

The Delusion of Symmetric Rights

DAPHNE BARAK-EREZ and RON SHAPIRA*

Abstract—This article takes a close look at a rhetoric strategy, often used in an attempt to preserve an appearance of neutrality in conflicts over rights. This strategy rests on the concept of symmetry, and in particular concerns symmetry between so-called ‘positive rights’ (described as the right to obtain or have an object, to engage in an activity, or to enjoy a desired state of affairs) and ‘negative rights’ (the right not to have this object, not to engage in this activity, or to prevent this state of affairs). When a positive and a negative right protect contradictory options, this strategy conveys that they are of equal standing. The article cautions against the risks entailed by this inference. The deceptive nature of symmetry is first examined in the context of procreation rights and subsequently in other contexts, including conflicts concerning freedom of expression, active euthanasia, and abortions. Our conclusion is that the explicit or implicit recourse to the argument from symmetry is a recurrent feature of rights discourse, deserving attention and cautious handling.

1. Symmetry Arguments in a Rights Discourse

Rights have traditionally been regarded as trumps over justifications for political decisions, and in particular, as overriding interests that have not been recognized as such.¹ Therefore, whenever a conflict of interests arises, the first question is whether any of these competing interests has been recognized as a legal right. This is obviously a highly debatable starting point for a normative discussion, if only because of its formal nature. Critics have consistently argued that the exclusive recognition granted to only a limited number of such rights, as well as the creative interpretation of these rights, reflect the political activity of interest groups.² Within the traditional rights discourse, however, no clear solution has emerged regarding conflicts of interests, all of which are recognized as rights (and hence enjoy the same normative status). These conflicts are the traditional domain of ‘balancing’ theories,³ which are necessarily based on value judgments

* Both authors are members of the Faculty of Law, Tel-Aviv University. We are indebted to Chaim Ganz, Aeyal Gross, Amos Shapira, and the participants of the Faculty Seminar at the Hebrew University, Faculty of Law for their valuable comments, and to Gill Yokhananoff for his research assistance.

¹ R. Dworkin, *Taking Rights Seriously* (1978) *passim*; R. Dworkin, ‘Rights as Trumps’ in Jeremy Waldron (ed.), *Theories of Rights* (1984) 153.

² Rights critique is central to critical legal studies (CLS) arguments. See, e.g. M. Tushnet, ‘An Essay on Rights’, 62 *Tex L Rev* 1361 (1984); M. Horowitz, ‘Rights’, 23 *Harv CR-LL Rev* 393 (1988); D. Kennedy, *A Critique of Adjudication* (1997) at 299–338. For representative answers, see: F. Michelman, ‘Justification and Justifiability of Law in a Contradictory World’, 28 *Nomos* 71 (1986); M. J. Radin and F. Michelman, ‘Pragmatist and Post-structuralist Critical Legal Practices’, 139 *U Pa L Rev* 1019 (1991).

³ For example, the famous precedent of *New York Times v Sullivan* 376 US 254 (1964) decided the proper balance between freedom of speech and the right to defend one’s good name.

about the relative importance of rights (either in general, or in the circumstances of particular cases). Recourse to balancing theories tends to frustrate the main purpose of resorting to a rights discourse in the first place, namely, to achieve 'neutrality' in law,⁴ which, in turn, explains the persistent popularity of theories supposedly offering neutral legal solutions.⁵

In this paper we take a close look at a rhetoric strategy that is often used in rights discourse, in an attempt to preserve an appearance of neutrality in conflicts over rights. This strategy rests on the concept of symmetry, which is also associated with harmony and equality,⁶ and may be called 'an argument from symmetry'. In particular, this argument concerns symmetry between so-called 'positive rights' (described as the right to obtain or have an object, to engage in an activity, or to enjoy a desired state of affairs) and 'negative rights' (the right not to have this object, not to engage in this activity, or to prevent this state of affairs).⁷ When a positive and a negative right protect contradictory options, it is sometimes tempting to assume a symmetry of opposites, and argue that the assumed symmetry should have normative consequences. In other words, it may be tempting to argue that rights taken to be symmetric are of equal importance, that they should therefore be legally protected to the same extent and that, consequently, the dispute should be determined 'technically' by favouring the option ostensibly protecting the 'status quo'.

The following discussion cautions against the risks entailed by the argument from symmetry. The deceptive nature of symmetry will first be examined in the context of procreation rights (in relation to both abortion and *in vitro* fertilization (IVF) procedures), an interesting arena for comparing the contrasting aspirations of prospective parents. Conclusions will then be applied to other matters that invite arguments from symmetry.

2. *The Clash of Symmetric Rights in the Realm of Procreation*

To be or not to be a parent? More than at any other time in history, adults, even if mainly those enjoying the advantages offered by relatively affluent societies, now confront this as a practical question.⁸ In most cases, this is an entirely

⁴ H. Wechsler, 'Toward Neutral Principles of Constitutional Law', 73 *Harv L Rev* 1 (1959).

⁵ See L. H. Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories', 80 *Yale Lj* 1063 (1980).

