jewish and the father is not, again the child is not recognized as the child of his Gentile father.

This determination ignores natural reality and halakhically annuls the Jewish child's genetic lineage from his non-Jewish father due to a fictional determination in which the Torah "forfeits" the semen of a Gentile and, from the perspective of Judaism, his offspring are not defined as his legal children. One scholar recently noted that this principle is applied also in the context of adoption, where many *poskim* indicate a clear preference for adopting non-Jewish babies over Jewish babies, for fear of incest, which could lead to *mamzerut*.<sup>123</sup> Moreover, this preference for Gentile sperm or a Gentile child contradicts one of Judaism's most basic principles – preserving the Jewish bloodline.<sup>124</sup>

### C. *Annulment of Lineage in a Proselyte*

Like the principle discussed in the previous subsection, halakhic annulment of a Gentile's genetic lineage also occurs when he converts to Judaism. The Talmud states several times that a proselyte is like a newborn, thus completely severing all of his former familial relationships despite the fact that the biological relationships still exist.<sup>125</sup> Therefore, according to the Written Law, after his conversion a proselyte can even marry his mother or sister, and he does not inherit his biological parents. But the Oral Law restricts these two problematic consequences, as it is unfitting that what is prohibited before his conversion – incest – is permitted afterwards. For similar reasons, it is unfitting to prevent him from inheriting his biological parents. With the exception of these two situations, the convert is totally severed from all his previous familial relationships. Once again, *halakhah* totally ignores the natural order because of other important halakhic-

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123. *Id.* at 20.

124. See Shlomo Z. Auerbach, *Artificial Insemination*, 1 NOAM 145, 166 (1958); GREEN, *supra* note 116, at 169-70; *Lost Children*, *supra* note 13, at 20-25; see *Regulating ART*, *supra* note 1, at 413-16; Ryzman, *supra* note 112, at 7-8.

125. See BT *Yevamot* 22a, 62b, 97b and parallels. For a discussion in the halakhic codices, see MAIMONIDES, *Issurei Biah* 14:11; *Shulhan Arukh*, *Yore Dea* 269:10. For a theoretical explanation of this rebirth which severs all previous familial relationships after the conversion, see Bleich, *supra* note 93, at 49-50; *Gestation*, *supra* note 1, at 107.

sociological reasons.<sup>126</sup>

*D. Annulment of Lineage in Posthumous Procreation*

Posthumous procreation has recently become more common,<sup>127</sup> at least in Israel, where it is possible to make a “biological will” to ensure posthumous use of one’s sperm.<sup>128</sup> There is even a precedent for fertilizing a deceased woman’s ovum with the sperm of her living husband and using a surrogate mother to bring their child into the world.<sup>129</sup> This posthumous practice may, on the one hand, be humanity’s ultimate answer to the inevitability of an imminent death, but, on the other hand, may also create a nightmare.<sup>130</sup> The various socio-ethical dilemmas of “planned orphanhood,”<sup>131</sup> the “non-identity problem,”<sup>132</sup> and how to evaluate the BIC of the resulting child are

126. See BT *Yevamot* 97b; MAIMONIDES, *Ishut* 15:6; *Shulhan Arukh, Even HaEzer* 1:7; 6 TALMUDIC ENCYCLOPEDIA 259-62 (Slomo Y. Zevin et al. eds., 1954); Aharon Lichtenstein, *On Conversion*, 23(2) TRADITION 1 (1988); ZVI ZOHAR & AVRAHAM SAGI, *GIYUR VEZEHUT YEHUDIT* 227-48 (1994).

127. See GREEN, *supra* note 116, at 331-36, 399-419. See also *Regulating ART, supra* note 1, at 437-40. For Hebrew sources that address the issue, see Gideon Weitzman, *Taking Sperm from an Unconscious Husband*, 25 TCHUMIN 59, 63 (2005); Yigal Shafran, *Postmortem Fatherhood*, 20 TECHUMIN 347 (2000); Yaakov Ariel et al., *Postmortem Sperm Procurement--Juridical and Halachic Aspects*, 139 HAREFUAH 331 (2000); Moshe Hershler, *Test-Tube Babies According to Halakha*, 4 HALAKHA & MED. 90, 92 (1985).

