REDEFINING PARENTHOOD

RUTH HALPERIN-KADDARI *

Sighed Mazie, a lazy bird hatching an egg:

"I'm tired and I'm bored
and I've kinks in my leg
From sitting, just sitting here day after day.
It's work! How I hate it!
I'd much rather play!
I'd take a vacation, fly off for a rest
If I could find someone, I'd fly away free. . . ."
Then Horton, the Elephant, passed by her tree.
"Hello" called the lazy bird, smiling her best,
"You've nothing to do and I do need a rest.
Would YOU like to sit on the egg in my nest?"

. . .

"very well," said the elephant, "since you insist . . . [continued on page 336-37]."

Horton Hatches the Egg, Dr. Seuss

I. INTRODUCTION

There is no doubt that new reproductive technologies have revolutionized our traditional concepts of parenthood.[1] Evidence exists to support the belief that these technologies have weakened the importance and exclusivity of genetic ties in establishing parenthood.[2] New reproductive technologies

* Dr. Ruth Halperin-Kaddari, Faculty of Law, Bar-Ilan University. Thanks to Jay Katz and Professor Donald Shapiro for their comments on an earlier draft, and their support and encouragement along the way. Also, thanks to Yochi Kleiman, my wonderful research assistant.

1. *See, e.g.*, Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986); R. Alta Charo, *Legislative Approaches to Surrogate Motherhood, in* SURROGATE MOTHERHOOD POLITICS AND PRIVACY 88 (Larry Gostin ed., 1990); Kate Harrison, *Fresh or Frozen: Lesbian Mothers, Sperm Donors, and Limited Fathers, in* MOTHERS IN LAW 167 (Martha A. Fineman & Isabel Karpin eds., 1995).

2. *See generally* Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (1998); John L. Hill, *What Does it Mean To Be a "Parent"? The Claims of Biology as the Basics for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Marjorie M. Shultz, *Reproductive Technology and Intent-Based*

generally are viewed as opening up and broadening the traditional manner of bearing children, turning it into a much more flexible concept, and, *en route*, causing genetics to lose its special role and status as the prime factor in establishing parenthood.

The issue of genetics and its role in the construction of parenthood cannot be separated from the influence of new reproductive technologies on gender relationships with regard to reproduction and procreation. There is no doubt that the power-balance has been shifted, or at least has the potential for being shifted, by this revolution. But in what direction? What exactly is its substantive potential? These questions are among the most debated in anthropological, psychological, gender, and feminist scholarship.[3] In all events, it is clear that the issue of genetics is strongly related to the power-balance between men and women within the particular context of reproduction.

Another undisputed consequence of new reproductive technologies is the separation between sex and reproduction. Your spouse, or your sexual partner, is not necessarily genetically related to the child that you raise together; you yourself are not necessarily related to that child.[4] Test-tube babies enable people to parent children using other people's (donor's) sperm or ovum. Artificial insemination by donor (AID) is a clear example of this; the husband of the woman who is artificially inseminated by a donor's sperm is to be perceived as the father of the child for all social and legal purposes.[5] Similarly, the woman who gives birth to a child following an *in vitro* fertilization (IVF) procedure using a donor's egg is also to be perceived as the child's mother for all purposes.[6] These well-established procedures may support the intuitive perception of the new reproductive technologies as lessening the importance of the genetic element in the construction of parenthood, while promoting the social factor of parenthood.[7]

This article suggests that this analysis is too simplistic. It does not accurately describe the full picture and does not capture its complexity, especially within different societies and cultures. Innovative medico-legal practices pursued in a specific society may change their meaning and message when transferred to a different culture and society. This is the case with re-

---

Parenthood: An Opportunity For Gender Neutrality, 1990 WIS. L. REV. 297 (1990).

3. *See, e.g.*, SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970); CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1989).

4. *See generally* Harrison, *supra* note 1, at 167.

5. *See, e.g.*, People v. Sorensen, 437 P.2d 495 (Cal. 1968) (holding that an infertile husband who consented to his wife being artificially inseminated is the "lawful father" of the ensuing child); *see also* MASS. GEN. LAWS ANN. ch. 46, § 4B (West 1998).

6. *See, e.g.*, McDonald v. McDonald, 608 N.Y.S.2d 477 (1994) (finding that in a "true egg donation" situation, where the woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is regarded as the natural mother for custody purposes).

7. The term "social factor" is used here to describe all the non-biological elements of parenthood, ranging from expectations and intentions through emotions and nurture.

spect to new reproductive technologies in Israel.

Israel presents a particularly interesting setting for examination. It stands at the forefront of medical technologies and boasts a world record of fertility clinics *per capita* of the population.[8] However, its unique social environment, and more so its exceptional legal system, which combines religious and secular law,[9] affect the practice of the new reproductive technologies, their implementation, and their impact. Taking the legal developments in Israel as a case study, to be viewed in the light of parallel developments in the United States, this article provides a unique opportunity to examine the direct influences of religious considerations on the practice of the new reproductive technologies.

This article suggests that the analysis offered above is faulty in three respects. Two of these matters are certainly not limited to the Israeli context, but are evident in the United States as well, as shall be demonstrated below. The third issue is more specific to the Israeli context, as it entails Jewish law (*halakhic*) considerations.

First, various developments in new reproductive technologies send mixed and sometimes contradictory, and perhaps even paradoxical, messages as to the role of genetics in parenthood. Second, the genetics/social dichotomy is more reflective of the paternal-male side of the picture than the maternal-female side of it. Third, when *halakhic* considerations are introduced,[10] as occurs in Israel, the picture becomes much more intricate. The fresh complexity adds a new and sometimes distorted dimension to the already complex interaction between men's and women's roles, and reproductive functions within the various reproductive technologies. The *halakhic* considerations may have unintended consequences in terms of the importance of genetics, and may shift the balance between men's and women's roles, to the detriment of women.

The parallel examination of these propositions within two totally different legal systems reveals some shared and similar inconsistencies and dilemmas on one hand, and exposes substantial differences due to religious concerns on the other hand. Two recent legal developments in this area in Israeli law provide the context for this analysis. The first is the worldwide precedent-setting case of *Nakhmani*.[11] The second is the Israeli Surrogacy

8. "Fertility treatments in Israel are highly developed and well subsidized. Currently, Israel boasts a world record of 20 *in vitro* fertilization (IVF) clinics, or approximately one such center for every 285,000 inhabitants." *See* Dr. Ruth Halperin-Kaddari, Combined Initial and Second Report of the State of Israel Concerning the Implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), *submitted to* The United Nations Committee on the Elimination of Discrimination Against Women, at 161 (1997).

9. *See infra* note 12 and accompanying text.

10. *Halakhic* considerations are introduced in the sense of both the legal arrangement and regulation of the new reproductive technologies and their actual practice.

11. F.H. 2401/95, Nakhmani v. Nakhmani, 50(4) P.D. 661 (1996) (Hebrew, translated by author).

Law of 1996, officially known as the Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law.[12] This law is another globally unique piece of legislation in its sanction and administrative regulation of the practice of surrogacy. Additionally, the most recent American surrogacy cases and legislation will supplement these Israeli developments.

II. BACKGROUND ON ISRAELI LAW

A. Interaction Between Religious and General Law

Before proceeding to describe these developments, a brief account of the relevant aspects of the Israeli legal system is required. The most important of these is the place of religious law within the Israeli legal system. Religious law exclusively governs the area of marriage and divorce according to each individual's religious affiliation. Strictly speaking, there is no civil marriage and divorce in Israel. However, it is important to note that the subject of marriage and divorce includes questions of eligibility to marry. *Halakha* contains many limitations on eligibility to marry and attributes great importance to lineage. Accordingly, even though the actual administration of medical treatment, including assistance in reproduction, is obviously not subject to religious law, and even though questions of paternity have long been held to be excluded from "matters of personal status"[13] and not governed by religious law, nonetheless, *halakhic* considerations may have an immense effect on the administration of these new technologies.

Because these technologies raise complex questions of paternity and maternity, in other words, of lineage, they are intimately linked to the laws of marriage and of eligibility to marry. *Halakhic* conceptions regarding the new reproductive technologies may, therefore, greatly affect people's personal status and their prospective position with respect to marriage. Hence, they may obviously influence the choices contemplated by persons facing fertility problems.

Chief among the eligibility to marriage laws is the law regarding *mamzerut*. A *mamzer* is a child born as a result of adulterous or incestuous relations, and that child is barred from marriage to any person, save another *mamzer*.[14] The main question in the context of the reproductive technologies is what exactly constitutes such illicit adulterous relations?[15] Is it the sexual

---

12. 1996, S.H. 1577, 176 [hereinafter Surrogate Motherhood Agreements].