⁶ The notion of symmetry is often used as a metaphor for equality and fairness. For example, from a perspective of public choice theory, it was suggested that 'symmetrical' rights and duties entailed by a statute are evidence for a 'legislative process [that] has worked reasonably well'. See W. N. Eskridge, 'Politics Without Romance: Implications of Public Choice Theory For Statutory Interpretation', 74 *Vir L Rev* 275 at 323 (1988).

For a criticism on the notion of 'equality' itself, similar to our criticism on the application of symmetry, see P. Westin, 'The Empty Idea of Equality', 95 *Harv L Rev* 537 (1982).

⁷ To be precise, the discussed rights are 'liberties' in the Hohfeldian sense. See W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale Lj* 16 (1923).

⁸ Contraceptives and abortion procedures are notoriously inaccessible to those who most desperately need them, because of social neglect and lack of resources. Similarly, procreation techniques are more easily available to those relatively well-off. For criticism of the use of such techniques as symbols of white supremacy in the USA, see D. E. Roberts, 'The Genetic Tie', 62 *U Chi L Rev* 209 (1995).

personal matter without any legal repercussions. The law may step in, however, when individuals making the decisions are in need of outside intervention. They cannot or do not want to rely on consensual decisions to avoid or to have sex, but are interested in using contraceptives or abortion procedures, or need IVF and surrogacy procedures.

In these circumstances, the key normative question is whether the legal system is willing to recognize personal autonomy in matters of procreation. The law has to determine whether individuals should have a right to oppose state intervention in their decisions to be or not to be parents. The debate surrounding this issue raises complex moral questions, and remains open-ended.⁹ If the legal system considers parenthood a private autonomous matter, whether completely or partly,¹⁰ further dilemmas arise concerning the resolution of conflicts between the prospective parents, the possibility of abortion, or even the completion of IVF procedures that have already resulted in the creation of a pre-embryo. The preliminary question of whether to implement private autonomy in matters of procreation tends to disguise the separate, and different, nature of the questions arising from a controversy between the prospective parents. In this case, the principle of autonomy *per se* fails to mark a clear path. The two individuals involved supposedly enjoy the same degree of autonomy when determining the course of their lives, but have simply chosen two incompatible options. Whose autonomy should prevail? More specifically, what should be the law when only one of these individuals is interested in keeping the pregnancy: does the legal system treat the two conflicting sets of interests neutrally?

Many think that when the question concerns an abortion sought by the mother, the answer is relatively easy. The disproportionate physical burden that a pregnancy or, alternatively, an abortion procedure, entails for the mother, is an overwhelming factor in favour of her decision. Hence, the ideal test case for evaluating the relative importance of 'positive' and 'negative' procreation rights is a pregnancy that poses no physical demands on either of the parents. Is such a pregnancy at all possible? Because of technological advances we can now say yes when referring to the preliminary stages of an IVF procedure, before the embryo is implanted in a human womb. In these circumstances, which right should yield when one of the parents-to-be has a change of heart?¹¹

⁹ See, generally, J. Jarvis Thomson, 'A Defense of Abortion', 1 *Phil Pub Affairs* 47 (1971); M. Tooley, 'Abortion and Infanticide', 2 *Phil Pub Affairs* 37 (1972); J. Finnis, 'The Rights and Wrongs of Abortion: A Reply to Judith Jarvis Thomson', 2 *Phil Pub Affairs* 117 (1972); P. A. Roth, 'Personhood, Property Rights, and The Permissibility of Abortion', 2 *Law Phil* 163 (1983); D. H. Regan, 'Rewriting *Roe v Wade*', 77 *Michigan L Rev* 1569 (1979).

¹⁰ More or less, this is the American constitutional premise formulated in *Roe v Wade* 410 US 113 (1973) and *Planned Parenthood v Casey* 112 S Ct 2791 (1992). Indeed, liberty of procreation is a point of departure for the mainstream discussion of the challenges posed by reproductive technology. See J. A. Robertson, *Children of Choice* (1994).

¹¹ The importance of evaluating the so-called 'right to reproductive choice' in circumstances where the would-be child might survive and develop without the support of the biological mother's body was stressed by Tushnet, above n 2 at 1365-9. The IVF procedures render the hypothetical raised by Tushnet a reality. See also Roberts, above n 8 at 217-19.

3. *The Nachmani Affair*

In the following five sections of this article, we consider symmetry arguments in procreation cases in reference to a precedential case decided last year by the Israeli Supreme Court—*Nachmani v Nachmani*, in which the Supreme Court gave two contrary decisions¹² (after agreeing to exercise its power to reconsider its own judgments of exceptional importance, complexity or precedential value).¹³ A succinct description of the case follows.

