

Survey of Recent Halakhic Periodical Literature

SURROGATE MOTHERHOOD

I. INFERTILITY AND THE OBLIGATION TO PROCREATE

Despite the passage of time since the New Jersey case of Baby M¹ captured the attention of millions of Americans, both the human and legal questions posed by surrogate motherhood remain largely unresolved. Medically, the procedure is not at all complex and represents a simple method of coping with female infertility. A woman who is willing to serve as a surrogate, usually in return for a fee, is found and an agreement is reached. She is artificially inseminated with the semen of the infertile woman's husband, carries the baby to term and subsequently surrenders the baby to the couple. In such cases, the husband is the biological father but the wife has no natural relationship with the child. With the development of *in vitro* fertilization, it is now possible, in some limited circumstances, for the wife to be the biological mother as well.² If the wife's fertility problem is not related to production of ova, her own ovum can be fertilized in a petri dish with her husband's sperm and then transferred to the womb of the surrogate who serves as host for purposes of gestation. When all parties are content with the terms of the agreement, there is no occasion for public attention to be focused on the arrangement. But, at times, as was the case with regard to Baby M, the surrogate undergoes a change of heart and refuses to deliver the baby to the father and his wife or attempts to recover custody of the child after the child has been surrendered. In either event, the emotional turmoil is readily understandable and the legal dilemma is obvious.

The problems of surrogate motherhood, as issues of Halakhah, must be placed in proper perspective. Perhaps, this can best be done by means of an anecdote. Many years ago, I was approached by the rabbi of a Hasidic congregation. The problem concerned a couple in his community. Unfortunately, the man and his wife were unable to have children. The rabbi arranged for the gentleman to meet with me. In the course of our conversation, the gentleman requested my assistance in obtaining a child for adoption. Time went by and several months later this person sought me out again. This time he thanked me for my efforts and proceeded to inform me that he and his wife were no longer

seeking a child for adoption. Taken by surprise, I asked him why he had undergone a change of heart. The gentleman, who frequently consulted a Hasidic leader or *rebbe* with regard to personal matters, told me that he had informed the *rebbe* of his desire to adopt a child. The *rebbe's* response in its entirety consisted of a single sentence: "*Vemen vilst du a tova ton, der Ribbono shel olom, oder zikh alein?*"—For whom do you wish to do the favor, the Master of the universe or yourself?"

The question prodded the man to whom it was addressed to serious introspection and reconsideration of his motives. Recognition of the fact that he was not really seeking to perform a *mizvah*, and indeed that adoption and conversion of a non-Jewish child does not constitute fulfillment of a *mizvah* incumbent upon a Jew, led him to the awareness that his motives were neither spiritual nor altruistic. To be sure, his desire was entirely natural, quite human and readily understandable; but seen in that perspective he no longer perceived his need to be imperative.

Hasidic mentors often prove to be psychologically insightful. There can be no question that lack of children leaves a painful void. Paternal and maternal inclinations are deeply ingrained in the human psyche and cry out for expression. Such needs should neither be decried nor minimized. Rachel of old cried out in deep anguish, "Give me children, or else I die" (Genesis 30:1). Nevertheless, it is necessary to evaluate the means adopted in satisfying that need. The means must be measured against the results in assessing the propriety of the procedures that must be employed in achieving the desired goal.

Elsewhere³ this writer has endeavored to demonstrate that the essence of the biblical commandment to "be fruitful and multiply" that is binding upon males is simply to engage in coital activity with the prescribed frequency and that the birth of children is merely the *terminus ad quem* beyond which sexual activity is no longer mandated by virtue of the biblical commandment. Recognition that the commandment to "be fruitful and multiply" (Genesis 1:28 and 9:7) requires only conventional sexual activity within the context of a marital relationship yields the conclusion that no form of assisted procreation is mandatory. Although Halakhah may demand employment of extraordinary and heroic measures in prolonging life, with regard to the generation of life it requires only that which is ordinary, normal and natural. However, so long as the methods employed in assisted procreation do not entail transgression of halakhic strictures such methods are discretionary and permissible.

It is readily demonstrable that even if the husband desires to avail himself of some form of assisted procreation, the wife is under no oblig-

ation to cooperate by submitting to procedures that place any unusual and undue burden upon her or expose her to risks other than those associated with natural pregnancy. Assuredly, no person is required to assume the risks associated with a surgical procedure for the purpose of fulfilling any *mizvah*. That principle is clearly reflected in the comments of *Tosafot, Pesahim* 28b, s.v. *arei*, who declare that it is reasonable to assume (*mistavra*) that a *tumtum* need not undergo abdominal surgery in order to fulfill the commandment of circumcision. A *tumtum* is described in talmudic sources as a person whose gender cannot be determined due to the absence of external genitalia. It was presumed that incision of the abdomen would reveal the presence of either male or female anatomical structures. It was further presumed that if the individual was found to be a male, the organs might be released and caused to descend with the result that circumcision would become feasible. Yet, despite the presumed feasibility of the procedure, the authors of *Tosafot* take it for granted that there is no obligation for a person to submit to such measures despite his ongoing failure to fulfill the *mizvah* of circumcision. The obvious consideration upon which this position is predicated is that, although performance of *mizvot* necessarily entails certain burdens both in terms of expenditure of financial resources and in terms of personal inconvenience, the onus of undergoing a surgical procedure is beyond the pale of duty.

Teshuvot Helkat Yo'av, I, Dinei Ones, sec.7, extends this principle to performance of a *mizvah* in face of any significant threat to health in declaring that a person need not assume the risk of falling victim to a serious illness in discharging a religious obligation. That conclusion is readily understood in light of the limit placed upon the financial burden that must be assumed in fulfillment of a *mizvah*. A person need not expend more than twenty percent of his or her net worth in order to fulfill a positive commandment.⁴ Indeed, according to some authorities, a person is required to expend no more than one tenth of his fortune for such a purpose.⁵ A rational individual would cheerfully spend at least a fifth of his financial resources in order to avoid serious illness or to avoid the burden of a major surgical procedure. Hence it may be stated that, conversely, incurrance of serious illness is tantamount to expenditure of more than a fifth of one's fortune. Accordingly, a person need not assume the risk of succumbing to a serious malady in order to perform a *mizvah*.