13. H.C. 283/72, Buaron v. The Rabbinical Tribunal, 26(2) P.D. 727; C.A. 3077/90, Plonit v. Plonit, 49(2) P.D. 578.

14. The prohibition against adulterous relations is found in *Leviticus* 18:20, and the prohibition against *mamzerim* (*i.e.*, bastards) marrying "ordinary" Jews is found in *Deuteronomy* 23:2: "A bastard shall not enter into the congregation of the Lord; even to his tenth generation shall he not enter into the congregation of the Lord." It is worth noting that this prohibition is only one-sided, forbidding only married women, and not married men, to enter into extramarital relations. *See* NOAM ZOHAR, ALTERNATIVES IN JEWISH BIOETHICS 78-80 (1997).

15. For a comprehensive survey of *halakhic* opinions regarding the permissibility of AID

act alone, or the actual fertilization of a married woman's egg otherwise than by her husband's sperm, or, even the mere fact that one man's wife bears children from another man's sperm?[16] These questions are by no means settled, and their respective implications will be clarified below in the discussion of the recent Israeli Surrogacy Law.

B. Nakhmani v. Nakhmani[17]

In a worldwide precedent-setting case,[18] the largest panel ever of the Israeli Supreme Court (eleven Justices) ruled 7-4 in favor of Ruthi Nakhmani (Ruthi). The court upheld her claim to the frozen embryos produced from her ovum and the sperm of her estranged husband Danny Nakhmani (Danny) so that she could proceed with implanting them in another woman's womb. The Nakhmanis had started the process of *in vitro* fertilization together after Ruthi's womb was removed due to cancer. Several years into the process, after having frozen several fertilized eggs, and having already signed an agreement with a center for surrogacy based in the United States, Danny left

---

in light of *mamzerut* concerns, see, e.g., A HALAKHIC-MEDICAL ENCYCLOPEDIA 157a (Hebrew, translated by author). For a recent survey, see Rebecca L. Reichman, *The Rabbinic Conception of Conception: An Exercise in Fertility, in* JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES 1 (Emanual Feldman & Joel B. Wolowelsky eds., 1997). Interestingly, Jewish law has not been alone in considering this issue. *See, e.g.,* IMMANUEL JAKOBOVITS, MEDICINE AND JUDAISM, 231 (1966) (Hebrew, translated by author) (citing various American, English, and Canadian cases).

16. Note the difference between the second and the third alternatives. The second situation may occur whenever an egg extracted from a married woman is fertilized by a stranger's sperm. The third may occur whenever a married woman bears a child from a stranger's sperm, whether the egg is hers (AID) or from a donor (IVF). Most contemporary rabbinic authorities agree that only the first alternative is of concern here, namely, that only a prohibited actual sexual encounter leads to *mamzerut*. First and foremost among these authorities is Rabbi M. Feinstein, in *Igrot Moshe, Even Ha-Ezer* 10 and 71; B 11. Nevertheless, some see the basis for the prohibition on adultery as designed to prevent any "fusion of seed," irrespective of the manner in which this "fusion" is brought about. Those who hold this view emphasize their concern for paternal identity, which is obviously dispelled if the donor's identity is known; whereas, others still maintain that the actual "placement" of a stranger's seed in a married woman's womb is in itself prohibited. For an elaborate discussion of the various *halakhic* methods see Dvora Ross, *Artificial Insemination in Non-Married Women, in* JEWISH LEGAL WRITINGS BY WOMEN 48-53 (Chana Safrai & Micha Halperin eds., 1998) (Hebrew, translated by author). For an excellent analysis of the various rationales underlying the different *halakhic* rulings, see ZOHAR, *supra* note 14, at 71-78.

17. F.H 2401/95, Nakhmani v. Nakhmani, 50(4) P.D. 661 (Hebrew, translated by author). For an elaborate description of the history and the judgment in *Nakhmani,* see Rhona Schuz, *The Right to Parenthood: Surrogacy and Frozen Embryos, in* INT'L SURV. OF FAM. L. 237, 237-56 (Andrew Bainham ed., 1996). For an engaging analysis of the theory of symmetry and the idea of symmetric rights in the Nakhmani affair, see Dafna Barak-Erez & Ron Shapira, *The Delusion of Symmetry,* 19 OXFORD J. LEGAL. STUD. 299 (1999).

18. *See* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *cert. denied,* 507 U.S. 911 (1993); *see also* Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998). To review two other recent cases from New Jersey and Massachusetts, see discussion *infra* note 47. In *Buzzanca,* J. Sills predicts that "courts are still going to be faced with the problem of determining lawful parentage. . . . [T]hese cases will not go away." 72 Cal. Rptr. 2d at 293.

the marital home for another woman, with whom he had two daughters. He refused to let Ruthi continue on her own with the process of finding a surrogate to carry the fertilized eggs, claiming that this would violate his procreative rights and force him to become a father against his will. Ruthi claimed that withholding the fertilized eggs from her violated her procreative rights and nullified her only chance of ever becoming a mother.[19]

The case was first decided in Ruthi's favor in the District Court; the judgment was overturned on appeal by the Supreme Court and was then reheard by an eleven-Justice bench, which again overturned the decision, finally holding in favor of Ruthi in eleven separate opinions. Describing and analyzing these fascinating opinions, which reflect considerations that range from conflicting rights and equality concepts *via* contractual and constitutional analyses to pure justice issues, is beyond the scope of this article.[20] However, the exploration below draws on one element that runs through the various arguments and opinions expressed in this case.

C. The Surrogate Motherhood Agreements[21]

Enacted in 1996, the Israeli Surrogacy Law has made Israel only the third jurisdiction in the world, after the American states of New Hampshire and Virginia, to not only positively sanction, but also to heavily regulate, surrogacy.[22] Israel, though, is the only jurisdiction that regulates surrogacy through the operation of an administrative (and not judicial) organ.[23] The passage of this statute was the culmination of a long process, in the initiation of which, interestingly, the Nakhmanis also played a role.[24]

Prior to its enactment, the law in this area consisted of secondary legislation, namely, the Public Health (*In Vitro* Fertilization) Regulation (IVF Regulations).[25] These regulations covered the administrative and medical as-

---

19. *Nakhmani*, 50(4) P.D. at 680, 702, 731, 745.

20. This case, indeed, supplies an extraordinary opportunity to thoroughly compare the Justices' varying jurisprudential theories and ideologies, and enables a comparison of their division on such lines as gender (two of the eleven Justices were women) or personal religious identity (two of the eleven Justices openly identify themselves as observant Jews).

21. 1996, S.H. 1577, at 176. For a comprehensive analysis of the new law, see Amos Shapiro, *A "Yellow Light" Approach to Surrogacy: Some Socio-legal Reflections*, *in* A SESTCHRIFT HONORING PROF. ERWIN DEUTCH (forthcoming 1999); *see also* Schuz, *supra* note 17.

22. *See* N.H. REV. STAT. ANN. § 168-B (1998); VA. CODE. ANN. §§ 20-156 to 20-165 (Michie 1998).

23. Both New Hampshire and Virginia's surrogacy statutes require prior judicial approval of the agreements. Interestingly, while New Hampshire recognizes surrogacy agreements as lawful only if judicially preauthorized according to its law, Virginia recognizes both approved and unapproved contracts.

24. It was their first petition to the High Court of Justice against restrictions contained in former IVF regulations which had prompted the establishment in 1992 of a public multi-professional commission to consider all aspects of new reproductive technologies in Israel.

25. 1987, K.T. 5035, 978.

pects of *in vitro* fertilization and mandated that fertilized eggs could only be implanted in a woman who was to raise the ensuing children. Hence, surrogacy was, in fact, prohibited in Israel.

Following the Nakhmani's first petition, a public multi-professional commission headed by Justice Aloni was formed in order to consider all aspects of reproductive technologies in Israel and make recommendations for their regulation. The commission emphasized the need for comprehensive legislative reform and called for the whole area to be regulated through primary legislation. Focusing on surrogacy, the commission recommended a regime under which altruistic surrogacy would be permitted upon approval by a statutory committee.[26] Another petition to the High Court of Justice, this time by a group of childless couples seeking surrogacy, was needed before the legislature decided to act. However, the statute that was finally passed differs considerably from the Aloni Commission's recommendations. The only principle adopted from the Commission's recommendations was the establishment of a statutory committee that would serve as a supervisory and approving medium. It is primarily the divergences of the final statute from the original recommendations which forms the basis for the analysis offered below.