Ruth and Daniel Nachmani, a married couple, decided to have a child by relying on IVF procedures and a surrogate mother because Ruth had lost her womb and could not bear children. After contending with a long series of expensive and complicated legal and medical obstacles, their efforts proved successful and the treatment ended in the fertilization of 11 ovules. At this stage, and before a surrogate mother was chosen, Daniel left home and started a new life with another woman, with whom he eventually had two children. In light of these developments in his personal life, Daniel tried to get a divorce from Ruth and objected to the surrogacy process, stressing that he was no longer interested in building a family with her. For her part, Ruth insisted on completing a process that had started years before claiming that, medically, this was probably her last and only chance to become a biological mother. In many, but not all, respects, the basic facts of the *Nachmani* case are similar to those that concerned the Tennessee Courts in the Davis affair.¹⁴ The litigants in the Davis case were also a husband and wife who had begun IVF procedures and, facing divorce, disagreed concerning their completion. In the Davis case, however, the woman abandoned her original wish to utilize the frozen embryos herself and wanted to donate them to another childless couple. The Davis case could therefore be said to involve a clash of decisions, whereas the *Nachmani* case was also concerned with the right to attain parenthood *vis-à-vis* the right (liberty) to avoid it. The *Nachmani* case was therefore a perfect example of a clash between a right presented as a ‘positive’ right and one presented as a ‘negative’ right.

Obviously, the conflict between the right to become a parent and the right not to become a parent is not the only relevant perspective in the dilemma posed by the *Nachmani* affair. Other relevant questions are, *inter alia*, the legal effect of the couple’s preliminary understanding, the importance ascribed to protecting the reliance and the expectations based on this understanding, and the legal status of embryos as arguable human beings.¹⁵ Some of these additional aspects

¹² *Nachmani v Nachmani* 49 (1) PD 485 (hereinafter the first *Nachmani* decision) and *Nachmani v Nachmani* 50 (4) PD 661 (hereinafter the second *Nachmani* decision).

¹³ Section 30 of the Basic Law: Judicature, *Laws of the State of Israel*, vol 38 at 101.

¹⁴ *Davis v Davis* 842 SW 2d 588 (1992) (hereinafter *Davis*).

¹⁵ For further discussion of other aspects of IVF procedures, see Note, ‘Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos’, 36 *Syracuse L Rev* 1021 (1985); L. B. Andrews, ‘The Legal Status of the Embryo’, 32 *Loyola L Rev* 357 (1986); Note, ‘Frozen Embryos: Moral, Social, and Legal Implications’, 59 *S Cal L Rev* 1079 (1986); J. A. Robertson, ‘Prior Agreements for Disposition of Frozen Embryos’, 51 *Ohio St Lj* 407 (1990); J. A. Robertson, ‘In the Beginning: The Legal Status of Early Embryos’, 76 *Vir L Rev* 437 (1990); Note, ‘The Davis Dilemma: How to Prevent Battles Over Frozen Preembryos’, 41 *Case W Res L Rev* 543 (1991). Some of the latest articles that discuss these issues address the *Davis* affair. See also Robertson, above n 10 at 113–14.

were indeed discussed in the various proceedings held on this matter. In any event, the argument from symmetry, on which we focus, played a major role in the argumentation of both parties, as well as in the opinions of several Israeli Supreme Court justices.

4. *The First Nachmani Decision*

The *Nachmani* case was brought before the Israeli Supreme Court in its regular appellate capacity, and was decided for Daniel. The court recognized that the two litigants had valid rights or, more exactly, valid liberties: the right to attain parenthood and the right to avoid it. Largely due to symmetry considerations, it preferred the latter. The majority opinion, written by Justice Strasbour-Cohen, held that the two rights—the right to become a parent and the right not to become a parent—are ‘two sides of the same coin’.¹⁶ The conclusion drawn from this understanding was that the court had to prefer the litigant who opposed parenthood, since his right did not curtail the autonomy of the other side, whereas the claim for parenthood entailed emotional, moral, and economic burdens that would become incumbent on the other side. Since the court perceived the two rights as symmetric,¹⁷ it favoured the right considered less burdensome to the other party.

We believe that this reasoning of the court was not only mistaken in its own merits, but also entailed a conceptual misperception. The decision presented the right to enjoy a desired state of affairs and the right to prevent the very existence of this state of affairs as necessarily symmetric and, therefore, as fundamentally having the same weight. Relying on the notion of symmetry, the decision of the court could be presented as neutral and mandated by law; in fact, however, it was neither derived from existing legal rules or principles nor neutral.¹⁸ The description of the two opposing rights as symmetric actually served to create a convenient illusion, the nature of which we describe below.

A closer reading of the majority opinion will enable us to detect the origin of this misconception, which was a strong assumption concerning the justification for the two conflicting rights. According to the court, the right to become a

¹⁶ The first *Nachmani* decision at 500. The coin metaphor used by Justice Strasbour-Cohen implies more than symmetry. The two sides of the same coin are complementary, in addition to being of equal value. See below n 63.

¹⁷ The court assumes formal equality between men and women, which is surely indisputable to us, in spite of our following criticism on the stronger assumptions of symmetry.