128. See Yael Hashiloni-Dolev, *Posthumous Reproduction (PHR) in Israel: Policy Rationales Versus Lay People’s Concerns, a Preliminary Study*, 39 CULTURE, MED. & PSYCHIATRY 634, 635 (2015); Irit Rosenblum, *The Biological Will – A New Paradigm in ART?*, NEW FAMILY ORG. (Feb. 25, 2013), <http://www.newfamily.org.il/en/4905/the-biological-will%E2%84%A2-%E2%80%93-a-new-paradigm-in-art/>; Irit Rosenblum, *Being Fruitful and Multiplying: Legal, Philosophical, Religious, and Medical Perspectives on Assisted Reproductive Technologies in Israel and Internationally*, 36 SUFFOLK TRANSNAT’L L. REV. 627, 630 (2013). See also Lifshitz, *supra* note 27, at 313, 330.

129. See David Regev, *Woman’s Dream to Have Child Fulfilled After Death*, YNET MAGAZINE (June 14, 2011), <http://www.ynetnews.com/articles/0,7340,L-4081456,00.html> (recounting the story of Nissim Ayish, who fulfilled his late wife’s wish to become a mother two years after she died from a deadly tumor).

130. See Devon D. Williams, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval*, 34 CAMPBELL L. REV. 181, 192-94 (2012).

131. See Ruth Landau, *Planned Orphanhood*, 49(2) SOC. SCI. & MED. 185, 188-94 (1999).

132. See I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1208-14

beyond the scope of this article.

I will just briefly review the opinions of *poskim* who maintain that any child created after his progenitor's death may not be regarded as the deceased's legal child, despite the strong connection which genetic reality and natural order create between the child and his genetic parent.<sup>133</sup> The vast majority of *halakhists* adhere to the natural order and maintain that the conceived child is still the legal child of the deceased, even though he was conceived after the parent's death. But there are some prominent *poskim* who argue that in this unique scenario, the child is not defined as the legal child of his progenitor, at least for stringent considerations ("*lechumra*"), because he was born to a dead person and by artificial means. This is yet another halakhic exception to the natural order, where *halakhah* ignores genetic reality in favor of other considerations.<sup>134</sup>

#### E. *Annulment of Lineage When the Heir Murders his Decedent*

Perhaps one of the most well-known Jewish moral dicta is the rhetorical question, "Would you murder and also inherit?"<sup>135</sup> This was the cry of Elijah

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(2012); I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 441-45 (2011); I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 HASTINGS L.J. 347, 348-49 (2008); James Woodward, *The Non-Identity Problem* 96 ETHICS 804 (1986).

133. See Unif. Parentage Act § 707 (2017) (stating, "If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child."); Amanda Horner, *I Consented to Do What?: Posthumous Children and the Consent to Parent After-Death*, 33 S. ILL. U. L.J. 157 (2008); Gail A. Katz, *Parpalaix v. CECOS: Protecting Intent in Reproductive Technology*, 11 HARV. J. LAW & TECH. 683, 696-98 (1998); *Frozen Embryo Dispute*, *supra* note 4, at 376-77; Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 371-75 (2009); Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 935-37 (1997); Ruth Zafran, *Dying to be a Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL'Y 47, 73-74 (2007).

134. See Shaul Israeli, 4 RESP. BEMAREH HABAZAK ch. 228-9 (2001); Shaul Israeli, 3 RESP. BEMAREH HABAZAK ch. 226 (1998); RESP. HAVUT BENJAMIN ch. 107 (1992). See also Yossi Green, *Post Modern Procreation By Means of IVF and Ibum And Haliza*, 2 NETANYA ACAD. C. L.R. 207, 219-28 (2002).

