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Survey of Recent Halakhic Periodical Literature: Disposition of Fertilized Ova

I. THE PROBLEM

Louise Brown, the world's first "test tube" baby, is to be credited not only with creating a new frontier in human procreation but also with opening a new chapter in the jurisprudence of the family. Interpersonal and societal relationships are the breeding grounds of litigation; there can be no litigation in a solipsist universe. Man is a social animal but it is precisely interaction with fellow human beings that spawns controversy. Property rights and tort law are emblematic of such conflict.

Marriage is a unique relationship. However, since the institution of marriage involves two distinct and disparate individuals and since lamentably all too many human beings are contentious, by nature or otherwise, on occasion, domestic tranquility ceases to reign in the marital abode. Domestic relations law is designed to deal with unamicable breakdown of the marital relationship.

Marriage is designed to regularize propagation of the species which, in turn, makes possible the survival of mankind. Breakdown of the spousal relationship carries with it the very real possibility, nay, probability, of collateral damage to progeny born of such a relationship—not to speak of antagonistic claims to affection, companionship and parental privileges asserted by each of the progenitors. Ergo, the development of principles governing custody and its associated prerogatives and responsibilities.

Parenthood is not a prophylactic that shields against spousal discord. Birth of a child does not necessarily have a salutary effect upon a troubled marriage. *A fortiori* it is not to be expected that cooperative efforts in generating a nascent zygote will necessarily have that effect. Indeed, cooperative efforts in overcoming infertility may conceal fissures in the

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relationship only temporarily with the result that the prospect of impending parenthood may, at times, reverse the therapeutic benefits of anticipation. The only surprise in the socio-legal history of in vitro fertilization is that, although Louise Brown made her appearance in 1978 and her successors have since multiplied exponentially, the earliest litigation concerning a dispute with regard to fertilized ova dates to July, 1989.[1]

Litigation is not the product of in vitro fertilization *per se* but of the remarkable scientific phenomenon of cryopreservation of fertilized ova. In the normal course of events a single ovum matures during the course of each menstrual cycle and is released into one of the Fallopian tubes. In order to achieve in vitro fertilization the mature ovum is aspirated by laparoscopy or an ultrasound needle and placed in a petri dish together with sperm ejaculated by the husband. The fertilized ovum is allowed to divide until it reaches the four- or eight-cell stage and is then transferred to the woman's uterus by means of a cervical catheter. The statistical probability that fertilization will occur and that the single fertilized ovum will be viable for implantation is remarkably low. In order to enhance the probability of achieving a successful pregnancy, the woman is treated with hormones to induce superovulation and cause multiple ova to be released. When placed in a petri dish together with sperm multiple ova may become fertilized. A number of those fertilized ova are then transferred to the woman's uterus in order to maximize the chances of at least one of those ova becoming implanted in the uterine wall. Current practice is to transfer no more than three fertilized ova at one time in order to avoid gestation of multiple fetuses which would have the effect of decreasing the likelihood of a woman carrying the fetus to term and also pose a danger to the life and health of the mother.[2]

As a result, it is frequently the case that surplus fertilized ova remain after implantation. Percentage-wise, only a relatively small number of attempts at in vitro fertilization result in a successful pregnancy. When an attempt to achieve pregnancy fails, the entire procedure must be repeated, a process that is both expensive and arduous to the mother. In order to assure that further attempts may be undertaken without need for repeated harvesting of ova, the existing fertilized ova are frozen in liquid hydrogen at a temperature of minus 196 Centigrade and preserved for future use. Those fertilized ova may be used by the couple in further attempts to

[1] See York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989).

[2] See U.K. Human Fertilisation and Embryology Authority, "IVF—What is in vitro fertilisation (IVF) and how does it work?", http://www.hfea.gov.uk/IVF.html. In the U.K., a maximum of two embryos are transferred at one time if the woman is under the age of forty and three for those over forty.

achieve parenthood, used to give birth to additional children at some future time, donated to other infertile couples, used for scientific research, or destroyed.[3]

Increased reliance upon cryopreservation of fertilized ova has spawned disputes between divorced or estranged spouses regarding disposition of surplus or otherwise unimplanted zygotes.[4] Legal controversies arise when, for whatever reason, the couple cannot agree with regard to the disposition of those cryopreserved fertilized ova. In the United States, the status of a fertilized ovum varies from jurisdiction to jurisdiction. In some states, disposition of preserved zygotes is governed by statute.[5] In others, various courts have adopted disparate doctrines. American case law has treated the conceptus either as property or as a nascent person. Categorization of the conceptus as property has led to validation of contractual agreements between the parties[6] and to application of principles governing disposition of marital assets.[7] Categorization of the zygote as progeny of the parents has generally led to treating a dispute between the parties as litigation involving reproductive rights and has required "contemporaneous mutual consent" for disposition of the preembryos[8] or as a matter to be resolved by applying a balancing test.[9] On occasion, when a fertility

[3] Fertilized ova are generally cryopreserved for a period of five to ten years. The longest reported period of preservation culminating in a successful pregnancy is thirteen years. See *infra*, note 17.

[4] Although the precise number is contested, there may be as many as one million cryopreserved preembryos in the United States. See I. Glenn Cohen and Eli Y. Adashi, "Embryo Disposition Disputes: Controversies and Case Law," *Hastings Center Report*, vol. 46, no. 5 (July, 2016), pp. 13-19.

[5] See Cal. Health & Safety Code § 125315; 13 Del. Code § 8-706; Fla. Stat. § 742.17; Mass. Gen. Law. 111L § 4; N.D. Code § 14-20-64.706; and Wash. Code § 26.26.725.

[6] Litowitz v. Litowitz, 146 Wash.2d 514 (Wash. 2002) (en banc), *amended*, 53 P.3d 516 (Wash. 2002); Roman v. Roman, 193 S.W.3d 40 (Tex. Ct. App. 2006); In re Marriage of Dahl and Angle, 222 Or. App. 572 (Oregon Court of Appeals 2008); Findley v. Lee, No. FDI-13-780539 (Cal. Sup. Ct. Jan. 11, 2016; and, together with a balancing of interests test, in Szafranski v. Dunston, No. 1-12-2975, 2013 IL App (1st) 122975 (Ill. App. Ct. June 18, 2013).

[7] York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989); Cahill v. Cahill, 757 So.2d 465 (Ala. Ct. App. 2000); and Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[8] A.Z. v. B.Z., 431 Mass. 150 (Mass. Sup. Ct. 2000); J.B. v. M.B., 170 N.J. 9 (N.J. 2001); In re the Marriage of Witten, 672 N.W.2d 678 (Iowa 2003).