Talmudic law did not recognize this equality, even at the formal level. According to Talmudic law, a man has an independent right to become a father (derived from his religious duty to give birth to children), whereas a woman is arguably neither burdened by this obligation nor capable of enjoying the accompanying right (for this dispute, traced back to the beginning of the second century AD, see *Babylonian Talmud*, tractate Ketuboth 64a). A woman's right to become a mother can probably be derived only partially from her interests in her children's support when she grows old and in being buried by them after her death (‘... needs a stick to hold and a tool to be buried with’: *Babylonian Talmud*, tractate Ketuboth 77a). See generally E. Westreich, ‘The Right to a Woman's Child in Jewish Law’ in M. Mautner and D. Gutwein, *Law and History* (1999) [Hebrew].

¹⁸ See also D. Barak-Erez, ‘On Symmetry and Neutrality: Reflections on the *Nachmani* Case’, 20 *Tel-Aviv L Rev* (1996) 197 [Hebrew].

parent is derivative from the right to personal autonomy.¹⁹ In other words, parenthood should be protected solely as a manifestation of the individual's personal sphere of autonomy. The argument against unwanted parenthood is also seen as derivative from the protection of a personal sphere of autonomy and, consequently, the conflict seems to have a symmetric quality.²⁰ This symmetry, however, is only superficial. The justification for protecting the right of procreation is not grounded merely on the autonomous nature of the decision to become a parent, but rather on the very phenomenon of human existence.²¹ For some, parenthood is a shield against loneliness, for many it is a way to cope with mortality, and for others it is the opportunity to live their 'unlived lives'.²² A decision to avoid parenthood, on the other hand, is not perceived in this way by many people. True, a decision to avoid parenthood is a legitimate choice that the law must honour, but a decision to become a parent is not merely a wish to act in a specific way. It is an existential choice.²³

A related troubling aspect in the *Nachmani* decision is the selection of values acknowledged by the court as relevant and which therefore entered into the balance of interests. Because of its sharp focus on autonomy, the court narrowed its perspective and centred the discussion on the relative potential effect of the two alternative decisions on the autonomy of the two litigants. From this perspective, the claim to become a parent could be described as more burdensome to the other party than the claim to waive it. Hence, the court disregarded the burdens of frustrated parenthood, such as the agony of barrenness (at least for some individuals). We believe that an apt balance of interests should also take into consideration the balance of existential agony, and not only the balance of autonomy.²⁴

Another perspective on the misleading nature of the argument from symmetry in the *Nachmani* case is the analogy drawn by the majority opinion between the *Nachmani* scenario and a dispute about abortion between two prospective parents. In the latter case, the mother who chooses abortion prevails, and since Daniel's decision is analogized to a woman's decision to abort (at a very early stage of the pregnancy), the predominance of his right, as a negative right, was said to ensue.²⁵ The court thereby merely paid lip service to the vast difference between an unwanted pregnancy a woman may be asked to carry through to term, and

¹⁹ The first *Nachmani* decision at 499.

²⁰ *Ibid* at 499–500.

²¹ For the importance of the right to procreate, compare *Skinner v Oklahoma* 316 US 535 (1942).

²² M. Harrison, 'Drug Addiction in Pregnancy: The Interface of Science, Emotion, and Social Policy', 8 *J Substance Abuse Treatment* 261 at 264 (1991).

²³ True, for some people not becoming a parent may well be an existential choice (even though Daniel Nachmani, who contemplated having a family from another woman, was probably not one of them). Our last argument, therefore, admittedly relies on the contingent relative infrequency of such an attitude. However, such a reliance is not at all unheard of in political and moral arguments. Indeed, most people prefer life to death, but some do not. It is a perfectly legitimate assumption, nevertheless, that life is preferable to death only due to its contingent widespread desirability.

²⁴ Notably, the agony of barrenness was irrelevant in the *Davis* case, but was central in the circumstances of the *Nachmani* affair.

²⁵ The first *Nachmani* decision at 501–2.

an unwanted pregnancy without any physical implications for the person who objects to it.²⁶

5. *The Second Nachmani Decision*

Due to the disturbing features of the *Nachmani* dilemma, the Israeli Supreme Court decided to retry the case before an enlarged panel of 11 justices, citing its special power to do so in exceptional cases.²⁷ This time, the majority ruled for Ruth and overruled the original decision. All 11 justices wrote separate opinions, thus making it almost impossible to formulate one consistent 'view of the court' as to the separate components of its reasoning.²⁸ For our purpose, however, an examination of the argument from symmetry and the role it played in the reasoning of the different justices will suffice.

Generally, the (new) majority justices shared the view that no conclusion can be drawn from the seemingly opposite nature of the conflicting liberties before them. Some of the justices were willing to oppose the argument from symmetry explicitly, accepting the earlier critique of it by Barak-Erez following the first *Nachmani* decision.²⁹ Arguably, the other justices were in implicit agreement with this view since, in practice, they balanced the two rights in light of the particular circumstances of the case. Probing into the particular facts implies the rejection of symmetry arguments, which can only be adopted when the conflicting rights are considered in abstraction.