135. See *I Kings* 21:19. This principle is embedded in article 5 of Israel's 1965 Inheritance Law.

the Prophet in the name of the Almighty against Ahab, King of Israel, who wrongfully killed a man just to inherit his vineyard, which was adjacent to Ahab's own land. The Talmud brings a difference of opinion between the sages on this matter: Did Ahab attempt to inherit the man based on the general public law that if a man is killed by the king, the king inherits his possessions? Or, as R. Yehuda claims, since Ahab was his relative, did Ahab intend to inherit him based on private law, but was stopped by Elijah's moral claim, which may indicate that this Jewish ethic was well accepted in the ancient world?<sup>136</sup> The question of whether an heir who murders his decedent should be disqualified from inheriting him is hotly debated in Judaism. The vast majority of opinions contend that the biological relationship overrides the problematic deed. Thus, Menachem Porush, one of the most well-known ultra-orthodox members of Israel's parliament, argued that this despicable murderer may be punished by imprisonment, but cannot be prevented from inheriting the deceased, as a halakhic inheritance is neither a right nor a privilege, but an automatic process that we cannot stop.

In addition, Yitzchak Zilberstein, one of the most prominent *poskim* of modern medical *halakhah*, stated explicitly in a responsum that a physician who injected his wife with an overdose of medication to kill her is still permitted to inherit her. Lastly, according to several leading professors of Jewish and civil law, the murderer may be punished by depriving him of the inheritance, but according to *halakhah* he is still fully entitled to inherit the deceased.<sup>137</sup> But, a more challenging and important opinion for our discussion is a ruling by a minority of *poskim* that the moment the son kills the deceased, he immediately ceases to be his biological, and therefore also his halakhic son, which prevents him from being the beneficiary. This is a unique and most interesting departure from genetic truth in favor of socio-ethical-legal considerations. These *poskim* are following an earlier and much better-known exception concerning an apostate, who according to some prominent *halakhists*, loses his inheritance rights upon his renunciation of Judaism. This principle can be implemented in our context,<sup>138</sup> not simply as a punishment or fine, but by annulling the murderer's status as the biological

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136. See BT *Sanhedrin* 48b.

137. See Eliav Shochetman, *Would You Murder and Also Inherit?*, 302 WEEKLY PARASHA, BERESHIT (2008), <http://www.daat.ac.il/mishpat-ivri/skirot/302-2.htm>.

138. See generally YOSEF ROZIN, TZAFNAT PANEACH, *Matmot Aniiim* 108 (1979); 1 YEHOSHUA EHRENBERG, RESP. DVAR YEHOSHUA vol. 1 ch. 100 (1998); ZVI YEHUDA BEN YAAKOV, RESP. MISHPATECHA LEYAKOV Vol. 2 ch. 23 (1997).

son of the deceased.<sup>139</sup>

#### V. HALAKHIC PARENTHOOD AND INTENTIONAL PARENTHOOD – CAN THEY BE RECONCILED?

In the previous sections I explored the application of the traditional halakhic natural order as the basis for establishing legal parenthood, which, *prima facie*, does not allow for any deviation from it to other models, such as the social and/or psychological parenthood model, and in particular when the alternative is intentional parenthood. In section 1, I enumerated the two main methods for establishing halakhic parenthood in ancient times – a coitally produced child and adoption. I discussed how, in both cases, the natural order is sometimes completely blurred. For example, the Jewish presumption of paternity, discussed in subsection 4.1., favors the principle of BIC by masking the truth that the child is actually not the “legitimate” child of his father and ignoring that, by definition, he is *mamzer*. In the case of adoption, the urgent need to “fill the void” and find caring parents for the hundreds of thousands of Jewish children orphaned in the Holocaust and in other catastrophes and disasters that have plagued the Jewish people, has forced Judaism to accept adoption as a legitimate option. In these two scenarios, *halakhah* explicitly deviates from its principle of the basic natural order because of other important socio-halakhic justifications, *inter alia*, recognizing, even if only to varying degrees, the social and/or psychological parenthood of the adopting parents.

As I have elaborated in several articles, I believe that both the presumption of paternity and adoption in particular, and the social and/or psychological parenthood model in general, are examples of implementing intentional parenthood. The presumption of paternity is a fictional presumption that the husband of a woman who conceives a child is the legal father of that child, even if the father is not biologically related to the child.<sup>140</sup> At its core, this presumption is based on a broader societal presumption that it is the intention of the husband of a married woman who conceives a child to serve as the legal father of that child and to provide for the child financially.<sup>141</sup> This

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139. See Yaakov Shapira, *And Again, Would You Murder and Also Inherit?*, 374 WEEKLY PARASHA, Pinchas (2010), [www.justice.gov.il/Units/MishpatIvri/Gilyonot/374.rtf](http://www.justice.gov.il/Units/MishpatIvri/Gilyonot/374.rtf).