[9] See Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Reber v. Reiss, 42 A.3d 1131 (Penn. Super. Ct. 2012). See also Cahill v. Cahill, 757 So.2d 465 (Ala. Ct. App. 2000); and Szafranski v. Dunston, No. 1-12-2975, 2013 IL App (1st) 122975 (Ill. App. Ct. June 18, 2013).

clinic is involved, contract law has been invoked in support of the rights of the clinic.[10]

II. DIVERSE JEWISH LAW PERSPECTIVES

1. R. Saul Israeli

A Jewish law perspective with regard to the issue of disposition of fertilized ova upon breakdown of a marriage was first advanced some years ago by R. Saul Israeli, *Havvot Binyamin*, III, no. 108, secs. 2–3. Rabbi Israeli treats the agreement between the couple and the fertility clinic as a contract that also serves to establish a partnership between the husband and wife in the fertilized ova. Ordinarily such an agreement might be nullified only upon consent of the parties. Nevertheless, contends Rabbi Israeli, since the parties did not contemplate a breakdown of the marriage and, assuredly, would not have entered into the agreement had they envisioned such a contingency, that supervening event serves to nullify the partnership agreement.

2. R. Abraham Sherman and R. Shlomoh Dichovsky's Dissent

a) Implantation Subsequent to Termination of the Marriage

Later, a case involving a breakdown of a marriage subsequent to cryopreservation of fertilized ova was brought before an Israeli rabbinical court. The wife insisted upon implantation and was prepared to assume full financial responsibility for child support. The husband sought to prevent implantation, arguing that it should not be carried out without his consent. The rabbinical district court issued an injunction preventing implantation and that order was upheld by the Supreme Rabbinic Court of Appeals by a two-one majority. The two rabbinic judges in the majority each wrote a separate decision based on different considerations. Those opinions were published in *Tehumin*, XXII (1962).

The principal and most thorough opinion was authored by R. Abraham Sherman, *Tehumin*, XXII, 392–403. Rabbi Sherman places a somewhat different face upon the matter than did Rabbi Israeli, but with the same practical effect. Rabbi Sherman contends that the agreement must be construed as a contract for the gestation of a child to be reared within the marital relationship, not for the gestation of a child to be raised either by a single mother or by a mother and a stepfather. Since the subsequent

[10] York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989).

divorce of the couple renders fulfillment of the implied condition impossible, concludes Rabbi Sherman, the agreement is nullified and hence the wife cannot unilaterally demand implantation.

Rabbi Sherman recognizes that Rabbi Israeli's earlier depiction of the creation of a partnership interest in the fetus is inaccurate. Neither parent enjoys a property interest in the fetus and hence those interests cannot be conjoined in a partnership. The absence of a proprietary interest in the fetus was earlier enunciated by R. Levi Yitzchak Halperin, *Teshuvot Ma'aseh Hoshev*, III, no. 2. Rabbi Sherman nevertheless asserts that the parties do have a property interest in their respective gametes. Indeed, an unnamed member of the rabbinical district court had earlier written that, although a person does not have a proprietary interest in his life or body, he or she does have such an interest in his or her hair and in tissue severed from the body as well.[11] If so, it would follow that the parties should have the capacity to cede ownership of sperm and ova to the partnership that they have created. However, argued the rabbinic judge, the parties had no intention of creating a partnership in sperm or ova; rather, they intended to establish a partnership in an entirely different entity, *viz.*, the preembryo—and that they cannot do because a fertilized ovum or preembryo is not a mere glob of tissue but a new entity in which neither party enjoys a property interest.

Rabbi Sherman cites his earlier announced view, published in *Tehumin*, XX (5660), 353–362, to the effect that a person has no property interest in his body that would authorize him to wound, maim or destroy his body, or even to engage in an act of self-mortification, but that, nevertheless, a person does have a limited property right in the tissue of his body for positive purposes and that such interest can be transferred in return for payment. Accordingly, he argues, the parties have the capacity to create a partnership in which ownership of sperm and ova are vested solely for the purpose of procreation. However, under the circumstances of the case presented to the Rabbinical Supreme Court, argues Rabbi Sherman, the gametes can be used only in the context of the marital relationship since such was the premise upon which the partnership was founded.

Rabbi Sherman's position was challenged in a dissenting opinion authored by R. Shlomoh Dichovsky, *Tehumin*, XXII, 406, and in this writer's opinion, correctly so. Whatever property rights a person might possibly have in his gametes are extinguished upon transformation of those gametes into a zygote. A person certainly has no property interest in a donated kidney or other organ—including blood—that has become part of the body of a recipient. No person enjoys a property interest either in his

[11] See *Tehumin*, XXII, 394–95.

body or in the body of another.[12] A fertilized ovum is a new entity, a nascent human being that cannot be the subject of conventional property interests. Moreover, even though a person may have the right to demand payment for acquiescence in permitting a quantity of his or her blood to be drawn, for making his sperm available, or for cooperation in aspiration of ova, such compensation does not constitute payment in return for the transfer of a property interest; in such contexts compensation is legitimate only in the guise of remuneration for personal services, discomfort or inconvenience. Viewed in that light, once a preembryo has been created, no one can claim a property interest or otherwise assert a personal right to jurisdiction over, and control of, the nascent life.

Nevertheless, in formulating his opinion, Rabbi Sherman did not regard adjudication of that issue as the sole dispositive consideration. Quite apart from the issue of the wife's proprietary interest, Rabbi Sherman declined to suspend the injunction against the wife issued by the rabbinical district court for two other reasons:

(i) Rabbi Sherman regards implantation under such circumstances to be *contra* the best interests of the child. Much as a *bet din* would have regarded non-existence as preferable to a life burdened by a serious physical or developmental impairment[13] Rabbi Sherman similarly regards non-existence as preferable to being raised in a one-parent family or with a step-parent.

Elsewhere, this writer has expanded upon the notion that man does not have the right to expose the unborn to unknown risks in generating life through experimental intervention in the natural order.[14] Rabbi Sherman appears to have regarded the burden of being raised by a single parent or by a natural parent together with a step-parent as posing a potential burden of similar magnitude and accordingly used its injunctive power to prevent artificial assistance in causing the child to be born.[15]

[12] See *Teshuvot Rivash*, no. 484; *Shulhan Arukh ha-Rav*, V, *Hilkhot Nizkei Guf va-Nefesh*, sec. 4. See R. Shlomoh Zevin, "Mishpat Shylock lefi ha-Halakhah," *Le-Or ha-Halakhah* (2nd ed.) (Tel Aviv, 5717), 310-336; *idem*, *Halakhah u-Refu'ah*, ed. R. Moshe Hershler, II (Jerusalem, 5741), 93-100. Cf., *Minhat Himmukh*, no. 48, sec. 2; *Turei Even*, *Megillah* 27a; Cf., R. Shiloh Rafael, *Torah she-be-al Pah*, XXXII (5752), 77-80; reprinted in *Mishkan Shiloh* (Jerusalem, 5756), pp. 214-221.