The basic principle enunciated by the law is that only full surrogacy[27] is permitted under very specific conditions. Furthermore, the whole procedure is legal only if a surrogacy agreement is approved by a statutory committee composed of seven members of relevant professions (physicians, social-workers, and the like) and a religious official of the contracting couple's religion.[28] The imperative substantive conditions, which are primarily based on *halakhic* considerations,[29] are that the surrogate be an unmarried woman

---

26. Report of the Public-Professional Commission in the Matter of *In Vitro* Fertilization, Israel Ministry of Justice, 59-61, 78-80 (Jerusalem, July 1994).

27. The terms that are conventionally used in Israeli literature are "full" versus "partial" surrogacy, describing "gestational" versus "traditional" surrogacy respectively. In full-gestational surrogacy, no genetic connection exists between the carrying mother and the child. The conception results from *in vitro* fertilization, and ideally (but not categorically) the fertilized egg is a combination of the intended parents' gametes. In partial-traditional surrogacy, the carrying mother is genetically related to the child, as the conception results from her being artificially inseminated by the intended father's sperm. No biological connection at all exists between the intended father's wife, who is usually the intended mother, and the child. For an explanation of these terms, see In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (1994); *see also* R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998). This principle that permits full-gestational surrogacy only is manifested in Surrogate Motherhood Agreements, 1996, S.H. 1577, § 2(4), and in the definitions contained in § 1. Its underlying rationale will be discussed later, see *infra* text following note 74. Neither the New Hampshire nor the Virginia statutes distinguish between the two forms of surrogacy for purposes of approval.

28. The law mandates equal gender representation in the committee, namely, three of the members must be either men or women.

29. *See* Rabbi Dr. M. Halperin's explanation at the Labor & Welfare Comm., 13th *Knesset*, Protocol 422 (unedited version Dec. 26, 1995) (Hebrew, translated by author) [hereinafter Welfare Comm. Deliberations], confirming that all these are *halakhic* considerations. *See* Report of the Public-Professional Commission in the Matter of In Vitro Fertilization, Is-

(with provision for exceptions in rare circumstances);[30] that there be no family relationship between her and the designated parents;[31] that the surrogate's religion be the same as the designated mother's religion;[32] and that the sperm be the designated father's sperm.[33] Apart from these religiously based restrictions, all parties to the surrogacy agreement must be of full age and residents of Israel, and the designated parents probably must be married.[34] The surrogacy agreement is approved only upon a medical evaluation as to the inability of the designated mother to become pregnant or carry a pregnancy. The committee may approve monthly payments to the carrying mother to cover actual costs in addition to compensation for suffering, loss of time, income, or earning capacity, or any other reasonable compensation. No payment beyond this compensation is allowed.[35]

As to the status of the child, the law, in principle, views the designated

---

rael Ministry of Justice, (Jerusalem, July 1994) (minority opinion by Dr. Micha Halperin). The majority was of the opinion that *halakhic* considerations should not be forced upon individuals who resort to these treatments, but rather such concerns and their implications should be made known to them, enabling them to make fully informed choices.

30. *See* Surrogate Motherhood Agreements, 1996, S.H. 1577, § 2(3)(a). This restriction clearly derives from the goal of preventing any possible labeling of the resulting child as a *mamzer*. *See infra* note 105 and accompanying text. Virginia statute mandates the exact opposite, namely, that the surrogate be married. *See* VA. CODE ANN. § 20-160(B)(6) (Michie 1998). Women's organizations in Israel strongly objected to the non-marriagability requirement, pointing to the class disparity inherent in the situation, and to lack of sufficient supportive systems possibly available to a non-married woman. *See* R. Ben Ziman, Address at the Welfare Comm. Deliberations, *supra* note 29, at 17; *see also* MARGARET E. ATWOOD, THE HANDMAID'S TALE (1998).

31. *See* Surrogate Motherhood Agreements, 1996, S.H. 1577, § 2(3)(b). "Family relation" is broadly defined here to include cousins as well as siblings, consistent with the *halakhic* marital restrictions. Once again, this restriction derives from the need to prevent suspicion of *mamzerut*.

32. *See* Surrogate Motherhood Agreements, 1996, S.H. 1577, § 2(5). Since, under Jewish law, a child follows the religion of the mother, this requirement serves to prevent any doubts as to the religious affiliation of the ensuing child.

33. *See* Surrogate Motherhood Agreements, 1996, S.H. 1577, § 2(4). The basis for this restriction will be considered later. *See infra* note 97 and accompanying text.

34. The qualification stems from the use of the word "couple" in Surrogate Motherhood Agreements, 1996, S.H. 1577, § 2(2), absent an explanation of the term. However, case law has established that this term always entails marriage, unless otherwise specified in the specific statute that uses the term. Interestingly, the representative of the Ministry of Justice Legislation Bureau to the Welfare Committee commented that the term "couple" in this context should not be interpreted as excluding non-married heterosexual couples. *See* Welfare Comm. Deliberations, *supra* note 29, at 6. Nevertheless, as explained, this suggestion contradicts established precedents. Both New Hampshire and Virginia statutes mandate that the intended parents are married to each other. *See* N.H. REV. STAT. ANN. § 168-B:1 (1998) (definition of "intended parents"); VA. CODE ANN. § 20-156 (Michie 1998) (definition of "intended parents").

35. New Hampshire and Virginia statutes are much less permissive in terms of allowing compensation. Both permit payment of pregnancy-related costs only, while New Hampshire also permits actual loss of earnings. *See* N.H. REV. STAT. ANN. § 168-B:25(V)(b) (1998). See also the terms suggested in *R.R*, 689 N.E.2d at 797 ("[I]f no compensation is paid beyond pregnancy-related expenses. . . .").

parents as the legal parents of the ensuing child. To formalize this principle, the designated parents must apply for a "parenthood order" within a week of the child's birth.[36] The court will grant the order, unless convinced it is contrary to the best interests of the child.[37] Prior to the issuance of the order, the carrying mother may ask to withdraw from the agreement, but the court will only allow her to do so in rare instances. The court must be convinced that a change in circumstances has occurred which justifies her retraction and that the child's interests are not being jeopardized.[38] In such a case, another "parenthood order" is appropriate this time, declaring the carrying mother to be the legal mother of the child. If this occurs, the court may also order restitution of expenses paid by the contracting couple to the carrying mother.[39]

III. SURROGACY AS THE ULTIMATE PARADOX OF GENETICS

The first point made above was that both *Nakhmani* and the Surrogacy Law reflect the double standard regarding the role of genetics in parenthood. Both examples actually center on the social arrangement, or institution, of surrogacy, which is the ultimate demonstration of the paradox of genetics. On one hand, the donated gametes do not establish any parental relationship with the ensuing child, just as is the case with ordinary artificial insemination by donor or *in vitro* fertilization using a donor's egg. On the other hand, the whole point of "inventing" the social-arrangement of surrogacy is to enable the contracting couple to have a child "of their own," meaning one that is genetically related to them even though the woman (the wife) is unable to become pregnant or carry the pregnancy to term. This is well reflected in the Surrogacy Law and in the preceding Aloni Commission's deliberations and recommendations and the public debate that surrounded these developments. At no point was it suggested that surrogacy arrangements could be pursued where neither the sperm nor the egg originated from the intended parents. The Aloni Commission advised a genetic connection to at least one of the spouses, while the Surrogacy Law mandates the genetic connection to the male spouse.[40] Neither of these sources, nor the public debate throughout the process, contemplated a situation such as that which occurred in the California case of *Buzzanca v. Buzzanca*,[41] where the child was conceived following

36. *See* Surrogate Motherhood Agreements, 1996, S.H. 1577, § 11(a).

37. *See id.* § 11(b).

38. *See id.* § 13. Phone conversation with Rahel Ben-ziman, legal counsel to the Israel Women's Network, June 20, 1998. Complications at birth, which jeopardize the birth mother's chances of having more children in the future, are circumstances which justify judicial approval of her retraction. New Hampshire statute permits the surrogate to opt out of the agreement to surrender custody at any time up to seventy-two hours after birth. *See* N.H. REV. STAT. ANN. § 168-B:25(IV) (1998).

39. *See* Surrogate Motherhood Agreements, 1996, S.H. 1577, § 15.

40. *See infra* note 97 and accompanying text.

41. *See* Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (1998); *see also infra* note 44 and accompanying text.

IVF from anonymously donated egg and sperm. The Israeli experience makes it very clear that achieving a genetic relationship to at least one spouse is the quintessential goal that motivates the practice of surrogacy.[42] Similarly, both the New Hampshire and Virginia statutes sanctioning surrogacy mandate the genetic relationship of at least one of the designated parents to the ensuing child.[43]

The double meaning of genetics was clearly reflected in *Nakhmani* as well, where the Justices themselves expressed Ruthi's argument as a claim for "a child of her own."[44] The message that was conveyed throughout her struggle, and in the endorsement of these arguments, is clear; genetic connection is a prerequisite for parenthood. It is almost as if a child is not one's own unless he or she bears an individual's genes. The irony and complexity of *Nakhmani* lay in the fact that this concept, the sanctity of the genetic connection, was central to Danny's argument as well. His entire claim to a right not to procreate was based on the perception of the genetic connection as the exclusive and binding prerequisite for parenthood. From his perspective, the mere fact of having a genetically related offspring in this world made him a "father."[45] The institution of fatherhood, together with its emotional and psychological burden, was allegedly automatically conferred by biologic paternity-based solely upon the genetic connection.