Fulfillment of the commandment to be fruitful and multiply does not require assumption of a burden greater than that required for ful-

fillment of any other positive commandment. Women, who are not bound by the *mizvah* of procreation,⁶ are held to a different, and indeed lesser, standard in fulfilling reproductive obligations. Although the *mizvah* to populate the universe (*shevet*) may apply to females as well as to males, that *mizvah* is not in the character of a mandatory obligation. The Gemara, *Haggigah* 2b, declares, "For indeed the universe was created solely for procreation as it is said, 'He created it not a waste. He formed it to be inhabited' (Isaiah 45:18)." Populating the universe is a divine *desideratum* and human activity undertaken to achieve that *telos* constitutes fulfillment of the divine will. Nevertheless, absent an obligation to "be fruitful and multiply," activity designed to achieve that goal is in the nature of a discretionary *mizvah* (*mizvah kiyyumit*) rather than in the nature of a mandatory obligation (*mizvah biyyuvit*). A wife's reproductive obligations are a product of the covenant generated by the marital relationship. As such, they are limited to pregnancy, child-bearing and child-rearing involving risk, stress and emotional anguish no greater than the norm. Thus *Lagerot Mosheh Even ha-Ezer*, III, no. 12, rules that a woman confronted with an inordinate statistical risk of bearing a child afflicted with a severe congenital abnormality may insist upon utilizing permissible contraceptive measures on the grounds that she is not contractually bound to assume a burden of that nature even though her husband is desirous of doing so. Accordingly, a woman is certainly not required to undergo a laparoscopy in order to remove ova as part of an attempt to overcome infertility. Similarly, she is under no obligation to accept the medical risks inherent in hormone treatment designed to produce multiple ova.⁷ For similar reasons, it would seem that a wife is under no obligation to assume the duty to raise the child of a woman with whom her husband has entered into a surrogate motherhood relationship. Thus a wife may effectively veto her husband's desire for a surrogate relationship.

II. ARTIFICIAL INSEMINATION AND ADULTERY

Assuming the consent and desire of all parties, the permissibility of surrogate motherhood hinges upon resolution of a number of halakhic questions. Since surrogate motherhood involves insemination of a woman with the semen of a man who is not her husband, the first halakhic issue encountered is identical to that involved in a far more common means of overcoming male, rather than female, infertility, viz., AID, or artificial insemination using the semen of a donor.

The empirical possibility of conception *sine concubito* was recog-

nized by the sages of the Talmud. In questioning the permissibility of marriage between a high priest and a pregnant virgin, the Gemara, *Hagigah* 14b, accepts the possibility that pregnancy might have occurred in a “bathroom” other than by means of sexual intercourse, i.e., the woman may have been impregnated in the course of bathing in water in which the male had previously ejaculated.⁸ One midrashic source, the *Alfa Beta de-Ben Sira*, reports that Ben Sira was conceived in such a manner.⁹ His father is reported to have been the prophet Jeremiah. Jeremiah experienced an ejaculation in the course of bathing and his own daughter, who later used the same bathwater, was impregnated.¹⁰

Although some authorities differ,¹¹ the consensus of rabbinic opinion is that there is no technical infringement of the prohibition against adultery other than by means of vaginal penetration by a male.¹² That position is confirmed by a statement of a thirteenth-century rabbinic scholar, R. Peretz of Corbeil, in his work *Hagahot Semak*, cited by *Bah, Yoreh De'ah* 195; *Taz, Yoreh De'ah* 195:7; *Bet Shmu'el, Even ha-Ezer* 1:10; and *Helkat Mehokek, Even ha-Ezer* 1:8, cautioning a woman not to recline upon bedsheets used earlier by a male other than her husband lest those sheets be soiled by the man's still moist semen. The concern is expressed in terms of fear that the woman may become pregnant and that in the course of time “a brother may marry his [half-] sister.” The fact that *Hagahot Semak* expresses concern for a possible incestuous relationship but is silent with regard to a concern for bastardy and its associated marital disqualification or that the woman be forbidden to her husband on account of an adulterous act is taken by later authorities as evidence reflecting the notion that, since bastardy results only from adultery (or incest), the prohibition against adultery is limited to sexual intercourse.

Nevertheless, Ramban, in his commentary on the verse “And unto the wife of your fellow you shall not give your semen for seed to defile her through it” (Leviticus 18:20), notes that the biblical admonition concerning adultery is couched in language quite different from that found in multiple verses occurring in the same biblical section dealing with consanguineous relationships. In those instances the biblical phrase employed is “you shall not lie with” or “you shall not uncover the nakedness of,” each of which is a euphemism for the sexual act, and indeed that biblical section opens with the verse “No man shall draw near to the relative of his flesh to uncover nakedness” (Leviticus 18:6). Only with regard to the concluding prohibition in that section, viz., adultery, does Scripture speak of “semen” and “seed.” If that phraseology is taken literally, the essence of adultery would be understood as consisting of the deposit of the ejaculate in the genital tract of a married

woman. Ramban explains that, unlike the considerations underlying other sexual prohibitions, adultery is forbidden because of the consequences resulting from the deposit of semen, i.e., conception. A woman who has had multiple sexual partners, explains Ramban, will perforce not be able to ascertain the father of her child with certainty. Thus, for Ramban, the rationale underlying the prohibition against adultery is the blurring of paternal identity and it is that concept that is reflected in the description of adultery as the deposit of semen by a stranger to the marital relationship.¹³ Thus it follows that artificial insemination, even if it does not constitute a technical halakhic violation,¹⁴ is contrary to the spirit of the law. Following Ramban's own explication of the biblical command “You shall be holy” (Leviticus 19:2) as an admonition not to be “a degenerate within the bounds of biblical license,”¹⁵ AID, even if it does not constitute actual adultery, must be regarded as quasi-adulterous in nature and hence a prohibited form of procreation.¹⁶

Rabbi Yosef Eliyahu Henkin asserts that the act of insemination is prohibited on other grounds.¹⁷ The admonition “be fruitful and multiply” occurs twice. In its first occurrence (Genesis 1:28) it is addressed to Adam; the second time (Genesis 9:7) it is addressed to Noah and his sons upon their emergence from the ark. The repetition to Noah, opines Rabbi Henkin, is for the purpose of establishing a limitation upon the parameters of procreation. Addressing Noah, God tells him, “Go forth from the ark, you and your wife and your sons and your sons' wives with you” (Genesis 8:16). That passage underscores the fact that Noah and his sons each emerged from the ark with his wife, i.e., that the inhabitants of the ark emerged as members of family units. It was in that context, i.e., as members of distinct and identifiable families, that Noah and his sons were commanded to “be fruitful and multiply.”