[13] "Mitochondrial DNA Replacement: How Many Mothers?," *Tradition*, vol. 48, no. 4 (Winter, 2015), pp. 71–76.

[14] *Ibid*., p. 76.

[15] Cf., Litowitz v. Litowitz, 146 Wash.2d 514, 520–21 (Wash. 2002) (*en banc*):

> This court makes the following decision awarding the preembryos to father in the best interest of the child. If this child is brought into the world here in Tacoma or Federal Way, Washington the alternatives are not in the child's best interest. In the first alternative the child would be a child of a single parent.

There is no gainsaying the view that a traditional family is the optimal milieu for raising a child. However, it must be recognized that every life carries with itself burdens, both physical and psychological, both potential and actual. The risk of such burdens is normal, natural and inherent in procreation. Thus, even known genetic risks do not serve as a warrant for a sterile marriage.[16] Since natural procreation is a duty, it must be the case that only the risk of an inordinate or unnatural burden may not be placed upon the as yet unborn life. It is far from clear that the burden associated with being raised without two biological parents—albeit identified by Rabbi Sherman as a burden—is of that nature. Thus it is not surprising that Rabbi Dichovsky, *Tehumin*, XXII, 407, peremptorily dismisses the consideration that being reared by a non-biological parent or parents is an inordinate burden to which the unborn may not be subjected.

Moreover, refraining from generation of a life is quite different from denying development to an already generated life. Arguably, the certainty of imposition of any inordinate burden upon a yet-to-be-born child may augur against conceiving such a child. There can be no affirmative obligation to the not yet conceived to bestow life upon it; however, once fertilization has occurred, a life is already in existence. That life certainly may not be terminated and, arguably, such life is also the object of an obligation of rescue. It may well be the case that no particular woman is obligated to assume the emotional and physical burden, as well as the risk to her health and life, entailed by implantation of a fetus in her uterus because assumption of so onerous a burden is not mandated. However, there can be no moral impediment to implantation arising of an already conceived fetus because the neonate may be afflicted with a handicap, just as no moral consideration would mitigate the nobleness of assisting in the development of a handicapped child.[17]

> That is not in the best interest of a child that could have an opportunity to be brought up by two parents. In the second alternative, the child may have a life of turmoil as the child of divorced parents. Also, both parties here are old enough to be the grandparents of any child, and that is not an ideal circumstance. The court awards the preembryos to Father with orders to use his best efforts for adoption to a two-parent, husband and wife, family. . . .

Unlike other U.S. courts, the trial court in *Litowitz* deemed it appropriate to employ a best interest standard in determining disposition of preembryos. The Supreme Court of Washington reversed that decision and ruled that the contract between the parties should govern.

[16] See R. Moshe Feinstein, *Iggerot Mosheh*, *Even ha-Ezer*, I, no. 62.

[17] Nor is indefinite preservation of the fertilized ovum in a state of suspended animation an acceptable option since the frozen zygote does not remain viable indefinitely. See "Longest frozen embryo baby born," BBC News (July 6, 2005), http://news.bbc.co.uk/2/hi/health/4655035.stm.

(ii) R. Eliezer Waldenberg, *Ziz Eli'ezer*, XV, no. 45, asserts that concern for the possibility of substitution of the fertilized ovum of another woman and the subsequent confusion of genealogical identity is sufficient reason to abjure IVF entirely. Rabbi Sherman entertains the view that such consideration, in and of itself, is sufficient grounds to deny the wife's demand for implantation.

In principle, the concern voiced by *Ziz Eli'ezer* with regard to substitution of zygotes may well be cogent. However, DNA can readily be employed to confirm that substitution has not occurred. Putting aside the question of whether DNA evidence is to be regarded as an acceptable form of circumstantial evidence for halakhic matters that otherwise require eyewitness testimony, the reliability of properly performed DNA testing for matters not governed by halakhic rules of evidence is not subject to question. Moreover, the *post factum* ease of establishing that substitution has occurred and the onerous legal consequences thereof serve to thwart any willful attempt at substitution. Furthermore, consistent with that concern, the *bet din* might have ruled that the woman is entitled to recover the frozen ova for purposes of implantation only on the condition that measures be taken to satisfy the *bet din* that any possibility of substitution has been precluded. That end might be achieved by means of rabbinic supervision of the transfer procedure or by means of other safeguards stipulated by the *bet din*.[18]

b) Implantation in Face of Spousal Objection

Dicta in the decision of the Supreme Rabbinical Court also have a bearing upon a question that was not raised and hence was not directly addressed in its decision. Marital obligations are limited to natural procreation. There is no obligation incumbent upon either marriage partner to participate in IVF. However, suppose that the parties agree to an IVF procedure and cooperate in procurement of semen and ova but one or the other of the spouses has a change of heart before implantation has actually occurred. Does either husband or wife have the right to veto implantation? It is highly questionable that the wife's marital obligations include assumption of the inconvenience, pain and risk of the implantation procedure; her obligations are limited to pregnancy

[18] In a concurring opinion rejecting the wife's appeal, Rabbi Shlomoh Ben Shimon asserts that the wife has no rights with regard to an unimplanted zygote. Rabbi Ben Shimon also advances other halakhically grounded but uncompelling considerations that augur against encouraging the husband to accede to his former wife's wishes *ex gratia*. See *Tehumin*, XXII, 404–407.

arising from natural intercourse.[19] But does the husband, whose role after ejaculation is entirely passive, have the right to prevent implantation or, for that matter, to prevent fertilization of his wife's ova in the laboratory?

Rabbi Israeli, *Havvot Binyamin*, III, in an addendum to no. 108, notes that the Gemara, *Ketubot* 64a, declares that the wife of an infertile man has the right to compel divorce on the grounds that she is in need of "a staff for her hand and a spade for her grave," i.e., a son to support her in her declining years and to provide for her burial. Halakhic recognition of such a claim as sufficient to compel a divorce, argues Rabbi Israeli, indicates that providing a wife with a son is inherent in the marital obligations assumed by a husband *vis-à-vis* his wife. If so, it should follow that the wife may assert a claim for implantation of an already fertilized zygote or insemination with her husband's ejaculated sperm as a means of compelling fulfillment of a husband's marital obligation.

However, without citing Rabbi Israeli, Rabbi Sherman, *Tehumin*, XXII, 396–98, counters that argument in asserting that a wife may demand dissolution of an infertile marriage, not because the husband has failed in his duty to provide her with a son, but because procreation is integral to the marital relationship and is the reason for its inception. Rabbi Dichovsky, *Tehumin*, XXII, 406, insists that a mutual and reciprocal obligation to produce children is an intrinsic marital duty incumbent upon the spouses.