Thus, in weighing whether to side with the man or the woman in this bitter battle, one must first distinguish between these two facets of the same ideology of the "sacred genes." Why should one version or interpretation be accorded more legitimacy and validity than the other? Is it perhaps because genetics is not exclusive? Or is it because other considerations, such as the intent, the expectations, and the psychological-emotional construct with respect to the process of parenthood, should be brought into the equation? The *Nakhmani* court did not confront these speculations. Rather, the rulings were based upon other analyses, such as balancing between positive and negative rights, between justice and law, and between general justice and personal justice.

Interestingly, American cases offer much fuller and richer reflections on these questions of genetics and its role. Although the recent decision of the

---

42. *See, e.g.*, Welfare Comm. Deliberations, *supra* note 29, at 4, and the explanation offered by Mr. Mazuz, Senior Aid to the Attorney General, to the new term "parenthood order" as opposed to the familiar term "adoption order."

43. N.H. REV. STAT. ANN. § 168-B:1 (definition XII "surrogacy" or "surrogacy arrangement"); VA. CODE ANN. § 20-160(9) (Michie 1998).

44. *Nakhmani*, 50(4) P.D. at 731, 745 (J. Eliezer Goldberg and J. Gavriel Bach). Interestingly, Justice Dalia Dorner, who was one of the Justices that decided for Ruthi, used the exact same words, and presented Ruthi as a woman "who had no other means of having children of her own" in a lecture titled *Jurisprudence in the Age of Bio-Technologly* which was delivered on Jan. 5, 1998, Keynote Lecture at the Medical Ethics at the Close of the 20th Century International Conference (Van-Leer Jerusalem Institute, Jan. 5-8, 1998).

45. *See, e.g.*, *Nakhmani*, 50(4) P.D. at 792.

New York Court of Appeals in *Kass v. Kass*[46] is only the second American judicial decision to deal with a dispute over the disposition of preembryos,[47] it offers an insight not present in the Israeli case of *Nakhmani*. *Kass* differs from *Nakhmani* in two major respects. First, the woman, Maureen Kass, requested sole custody over the preembryos so that she herself could attempt to undergo another implantation procedure. Second, and much more important, the Kasses, unlike the Nakhmanis, signed an agreement determining the disposition of any unused fertilized eggs in the event of divorce. The express agreement, which the court of appeals found sufficiently clear, controlled the outcome of the case and distinguished it significantly from the facts in *Nakhmani*.

Nevertheless, what is still relevant for the purposes of this analysis is the reference made by the concurring Justice of the appellate division (who, incidentally, did not deem the agreement to be sufficiently clear) to the possible alternatives for parenthood possessed by the parties. He was of the opinion that in the absence of a clear and express agreement (as was the position in *Nakhmani*), the party who objected to parenthood should prevail unless the party who desired parenthood had no means of achieving genetic or adoptive parenthood.[48] The *Nakhmani* Justices, on the other hand, referred to genetic parenthood as the only way to fulfill the desire for parenthood. Adoption was not mentioned at all as an alternative that could justify rejection of Ruthi's claim.[49] When drawing a balance between the opposing rights and interests of the parties and the expected consequences of each decision, the aftermath of childlessness was construed exclusively in genetic terms.[50]

Other American decisions, primarily concerned with surrogacy, shed more light on the perception of genetics and the perplexity it generates. Some of the ideas expressed in the decisions will be reviewed below in the context of the two forms of surrogacy; the discussion to some extent parallels the discussion of the role of genetics in the construction of parenthood. The most far-reaching of the surrogacy cases, in terms of overcoming ge-

---

46. 696 N.E. 2d 174 (1998).

47. The first was the famous Tennessee case of *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993). A dispute over the fate of frozen embryos has been developing between a divorced couple, in the Supreme Court of New Jersey. There, the woman has requested that the embryos be destroyed; the man has objected and asked for custody so as to afford him the possibility of implanting the embryos in the womb of another woman should he remarry. *See* Michael Booth, *Fate of Frozen Embryos Brings N.J. Again to Bioethics Fore with No Precedent, Court to Decide on Request to Destroy Fertilized Ova*, 151 N.J. L.J. 993 (1998), *available in* WESTLAW. Another lawsuit has been recently filed at the Middlesex Superior Court in Boston by a man whose then estranged wife had the preembryos implanted in her, without his knowledge, at the Boston IVF clinic. *See* Doreen I. Vigue, *Boston Clinic Sued Over Use of Embryo*, BOSTON GLOBE, Aug. 19, 1998, at A1.

48. *Kass*, 696 N.E. 2d at 177.

49. It should be acknowledged that the particular circumstances of Ruthi Nakhmani had probably made the alternative of adoption an impossible option, but this line of thinking was not even pursued in theory.

50. *See, e.g., Nakhmani*, 50(4) P.D. at 722 (J. Dorner's opinion).

netics, is obviously the recent *Buzzanca* case in California, which declared a commissioning couple who had hired a surrogate to bear them a child from an anonymous donation of a preembryo to be the legal parents of the ensuing child.[51] The determination of the parental relationship was based on the couple's intent to procreate, notwithstanding their total lack of genetic relationship to the child. The case obviously raises many interesting points, and also will be discussed later. Here, however, it is first important to note one specific issue.

Judge Sills, who delivered the opinion of the court, relied strongly on the famous case of *Johnson v. Calvert,*[52] where a commissioning egg-providing mother was declared to be the legal mother of the ensuing child over the objections of the carrying (non-genetically related) mother. The *Johnson* court had declined to merely enforce the surrogacy agreement, but rather looked to the intentions and expectations reflected in that agreement to reach the result that preferred the commissioning genetic mother. Judge Sills treated *Johnson* as a precedent, establishing the rule of "intent to parent" for constituting parenthood. In applying the rule of "intent to parent" to the circumstances in the *Buzzanca* case, he could declare the commissioning couple to be the lawful parents of the ensuing child and overrule the trial court's decision that the child had no lawful parents. However, a major point has been overlooked in the direct analogy and application of the *Johnson* "rule of intent" to the *Buzzanca* circumstances. The "rule of intent" in *Johnson* only served as a "tie-breaker" between the two women who could both claim maternity under the existing law, one relying on gestation and giving birth, the other on genetics.[53] Only after having established the "first tier" of the maternity claim could the "second tier" be considered, introducing the intentions component and identifying it as critical to a determination of maternal identity. Judge Sills' opinion in *Buzzanca* seems to have skipped the "first tier" and moved directly to the "second tier" in its enthusiastic adoption of the "rule of intent." In a sense, Judge Sills treated the genetic element in a manner diametrically opposed to the way it had been treated in *Johnson.* The genetic element in *Johnson* was, in fact, a prerequisite for the application of the "rule of intent," whereas Judge Sills' opinion turned it into a totally dispensable element, entirely overcome by the "rule of intent." In other words, *Buzzanca* goes much further than the *Johnson* precedent in overlooking genetics. In light of the analysis offered here, Judge Sills' reliance on *Johnson* in taking this approach is of somewhat dubious validity.

Perhaps the most pertinent and acute illustration of the paradox of genetics inherent in the new reproductive technologies, and particularly in the social institution of surrogacy, may be found in the case of *Ohio Belsito v. Clark.*[54] This case also stands in direct contradiction to the *Buzzanca* rea-

51. 72 Cal. Rptr. 2d 280.
52. 851 P.2d 776 (Cal. 1993).
53. *Id.* at 782.
54. 644 N.E.2d 760 (Ohio 1994).

soning, although it was not mentioned there. The *Belsito* court was faced with the problem of maternal determination in a gestational full-surrogacy situation where the commissioning couple provided the egg and the sperm and the surrogate (who was the commissioning wife's sister) did not assert maternal rights. The court concluded that "because [the commissioning couple] provided the child with its genetics, they must be designated as the legal and natural parents."[55] It rejected the *Johnson* "rule of intent" and concluded that a "non-genetic-providing surrogate" (*i.e.*, a gestational-full surrogate) could never be regarded as the natural parent, unless the genetic parent or parents had waived their right to be so determined.[56] This reasoning lead the *Belsito* court to absurdly label the carrying and birth mother in a "true egg-donation" situation as a "gestational surrogate" and to describe *McDonald*[57] as similar to *Johnson*. This is a clear example of the double bind and perplexity inherent in the practice of the new reproductive technologies as mentioned above. How is it possible to ascribe significance to the genetic relationship in one set of circumstances, while totally overlooking it in another?