140. See Rachel L. Kovach, *Sorry Daddy - Your Time Is Up: Rebutting the Presumption of Paternity in Louisiana*, 56 LOY. L. REV. 651, 655-58 (2010) (explaining the problematic aspects of a modern adhering to this legal fiction).

141. See June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45

presumption demonstrates that throughout history, the natural order was often subordinate to other considerations, including intention, in determining legal parentage. Similarly, social and/or psychological parenthood is based primarily on the intention and express or implied agreement of an individual to accept legal parentage.<sup>142</sup> One underpinning of ascribing parental status to an individual acting as a de facto parent is the implicit understanding that, by his or her actions, the individual has demonstrated an intent and capacity to become a legal parent. Thus, even unintentionally, *halakhah* applied intentional parenthood in the ancient era, to varying degrees.

With regard to the modern era, I discussed in subsection 2 the difficulty of applying the natural order to current biomedical innovations, as illustrated in the case of AID, where the identity of the genetic donor is unknown and there is no way of compelling him to fulfill his parental obligations. Therefore, there is no choice but to recognize the donee's husband, wholly or partially, as the legal parent of the conceived child. As I have explained in depth elsewhere, the entire AID process will work effectively only if we implement DLPBA to enhance and not damage the rights and welfare of the contracting parties. This will allow the sperm donor to opt out of legal paternity and the donee's husband to opt in to this paternity solely by virtue of their reciprocal initial intention and agreement to respectively disconnect from and connect to the resulting child.<sup>143</sup> But, far more problematic is the extreme blurring of the natural order in determining legal maternity in ovum donation, IVF, and surrogacy, where "natural" maternity is unbundled into its smaller and more basic natural genetic and gestational components. Even if we wished to adhere to the natural order for determining halakhic parenthood, which of the two components is superior for establishing legal maternity? And how exactly does surrogacy work, if not by validating the initial agreement of DLPBA to transfer legal maternity from the surrogate mother to the intending mother?

In the futuristic era, as I argued in section 3, the natural order will be totally confusing, inadequate, and insufficient. Is a cloned child the child of his progenitor? Is he the progenitor's "long extension" of life and/or is he

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FAM. L.Q. 219, 221-28 (2011); Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 WHITTIER J. CHILD & FAM. ADVOC. 39, 55-57 (2013); *Bridging the Gap*, *supra* note 6, at 12, 14.

142. See Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 31-38 (2004).

143. See *Status to Contract*, *supra* note 9, at 73-74.

actually a duplication of the progenitor? Or his (twin) brother? Or perhaps the clone is not a human being at all and does not have any lineage?<sup>144</sup> In addition, the numerous exceptions to the determination of parenthood based on the traditional natural order, mentioned earlier, clearly demonstrate *halakhah's* capacity to ignore the genetic component in favor of other components for establishing legal parenthood, if there are important justifications. Thus, it is imperative, and useful even in and of itself, and especially in view of future biomedical innovations, to add intentional parenthood to the process of establishing legal parenthood to help the “natural order” survive all of these major changes. It is the more flexible characteristics of DLPBA that can help us to understand correctly the initial intentions and agreements of the individuals involved in the process of producing a child.

In the absence of a clear halakhic consensus as to whether the genetic mother or the gestational mother is to be recognized as the legal mother, it may be possible, even halakhically, to differentially determine legal maternity in the various contexts where this determination is required, based on the initial intentions and agreement of the contracting parties.<sup>145</sup>

But, *halakhah* is very slow to respond, for several reasons, and its most basic principle of the natural model for establishing legal parenthood is unlikely to undergo a rapid change. I also do not anticipate my normative model being accepted in its entirety in the foreseeable future. Therefore, I will conclude this article by suggesting that we borrow some useful existing halakhic devices that may facilitate the acceptance of my perspective and enable my model to be applied, even if only partially. First, intended parents can be recognized as legal parents through adoption.<sup>146</sup> There is an animated documented history of rabbinical courts issuing “adoption decrees” to settle the various parental obligations which adopting parents undertake when they adopt a child.<sup>147</sup> Alternatively, the intended parents may be defined as the

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144. See Zvi Ryzman, *Is a Cloned Kohen Permitted to Recite the Kohen's Blessing?*, [http://olamot.net/sites/default/files/ratz\\_katzvi/pdf/-\\_32.pdf](http://olamot.net/sites/default/files/ratz_katzvi/pdf/-_32.pdf) (in Hebrew).