The question of whether a husband has a duty to provide his wife with progeny comparable to his duty of support and maintenance, conjugal gratification, etc., and the wife's claim to a divorce if the marriage proves to be barren is rooted in the husband's failure to fulfill a fundamental marital obligation, or whether, if the marriage is without issue, the wife enjoys a claim for divorce that is not predicated upon the husband's failure to fulfill a marital duty is intriguing but that question is essentially irrelevant to the present discussion. An obligation to provide one's wife with a son does not survive termination of the marriage; hence such a duty could not compel acquiescence to implantation of a zygote subsequent to divorce. If the marriage is still intact, regardless of whether or not there is a duty incumbent upon the husband, the wife may demand implantation or, in the alternative, a divorce.

[19] See, for example, R. Shlomoh Zalman Auerbach, *No'am*, I (Jerusalem, 5718), 158 regarding artificial implantation. See also R. Levi Yitzhak Halperin, *Teshuvot Ma'aseh Hoshev*, III, no. 2, sec. 5 cited later in the text.

3. R. Levi Yitzchak Halperin

R. Levi Yitzchak Halperin, *Teshuvot Ma'aseh Hoshev*, III, no. 2, sec. 5, adopts yet another view with regard to disposition of fertilized ova. Rabbi Halperin recognizes that the husband is the sole proprietor of a fetus that is within his wife's womb. However, argues Rabbi Halperin, since the wife has no obligation to allow her ova to be aspirated, she may veto aspiration for purposes of IVF and subsequent transfer of the fertilized ovum. Hence, as a condition of agreement, the wife may assert an equal claim to preembryos fertilized in vitro. Rabbi Halperin apparently assumes that such a condition is implied even when not explicitly expressed. Accordingly, consent of both parties must be obtained for use of preembryos.

If Rabbi Halperin is correct, it might be argued that, since a woman is under no duty to undergo implantation by virtue of her marital responsibilities, the husband has no rights with regard to the fetus. If so, it would follow that the wife may also claim tort damages in instances of wrongful death of the fetus conceived by means of IVF. Also, if Rabbi Halperin is correct, the wife should have a similar claim with regard to any fetus conceived by artificial insemination by means of her husband's sperm. A wife's marital obligations are limited to normal intercourse; she is under no obligation to submit to artificial insemination. Since the wife's consent is required, the identical argument might be made in support of her claim to share in compensation for destruction of a fetus conceived by means of artificial insemination even if the husband's sperm is utilized for that purpose.

Moreover, the right described by Rabbi Halperin is not in the nature of a property interest, but a claim born of a contract designed to induce consent. To be enforceable, a contractual obligation of that nature would have to be executed before aspiration of the ova takes place or before transfer of the preembryo to her womb. Such a contract would necessarily be in the form of a contract between the husband and the wife drafted in a halakhically binding manner.

III. A DIFFERING ANALYSIS

In this writer's view, in instances of dispute regarding the disposition of ova, the fertilized ova should be made available for implantation for reasons more compelling than those heretofore presented. Those considerations, based upon principles of Jewish law, although not presently reflected in controlling case law, might readily be adopted by American courts as well.

1. A Jewish Law Perspective

In order to formulate the position of Jewish law with regard to disposition of fertilized ova, the halakhic status of the fetus must be examined. There is no basis upon which to distinguish between fertilization *in utero* and fertilization e*x utero* for any halakhic purpose.[20] A superficial reading of Exodus 21:22, "And if men strive together and they batter a pregnant woman and her children emerge but there is no misfortune [to her], he shall surely be punished as the husband shall place upon him and he shall pay as ordered by the judges," certainly gives the impression that a husband enjoys a property interest in the fetus carried by his wife and is entitled to recover tort damages for its loss.

The consensus of halakhic opinion is that even conception *sine concubito* gives rise to a paternal-filial relationship.[21] According to the minority view that maintains that a halakhically recognized paternal relationship arises only as a result of natural intercourse, there is no reason to assume that the father has a claim to damages if the fetus is conceived by means of an IVF procedure. No source or halakhic argument is adduced by R. Saul Israeli in support of his doubt with regard to this point as expressed in his *Havvot Binyamin*, III, no. 108, sec. 1:3.

Yet Jewish law certainly does not recognize the fetus as property whose harm or destruction gives rise to any form of tort liability other than as stipulated in Exodus 21:22. Liability is limited to loss resulting from miscarriage of the fetus attributable to "harm caused by a person" (*adam ha-mazik*), i.e., a battery. There is no comparable liability if the miscarriage is caused by a person's animal, even if the misadventure is foreseeable and attributable to negligence on the part of the animal's master; nor is there liability if the miscarriage is occasioned by the fall of the woman into a pit unlawfully excavated in a public area. Those ostensibly contradictory provisions give rise to an analytic query: is recovery for miscarriage of a fetus as the result of battery in the nature of a penalty or fine, as might seem apparent upon a literal meaning of the verse "and he shall surely be *punished*" (*anosh ye'anesh*),[22] or are the damages actually compensation for loss of a property interest with recovery limited to a

[20] See this writer's *Bioethical Dilemmas*, II (Southfield, Michigan, 2006), 218-223.
[21] See this writer's *Bioethical Dilemmas*, I (Hoboken, New Jersey, 1998), 225-227.
[22] Ramban, *Commentary on the Bible*, Exodus 21:22 and *Targum Yonatan*, *ad locum*, describe the payment as a fine. The Hebrew phrase employed, "*anosh ye'anesh*," unlike the more conventional phrase "*shalem yeshalem*" used elsewhere in the Pentateuch in connection with tort damages, has the flavor of a punishment.

particular form of tort, *viz.*, battery, to the exclusion of other forms of tort?[23]

Resolution of that question hinges upon analysis of a talmudic discussion recorded in *Bava Kamma* 49a. The Mishnah, *Bava Kamma* 49a, states that, if the pregnant victim of a battery is an emancipated slave or a proselyte, the tortfeasor bears no liability for causing the death of her fetus. The Gemara records a controversy between two *Amora'im*:

> Rabbah said: The rule [with regard to the wife of a proselyte] was taught only with regard to a battery that occurred during the lifetime of the proselyte husband and the proselyte subsequently died for, since he accosted her during the lifetime of the proselyte, the proselyte became entitled [to compensation for the miscarried fetus] but since the proselyte died [the tortfeasor] acquired [the right to such compensation] from the proselyte; but if he accosted her after the death of the proselyte she acquires the rights [to the fetus] and [the tortfeasor] is obligated to make compensation to her.
>
> Rabbi Hisda said: . . . Are fetuses bundles [of coins] to which one may acquire rights? Rather, if the husband is alive [at the time of the battery] the Torah vested [the right of compensation] in him; if the husband is not alive [at the time of the battery] there is no one who is [entitled to compensation].