Accordingly, procreation, declares Rabbi Henkin, is designed to take place only within the family unit in a manner such that the genealogy of offspring is known in a determinate manner. Promiscuous relationships are to be eschewed because of the resultant ambiguity regarding parental identity. Consorting with multiple males blurs parental identity. Artificial insemination with the semen of an anonymous donor similarly renders identification of the father virtually impossible. That consideration, declares Rabbi Henkin, serves to render AID impermissible for married and unmarried women alike.

Rabbi Henkin similarly points to the terminology employed in the prohibitions “*lo tihyeh kedeshah*” and “*lo yihyeh kadesh*” (Deuteronomy 23:18). Those passages are read literally as prohibiting both female and male prostitution. Some rabbinic scholars, including *Targum Onkelos*,

ad locum, interpret the verse as prohibiting sexual liaisons between a slave and a freeman or a freewoman.¹⁸ Rabbi Henkin notes that, unlike the terminology employed in the various prohibitions against incestuous unions, there is no direct reference in these passages to the sexual act *per se*. Accordingly, asserts Rabbi Henkin, it must be concluded that the primary concern is not the sexual act itself but rather the concern is with regard to promiscuity and the resultant absence of a halakhically identifiable paternal-filial relationships. Any act, including artificial insemination, argues Rabbi Henkin, that leads to the birth of a child whose father cannot be identified must be abjured as the moral equivalent of prostitution.

III. ARTIFICIAL INSEMINATION AND BASTARDY

Putting aside the sexual propriety of the surrogate relationship, once parties have entered into such a relationship and a child is born, what is the status of the issue of a surrogate relationship?

The earliest source addressing the underlying issue is the previously cited admonition of *Hagahot Semak* to the effect that a woman should not recline upon the bedsheets of a male other than her husband. The concern expressed is that the woman may become pregnant and, with the passage of time, a brother may unknowingly enter into a marital relationship with his half-sister. That, to be sure, is a significant concern. Equally significant is a consideration that *Hagahot Semak* passes over in silence, viz., that any child conceived in that manner is himself a *mamzer* by virtue of the fact that he or she is the progeny of a married woman and a male who is not her lawful husband and hence is forbidden to contract a marriage with any woman of legitimate birth. Since that concern is universal and far more immediate than the concern that is expressed by *Hagahot Semak*, the failure of *Semak* to state that concern should presumably be accepted as a clear indication that he did not consider it to be relevant. Accordingly, *Hagahot Semak* must have regarded a child born to a married woman but sired *sine concubito* by a male other than her husband as free of the taint of bastardy. Hence, it must be inferred that *Hagahot Semak* regarded *mamzerut* as attendant solely upon an adulterous or incestuous act. Since physical penetration of the female by the male is a necessary element of adultery, any child born *sine concubito* is not a *mamzer* because the child is technically not the product of an act of adultery.

Conversely, it follows that those few authorities who adopt the position that there can be adultery without an actual act of sexual penetration would regard the child conceived in that manner as a *mamzer*.¹⁹

One authority, R. Ya'akov Breisch, *Teshuvot Helkat Ya'akov*, I, no. 24, cites a statement of *Tosafot*, *Tevamot* 77b, asserting that bastardy is not necessarily contingent upon transgression of the prohibition against an adulterous or incestuous relationship. *Tosafot* cite the non-normative talmudic opinion that a child of a Jewish woman and a non-Jewish father is a *mamzer*. That relationship entails neither capital punishment nor the biblical penalty of excision (*ka'aret*). Indeed, according to the talmudic opinion that maintains that the commandment "And you shall not intermarry with them" (Deuteronomy 7:3) applies only to members of the seven indigenous nations of the land of Canaan, such acts are not interdicted by an express biblical command. If so, query *Tosafot*, on what grounds can the issue of such a union be declared bastards? In one resolution of that problem, *Tosafot* posit that *mamzerut* flows, not from particular illicit acts, but from any union between individuals disqualified from contracting a valid marriage with one another. *Helkat Ya'akov* argues, in effect, that, since transgression is not a necessary condition of bastardy, there is no independent reason to assume that an antecedent sexual act is such a condition. He argues that, quite to the contrary, bastardy is simply the result of the halakhic status of the parents vis-a-vis one another. It should be noted that this argument is based upon one theory advanced by *Tosafot* in resolution of a particular problem and may well represent a concept not accepted by other authorities who present alternative answers to the query posed by *Tosafot*.

IV. SEMEN PROCUREMENT

There is yet another aspect of the process of artificial insemination that may serve to preclude surrogate motherhood in many, if not most, situations.

The prohibition against onanism serves to proscribe ejaculation other than in conjunction with the act of intercourse. However, many authorities recognize at least some exceptions to the prohibition based primarily upon a discussion of the Gemara, *Tevamot* 76a. Elsewhere²⁰ this writer has analyzed the reasoning employed by the numerous authorities who permit ejaculation for purposes of AIH (artificial insemination utilizing the semen of the husband) and indeed even for semen testing in conjunction with diagnosis and treatment of infertility. That analysis also discusses the methods of semen procurement sanctioned by Halakhah for such purposes.