This last question, reflecting the genetics quandary in American case law, echoes the above discussion of *Nakhmani* and the dilemma with which it was ended.[58] These substantive dilemmas are shared by diverse jurisdictions across geographic and cultural borders, and apparently they are not necessarily produced by religious concerns. The State of California shows signs of untangling the dilemma and the paradox of genetics, notwithstanding the criticism that this development may well attract.

In Israel, on the other hand, the message that is still heard is that genetics rules. Genetics is the rule; it is viewed as natural and is the natural way to have children. The rhetoric in the new reproductive technologies discourse sometimes borders on the absurd when people explain their recourse to surrogacy using such phrases as "we want to have a natural child."[59] Thus, the means that are probably most remote from nature are seen as "natural" through their ends, namely, the genetic connection.

IV. PATERNAL VERSUS MATERNAL MODELS OF MATERNITY

The second point in this article is also reflected in a specific provision in the Israeli Surrogacy Law and in several American surrogacy precedents. The point is that the conventional dichotomy of genetic versus social construction of parenthood is more reflective of the male experience of parent-

55. *Id.* at 762.
56. *Id.* at 766.
57. *See* McDonald v. McDonald, 608 N.Y.S.2d 477 (1994).
58. *See supra* note 44 and accompanying text.
59. Welfare Comm. Deliberations, *supra* note 29; *See also* H.C 1237/91, Nakhmani v. Minister of Health (May 6, 1991) (unpublished decision) (on file with the author) (Hebrew, translated by author).

hood than of the female experience. The female model is, in fact, a trichotomous, not a dichotomous, one. The genetic element in motherhood is only one factor in the biological construction of motherhood. The other is, of course, the pregnancy—carrying the fetus in the womb for nine months, and giving birth to the child it has become. Significantly, the dichotomous model is usually the one that is debated when the issue of the construction of parenthood is examined. The female trichotomous model is usually minimized, if not altogether ignored.

A. American Surrogacy Case Law

The consequences of this course can be quite oppressive. A clear example of undermining the experience of pregnancy and birth on one hand, and attributing infinite weight to the genetic element on the other, may be seen in the divergent results reached in several American precedents. The cases on point here are those where the carrying mother repudiated her part of the surrogacy agreement and claimed the child for herself. Such sad circumstances took place under both forms of surrogacy, traditional-partial and gestational-full. Notwithstanding some judicial attempts to attain consistency and formulate a clear model presumably devoid of conservative notions of genetics, the bottom line remains that in traditional-partial surrogacy where the carrying mother is also genetically related to the child, she retains maternity.[60] Whereas, in gestational-full surrogacy, where the carrying mother is not genetically related to the child, she loses her maternity claim.[61] In a very extreme expression of this attitude, one of the courts described the carrying mother in a gestational surrogacy case as actually serving as "a human incubator."[62]

Some of these cases merit further discussion for the purposes of this article. At first glance, the difference in outcome between the two groups of cases, namely, the traditional-partial *versus* the gestational-full surrogacy, clearly seems to affirm the claim that contemporary case law regards genetics as the prime factor in motherhood to the detriment of the gestational-and-birth factors. In *Moschetta*, Judge Sills even went as far as using the famous

---

60. *See, e.g.*, In the Matter of Baby M, 537 A.2d 1227 (N.J. 1988); *In Re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893; R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998).

61. *See* Johnson v. Calvert, 19 Cal. Rptr. 2d 494 (1993). The last sentence could also be phrased differently, emphasizing not only the carrying mother's lack of genetic connection to the child, but the presence of this connection between the intended mother and the child, as was the situation in *Johnson*. However, the certainty of the relative significance of each of these variables is unknown, since there appears to not yet be a case in which the egg used for IVF was extracted from an anonymous donor, and both women (the carrying mother and the intended mother) claimed maternity. *Buzzanca* is not on point here, since the carrying mother there clearly did not assert any claim to the child *Buzzanca*, 72 Cal. Rptr. 2d at 288. ("[N]o *bona fide* attempt has been made to establish the surrogate as the lawful mother.").

62. Smith v. Jones, 85-532014 DZ, Detroit, 3d Dist. (March 15, 1986) *cited in* Charo, *supra* note 1.

slogan from another context, that "biology is destiny," to stress the prominence of the genetic tie.[63] In distinguishing it from *Johnson*, Judge Sills plainly held the different genetic relationships to be the key distinction between the two cases and the justification for their opposite outcomes. The "rule of intent" could be applied to the *Johnson* circumstances only after it was determined that the two women could properly make maternity claims, one based on gestation and the other on a genetic relationship to the child.[64] The genetic connection that existed between the intending mother and the child was a prerequisite for applying the "rule of intent" to decide between the two women. The lack of the genetic connection in *Moschetta* led Judge Sills to conclude that "there [wa]s no tie to break,"[65] and thus no need and no justification for the application of this rule of intent. The genetic factor, constituting the two different modes of surrogacy, was plainly asserted as the sole distinction between the two cases. Indeed, this analysis conforms closely to *Baby M* on the one side (traditional surrogacy), *Johnson* on the other (gestational surrogacy), and echoes the most recent case of *R.R.*[66]

Upon further examination, however, it seems that the particular set of facts before the court were definitely not the most apt to illustrate the point which Judge Sills apparently wanted to make, as in that specific case, there was no dispute between the carrying and the intended mother (there, the father's ex-wife). Thus, the ruling in favor of the carrying mother, who was also genetically related to the child, did not supersede any possible claims by the intended mother since no such claims were made. Indeed, Judge Sills himself, in a *dictum* in the more recent *Buzzanca* case, strongly implied that had the intending mother in *Moschetta* asserted any claim to the child against the carrying mother, the outcome might very well have been different. Judge Sills confronted the *Moschetta* precedent in the following manner:

> Our decision in *In re Marriage of Moschetta* . . . is inapposite and distinguishable. . . . *Moschetta* is inapposite because this court never had occasion to consider or discuss whether the original intended mother's participation in the surrogacy arrangement, which brought about the child's birth, might have formed the basis for holding her responsible as a parent. She has given up her claim; the issue was not before the court.[67]

This intimation is extremely important, and also quite surprising, in light of the strong wording and enormous weight that the judge had previ-

---

63. *See Marriage of Moschetta*, 30 Cal. Rptr. 2d at 896.

64. *See* the discussion above and *supra* note 53 and accompanying text.

65. *Marriage of Moschetta*, 30 Cal. Rptr. 2d at 896. After presenting the father's argument, which was based on an analogy to the *Johnson* case, Judge Sills continued: "The flaw in the argument is that [the father's ex-wife] is not 'equally' the mother of Marissa. In fact, she is not Marissa's mother at all. There is no tie to break." *Id.*

66. See *R.R.*, 689 N.E.2d at 795, where the court clearly distinguished the case at hand (involving traditional-partial surrogacy) from the case of gestational-full surrogacy, citing *Johnson* as an example of the latter. *See Johnson*, 851 P.2d at 776.

67. *See Buzzanca*, 72 Cal. Rptr. 2d at 288.

ously (that is, in *Moschetta*) attributed to the genetic-factor difference, which had left no doubt as to the outcome of a possible confrontation between a "traditional surrogate" and an "intending mother." Of great interest is a comparison between Judge Sills' use of the phrase "[t]here is no tie to break" in *Moschetta*,[68] and his reference to it in *Buzzanca*.[69] While the former use was clearly in the context of biology (that is, lack of genetic connection), the latter reference was clearly in the context of intentions (namely, lack of a claim to keep the child). The reference in *Buzzanca* came immediately after the paragraph quoted above:[70] "Unlike the *Johnson* case there was no tie to break between two women both of whom could be held to be mothers under the Act. When courts do not consider propositions, their subsequent decisions are not precedent for them."[71] The discrepancy between the *Moschetta* holding and analysis, and the reference to it in *Buzzanca*, is thus apparent.

A possible explanation for this contradiction is the assumed necessity to avoid an even more obvious contradiction between *Moschetta* and *Buzzanca* itself. It would be difficult to defend an absolute and exclusive reliance on a biological factor, such as the genetic connection that occurred in the former case, in light of the recourse to the abstract level of intentions which was so heavily advocated in the latter case. In light of *Buzzanca*, it would be difficult to deny any possible claim by the intending mother in circumstances that parallel *Moschetta*, were she to make such a claim, only by reason of her lack of any genetic relationship to the child. It would seem that Judge Sills felt obliged to reconcile this manifest inconsistency, only to create another discrepancy between the cases.[72]

All these inconsistencies and the attempt at their reconciliation should not be cause for surprise. They are predictable reflections of the confusion and perplexity that have accompanied the new reproductive technologies ever since their introduction. They express uncertainty as to the proper place of genetics, particularly in the context of surrogacy, with its paradox of genetics discussed above. Specifically, they reflect the challenges that the new reproductive technologies present to the construction of motherhood and the

---

68. *See Marriage of Moschetta*, 30 Cal. Rptr. 2d at 896. *See supra* note 65 and accompanying text.