Both *Amora'im* understood the Mishnah as dealing with a hypothetical situation involving two proselytes who have been joined in marriage. For all halakhic purposes, a convert to Judaism is regarded as "born again" with the result that, upon conversion, all prior familial relationships are extinguished. Thus, the proselyte has no halakhically recognized heir. Should the proselyte die intestate without having sired a child subsequent to his conversion, the proselyte's estate becomes *res nullius* and is available for seizure by all and sundry.

Applying those principles, Rabbah ruled that, when the husband's interest is extinguished by virtue of his death, any pecuniary interest in the fetus automatically passes to the pregnant mother since she is literally "seized of the fetus." Consequently, tort damages are payable to her. R. Hisda

[23] Some few rabbinic authorities maintain that the developing zygote is "mere water" lacking any halakhic status until forty days of gestation have elapsed. See this writer's *Contemporary Halakhic Problems*, I (New York, New York, 1977), pp. 339-347 and idem, *Bioethical Dilemmas*, II, 205-215. It must be presumed that, according to those authorities, no right can be asserted *vis-à-vis* a preembryo with the result that, to all intents and purposes, it is *res nullius*.

voices his disagreement with the exclamation "Are fetuses bundles of coins?," i.e., fetuses are not property and hence no proprietary interest can be vested in the father. Rather, the Torah merely designated the father as the recipient of damages for wrongful death of the fetus—but did not name a successor recipient. Hence, if the miscarriage occurs after death of the husband there is no liability because there is no plaintiff with standing to assert a justiciable claim.[24]

The controversy between Rabbah and R. Hisda seems to be precisely with regard to the question of whether the husband's right to claim damages for the wrongful death of the fetus he has sired is in the nature of restitution for loss of a property interest or whether the husband is simply the statutory beneficiary of an assessed penalty.[25] Even if the former, there is no basis for assuming that the father's proprietary interest gives him license to destroy a fetus or an embryo;[26] nor is there reason to assume

[24] That controversy is reflected in the rulings of the medieval codifiers. Rambam, *Hilkhot Hovel u-Mazik*, 4:2, rules in accordance with Rabbah while Ra'avad, in a gloss *ad locum*, and Rosh, *Bava Kamma* 5:5, accept the position of R. Hisda. Moreover, even according to Rabbah, a woman may, in some circumstances, have a property interest in a fetus but not necessarily in a preembryo. Rambam, *Hilkhot Hovel u-Mazik* 4:2, rules that, if the battery takes place after the death of the husband or subsequent to divorce of the parties, compensation is paid to the wife, not to the divorced husband or to his heirs. R. Meir Simchah of Dvinsk, *Or Same'ah*, *ad locum*, explains that Rambam maintains that the property interest is actually vested in the wife, not in the husband, but, nevertheless, if the battery occurs during the course of the marriage the husband is entitled to claim compensation for loss of the fetus as one of the prerogatives flowing from the marriage, just as he is entitled to claim his wife's handiwork or earnings. Rabbi Shlomoh Ben-Shimon, *Tehumin*, XXII, 410-22, argues that the wife's property interest in the fetus, as posited by *Or Sameah*'s thesis, is presumably rooted in the consideration that the developing fetus is an integral part of her body. If so, there are no grounds to assume that she has a similar interest in a zygote prior to implantation.

[25] The Mishnah, *Arakhin* 7a, declares that the execution of a pregnant woman sentenced to death is not to be delayed until after her child's delivery. The Gemara queries, since the fetus is integral to the persona of the mother, why is there a need for the Mishnah to record what seems to be an obvious rule? In response the Gemara declares, "I might think that since it is written 'as the husband shall place upon him' (Exodus 21:22) the fetus is the property of the husband and he should not be deprived of it; therefore, the rule must be announced." The Gemara's statement can be understood as stating either: 1) that payment for destroying the fetus is indeed not compensation for destruction of the husband's property but in the nature of a fine or penalty; or 2) that the property interest is limited and cannot be asserted in any and all circumstances. *Tosafot*, *Sotah* 26a, s.v. *me'uberet*, comment that compensation for destruction of the fetus is made to the husband but that despite the husband's pecuniary interest the Torah nevertheless demands execution without delay.

[26] Damages for the loss of the fetus are recoverable by the father even if the child is born out of wedlock but, according to the Palestinian Talmud cited by *Tosafot*, *Bava*

that, by virtue of that interest, the father is entitled to have the fetus implanted in another woman's womb.[27]

There is ample evidence that, even if a Jewish law does not regard a fetus as a person in the full sense of the term, the fetus is nevertheless regarded as a nascent human life and enjoys many of the privileges and immunities of personhood. For many authorities, the Jewish law prohibition against abortion arises from categorization of feticide as simply a non-capital form of homicide.[28] If so, the fetus may be sacrificed only to preserve the life of the mother and only if it is the fetus that is the source of danger to the mother's life and thereby acquires the status of a *rodef* or "pursuer."[29] According to other authorities, the life of the mother is given preference because the mother is a person in the full sense of the term whereas the quasi-personhood of the fetus reflects only a potential for complete personhood. Rashi, *Sanhedrin* 85b, maintains that the biblical prohibition against kidnapping and sale of a human encompasses the sale of an unborn child as well. There are conflicting talmudic opinions with regard to whether a fetus has the status of an existing being in whom title to property can be vested or whether its status is that of a merely potential, but not as yet existing, human being who cannot be seized of property.[30] There is also significant controversy with regard to whether a fetus can succeed to an estate while yet *in utero*.[31]

Of even greater relevance to the issue under discussion is the status of a fetus with regard to an obligation of rescue that can be accomplished only by performing acts that are otherwise prohibited. The Mishnah, *Yoma* 82a, dictates the manner in which a pregnant woman in distress

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Kamma 43a, s.v. *afilu*, not if the mother is a woman with whom the father could not have contracted a valid marriage. That provision is further evidence that the fetus is not property in the usual legal sense of the concept.

[27] R. Saul Israeli, *Havvot Binyamin*, III, no. 108, sec. 2 asserts that the couple has created a partnership in the fertilized ova with the result that disposal of the preembryo is governed by the conditions, both explicit and presumed, of their agreement. However, recognition that any possible property interest in a fetus is limited to recovery of tort damages renders that thesis untenable. Even were a person to enjoy a proprietary interest in his body, or in tissue separated from his body, no comparable proprietary interest exists with regard to embryos.

[28] See sources cited by *Contemporary Halakhic Problems*, I, 328-329.

[29] See Rambam, *Hilkhot Rozeah* 1:9. See also *Contemporary Halakhic Problems*, I, 347-354.

[30] See *Bava Batra* 142a. *Shulhan Arukh*, *Hoshen Mishpat* 210:1, rules that a fetus cannot acquire property.