145. For this challenging call, see Avshalom Westreich, *Changing Motherhood Paradigms: Jewish Law, Civil Law, and Society*, 28 HASTINGS WOMEN'S L.R. 97 (2017). For a previous call to reconcile *halakhah* with secular Israeli law, see SHIFMAN, *supra* note 98, at 25-27. For a discussion of whether it is possible to reconcile *halakhah* and secular Israeli law at least in the AID case, for paying the parental obligation of maintenance, see GREEN, *supra* note 116, at 124, 131.

146. See *Regulating ART*, *supra* note 1, at 450-51, 455-58; *Gestation*, *supra* note 1, at 128.

147. See *Artificial Means*, *supra* note 29, at 326. For the importance of signing a

conceived child's legal guardians (*apotropos*), which gives them (almost) all parental rights and obligations.

Similarly, and at least for the purpose of obligating them to carry out their various parental obligations, particularly maintenance, it is possible to adopt the abovementioned solution offered in 1980 by one of Israel's rabbinical courts. As mentioned earlier, the Haifa district rabbinical court compelled a sperm donee's husband to pay child support for the resulting child because, by his explicit or implied agreement to his wife's impregnation, he became her guarantor (*arev*).<sup>148</sup> The court explained that the husband was obligated to pay child support based upon the principle of guarantee. In consenting to his wife's AID procedure, the husband implicitly guaranteed all of her expenses in raising the child, including paying for the child's support. This principle can be extended to other parental obligations as well as applied to other ART contexts.<sup>149</sup> Lastly, even if a parent is not officially obligated by *halakhah* to pay child support to his wife, he can be obligated to pay it as charity (*tzedakah*).<sup>150</sup> This is a moral obligation that throughout the ages has become a binding legal duty. On November 30th, 2015, this binding legal duty was expanded by the Chief Rabbinate of Israel also to women,<sup>151</sup> and it can be applied even if, formalistically, the intended parents are not the legal parents.<sup>152</sup>

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written adoption agreement at the outset of the adoption, see Shlomo Dichovsky, *The Parental Obligation to Support Adoptive Children*, 15 *TECHUMIN* 278 (1995).

148. For scholarly articles discussing the suggestion of obligating the husband as a guarantor, see Itamar Warhaftig, *The Legal Validity of Reliance on Oral Promise in Jewish Law*, 2 *BAR-ILAN L. STUD.* 45, 77 n.212 (1982); BARUCH KAHANA, *GUARANTEE LAW* 517 (1991).

149. See note 79. This interesting ruling was first mentioned by Yosi Green, *Artificial Insemination (AID) in Israeli Court Judgments and Legislation*, 5 *ASSIA* 125, 132-34 (1986) and was discussed also by *Regulating ART*, *supra* note 1, at 444-46.

150. For a discussion of this option concerning the husband, see Menashe Shawa, *Maintenance of Minor Children in Jewish and Positive Law*, 13 *JEWISH L. ASS'N STUD.* 289 (2002); Michael Corinaldi, *Should Equality be Implemented in the Laws of Parents and Children*, 2 *KIRYAT HAMISHPAT* 131, 152 (2002).

151. For a secular call based on halakhic sources for a more egalitarian obligation of child custody, see Yoav Mazeh, *The Religious Law of Child Support, the Supreme Court's Case-Law and the Practice of Courts: Between Myth and Reality* 4-18 *HAIFA L. REV.* (forthcoming, 2018) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2556149](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2556149)).

152. For earlier sources in Hebrew dealing with obligating a woman to pay child support, see Corinaldi, *supra* note 150.