69. *Buzzanca*, 72 Cal. Rptr. 2d at 1422.

70. *See id.* at 288.

71. *Id.* (citation omitted).

72. These difficulties become more apparent when examined in light of the above-referenced criticism of *Buzzanca*. *See supra* notes 51 and 53 and accompanying text. It was suggested there that Judge Sills' overreaching analysis required minimization of the significance of the genetic factor to the stage where it becomes an altogether unnecessary element, which may easily be overcome by the "rule of intent." Such a reduction of the genetic tie can hardly be reconciled with the straightforward understanding of the *Moschetta* holding. Thus, the previous and the present discussion and analysis of *Buzzanca* supplement each other, and propose the same critique: Notwithstanding Judge Sills' attempts to present it as continuing the trend set in previous precedents, *Buzzanca* goes much further than them, perhaps even contradicts them, and altogether offers a rather innovative approach to the paradox of genetics.

difficulties in trying to confront these challenges using familiar tools drawn from less innovative contexts, such as contracts law or simple paternity claims.[73] The difficulty in applying such tools to the obscure terrain of motherhood can not but produce such inconsistencies. The inherent paradox of genetics, added to the non-familiar experience of pregnancy and birth in terms of qualitative evaluation, is bound to lead to complexity and perplexity. This article does not aim to propose a solution or any alternative to the attempted reconciliation offered in the case law, rather it is to point to the underlying structural enigma presented by the role of genetics per se and in relation to the experience of gestation and parturition.

B. The Israeli Surrogacy Law

As mentioned earlier, the new Israeli Surrogacy Law also reflects this dismissal of the experience of pregnancy and childbearing as a crucial element for the construction of motherhood. In fact, the current version of the statute, which differs from the Aloni Commission's recommendations, almost epitomizes the confused-yet-persistent American idiosyncrasy in the two types of surrogacy described in the above case law. A basic premise of the Surrogacy Law is that the egg can never be the carrying mother's egg, in other words, the law only permits gestational-full surrogacy agreements.[74] The legislature made sure that there would be no genetic connection between the surrogate and the child.[75] This is a resounding assertion of the sanctity of the genetic connection, as the *sin qua non* for the construction of motherhood, just like the bottom-line outcomes of the American cases surveyed above. It expresses the belief that the traditional-partial surrogate (the one who is also genetically related to the child) is the real mother, whereas the gestational-full surrogate (who is not genetically related to the child) is not a mother, or, at least, is less of a mother than her former counterpart.[76]

This insight is supported by the legislature's own words, as expressed in the proceedings of the *Knesset* (Israeli Parliament) Welfare Committee during its deliberations over the final version of the Law. The Minister of Health, who introduced the final version, explained the limitation on the genetic connection between the surrogate and the child as provided in Section 2(4) in the following manner: "The moment the egg is of the carrying mother, she is no longer a carrying mother, but a partner throughout the

---

73. Both *Johnson* and *Buzzanca* demonstrate the latter, and Judge Sills' analysis in *Moschetta* also demonstrate the former, primarily in the judicial focus on the propriety of applying the doctrine of estoppel in the context of parenthood. *See* Johnson v. Calvert, 851 P.2d 776; Buzzanca, 72 Cal. Rptr. 2d 280; In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893.

74. *See* Surrogate Motherhood Agreements, 1996, S.H. 1577.

75. Note that the law does not mandate genetic connection between the designated mother and the child, unlike the position between the designated father and the child, as will be discussed later on. *See infra* note 97 and accompanying text.

76. *See* Welfare Comm. Deliberations, *supra* note 29, at 26 (Minister of Health, Dr. Sneh's opinion) (Hebrew, translated by author).

pregnancy, and this is an entirely different story."[77] Interestingly, although many of the limitations that were added to the Law resulted in objections and disapproval, this particular restriction did not lead to any discussion in the Welfare Committee.[78]

To fully appreciate this reading, it should be emphasized once more that this provision is one of the major aspects in which the ensuing statute diverged from the Aloni Commission's recommendations. The Aloni Commission expressly considered the issue, which in practical terms translates into the method employed for achieving conception, whether through artificial insemination (where the surrogate's egg is used) or through *in vitro* fertilization (where the egg is not the surrogate's egg). The majority opinion of the Commission was unequivocal: "The method of conception ought not to be significant."[79]

It should be recalled that most of the divergences from the Commission's recommendations stemmed from *halakhic* considerations.[80] Possible *halakhic* precepts in this regard had nothing to do with the predicament of *mamzerut* (since in most cases the carrying mother would not be married). What then were these *halakhic* considerations? It seems that they could only be concerns of maternal identification. *Halakhic* opinions regarding maternal identity in situations of gestational-full surrogacy, where the surrogate is not genetically related to the child, are somewhat divided. Although a greater number of the authorities would regard the surrogate as the mother, some would maintain that motherhood is determined by the genetic connection.[81] In situations of traditional-partial surrogacy, no question would arise as to the identity of the mother and all would accept the identification of the surrogate as the mother.[82] In other words, from a *halakhic* perspective, it is

---

77. *Id.*

78. Note that this restriction already appears in the first section of the law, as part of the definition of "Surrogacy Agreement" for the purposes of that law. *See supra* note 27 and accompanying text.

79. The Report of the Public-Professional Commission in the Matter of In Vitro Fertilization, *supra* note 29, ¶ 7.18, at 58.

80. *See* Surrogate Motherhood Agreements, 1996, S.H. 1577 and *supra* notes 27 and 33 and accompanying text.

81. For a comprehensive overview of the different opinions, see the recent debate between Rabbi David Bleich (maintaining that "the preponderance of evidence adduced from rabbinic sources demonstrates that parturition, in and of itself, serves to establish a maternal relationship") and Rabbi Ezra Bick (objecting and suggesting the ovum donation is determinant of maternity). David Bleich, *In Vitro Fertilization: Questions of Maternal Identity and Conversion, in* JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES, *supra* note 15, at 46; Ezra Bick, *Ovum Donations: A Rabbinic Conceptual Model, in* JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES, *supra* note 15, at 83; David Bleich, *Maternal Identity Revisited, in* JEWISH LAW AND THE NEW REPRODUCTIVE TECHNOLOGIES, *supra* note 15, at 106.

82. This is self-evident, as the parental relationship under *halakha* is generally perceived as a natural, biologically-determined link. Just as the *halakhic* system does not formally recognize the legal validity of adoption, and the biological parents remain parents for all *halakhic* purposes. *See* ZOHAR, *supra* note 14, at 79-82. In traditional-partial surrogacy arrangements, the surrogate will always be deemed to be the mother from the *halakhic* perspective.

doubtful whether a gestational–full surrogate would be regarded as the mother, whereas a traditional-partial surrogate is guaranteed to be regarded the halakhically legal mother. Thus, surrogacy arrangements in the latter case may cause much more profound problems from a *halakhic* point of view, since they would require that the child be removed from his or her true and only mother and be placed with a total stranger.

Deserving emphasis here is the fact that this *halakhic* debate runs along precisely the same line of analysis as was detected in the American case law and in the provisions of the Israeli Surrogacy Law. It reflects the very same perception of motherhood. When the carrying mother is genetically related to the child, she is truly the real mother; when she is only gestating and bearing the child, she is much less of a mother. This is the perception of motherhood that underlies the Israeli Surrogacy Law, perhaps under the guise of *halakhic* concerns.[83] It is why the architects of the Law chose not to provide for the option of traditional-partial surrogacy through AID, although it is a much easier process, far less oppressive and excruciating for the surrogate woman, has a higher success rate, and is much less expensive than gestational-full surrogacy, which requires the procedure of IVF.[84]

A careful reading of the statutory provisions regarding the status of the newborn child and the procedure for obtaining the parenthood order confirms these observations.[85] As mentioned above, the Law views the designated parents as the legal parents of the child. The newborn is placed in their custody upon birth and all the responsibilities and obligations of parents towards their children already apply to their relationship.[86] The Surrogate Motherhood Agreements (Approval of Agreements and Status of Newborn)

---

83. This assertion about the guise of *halakha* should be qualified. None of the explanatory sources to the law, such as the Welfare Committee's deliberations, or some notes that were written following the passage of the law, relate to this particular restriction of gestational-partial surrogacy. *See* Carmel Shalev, *Halakha and Patriarchal Motherhood—An Anatomy of the New Israeli Surrogacy Law*, 32 ISR. L. REV. 51 (1998). Thus, the reliance in *halakhic* considerations is a hypothesis. Nevertheless, whether these are *halakhic* or non-*halakhic* concerns, the ideology and perception of motherhood is the same.