[31] See *Tur Shulhan Arukh*, *Hoshen Mishpat* 210. For the implications of that controversy see *Bet Yosef*, *ad locum*; *Netivot ha-Mishpat* 2:10; and sources cited by R. Ya'akov Yeshaya Blau, *Pithei Hoshen*, X, chap. 1, note 24.

because she craves food is permitted to partake of food on *Yom Kippur*. The concern is that continued abstinence from food may lead to a spontaneous abortion. Biblical prohibitions, including restrictions attendant upon *Yom Kippur*, the Sabbath and Holy Days, are suspended when human life is threatened. Miscarriage, and indeed childbirth as well, are classified by statute as potential threats to the life of the mother. Miscarriage in the late stage of pregnancy, i.e., premature birth of a viable neonate, is accompanied with an enhanced risk to the life of the child; in earlier stages of pregnancy the life of the fetus is perforce extinguished.

The question is whether the danger for which breaking the fast is warranted is the danger to the life of the mother posed by miscarriage of her fetus or whether it is the danger to the fetus itself that justifies the required intervention. The answer to that question is a matter of dispute among medieval authorities. Ramban, in his *Torat ha-Adam*,[32] maintains that the concern is for the life of the mother. Timely parturition is normal and natural and hence a risk that is assumed with equanimity. Miscarriage is neither normal nor timely in occurrence. Accordingly, spontaneous abortion is to be prevented even if transgression of biblical law is entailed because of the danger it poses to the mother, even though similar danger associated with subsequent childbirth will not be avoided thereby. However, *Ba'al Halakhot Gedolot*, *Hilkhot Yom ha-Kippurim*, maintains that it is concern for preservation of the life of the fetus that is the governing consideration.[33]

Jewish law posits an obligation of rescue rooted in the biblical commandment "you shall not stand idly by the blood of your fellow" (Leviticus 19:16). Central to the controversy between the earlier-cited medieval authorities is the question of whether the obligation of rescue with regard to one's fellow encompasses an obligation to rescue a fetus. That question is entirely separate from the prohibition against feticide. A prohibition against homicide does not *ipso facto* entail an obligation of rescue. Common law proscribes homicide but does not mandate rescue. Conversely, however, an obligation of rescue surely precludes license to terminate life with impunity.[34] In the case of the distraught woman, her agitation, unless quelled, may result in expulsion of the fetus. Such death would result

[32] *Kol Kitvei ha-Ramban*, ed. R. Bernard Chavel (Jerusalem, 5724), II, 29.

[33] Rashi, *Yoma* 82a, comments that both lives are endangered. Rabbenu Nissim and Rosh, *ad locum*, remark that danger to the fetus necessarily entails danger to the mother and *vice versa*. Cf., the interesting comments of R. Israel Joshua Trunk, author of *Teshuvot Yeshu'ot Malko*, cited by R. Iser Yehudah Unterman, *Shevet me-Yehudah* (Jerusalem, 5715), p. 11.

[34] See R. Ya'ir Chaim Bachrach, *Teshuvot Havvot Ya'ir*, no. 31.

from natural causes, not from an overt act on the part of the pregnant woman. Thus, partaking of food by the pregnant woman would constitute an act of rescue *vis-à-vis* her fetus. Although formulated in a different guise, the question of whether a woman is obligated to provide nutrition and hydration for her gestating fetus is reducible to the issue of whether she is under obligation to rescue her endangered fetus. The answer turns directly upon whether the fetus is a "person" included within the ambit of the commandment "And you shall not stand idly by the blood of your fellow."[35]

The obligation of rescue entails preserving a physical and physiological status quo. An interesting theoretical question is whether there is a concomitant obligation, not simply to preserve the developmental status quo of a child, but also to advance the child's physiological development and maturation. Were it possible to do so, might a child be preserved in a state of arrested development? Presumably there is an obligation to promote a child's development, but it would appear to be an obligation akin to an obligation of charity rather than an obligation not to stand idly by the blood of one's fellow. The obligation in charity would be based upon the notion that development and maturation is a need of the child and that charity requires providing "sufficient for his need in that which he lacks" (Deuteronomy 15:8). Alternatively, the obligation may be encompassed within the obligation "And you shall love your brother as yourself" (Leviticus 19:18).

A similar question arises with regard to a fetus. Suppose that at some point in gestation the pregnant mother could embark upon a dietary regimen that would sustain her and her fetus but would not allow the fetus to continue to develop in accordance with the natural gestational trajectory. As a result, the fetus would remain *in utero* in that arrested state indefinitely. Is the mother obligated to provide the wherewithal required for continued development of her fetus? Granted that the mother may not imbibe substances that will cause harm to the fetus, is she obligated to ingest vitamins or medicaments that will assure the physical and mental well-being of her fetus?

Assuming, *arguendo*, that there is no normative obligation to do so, it is nevertheless certain that such conduct is highly laudable and indeed is to be anticipated. Implantation of an already existing preembryo in a

[35] *Ba'al Halkhot Gedolot* justifies violation of Sabbath restrictions in order to save fetal life on the basis of the principle "Desecrate a single Sabbath on his behalf so that he may observe many Sabbaths" (*Shabbat* 151b). Invocation of that principle implies recognition of an existing obligation of rescue and is employed to justify Sabbath violation in fulfilling that obligation.

uterus is analogous to providing hydration and nutrition to promote fetal development through the various stages of gestation. Thus the fetus has a right to be the recipient of whatever nurturing care others may choose to lavish upon it. At the very minimum that right is analogous to the right to be the beneficiary of charitable largess. As has already been stated, the biological parents enjoy no countervailing rights that may be asserted; accordingly, there are no rights to be balanced against those of the fetus.

Implantation of cryopreserved preembryos in the womb of a woman other than the ovum donor is analogous to adoption of a child by a stranger after parental rights have been surrendered. Parents have a natural right to rear—and to gestate—their children. Those "rights" are more akin to *obligationes naturales* than to conventional rights. Jewish law categorizes such a right as a *zekhut*, i.e., a privilege to fulfill a duty, rather than a right to be asserted for personal advantage or gratification.[36] It is the child who has the "right" to be raised; the parent is accorded the privilege of satisfying that right. A parent has a "right" to custody precisely because the parent's custody is instrumentally necessary in order to fulfill a duty *vis-à-vis* the child. It is for that reason that Jewish law refuses to recognize an irrevocable surrender of custody.[37] Rights may be renounced; duties to others cannot be unilaterally abandoned. In application, that stance is analogous to the notion of the unenforceability of a contract regarding child custody because it is deemed to be in violation of public policy.

When joint custody is not feasible, either parent may assert a right of custody. When both parents seek custody, the *bet din* will make a custody award on the basis of established principles deemed optimal for advancing the best interests of the child. When neither parent is able to assume custody or neither is found fit to assume custody, the *bet din* as "the father of orphans"—the *parens patriae*—must appoint a guardian, i.e., for all intents and purposes, a foster or adoptive parent.