The consideration underlying those permissive views is that at least some forms of non-coital ejaculation may be sanctioned when undertaken for the purpose of fulfilling the commandment to "be fruitful and

multiply." Left unclear is the question of whether ejaculation for a lesser purpose is deemed to be wanton and hence "for naught." R. Jacob Emden, *She'ilat Ya'avez*, I, no. 43, maintains that ejaculation for any "grave need," including avoidance of severe pain, is not wanton destruction and hence permissible. Most authorities, however, maintain that the *telos* of emission must be procreative in nature.²¹ The question is whether any ejaculation that is not designed to fulfill the biblical command to "be fruitful and multiply" constitutes ejaculation "for naught" or whether other forms of procreation that do not serve to fulfill the commandment but do serve to populate the universe in the sense of "He created it not a waste. He formed it to be inhabited" (Isaiah 45:18) also serve to legitimize emission of semen. Ordinarily, those *teloi* go hand in hand; populating the universe (*shevet*) also serves to fulfill the mandate to "be fruitful and multiply." But that need not always be the case. A person who engages in procreation that does not result in a halakhically recognized paternal-filial relationship has not "multiplied" himself since he has no halakhically recognized relationship with his biological progeny. Nevertheless, he has certainly contributed to augmentation of the population of the universe.

For those authorities who maintain that only birth of children as a result of natural intercourse serves to fulfill the command to "be fruitful and multiply," permissibility of AIH hinges upon whether non-coital ejaculation is permissible solely for purposes of fulfilling the commandment to "be fruitful and multiply" or whether fulfillment of *shevet* is sufficient to legitimize emission of semen.²² Assuming that the sexual act is not a necessary condition of fulfillment of the commandment to "be fruitful and multiply" because a paternal-filial relationship exists even in the absence of a sexual act,²³ some forms of non-coital ejaculation may be employed in order to fulfill the biblical command. However, ejaculation for the purpose of inseminating a non-Jewish woman does not serve to achieve that end. The issue of a Jewish father and a gentile mother, even if conceived in a normal, natural manner, is not regarded as the issue of the Jewish father for purposes of Halakhah and hence birth of such a child does not constitute fulfillment of the biblical commandment concerning procreation. Birth of such a child does, however, serve to populate the universe.

If, as is frequently the case, the surrogate is a non-Jewish woman, the child is obviously not Jewish and presumably, if surrendered to the childless couple, would be converted to Judaism. Nevertheless, the father does not fulfill the commandment to "be fruitful and multiply" even upon conversion of the child. Hence, if non-coital emission of

semen can be countenanced only for purposes of fulfilling the biblical commandment regarding procreation, impermissibility of semen procurement for insemination of a gentile woman would itself serve to bar a surrogate relationship with a surrogate who is not Jewish.

V. ARTIFICIAL INSEMINATION AND PATERNITY

A closely related issue is the question of the existence of a halakhically recognized paternal-filial relationship between the semen donor and the child born of artificial insemination. A host of halakhic matters hinge upon recognition or non-recognition of a paternal-filial relationship, including but not limited to: inheritance; mourning; exemption of the donor's wife, in the absence of other issue, from levirate marriage; priestly and levitical status; and, most ominous of all, consanguinity. Nor should the question of obligations a father owes a child, including the obligation of financial support, be overlooked.

Once again, the earlier cited comment of *Hagabot Semak* serves as the primary source for resolution of this question. To be sure, *Hagabot Semak* does not directly address the issue of paternal relationship, but his stance with regard to that question is abundantly clear. The concern to which he gives expression is that of a possible consanguineous marriage between a brother and a sister or, to be more precise, between a half-brother and a half-sister. The fear is that a child born *sine concubito* will not know the identity of his or her biological father and hence will be ignorant of a biological relationship with any half-siblings who may exist, i.e., any other children sired by the same man. But, it must be remembered, a fraternal relationship is really epiphenomenal; a fraternal relationship, by definition, is the relationship that exists between two persons who enjoy a common filial relationship with a single father or mother. Thus, if no halakhically recognized relationship exists between a male who procures semen and the child born as a result of insemination of the ejaculate, a child conceived in that manner could not have halakhically recognized paternal siblings and hence there could be no fear that the child might marry a paternal sister. From the fact that *Hagabot Semak* regards such a concern as cogent it must necessarily be deduced that he espouses the view that a paternal-filial relationship arises *sine concubito*. Thus, according to *Hagabot Semak*, although the male who ejaculates in bath water or on bedclothes, or who becomes a sperm donor and thereby causes a married woman to conceive, has not committed adultery and, despite the fact that the child is not regarded as the bastard issue of an adulterous union, the male is nevertheless regarded as the father of the child.²⁴

Nevertheless, one of the classical commentators on *Even ha-Ezer*, *Helkat Mehokek* 1:8, expresses doubt with regard to whether or not a paternal-filial relationship exists in such instances. Moreover, there is some dispute regarding the actual position of *Hagahot Semak*. The primary expositor of the view denying the existence of a paternal relationship is R. Chaim Joseph David Azulai, *Birkei Yosef*, *Even ha-Ezer* 1:14.²⁵ *Birkei Yosef* cites a variant manuscript reading of the text of *Hagahot Semak*. According to that reading, *Hagahot Semak* cites the concern regarding prevention of a future consanguineous marriage in the context of the ban against the remarriage of a widow or divorcee within three months of termination of her earlier marriage. That prohibition is expressly predicated upon a concern for certainty in establishing paternal identity and, according to *Birkei Yosef*, is cited solely by way of example or analogy. According to *Birkei Yosef*, if a child is conceived *sine concubito*, the biological father is not recognized as the halakhic father and *Hagahot Semak* merely expresses the view that the sages of the Talmud would have decried any act that leaves a child bereft of a halakhically recognized father just as they legislated against relationships that might give rise to ambiguous paternity.

VI. SUPPRESSION OF MATERNAL IDENTITY

Once a child is born as a result of surrogate motherhood, may the identity of the mother be suppressed?

That question, too, has its counterpart with regard to children born as a result of artificial insemination. If, as the vast majority of rabbinic authorities agree, a paternal-filial relationship does exist when a child has been born as a result of artificial insemination, is it necessary to disclose the identity of the father? As AID is customarily practiced in the United States, the donor is assured of anonymity and, in general, there is no way that the child can discover the identity of his or her father. In surrogate mother arrangements, sealing the records, if permitted, would have the same result.