On closer scrutiny, the opinions of the majority justices divide grossly into two camps: those for whom becoming a parent is more important than the liberty to avoid parenthood, and those unwilling to make this general value judgment, who confined themselves to a consideration of the rights involved in the particular matter at hand. Justice Tal, who wrote the original minority opinion and became a majority justice in the second decision, manifestly stated that the right to become a parent and the right to avoid parenthood were not symmetrical.³⁰ Justice Tal explicitly asserted that a decision to become a parent is a meaningful choice for the individual as well as for society, whereas the choice to avoid parenthood is only significant as far as it reflects one's autonomy to master one's life.³¹ However, Justice Tal's decision was not only based on his personal view regarding the relative importance of parenthood, but also on consideration of the specific circumstances of the case. Among other things, he emphasized that this was probably Ruth's last chance to become a mother.³² Similarly, Justice

²⁶ See text accompanying above n 11.

²⁷ See text accompanying above n 13. At present the Israeli Supreme Court consists of 14 justices, but it normally presides in panels of three justices. The first *Nachmani* decision was given also by an especially enlarged panel of five justices.

²⁸ By consistency we refer to the absence of Condorcet cycles. See M. L. Stearns, *Public Choice and Public Law, Readings and Commentary* (1997) ch 2.1.

²⁹ See Barak-Erez, above n 18.

³⁰ The second *Nachmani* decision at 701–2.

³¹ *Ibid* at 701.

³² *Ibid* at 702.

Tirkel candidly affirmed his preference for the right to procreate over the right to refrain from parenthood, and accounted for it as deriving from a general preference for 'Life'.³³ As noted, the other five majority justices decided the case on its merits, although some of them may have been guided by an unstated preference for the right to parenthood, presumably acknowledged to be more than a mere manifestation of personal autonomy. In discussing the circumstances of the case, Justice Dorner mentioned that, for men and women alike, the liberty to avoid parenthood would seem secondary to the right to procreate.³⁴ Justice Matsa did not address the relative importance of the two rights in abstract terms,³⁵ but added that the right to avoid parenthood should definitely not be considered greater than the right to procreate. Justice Matsa refrained from stating whether the opposing rights should be regarded as 'equal', or the right to procreate should be considered more important.³⁶ Among the majority justices, only Justice Goldberg pledged loyalty to the view that the two rights are of the same value,³⁷ being 'two derivatives of the same right, which is the right to dignity and freedom'.³⁸ He later ruled for Ruth, however, explaining that when a court confronts a normative void it has judicial discretion to decide according to 'justice',³⁹ which in the circumstances of this case meant weighing the relative losses of the two parties and consider the reasonableness of reliance on Ruth's side.⁴⁰ Similarly, Justice Bach, who did not discuss the relative importance of the two rights, followed the instructions of 'justice'⁴¹ and emphasized Ruth's reliance interest.⁴² To complete this review of the majority justices, it should be noted that Justice Kedmi suggested a completely different perspective, which considered the moment of conception as 'a point of no return'.⁴³

The minority opinions differed significantly. Justice Strasbourg-Cohen, who had written the original majority opinion, reiterated the 'two sides of a coin' metaphor⁴⁴ and explained that the right to procreate is at a relative disadvantage because it necessitates the cooperation of another individual, whereas the right not to become a parent is autonomous.⁴⁵ Justice Strasbourg-Cohen also returned to the analogy between the *Nachmani* case and a scenario of controversy over a sought abortion, although with a different emphasis than the one suggested in her first opinion. In the second opinion, Justice Strasbourg-Cohen did not

³³ Ibid at 734–7.

³⁴ Ibid at 720.

³⁵ Ibid at 748.

³⁶ Ibid at 760.

³⁷ Ibid at 724.

³⁸ Ibid at 723.

³⁹ Ibid at 728–31.

⁴⁰ Ibid at 731–2.

⁴¹ Ibid at 742–4.

⁴² Ibid at 744–8.

⁴³ Ibid at 733.

⁴⁴ Ibid at 682. See above n 16.

⁴⁵ Ibid.

overlook the observation⁴⁶ that a woman's right over her body constitutes an additional factor in the context of the abortion debate; rather, she stressed that a woman's right over her body derives from the same values (of personal autonomy) that also support the right to avoid parenthood.⁴⁷ Toward the end of her opinion, Justice Strasbourg-Cohen acknowledged that the loss incurred by Ruth in the circumstances of the case would probably be greater if the court were to rule against her, as opposed to the potential loss to Daniel if the court were to rule against him. Yet she did not think that the balance of losses should have any bearing on the legal determination of the case (unlike Daniel himself when explaining his approach).⁴⁸

It is worth noting that Justices Or, Zamir, and Barak, the other three minority justices in the second *Nachmani* decision, refrained from resting their opinions on the argument from symmetry. Nevertheless, and although concealed by the rhetoric, this argument played an even more substantial role in the second opinions of Justices Zamir and Barak than in that of Justice Strasbourg-Cohen (note that Justices Zamir and Barak had also concurred with the opinion of Justice Strasbourg-Cohen in the first *Nachmani* decision). Justice Zamir stated that, even if the right to procreation was more important than the right to avoid undesired parenthood, this difference could not establish a correlative duty on another person.⁴⁹ Justice Barak shared this view.⁵⁰ These two opinions, therefore, reveal an even more formalistic use of the argument from symmetry. While conceding that the respective opposing interests might not be of equal value, they still stressed that the liberties supporting them should nevertheless be considered equal, solely by virtue of their formal symmetric position. By preventing the acknowledged substantive disparity between these conflicting interests from entering the discourse of rights, Justices Zamir and Barak present the argument from symmetry in its purest form, as a sheer formalistic stance.