When neither parent wishes "custody" of the fertilized ovum, the parents have, in effect, abdicated parental responsibility. It would then stand to reason that in such a situation the *bet din* should permit the "adoption" of the preembryo by a suitable couple. Since the natural parents have "abandoned" their preembryo, they have no further rights or privileges

[36] See R. Samuel di Medina, *Teshuvot Maharashdam*, *Even ha-Ezer*, no. 123 and *Piskei Din ha-Rabbaniyim*, I, 75.

[37] See R. Moses di-Trani, *Teshuvot Mabit*, II, no. 62, cited by *Be'er Heitev*, *Even ha-Ezer* 82:6, and *Piskei Din ha-Rabbaniyim* II, 300. See also *Piskei Din ha-Rabbaniyim*, XI, 172.

to assert, just as parents who surrender parental rights are in no position to assert a "right" to veto adoption of their biological child.[38]

2. Applicability in U.S. Jurisprudence

This stance is antithetical to the premises upon which the decisions of the U.S. Supreme Court in *Roe v. Wade*[39] and *Planned Parenthood v. Casey*[40] rest, but not necessarily with their outcome. The U.S. Supreme Court recognized a privacy interest that enables a woman to assert an unqualified right to seek an abortion during the first trimester of pregnancy. During the second trimester, according to *Roe v. Wade*, or, according to *Casey*, until the fetus reaches the state of viability outside the womb, a woman's right to privacy is not absolute but is tempered by the state's interests in safeguarding maternal health. Only in the final stage of gestation is the fetus regarded as having rights that must be accorded respect, albeit those rights are subordinate to the mother's right to life and health. Earlier, the fetus is regarded as a non-person and hence devoid of rights. Accordingly, the U.S. Supreme Court has ruled that during early stages of gestation, the fetus may be destroyed with impunity.

However, whether the fetus is or is not a person, it is undeniably a potential human being. Assuming, *arguendo*, that the fetus has no claim to respect even as a potential life, it is nevertheless well-settled that the state has an interest in the life of each of its citizens. In *Quinlan*,[41] the New Jersey Supreme Court adopted a balancing test in announcing that, as life ebbs, the State's interest in preservation of that life also gradually recedes to the point that the state's interest becomes subordinate to the patient's right to bodily integrity and freedom from pain. A court might well find that the state has an interest not only in the life of its nationals but also in the life of every nascent human being having the potential to become one of its nationals. A court—unlike a *bet din*—might also assert that the mother has a countervailing privacy and/or liberty interest giving her the right to terminate the pregnancy. Applying a balancing test similar to that employed in *Quinlan*, a court might then conclude that during the early stages of pregnancy, when actual life is remote, the mother's rights

[38] This is essentially the position adopted by the trial court in *Kass v. Kass*, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995). That decision was reversed by the New York Court of Appeals. Instead, the Court of Appeals adopted a contractual approach. See Kass v. Kass, 91 N.Y.2d 554 (1998).

[39] Roe v. Wade, 410 U.S. 113 (1973).

[40] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[41] In the Matter of Karen Quinlan, 355 A.2d 647 (N.J. 1996).

are sufficiently strong to overcome the state's interest in the potential life inherent in the nascent fetus. As gestation progresses and the fetus comes closer to term, the state's interest in the fetus grows in a manner commensurate with the fetus' approaching vitality. When the potential life of the fetus comes closer to actualization the state's interest may be accorded priority over the mother's right of privacy—as is the currently accepted legal doctrine.

According recognition to the state's interest in a conceptus in even the early stages of gestation forces the balancing of the right of the state against the right of the mother. A woman's rights to privacy and liberty would serve to bar state action designed to compel her to become pregnant if for no other reason than because the state cannot have an interest in that which does not exist. But upon fertilization of the ovum a potential human being comes into existence and with it the state's interest in its protection and welfare. That interest might yet be regarded as subordinate to the woman's privacy and liberty interests. But the woman's right to assert a privacy interest and a right to bodily integrity against the state's interest might be recognized only to the extent that denial of her right to privacy and autonomy with regard to her body would compel the woman to incubate a fetus against her will. Applying a balancing test, such a gross invasion of privacy and autonomy need not necessarily be subordinated to the state's interest in the potential life of the fetus. Nevertheless, it might be acknowledged that the state does have a cognizable interest in the fetus as a potential person and hence a right to its preservation. That right need not be recognized as superior to a pregnant woman's privacy and liberty interests in not carrying her fetus to term. The fetus as a nonperson may not have intrinsic rights but that assumption does not logically forestall the state's assertion of its own interest in preservation of the fetus. The state's interest in preserving the life of the fetus may well be regarded as superior to a woman's interest in non-procreation as distinct from her privacy and liberty interests in not sustaining an unwanted pregnancy. A woman's interest in not continuing to bear the burdens of an unwanted pregnancy are certainly greater than her privacy interest in simply not becoming a mother. However, once the fetus is conceived and able to achieve viability without further need of assistance on the part of the fetus' biological mother, the fetus' right to viability and/or the state's interest in its preservation may well be regarded as superior to a woman's right to non-procreation.[42] That right, standing alone—as distinct from the right to refuse the ongoing burdens of pregnancy—might well be regarded as subordinate to the state's interest in the preservation of even nascent life.

[42] See, for example, No. 180, 1990 WL 130807 (Tenn. App. Sept. 13, 1990).

Whether expressed as an interest of the fetus or as the interest of the state, the net effect, *ceteris paribus*, would be an enforceable interest in preservation of the fetus.

Furthermore, even assuming that a nascent fetus' right to be born is subordinate to a woman's right not to procreate, the father's affirmative right to procreate coupled with the state's interest in actualization of potential life should outweigh the wife's right not to procreate. Standing alone, the father's affirmative right to procreate is readily seen as subordinate to the wife's right not to procreate but, when coupled with the state's interest in actualization of potential life, those two interests may be seen as outweighing the woman's right not to procreate. As already noted, this balancing test need not necessarily be predicated upon a view of the fetus as a nascent life or as a potential human being and hence endowed with independent rights of its own, but upon recognition of the state's interest in potential life. The balancing, then, is the balancing of the state's interest, coupled with the father's right to procreate, against the mother's right to privacy. To be sure, given the contemporary cultural and political milieu, such a doctrine is unlikely to be adopted by American courts but it is not fundamentally inconsistent with accepted constitutional principles.