Suppression of paternal identity is one of the considerations that led rabbinic decisors to ban AID. R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, I, no. 162 and *Even ha-Ezer*, I, no. 7, voices a similar concern in decrying sealed adoptions.²⁶ At least until recent years, adoption agencies and the American legal system joined forces in an attempt to prevent an adopted child from ever learning the identity of his or her natural parents. It would appear that *Iggerot Mosheh* regards any attempt to suppress the parental identity as a violation of a biblical commandment. Although polygamy is biblically permissible, the Gemara, *Yeva-*

mot 37b, declares that a man may not maintain a wife in every port, i.e., he may not maintain multiple families and households whose members do not know of one another's existence. The concern is that, with the passage of time, children of the various households may grow to maturity and contract a marriage without realizing that they share a common father. In prohibiting such arrangements, the Gemara adduces the verse "lest the earth be filled with licentiousness" (Leviticus 19:29) as the consideration upon which the ban is predicated. *Iggerot Mosheh* apparently asserts that the prohibition is not merely rabbinic in nature and simply reflective of the concern expressed in the cited scriptural passage; rather, the ban represents the instantiation of an actual biblical prohibition.²⁷ According to *Iggerot Mosheh*, any act carrying with it the potential for suppression of a familial relationship of a nature such that it may possibly lead to a consanguineous relationship is biblically proscribed. As such, suppression of the identity of natural parents in adoption proceedings, anonymous sperm donations and surrogate relationships in which the identity of the mother is not disclosed are equally forbidden as a violation of "lest the earth will be filled with licentiousness."

VII. SURROGACY AND BABY-SELLING

Conception by means of artificial insemination presents halakhic problems with regard to the permissibility of the means utilized in causing pregnancy to occur in the context of surrogate relationships. Enforcement of the surrogacy contract providing for custody of the child presents an additional cluster of issues. Although the contract may provide for impregnation in a manner that Halakhah regards as illicit, Jewish law does not regard illegal contracts *ipso facto* as unenforceable.

The enforceability of surrogate motherhood contracts in the American legal system is generally regarded as hinging in the first instance upon the question of whether the agreement is to be construed as a contract for the sale of a baby or as a contract for performance of personal services. Has the surrogate, who receives a fee for her services, simply agreed to make her uterus available for gestation of the fetus or has she contracted for the sale of a baby upon birth? If the latter, not only is the contract unenforceable, but fulfillment of its terms constitutes a penal offense.²⁸

However, since baby-selling, while undoubtedly repugnant, is not a criminal act in Jewish law, the question of enforceability of the provisions of an illegal contract need not be addressed. That baby-selling is not a criminal act in Jewish law is poignantly illustrated by a recommendation made by *Sefer Hasidim* (Jerusalem, 5720), no. 245.

Jewish tradition recognizes a number of nonmedical and nonscientific *segulot* or remedies in the nature of metaphysical forms of intervention designed to avert the natural result of life-threatening maladies. One of those is *shiny ha-shem*, changing the patient's name. That *segulah* is based upon the concept that no person dies other than pursuant to a decree of the Heavenly court. The procedures of the Heavenly court, we are told, mirror those of terrestrial courts in their procedural aspects. Change of name is designed to render such a decree nugatory on the grounds that a change of name entails a change of identity. The original decree cannot be carried out because it can be applied only against the named individual. The patient who has undergone a change of name is a different person against whom no decree has been issued. As a different person, he is entitled to a new hearing. In effect, the name change provides the basis for a writ of *habeas corpus* before the Heavenly tribunal. On rehearing, the Heavenly court may find some new merit, presumably not of sufficient strength to abrogate an already entered judgment but sufficient to prevent the entry of an unfavorable decree *de nouveau*.

In Jewish tradition, an individual's name is composed of a combination of his own name and his patronym or matronym. Accordingly, a change of name can be effected either by changing a person's given name or by changing the patronym or matronym. A patronym can be effectively changed by substitution of fathers, i.e., by acquisition of a new father in place of the original, biological father. A matronym can be effectively changed by substitution of mothers, i.e., by acquisition of a new mother in place of the original, biological mother.

Living in an age in which infant mortality was rampant, *Sefer Hasidim* provides instructions for changing a person's name by substituting new parents for the original ones. *Sefer Hasidim* advises that parents, concerned because they have had children who have died in infancy, arrange for a close friend to present them with a *shekel*, a loaf of bread, a piece of meat and a jug of wine and to acquire the child from them in return. From that point on, declares *Sefer Hasidim*, the infant will be deemed, at least for purposes of the Heavenly court, to be the child of the adoptive parents. The procedure involves what is at least *pro forma* the sale of a child. Were a person to undertake such a procedure today, and were he to do nothing more, the district attorney would certainly have no interest in the matter. However, Jewish law, unlike other systems of law, concerns itself with form no less than with substance. Hence, were baby-selling recognized as a crime by Jewish law, even a purely formal and indeed sham sale of a child could not be countenanced.

VIII. ENFORCEABILITY OF SURROGATE CONTRACTS

There are nevertheless other considerations that serve to render surrogate motherhood contracts unenforceable in Jewish law.

Typically, for reasons that are obvious, the contract is executed before the woman is inseminated. At that point, the fetus is not yet in existence. Halakha does not recognize the validity of the conveyance of an entity that is not yet in existence. Hence, were the contract to be construed as a sale, the sale would be void with the result that the woman has the prerogative of renegeing on her undertaking. If, on the other hand, the agreement is to be construed as an employment contract that provides for compensation for services rendered, apart from the right of a worker to abrogate such a contract, provision of such services at the behest of the father does not serve to convey a proprietary interest in the child.

More significantly, children are not property and do not represent a property interest that can be transferred. Child custody, although often a matter of dispute between a couple no longer living together as man and wife, is regarded by Judaism primarily as an obligation rather than a right.²⁹ To the extent that child custody involves an issue of the rights of an individual, the rights involved are those of the child. The duty of a parent to care for and to support a child may be said to give rise to a concomitant right vested in the child to receive such care and support. Thus, although both conceptually and for certain aspects of Jewish law, there may well be a distinction between a duty and a resultant right, in general, duties and rights may be regarded as two sides of the same coin.