6. *A Closer Look at Symmetry*

To evaluate the potential usefulness of arguments from symmetry to the legal realm, it may help us to look more closely at the notion of symmetry itself.

As a logical tool, symmetry is indeed regarded as most effective in the formulation of modern scientific theories in physics, chemistry, biology, and even

⁴⁶ See text accompanying above n 24.

⁴⁷ The second *Nachmani* decision at 684–5. In contrast, in the opinion of Justice Tal, the comparison to the abortion scenario had the opposite effect. Justice Tal explained that the mother's right to abort notwithstanding the father's will should be supported only because the pregnancy is also a part of the mother's body. In other words, according to Justice Tal, the mother's right over her body is the only factor that tips the scale against the right to accomplish parenthood. *Ibid* at 709.

⁴⁸ *Ibid* at 697.

⁴⁹ *Ibid* at 781.

⁵⁰ *Ibid* at 790.

the social sciences.⁵¹ However, a formal presentation of its structure unveils the sensitivity of its application to context.

Symmetry is mathematically defined, for a given partition and a corresponding equivalence relation,⁵² as a transformation,⁵³ by which all elements of the universe of discourse are assigned to members of the same partition class.⁵⁴ In other words, symmetry is a transformation in which some properties or respects of the transformed elements—those properties that determine the membership of elements in a partition class—are preserved or remain invariant.

Significantly, the set of all symmetries on a partitioned universe of discourse creates the algebraic construction called group with regard to the operation of the composition of symmetries (that is, the operation of applying symmetries one after another), where each of the partition classes includes all the elements that can be obtained by applying one of the symmetries to elements of the same class. The defining features of a group are a basis for the proof of subsequent properties, which make this algebraic construction an overwhelmingly important logical abstraction. Since the beginning of the 19th century,⁵⁵ the appreciation of groups has played a major role in the understanding of a variety of subject-matters, ranging from elementary particles to Escher's painting.⁵⁶

Symmetry may be viewed as an abstraction of the very nature of theorizing,⁵⁷ such that the characterization of the universe of discourse and of the properties preserved through transformations would define the subject-matter of the theory. Thus, for example, geometry would be the theory concerning properties of

⁵¹ See, e.g. B. C. van Fraassen, *Laws and Symmetry* (1989) at 233–347; *Group Theory and Special Symmetries in Nuclear Physics: Proceedings of the International Symposium in Honor of K.T. Hecht*, Ann Arbor Michigan, 19–21 September 1991 (1992); E. L. Charnov, *Life, History, Invariance: Some Explorations of Symmetry in Evolutionary Ecology* (1993); S. French and H. Kammaing (eds), *Correspondence, Invariance and Heuristics: Essays in Honor of Heinz Post* (1993); P. E. Schipper, *Symmetry and Topology in Chemical Reactivity* (1994).

See the discussion of a particular symmetry as a possible meta-theoretical guideline in criminal law theory in G. P. Fletcher, 'Criminal Theory as an International Discipline: Reflections on the Freiburg Workshop', 4 *Crim Just Ethics* 60 at 72 (1985).

⁵² A binary relation on a set is said to be an equivalence relation if it is reflexive, symmetric, and transitive. A partition of a set U is a set of non-empty subsets of U , denoted $\{U_1, U_2, \dots, U_k\}$ and named 'classes' of the same partition, such that the union of all U_i 's is equal to U and the intersection of U_i and U_j is empty for any distinct U_i and U_j . It can easily be demonstrated that any partition induces an equivalence relation on the partitioned set, which is the relation of being a member of the same class, and any equivalence relation on a set induces a partition of the set into disjoint classes, all of whose members are equivalent to each other.

⁵³ A transformation is a one-to-one function from a set onto itself. A one-to-one function onto a set is a correspondence between elements of the same set, such that for every element in the set there would be one unique element which is assigned to it (and hence every element would be assigned to one unique element). In texts of discrete mathematics transformations may be called 'permutations'.

⁵⁴ Unfortunately, 'symmetry' is a loaded term, to be used with care. While in some contexts it may refer to a property of a binary relation, in others it refers to the set of elements that are assigned to themselves by all the transformations of the same group (see explanation below).

⁵⁵ That is, since the mathematical achievements of Evariste Galois.

⁵⁶ D. R. Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (1979). According to Socrates, beauty, truth, and symmetry are mutually connected and complementary notions: *Plato, Philebus* *65*.