IV. SUPPORT OF CHILDREN BORN OF POST-DIVORCE IMPLANTATION

As do other legal systems, Jewish law imposes a duty of child support upon the father. The nature of that obligation depends upon the age of the child. The original rabbinic edict established an obligation of support until age six and provided that any effective means might be employed in securing the father's compliance. At a later time, an edict promulgated by a rabbinic synod convened in the Galilean city of Usha sometime in the middle of the second century C.E. extended the father's obligation until the child reaches the age of halakhic maturity.[43] Fulfillment of the latter obligation cannot be enforced by means of duress. Nevertheless, the obligation may be enforced by employment of social pressure and even public humiliation. In addition, if the father is a person of means (*amid*), he must provide for the support of his children on the basis of a quite independent obligation of charity. The obligation of charity extends even beyond the age of halakhic maturity until such time as the child can be expected

[43] See *Shulhan Arukh*, *Even ha-Ezer* 71:1.

to be self-supporting. Obligations of charity may be enforced by seizure of property.

The obligation of child support is attendant upon a paternal–filial relationship. The issue with regard to children born of in vitro fertilization, and hence with regard to progeny born of egg donation, is whether a halakhically recognized paternal–filial relationship arises only with regard to progeny sired by natural intercourse or whether the halakhic relationship coincides with genealogical realia and hence exists as well in instances of "bathhouse pregnancy" (described in *Hagigah* 14b). Although there are opposing opinions, the majority of rabbinic scholars maintain that natural intercourse is not a necessary condition of a paternal–filial relationship.[44] If so, it should follow that the semen donor is liable for child support in the same manner as he would be responsible for the support of a naturally-born child. Since the obligation of child support survives dissolution of the marriage the obligation of child support falls upon the semen donor regardless of who is awarded custody of the frozen embryos.

However, *Helkat Mehokek*, *Even ha-Ezer* 71:1, cites the comments of Ran, *Ketubot* 65b, from which he infers that, according to Ran, the obligation of child support is not an independent obligation incurred *vis-à-vis* the child but is subsumed within the husband's obligation of support and maintenance *vis-à-vis* his wife.[45] Ran reasons that, in ordinary situations, a separate edict providing for child support would have been unnecessary. Support of children is one of the needs of a wife. Indeed, Ran's position is based upon a comment of Rashi who is cited by Ran as declaring that mother and child "are as one body." Accordingly, the husband, who is responsible for providing for his wife's needs, must provide for the children of the union as well. According to Ran, it would follow that a rabbinically-ordained obligation of child support lapses with dissolution of the marriage. The obligation to support children born of implantation of cryopreserved embryos would similarly lapse upon divorce of the couple or upon adoption of the embryo or child by an infertile couple who thereby relieve the mother of the need to support her child.

Helkat Mehokek asserts that, *Teshuvot ha-Rosh*, *klal*, 17, no. 7, who posits an obligation of support with regard to offspring of an extra-marital liaison, disagrees with Ran and maintains that the obligation of child support is entirely distinct from, and independent of, the obligation of

[44] For further discussion of that issue, see *Bioethical Dilemmas*, I, 225–229 and 251–253.

[45] Cf., however, Rosh, *Ketubot* 4:14, who records only the opinion of R. Meir of Rothenberg which is identical to that of Ran.

support and maintenance *vis-à-vis* a wife.[46] The primary difference that emerges from that dispute is the standard of child support that must be provided: a wife is entitled to be supported in the style prevalent in her own family or in accordance with the socioeconomic status of the husband, whichever is higher.[47] If child support is simply one facet of support and maintenance of a wife, the child must be supported in a similar manner. If, however, the obligation is independent of the obligation vis-à-vis the wife, there is no evidence that the rabbinic edict provided for support of children commensurate with the father's socioeconomic status. *Shulhan Arukh*, *Even ha-Ezer* 71:4, in ruling that child support is mandated even if the child is the product of an extra-marital relationship, codifies the view of Rosh.[48]

Furthermore, it is certainly arguable that, even according to the position of Ran, the father's obligation in charity is entirely separate from any statutory obligation of child support. The obligation in charity to support progeny is a particular facet of a general obligation of charity. A child must be given preference over other needy individuals because Halakhah recognizes that "charity begins at home." Such priority would seem to arise simply as a concomitant of the biological paternal–filial relationship. Hence, such an obligation should exist even with regard to children born of cryopreserved embryos regardless of whether it is the husband or the wife who is awarded custody upon dissolution of the marriage.

There are oral reports of an interesting child support case brought before the *bet din* of R. Sharaya Rosenberg of Bnei Brak. The suit involved a divorced couple. During the marriage, the husband had his sperm frozen. Subsequent to their divorce, the wife managed to obtain her ex-husband's frozen sperm. Insemination with the sperm led to the birth of a child and, in turn, to her suit for child support. Consistent with the ruling of *Shulhan Arukh*, *Even ha-Ezer* 71:4, that a man is liable for the support of children born out of wedlock, the *bet din* reportedly ruled in favor of the mother.

[46] Cf., however, the novel view of R. Moses Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, I, no. 143 and *Even ha-Ezer*, I, no. 106, who asserts that there is no controversy and that Ran would agree that an obligation of support exists even with regard to children of an extra-marital relationship. In instances of rape, *Iggerot Mosheh* regards child support as a form of tort liability resulting from battery; in instances of pregnancy resulting from consensual intercourse, *Iggerot Mosheh* regards support of any children born of the encounter as an implied condition of the woman's consent.

[47] See *Even ha-Ezer* 70:1.

[48] For a discussion of Rambam's view regarding the nature of the obligation of child support, see the note appended to *Mishneh le-Melekh*, *Hilkhot Ishut* 12:14 and *Avnei Milu'im* 71:1.

If a father's obligation is rabbinic in nature, it is highly doubtful that the remote contingency of conception of a child without knowledge and consent of the father should be regarded as encompassed within the ambit of such legislation. If, however, the duty of child support is a biblical obligation in the nature of an *obligation natural*, such an obligation would appear to flow from the relationship *per se*. The counter-argument would be that the wife must ultimately bear the obligation of child support because she forced the financial obligation upon the husband in a manner in which, in the given circumstances, must be regarded as a form of *garmi*, i.e., an actionable non-proximate cause. The essence of that contention is that, although the husband does indeed have an obligation of child support, his former wife is in no position to lodge a claim against him because she herself is subject to a counterclaim to compensate her husband for his expenditures in the form of child support that necessarily follow from her course of action undertaken against his will.

That argument, however, is not as clear-cut as it might appear. The authorities who permit ejaculation other than in the context of natural intercourse do so only because the emission is designed to enable procreation to occur.[49] If the sperm is not used for that purpose, the prior ejaculation is retroactively rendered an act of onanism, i.e., "wanton emission of seed" (*hoza'at zera le-vatalah*). If so, the woman, in undertaking insemination without her former husband's consent, is thereby preventing him from transgression. Moreover, even if duress is not warranted, it is difficult to categorize an act that results in financial expenditure growing from an act that the "victim" is duty-bound to perform as being tortious in nature.

[49] See *Bioethical Dilemmas*, I, 219–224 and 249–251.