Since determination of which spouse shall be the custodial parent is in effect adjudication of how a child's right can best be exercised, any contract between the parents must be regarded as a nullity if it in any way prejudices the rights of the child. It is self-evident that two contracting parties do not have the power to dispose of, or in any way prejudice, the rights of a third party who is not a party to the contract. It is for that reason that *Teshuvot Mabib II*, no. 62, cited by *Be'er Heitev, Even ha-Ezer* 82:6, rules that a woman who, as part of a divorce settlement, enters into an agreement in which she renounces custodial prerogatives, may subsequently renege and is not bound by her initial undertaking.³⁰

Similarly, a surrogate contract providing for surrender of the baby by the natural mother represents an agreement by the natural mother not to seek custody. As such, it is unenforceable with the result that, if the mother declines to surrender the child voluntarily, the *Bet Din* must perforce treat the controversy as a dispute between two parents each of

whom asserts a prerogative to custody of the child. Thus, the case before the *Bet Din* is not a contract dispute but a custody dispute to be resolved on the basis of halakhic canons governing matters of custody.

Halakhah posits a number of general rules governing award of custody. Mothers are presumptively entitled to custody of girls on the theory that the mother is better qualified to serve as a role model and to provide the type of practical and moral guidance necessary in the rearing of a daughter, while the father is presumptively entitled to custody of male children because it is the father's obligation to teach his son Torah.³¹ The latter principle is, however, tempered with a tender years doctrine reflecting the consideration that children below the age of six, both male and female, require nurturing care that can best be provided by a mother. As stated by *Teshuvot Maharashdam, Even ha-Ezer*, I, no. 123, and Rema, *Even ha-Ezer* 82:7, those principles are merely the reflections of a simple, more general principle, namely, that custody is to be determined on the basis of the best interests of the child. Those particular provisions simply reflect the presumption that, in the generality of cases, both parents are equally fit and competent in all other respects. Hence, *ceteris paribus*, the factors that are enumerated must be regarded as determinative of the child's best interests. However, in the real world, seldom, if ever, are all other matters equal. Consequently, there is a long list of responsa, beginning with *Teshuvot Ri mi-Gash*, no. 71, *Teshuvot ha-Meyuhosot le Ramban*, no. 38, *Teshuvot Maharam Padua*, no. 53, and including, *inter alia*, the earlier cited *Teshuvot Maharashdam* and *Teshuvot Radvas*, I, nos. 64, 226, 263 and 360 as well as numerous decisions of the Israeli rabbinic courts³² indicating that custody must be determined on the basis of the best interests of the child and that such determination must be made on a case by case basis and only upon the weighing and balancing of all relevant factors.³³

IX. A SOLUTION TO THE SOCIETAL DILEMMA

For reasons that do not necessarily parallel the mores of Judaism, there is a strong inclination in many sectors of contemporary society to prohibit, or at least to discourage, surrogate motherhood arrangements.³⁴ Criminalization of the arrangement accompanied by appropriate penal sanctions might be one way of dealing with the problem. Yet criminalization is regarded as too harsh and, in any event, is not likely to be effective.

The halakhic considerations entering into an analysis of surrogate motherhood contracts suggest a solution to the societal problems posed by the specter of such arrangements, a solution that recommends itself

equally well to a society whose institutions are not necessarily predicated upon the provisions of Halakhah.^{34a}

As has been shown earlier, most rabbinic authorities are of the opinion that there exists a paternal-filial relationship between a semen donor and a child born of artificial insemination. It then follows that the donor is obligated with regard to financial support of his biological child. Halakhah also provides that the father is liable for child support whether or not he is awarded custody of the child. Moreover, if the mother is awarded custody, she is entitled not only to reimbursement for expenses incurred on behalf of the child but also to compensation for her services as a wet nurse. Although Halakhah does not provide for payment of alimony *per se*, it does provide for financial assistance to the mother of young children.

The financial responsibility for raising a child devolves upon the father. When the mother is awarded custody it is because such is in the best interests of the child. However, as recorded in *Shulhan Arukh, Even ha-Ezer* 82:7, a custody award in favor of the mother does not extinguish the father's financial responsibility. Since the mother is no longer married to the child's father, she is not required to provide child-rearing services without remuneration. Payment to the mother as guardian of the child, since that too is necessary for the child's welfare, is an expense that may be assigned to the father.

Adoption of the policy inherent in these provisions of Jewish law with regard to child support and custody would have a chilling effect upon surrogate agreements. As recorded in *Shulhan Arukh, Even ha-Ezer* 82:5 and 82:8, a mother has the prerogative of refusing to accept custody. Hence, in a surrogate arrangement, if the neonate suffers from a congenital defect or abnormality, the mother may well decline to accept custody and thereby leave responsibility for the child entirely in the hands of the father. In every case, if the woman who has agreed to surrender the child as part of the surrogate agreement undergoes a change of heart and seeks custody, she may very well prevail. If awarded custody, she is entitled both to child support and to a fee for her services in rearing the child. As a result, a male contemplating such an arrangement has no guarantee that he will actually have a child to raise. However, he will be absolutely certain of incurring financial obligations to the child born to the surrogate as well as of incurring an obligation for what constitutes, in effect, alimony payments to a woman who was never his wife. Thus, the man is assured of financial responsibilities but has no guarantee of custody of the child. The prospect should be sufficiently onerous to discourage most people from pursuing such an agreement.

In point of fact, in the early days of recourse to artificial insemination as a remedy for infertility, legislation was enacted in most American jurisdictions for the direct purpose of rendering sperm donors immune to financial claims for support of progeny born as a result of artificial insemination. Such legislation reflected a societal decision to encourage AID as a means of coping with infertility. If society is determined to discourage surrogate relationships, that goal can be achieved by amending existing sperm donor legislation to make it clear that the immunity from financial claims conveyed by such statutes does not extend to persons entering into written or oral surrogate agreements.

X. A FINAL COMMENT

One further observation is in order. Surrogate relationships are often described as a modern-day counterpart of concubinage that was prevalent in days of yore. There is no question that, in antiquity, and in the biblical period in particular, when a woman proved to be barren, her husband frequently took a concubine for purposes of procreation. The biblical narrative concerning Abraham and Hagar seems to be a case in point. Ramban, in his commentary on Genesis 16:2, offers the following observation:

“And Abraham hearkened to the voice of Sarah.” Even now [Abraham] did not intend that he be fulfilled through Hagar by having progeny through her. Rather, his sole intention was to do the desire of Sarah so that she be fulfilled through [Hagar], that she derive happiness of spirit from the children of her handmaiden.