⁵⁷ See van Fraassen, above n 51 at 10: 'Symmetry, like laws, is not an idea to be explained in one sentence. You can begin by thinking of a concrete example—Roman law for one and mirror symmetry for the other, or the Napoleon code and the five perfect solids. But then, with quickening interest, you will be struck by the suggestive analogies—between law and necessity; between rotation, which allows you to see the solid from all different angles, and intellectual abstraction. And soon you may turn reflexive, espousing similar structures in your own thoughts—the necessity of logical consequence in an argument, the symmetry of parallel solutions to essentially similar problems . . .'.

objects that remain intact by transformations that preserve the distance between points,⁵⁸ topology would concern properties preserved in transformations that continuously deform objects without allowing tearing or gluing spaces, and one can similarly devise symmetries preserving a mass of physical objects or the constitutional rights of law subjects.

The success of a theory depends on its ability to construct symmetries that preserve, through transformations, all and only relevant features of the concerned phenomena. Selecting those aspects of the phenomena relevant to the subject of the discussion is a creative process, directed by the interest motivating the construction of the theory. Hence, the quality of this process is not to be judged in terms of 'truth' or 'falsity', but rather in terms of 'efficiency', 'simplicity', 'comprehensiveness' etc. Euclidean geometry, for instance, which is a great tool for describing some phenomena, is a terribly clumsy way of describing the movements of objects on the surface of a globe,⁵⁹ where there is more than one shortest line between two points.

7. *Symmetry in Context*

As explained, selecting those aspects of a phenomenon that are relevant to the subject under discussion is a creative process, guided by the interest prompting the construction of the pertinent theory. Suppressing this context-dependence entails an effective manipulation, as it presents value-conditioned determinations as neutral. The first *Nachmani* decision, and the minority opinion in the second *Nachmani* decision, demonstrate that rights discourse is particularly sensitive to this kind of deception.

Symmetries may be misused in a variety of ways. The partition underlying the universe of cases may lack a necessary refinement relative to the relevant policy considerations,⁶⁰ resulting in unsimilar objects being treated as equivalent. Alternatively, it could be based on a refinement that is redundant to the pertinent considerations. Non-relativistic physical theories, for instance, are mistaken for the latter reason: they falsely assume an absolute point of reference, and fail to notice the equivalence of all points of reference.⁶¹ Other symmetries are simply incorrect, reflecting neither the lack nor the redundancy of any particular refinement. False symmetries of any of these kinds have a powerful misleading

⁵⁸ These transformations are called 'isometries', and can easily be presented as a group with regard to the operation of composition.

⁵⁹ More generally, we should speak of the movement of objects in any distorted space.

⁶⁰ Let F_1 and F_2 be two partitions of set A , and E_1, E_2 be the corresponding equivalence relations. We say that F_1 is a refinement of F_2 , denoted $F_1 \leq F_2$ if and only if $E_1 \subseteq E_2$. In other words, when F_1 is the refinement of F_2 , then any two elements that are in the same class of F_1 must also be in the same class of F_2 (although it may happen that two elements that are in the same class of F_2 would be in different classes of F_1). If F_1 is not identical to F_2 , it represents an additional partition of the classes of F_2 .

⁶¹ This flaw is not particular to the relativity of time, discovered in the 20th century, but also to the more basic Galilean relativity. A medieval physicist first encountering the Galilean contentions would intuitively reject the equivalence of constantly moving frames of reference, and would hardly be convinced by such classical experiments as the dropping of a weight from the top of the mast in a constantly moving ship. R. A. Shapira, 'Structural Flaws of The "Willed Bodily Movement" Theory of Action', 2 *Buffalo Crim L Rev* 349 at 383-401 (1998).

effect. As we desperately strive to form successful symmetries in an attempt to make sense of the endless flow of data overwhelming us, we are easily tempted by suggested symmetries. Symmetries appeal to our aesthetic and intellectual sense because they are so crucial for organizing our world, but it is precisely because of their beauty that they should be shunned (if we may, as feminists, resort to a connotation antifeminine in its origins). The argument from symmetry in the *Nachmani* case is paradigmatic of symmetry's hold on us.

One flaw in the *Nachmani* argument from symmetry is its tacit disregard of required essential distinctions. The assumption guiding the argument was that all propositions of the form ' x desires that truth-value y be assigned to the occurrence of event-token q ' should be equivalent to each other; hence, all transformations in which this equivalence remains invariant constitute a symmetry. Substituting x for 'the man' or 'the woman' interchangeably, and y for 'yes' or 'no', completed the argument from symmetry. This line of thought overlooks many relevant features of the normative situation that should have been used to partition the universe in question accordingly, including the balance of anticipated agony and the existential significance of procreation.