84. An interesting interpretation worth considering is that although the Law provides for gestational-full surrogacy alone, it does not prohibit traditional-partial surrogacy; rather, it does not address it at all. Thus, the penal provisions in the Law (Section 19, and to some extent Section 7 as well), may fairly be interpreted as prohibiting gestational-full surrogacy unless it is done according to this Law, but not as prohibiting any other form of surrogacy which is not covered by the Law at all. This interpretation is supported by the words of those sections themselves, which consistently refer to a prohibition against conducting IVF and implanting a fertilized egg in a woman for purposes of surrogacy. They do not mention any other reproductive technologies which might lead to other forms of surrogacy. Consequently, it can be said, they do not prohibit them. This interpretation goes against the conventional wisdom in Israel, which assumes the Surrogacy Law to preclude any form of surrogacy aside from gestational-full surrogacy approved according to the Law. Obviously, even if this interpretation offered above *is* legally correct, its practical implementation may be far more problematic, in light of the prevailing conventional wisdom.

85. *See supra* notes 36 and 39 and accompanying text.

86. *See* Surrogate Motherhood Agreements, 1996, S.H. 1577, § 10(a).

(Notifications, Appeals and Orders) Regulations,[87] which were just promulgated, support this analysis. According to these regulations, the carrying mother is not a party to the parenthood order proceedings. Nor is she a party if the statutorily appointed welfare officer concludes that there are circumstances impeding the child's transference to the parents.[88] Even more striking is the provision that requires a parenthood order to be granted declaring the carrying mother to be the mother in the rare case where the court may approve her request to repudiate the agreement.[89] It seems that according to the genetic perception of motherhood discerned in the Law, such disregard of the carrying mother's relationship to the newborn may only be approved when the carrying mother is not genetically related to the child.[90]

To supplement this account, a glance at the IVF Regulations is in place.[91] Originally, Regulation 13 prohibited the use of a donor's egg unless the sperm of the husband of the woman who underwent the IVF fertilized it. In other words, the regulation prohibited the donation of both gametes to the infertile couple. Couples who lacked both gametes, but desired the experience of pregnancy and childbearing, were unable to fulfill their needs according to these regulations, in further evidence of the law's disregard of the experience of pregnancy and childbearing and over-emphasis of the genetic element in parenthood. Maintenance of a genetic link to at least one spouse was clearly perceived as more important than allowing for the development of attachment and bonding during pregnancy. The use of the past tense in describing Regulation 13 is not without reason, as this regulation has become ineffective following a successful High Court of Justice challenge to the IVF Regulations by single women and lesbian couples who demanded equal access to IVF treatments.[92] The petitioners challenged Regulation 8(b), which required a single woman who requested IVF to undergo a social-worker evaluation showing she was qualified for the treatment. The petitioners claimed that the regulations discriminated against single women and lesbian couples on the basis of their marital status. The petition was settled by

87. 1998, K.T. 5912, 1036.

88. *See id.* (regs. 9 and 11 respectively).

89. *See* Surrogate Motherhood Agreements, 1996, S.H. 1577, § 15.

90. Compare the distinction made by the Virginia surrogacy statute between the two types of carrying mothers: the statute provides the right to terminate a court-approved surrogacy contract within 180 days after the last performance of any assisted conception, but only for a "surrogate who is also a genetic parent." VA. CODE ANN. §§ 20-161(B) (Michie 1998). Furthermore, it provides that in surrogacy contracts which had not been approved by the court, the surrogate-gestational mother is to be the child's mother, unless the intended mother is the genetic parent, in which case she is the mother. *See* VA. CODE. ANN. §§ 20-158 (E)(1) (Michie 1998). The New Hampshire statute, on the other hand, does not make such a distinction in mandating the inclusion of a provision in any surrogacy contract that ensures the right of the surrogate to decide to keep the child within 72 hours after the birth. *See* N.H. REV. STAT. ANN. § 168-B:25(IV) (1998).

91. *See supra* note 24.

92. *See* H.C. 998/96, 2078/96, 2444/96, Weitz et al. v. The Minister of Health (unpublished decision) (Feb. 11, 1997) (on file with the author).

the High Court of Justice, which, with the respondents' agreement, declared Regulation 8(b) to be void and ordered the Ministry of Health to publish an administrative directive mandating equal access to AID and IVF treatments.[93] The administrative directive, subsequently published by the Director General of the Ministry of Health, contained an instruction to the effect that a married couple's appeal for the donation of both sperm and egg would be acceded to as a logical inference from the overall equality reforms demanded by the High Court of Justice.[94] Thus, for reasons which are utterly unrelated to issues of construction of parenthood that concern us here, the former restriction on pre-embryo donation has been abolished.[95]

V. UNINTENDED PATRIARCHAL CONSEQUENCES OF *HALAKHIC* CONSIDERATIONS

The third point of this article suggests that the unique interaction between *halakhic* considerations and technological developments may cause a shift in social perceptions regarding issues of parenthood and the respective roles of men and women in reproduction in an unforeseen and unintended manner. This is best reflected in the Israeli Surrogacy Law, when the current final version is examined in light of earlier proposals.

The same provision of the Law, which currently prohibits any genetic connection between the surrogate and the fetus, namely, Section 2(4), contains an even more striking provision relating to genetics, which similarly diverges from the Aloni Commission's recommendations. The original version of the Israeli Surrogacy Bill contained two versions section 2(4). One, following the Commission's recommendations contained a provision mandating that the fetus had to be genetically related to either the man or the woman of the contracting couple (*i.e.,* the designated parents).[96] In other words, surrogacy would still be an option for those couples where the husband was totally a-sperm and infertile. A genetic relationship to the wife, who ovulated but was unable to carry the pregnancy, was deemed just as important and could be maintained through the option of surrogacy. However, this provision was rejected in the enacted, final version of the Law. Instead, Section 2(4) adopted the second version, mandating that the sperm used in surrogacy must always be the contracting husband's sperm.[97]

This time, the reason behind the diverging views is quite openly re-

93. *Id.* The Petitioners also successfully challenged a provision in the administrative directive that governs AID treatments since 1979 which had similarly required a psychiatric evaluation of every single women requesting a sperm donation. *See supra* note 88.

94. Letter from the Ministry of Health, Director General, dated Feb. 23, 1997, to managers of general hospitals (Hebrew, translated by author) (on file with the author).

95. Note, however, that the regulations themselves are still "on the books."

96. The Surrogate Motherhood Agreements (Approval of Agreements and Status of the Child) Bill, 1995, H.C. 2456, 260.

97. No such requirement applies to the egg, which may originate from the designated mother, or may come from a donor, so long as it is not the surrogate's egg.

vealed in the Welfare Committee's deliberations. Following the brief remark made by Minister Sneh concerning the restriction of genetic connection between the surrogate and the fetus,[98] the Minister proceeded to explain the two versions of the section that were before the Welfare Committee. The first version required that either the sperm or the egg had to be of the designated parents (and the egg could never be of the surrogate), whereas the second version, the one which was ultimately adopted, required that the sperm used had always to be that of the designated father. The Minister confessed his own opposition to the narrow and restrictive second version, and acknowledged its inherent regression from the existing practice of AID in Israel.[99] Under the second construction, while any woman in Israel[100] could receive a sperm donation to be used in AID or IVF treatment, a donor's sperm could not fertilize a contracting-designated mother's egg to be implanted in a surrogate's womb. The Minister then spelled out that notwithstanding his own conviction of the suitability of the first version he would submit to Rabbi Amital's disapproval of it and accede to the second version, "in honour of Rabbi Amital."[101]

Rabbi Amital had apparently adopted the strictest *halakhic* opinion with respect to AID. As mentioned above, *halakhic* objections to AID are based on several grounds, the principal ones being fear of *mamzerut*, even where no sexual relations have taken place, and fear of a possible future incestuous relationship as a result of indeterminate lineage.[102] Fear of *mamzerut* in the circumstances of the first version of Section 2(4) entails interpreting *mamzerut* to apply even in cases where a married woman's egg is fertilized by

98. *See supra* notes 76 and 78 and accompanying text.