Hagar is here described as the surrogate who will bear the children while Sarah will experience the gratification and pleasure of raising those children.

Ramban, however, offers a second observation as well. Commenting on the verse “And Sarah oppressed her” (Genesis 6:6), Ramban remarks: “Our mother [Sarah] sinned in this matter.” Sarah is described as having desired to displace Hagar and to raise Hagar’s child as her own. But, in practice, the arrangement does not succeed. The child is not Sarah’s; it is Hagar’s. People may believe that they are capable of transcending biological reality, but, in practice, they find that they cannot.³⁵ Despite the best intentions of all concerned, biological facts give rise to psychological consequences and human beings frequently find it impossible to rise above, or to suppress, natural instincts and emotions.

The phenomenon of a mother who reneges on a surrogate agree-

ment should not be at all surprising. The woman may be a surrogate wife or a surrogate reproductive partner, but the term “surrogate mother” is a misnomer. There is nothing in the nature of surrogacy in her maternity; she is a natural mother, both biologically and psychologically. At the time when she enters into the contractual relationship the surrogate may believe herself capable of renouncing her motherhood and of surrendering the child. However, when confronted with the reality of her motherhood, she may understandably find herself incapable of doing so. Men and women are human, not superhuman, and should not be called upon sacrificially to deny natural human instincts and emotions.

NOTES

1. Matter of Baby, 217 N.J. Super. 313; 525 A.2d 1128 (1987), *aff’d in part and rev’d in part*, 109 N.J. 396, 537 A.2d 1227 (1988).
2. The primary focus of this discussion will be upon surrogacy arrangements in which the gestational mother is the biological mother. The question of maternal identity in situations in which the gestational mother is not the biological mother is addressed in this writer’s *Contemporary Halakbic Problems*, I (New York, 1977), 106-109; II (New York, 1983), 91-93; and IV (New York, 1995), 237-272.
3. *Tradition*, vol. 29, no. 4 (Summer 1995), pp. 53-56.
4. See Rema, *Orah Hayyim* 656:1.
5. Cf., *Magen Avraham, Orah Hayyim* 656:7.
6. See, *inter alia*, Rambam, *Hilkhot Ishut* 15:2 and *Sefer ha-Hinnukh, mi-vah* 1.
7. Nor, pursuant to the edict of Rabbenu Gershom forbidding divorce other than with consent of the wife, does the husband have the right to divorce his wife on grounds of infertility. Although dispensation in the form of a *heter me’ah rabbanim* for the husband to enter into a polygamous relationship for purposes of fulfilling his obligation to “be fruitful and multiply” might well be forthcoming, there is ample authority serving to relieve the husband of availing himself of that opportunity. See *Pithei Teshuvah, Even ha-Ezer* 154:27 and *Ozar ha-Poskim, Even ha-Ezer*, 1:26.
8. Cf., however, *Mishneh le-Melekh, Hilkhot Ishut* 15:4, who asserts that the possibility of pregnancy occurring in this manner is a matter of dispute and is both inherently contradicted by other talmudic discussions and normatively rejected in the adoption of the rule imputing bastardy to the child of a married woman whose husband had no access to her for twelve months prior to its birth. See also R. Moshe Shick, *Maharam Shik al Taryag Mivrot*, no.1, sec. 3. *Mishneh le-Melekh*’s arguments are rebutted by various later authorities. See, for example, R. Yonatan Eibeschutz, *Bnei Ahuvah, Hilkhot Ishut* 15:6 and R. Jacob Ettlinger, *Arvakh la-Ner, Yevamot* 12b. See also *Tashbaz*, III, no. 263; cf., *Teshuvot Mahari Asad, Yoreh De’ah*, no. 179.
9. Published in J.D. Eisenstein, *Ozar Midrashim* (New York, 5688), p. 43.