99. Although the regulation of artificial insemination in Israel is far from satisfactory, it is routinely practiced in accredited fertility clinics, as provided by the Public Health (Sperm Bank) Regulations, 1979, K.T. 3996, 1448. No records enabling identification of the male donors are kept. The whole area of artificial insemination has been more fully set down in an administrative directive issued by the Director-General of the Ministry of Health, most recently updated in 1992. Circular 34/92, Rules as to the Administration of Sperm Banks and Guidelines for Performing Artificial Insemination. The directive contains guidelines for performing artificial insemination, including provisions relating to spousal consent (including a commitment to create parental relationship with the future child), confidentiality, and determination of a couple's "fitness." Most of the guidelines appear to exceed the Director-General's authority, and doubts as to their validity were expressed by the Supreme Court as early as 1980, in C.A. 449/79, Salameh v. Salameh, 34(2) P.D. 779, 784 (Hebrew, translated by author). Although such grave doubts continued to be raised, all the litigation in which they were asserted was settled before obtaining judgement. *See, e.g.*, Nakhmani petition; H.C. 5087/94, Zabaro and Others v. Minister of Health and Another (July 17, 1995) (unpublished decision) (on file with the author) (Hebrew, translated by author); H.C. 998/96, 2078/96, 2444/96, Weitz et al. v. The Minister of Health. *See also* PINCHAS SHIFMAN, II, FAMILY LAW IN ISRAEL 55-157 (1989) (Hebrew, translated by author).

100. *But see* Weitz et al. v. The Minister of Health (unpublished decision) (Feb. 11, 1997) (on file with the author) and *supra* notes 92 and 93 and accompanying text.

101. Welfare Comm. Deliberations, *supra* note 29. Rabbi Amital, who leads *Meimad*, the moderate modern-Orthodox movement, served at the time as a minister-without-portfolio in the late Prime Minister Rabin's government.

102. *See supra* notes 14 and 16 and accompanying text.

sperm that is not her husband's. Not only have no sexual relations taken place and not only is this not a case where a married woman gives birth to a child who is not her husband's, but the mere fusion of genetic material of a married woman with the genetic material of a man who is not her husband is deemed sufficient to raise the risk of *mamzerut* according to this interpretation.[103] Concern over consequences of undetectable lineage, such as the possibility of future marriage between unknowing siblings, leads to further disapproval of AID, even if apprehension regarding *mamzerut* has been overcome.[104] Such concerns obviously apply to the circumstances of the first version since it involves the use of an anonymous donor's sperm. The brief reference to Rabbi Amital's opinion does not permit full comprehension of the concerns underlying his position, thus there is no way to know which of these two principal worries influenced his view. Either way, the adoption of the second version settled both.[105]

---

103. This seems to be an even more restrictive interpretation than any formerly known source. Apparently, all the authorities who are concerned with the "fusion" theory refer to AID circumstances, where the married woman is actually fertilized by a stranger's seed, and that seed is indeed "put inside her womb," analogous to the prohibition in *Leviticus* 18:20. The circumstances involving IVF here are somewhat different, as the "fusion" does not take place inside the married woman's body, but rather in a petri-dish, and it is only her egg which converges with the stranger's genetic material. Nevertheless, it could be argued that the earlier *halakhic* opinions only related to the technological developments known at their time, and their restrictive approach should be extended to apply to current developments.

104. *See, e.g.*, Ross, *supra* note 16, at 49-50; Michael Korinaldi, *The Legal Status of a Child Born from Artificial Fertilization with Donor Sperm or Eggs*, 18-19 JEWISH L. ANN. 295, 310-15 (1992-1994); Mordechai Halperin, The Definition of Parenthood and the Right of Investigating Biological Roots, *presented at* the Medical Ethics at the Close of the 20th Century International Conference, (Van-Leer Jerusalem Institute, Jan. 5-8, 1998) (on file with the author) (Hebrew, translated by author). This is the reason why the liberal *halakhic* adjudicators, who permitted the practice of AID, recommended the use of sperm donations from gentiles. *See, e.g.*, Rabbi Feinstein, *Igrot Moshe, Even Ha-Ezer* A 10, 71. Jewish law does not recognize *halakhic* paternity of a non-Jewish man over children born to him from a Jewish woman.

105. The resolution of the lineage problem is obvious. The resolution of the fear of *mamzerut* is less obvious. If *mamzerut* is indeed caused from the mere fusion of a married woman's genetic material with the genetic material of a man other than her husband, then even the adoption of the second version which mandates the use of the designated father's sperm, yet still permits the use of a donor's egg, is problematic, unless the egg is extracted from a non-married woman. Indeed, there are apparently IVF clinics in Israel which only use egg donations from non-married women, notwithstanding the practical difficulties in obtaining such donations, as the IVF Regulations permit egg donations only from women who undergo fertility treatments themselves. *See, e.g.*, Susan M. Kahn, *Gentile Sperm and the Rabbinic Uses of Non-Jewish Bodies for Jewish Reproduction* (1996) (unpublished manuscript, on file with author); SUSAN M. KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL (1998); compare the *halakhic* opinion of Rabbi Tzirlsahn quoted in Ross, *supra* note 16, at 51, and mentioned too in JAKOBOVITS, *supra* note 15, at 235, adding that this was perceived as a strict interpretation, which in general was rejected by most authorities. If, on the other hand, the fear of *mamzerut* is not taken as inherent in the actual fusion of genetic materials, but as derived from concerns over indeterminate lineage, *see* JAKOBOVITS, *supra* note 15, at 235-36; Ross, *supra* note 16, at 48-53, then the second version which guarantees the paternal identity solves this problem.

Whatever the underlying concerns and fears, the resulting effect of this last-minute alteration to the Surrogacy Law may be cynically put as follows: genetics is indeed important, and the State will go to extremes to enable people to have "children of their own," but it is only the man's genes that are really important. There could hardly be a stronger expression of patriarchy within the legal regulation of the new reproductive technologies. Note that this does not suggest for a moment that this is what Rabbi Amital and the architects of the Law had in mind. They probably did not realize what distorted message would emerge from this revision.[106] This is the reason for acknowledging the lack of intention referred to in the title of this section. Nevertheless, even when unintended and unexpected, the final version of the Israeli Surrogacy Law has brought about negative and discriminatory consequences for women in changing the balance between men and women's roles in reproduction, to the detriment of women.

VI. CONCLUSION

Through the past two decades, since *in vitro* fertilization has become a reality and maternity is no longer a unified concept, social and legal systems have struggled to adapt and catch up with technological advancements. As seen in this article, the need for adaptation is felt in every society, and the dilemmas produced by this task are also shared. It is fascinating to realize that uncertainties, inconsistencies, and confusions are inherent to the subject-matter and are the same, notwithstanding societal and legal differences, and moreover, notwithstanding the huge disparity regarding the place of religion and religious values within the two societies. Thus, what has been termed "the paradox of genetics" may be discerned in both Israel and the United States in various legal instruments and case law, reflecting the very same basic dilemmas notwithstanding the differing socio-legal contexts. Similarly, the exaltation of the genetic relationship and its application to the question of maternal identity, leading to the demeaning of the experience of gestation and birth, is seen in both countries. Nonetheless, in a system that confers formal recognition and status on religious considerations, such as in the Israeli system, religious concerns do have an impact. As this article has shown, their effect in the Israeli case is to intensify pre-existing problems and add an even stronger patriarchal dimension to the scene.

There rang out the noisiest ear-splitting squeaks
From the egg that he'd sat on for fifty-one weeks!
A thumping! A bumping! A wild alive scratching!
"My egg!" shouted Horton. "MY EGG WHY IT'S HATCHING!"

---

106. Note the comment volunteered at the Welfare Committee's proceedings was by the Ministry of Justice's representative, G. Ben-Or, who was the only one to question why the ovum is considered less important than the sperm. *See* Welfare Comm. Deliberations, *supra* note 29, at 28.

"But it's MINE!" screamed the bird when she heard the egg crack.
(The work was all done. Now she wanted it back.)
"It's MY egg!" she sputtered. "You stole it from me!
Get off my nest and get out of my tree!"
Poor Horton backed down with a sad, heavy heart. . . .
But at that very instant, the egg burst apart!
And out of the pieces of red and white shell,
From the egg that he'd sat on so long and so well,
Horton the elephant saw something whizz!
IT HAD EARS
AND A TAIL
AND A TRUNK JUST LIKE HIS!
And the people came shouting, What's all this about. . . .?"
They looked! And they stared with their eyes popping out!
Then they cheered and they cheered and the CHEERED more and more.
They'd never seen anything like it before!
"My goodness! My gracious!" they shouted. "MY WORD!"
It's something brand new!
IT'S AN ELEPHANT-BIRD!!
And it should be, it should be, it SHOULD be like that!
Because Horton was Faithful! He sat and he sat!
He meant what he said
And he said what he meant. . . ."
. . . And they sent him home happy, one hundred percent!

Horton Hatches the Egg, Dr. Seuss