- That report is quoted by a noted fourteenth-century scholar, R. Jacob Ben Moses Mölln, in the first of the addenda (*likkutin*) to his *Sefer Maharil*. That work is cited, in turn, by numerous later sources.
10. Cf., however, R. David Gans, *Zemah David*, in his entry for the year 3448, who challenges the reliability of that report and advances a number of alternative theories regarding the identity of Ben Sira and the age in which he lived. See also R. Solomon ibn Verga, *Shevet Yehudah* (Hanover, 1924), p. 2.
 11. See R. Judah Leib Zitelson *Ma'arkhei Lev*, no. 73; R. Ovadiah Hadaya, *No'am*, vol. 1 (5718), pp. 130-137, reprinted in *idem*, *Teshuvot Yaskil Avdi*, V, *Even ha-Ezer*, no. 10; R. Joel Teitelbaum, *Ha-Ma'or*, Av 5724, pp. 3-13; *idem*, *Teshuvot Divrei Yo'el*, II, nos. 107-110; R. Samuel Aaron Yudelevitz, *No'am*, vol. X (5727), pp. 57-103; and R. Abraham Lurie, *Ha-Posek*, Heshvan-Kislev 5710, pp. 1-754—1-756.
 12. See, for example, R. Shalom Mordecai Schwaradron, *Teshuvot Maharsham*, III, no. 268; R. Aaron Walkin, *Teshuvot Zekan Aharon*, II, no. 97; R. Yehoshua Baumol, *Teshuvot Emek Halakhab*, no. 68; R. Ben Zion Uziel, *Mishpetei Uziel*, *Even ha-Ezer*, I, no. 10; and R. Elijah Meir Bloch, *Ha-Pardes*, Sivan 5713, pp. 1-3. For a survey of these and other sources see R. Michal Stern, *Ha-Refu'ah le-Or ha-Halakhab*, vol. 1 (Jerusalem, 5740), part 2, pp. 56-68. For a comprehensive bibliography of the rabbinic periodical literature devoted to artificial insemination see Nahum Rakover, *Ozar Mishpat*, I (Jerusalem, 5735), 322-333.
 13. However, implantation of an embryo in the uterus of a host mother subsequent to fertilization, since it does not involve deposit of semen, is a different matter. Cf., however, Yitzchak Mehlman, "Multi-Fetal Pregnancy Reduction," *Journal of Halacha and Contemporary Society*, no. XXVII (Spring, 1994), pp. 43f., who reports an oral communication by R. Aaron Soloveichik, to the effect that, in the latter's opinion, the status of an embryo during the first forty days of gestation is identical to that of the male "seed." Assuming, as Rabbi Soloveichik apparently does, that during that forty-day period the embryo does not have the status of a fetus, the conclusion that it has the status of "seed" is intellectually alluring and indeed almost intuitive: the male seed undergoes a metamorphosis and becomes a fetus; until it actually becomes a fetus it remains "seed." That position, however, is contradicted both by the authorities who apparently maintain that, unlike semen, an embryo may be destroyed during that period with impunity as well as by the conflicting authorities who maintain that destruction of an embryo even in that early stage of gestation constitutes feticide. Thus, to cite one example, unlike Rabbi Soloveichik, R. Yechiel Ya'akov Weinberg, *Seridei Esh*, III, no. 127, places no restriction upon termination of pregnancy during the first forty days. Those authorities apparently maintain that, in light of the description of the embryo during that period by the Gemara, *Yevamos* 69b, as "mere water," the sperm loses its status as "seed" upon fusing with the ovum with the result that, according to those authorities, the nascent embryo is neither "seed" nor fetus. However, R. Ya'ir Bacharach, *Teshuvot Havot Ya'ir*, no. 31, and R. Jacob Emden, *She'ilat Ya'avez*, I, no. 43, who maintain that feticide in all stages of pregnancy is prohibited as a form of "destruction of the seed," clearly maintain that the fetus is endowed with the halakhic status of "seed" during the entire period of gestation. It might cogently be argued that, according to those authorities, embryo transfer at any stage of gestation is no different from AID insofar as the issue of adultery is concerned.
 14. One authority, *Teshuvot Ma'arkhei Lev*, no. 73, understands the comments of Ramban quite literally in declaring not only that AID constitutes adultery, but that the physician performing the insemination, in effect, acts as an agent of the donor in committing adultery.
 15. See Ramban, *Commentary on the Bible*, Leviticus 19:20.
 16. See R. Eliezer Waldenberg, *Ziv Eli'ezer*, IX, no. 51, sec. 4. Cf., R. Moshe Feinstein, *Iggerot Mosheh*, *Even ha-Ezer*, II, no. 11.
 17. See R. Yosef Eliyahu Henkin, *Ha-Ma'or*, Tishri-Heshvan 5725, pp. 9-11, reprinted in *idem*, *Kol Kitvei ha-Grya Henkin* (New York, 5746), II, 100-101.
 18. Rambam, *Sefer ha-Mizvot*, *mizvot lo-ta'aseh*, no. 350, understands "lo yiyeh kadeshi" as a reiteration of the prohibition against homosexual acts.
 19. See *supra*, note 11. See also *Zekher Haaggigah*, *Haggigah* 15a; *Teshuvot Bar Leva'y*, II, no. 1; and R. Elijah Meir Bloch, *Ha-Pardes*, Sivan 5713, pp. 1-3. For a discussion of these various sources see *Ha-Refu'ah le-Or ha-Halakhab*, vol. 1, part 2, pp. 68-76.
 20. *Tradition*, vol. 29, no. 4 (Summer 1995), pp. 48-51. See also *Ha-Refu'ah le-Or ha-Halakhab*, vol. 1, part 2, pp. 36-43.
 21. See *Ha-Refu'ah le-Or ha-Halakhab*, I, part 1, pp. 113-119. Cf., however, *Ziv Eli'ezer*, XIII, no. 102 and the sharp rejoinder of *Iggerot Mosheh*, *Hoshen Mishpat*, II, no. 69, sec. 4.
 22. Some few authorities maintain that AID does establish a paternal-filial relationship between the donor and the child born of such a procedure but that, since no sexual act is involved, the donor does not thereby fulfill his obligation with regard to procreation. See R. Jacob Emden, *She'ilat Ya'avez*, II, no. 97, sec. 3; R. Chaim Joseph David Azulai, *Birkei Yosef*, *Even ha-Ezer* 1:14; *Maharam Shik al Taryag Mizvot*, no. 1; *Bigdei Yeshn*, no. 123; and *Bigdei Shesh*, *Even ha-Ezer* 1:11.
 23. Authorities who espouse the latter view include *Teshuvot Emek Halakhab*, I, no. 60; R. Shlomo Zalman Auerbach, *No'am*, I, 157; and R. Judah Gefshuni, *Or ha-Mizrah*, Tishri 5739, pp. 15-22, reprinted in *idem*, *Kol Zofayikh* (Jerusalem, 5740), p. 367.
 24. See *Bet Shmu'el*, *Even ha-Ezer* 1:6. This view is accepted by most authorities including, *inter alia*, *Tashbaz*, III, no. 263; *Teshuvot Bet Ya'akov*, no. 124; *Bnei Ahuvyah*, *Hilkhot Ishut* 15:6; *Teshuvot Ben Ya'akov*, no. 122; *Turei Even*, *Haggigah* 15a; *Arukh la-Ner*, *Yevamos* 10a; R. Malkiel Zevi Tennenbaum, *Teshuvot Divrei Malki'el*, IV, no. 107; R. Ya'akov Yitzchak Weisz, *Teshuvot Minhag Yitzhak*, I, no. 50; *Ziv Eli'ezer*, IX, no. 51; and R. Yisra'el Zev Mintzberg, *No'am*, I, 129.
 25. See also *Teshuvot Bar Leva'y*, *Even ha-Ezer*, no. 1; *Mishpetei Uzi'el*, *Even ha-Ezer*, I, no. 19; R. Menachem Kasher, *No'am*, I, 125-128; *idem*, *Torah Sheleimah*, XVII, 242; and R. Moshe Aryeh Leib Shapiro, *No'am*, I, 138-142. For further sources see *Ha-Refu'ah le-Or ha-Halakhab*, vol. 1, part 2, pp. 14-29.