The ability of symmetries to captivate us may emerge as highly comic when these symmetries are ill-conceived. Laurence Sterne took advantage of this effect in the following dialogue:

'But who ever thought', cried Kysarcius, 'of laying with his grandmother?' 'The young gentleman', replied Yorick 'whom Selden speaks of, who not only thought of it, but justified his intention to his father by the argument drawn from the law of retaliation: "You lay'd, sir, with my mother, said the lad—why may not I lay with yours?"'⁶²

The symmetry notion guiding the first *Nachmani* decision, and the minority opinion in the second *Nachmani* decision, emerges as ill-conceived in this context for another reason. Besides a failure to notice relevant features of the situation, which confused the formation of the symmetry, when two inseparable aspects of the same phenomenon are defined as symmetric we find ourselves begging the question. Let us compare the *Nachmani* case to a situation where assuming symmetry may make sense. Take, for example, the almost hackneyed Coasian situation: a conflict between an air-polluter and his neighbouring farmer. Here, the interests of the two parties are contradictory, but conceptually independent of each other. The polluter is not intrinsically interested in polluting the air used by the farmer, and the latter does not mind the production itself, but its by-products. The conflict is contingent: it stems only from the circumstantial incompatibility of their independently discernible desires. Therefore, presenting the two competing interests as symmetric and evaluating their respective importance might be a meaningful consideration. In contrast, the desires of Ruth and Daniel related to the same object.⁶³ Ruth wanted the specific interaction between

⁶² L. Sterne, *The Life and Opinions of Tristram Shandy, Gentleman* (ed. Watt, 1965) at 250.

⁶³ In that sense, they were indeed 'two sides of the same coin', as put by Justice Strasbourg-Cohen. See above n 16.

herself and Daniel to endure, whereas Daniel wanted to withdraw from the same interaction. The objects of the two conflicting aspirations converged. In these circumstances, forging a symmetry between them was an empty manoeuvre, which basically amounted to stating in advance a basic unwillingness to examine the dispute on its merits.

Luci Olbrechts-Tyteca quotes a beggar ironically asking: 'Je n'arrive pas à comprendre comment la mendicité peut être un délit dans une société où la charité est une vertu!'⁶⁴ 'I cannot begin to understand how beggary can be a vice in a society where charity is a virtue'). Again, if the object of both moral judgments is the same—voluntary interaction between the benevolent person and his beneficiary—two inconsistent evaluations of it might seem paradoxical. If the transaction is commendable, why are praises for one party accompanied by condemnation of the other? To solve this apparent paradox one has to dissociate the moral quality of the action from its object (i.e. the transfer of money). This can conceivably be done in regard to charity, but is very unlikely in the Nachmanis' situation. There was no additional content to the conflicting wishes of Ruth and Daniel other than the object of this desire: their respective attitudes toward the possible fertilization of the ovules.

8. *Other Symmetry Arguments*

Let us briefly examine other situations in which the use of an argument from symmetry leads to a view of autonomy as the arbiter between rights perceived as symmetric. One type of situation of this kind concerns freedom of expression. In this context, the 'positive right' indicates speaking out one's views to everyone (or, more generally, a decision to engage in communicative activity), whereas the 'negative right' denotes abstention from exposure to expressions the listener finds irritating (that is, abstaining from communicative activity). These opposite rights may come into conflict when a speaker wants to express his views to a listener who is irritated, or even deeply hurt, by them. Should the apparent symmetry between the two rights determine the case? At a superficial level, the answer appears to be yes. The symmetry argument leads to the standard liberal answer that the right to communicate prevails. This result is based on the argument that when two rights are said to be symmetric, a right that does not necessitate curtailment of the others' autonomy should prevail.

Usually, the interest of expression rightfully outweighs the interest of not being irritated by expression, but this is not a universal rule. Consider cases where these interests are conceptually attached, that is, they refer precisely to the same communicative transaction. Such was the Nazi rally in the Jewish neighbourhood of Skokie, allowed to be held in the name of free speech.⁶⁵ If one sees expression as concerned mainly with communication with others (as distinct from merely

⁶⁴ L. Olbrechts-Tyteca, *Le Comique du Discours* (1963) at 199.

⁶⁵ *The Village of Skokie v The National Socialist Party of America* 373 NE 2d 21 (1978).

a possible interest in the self-contained assertion of the speaker's individuality), the Skokie march was not just an expression contested in the name of emotional harm to others but a communicative message harming exactly its original addressees. If so perceived, the Skokie march was a performative speech-act directed against the residents of Skokie. At stake was, in fact, the right of one party to enforce a communicative transaction over another. If marching in Skokie was a message designed almost exclusively for a captive audience, the argument from symmetry is rendered meaningless.⁶⁶ Merely presenting the right to express one's views as symmetric to the audience's right not to be exposed to the same expression does not entail any normative conclusion, but baffles the direct examination of the opposing interests.

Interestingly, the argument from symmetry in the *Skokie* scenario leads to a solution different from the one advocated in the first *Nachmani* decision. In *Skokie* it reasoned an enforcement of coerced interaction, in the *Nachmani* case a dissolution of interaction. This alone demonstrates the susceptibility of this argument to deceptive manipulations. When the right to engage in an interpersonal transaction is presented as formally symmetrical to the right to abstain from this transaction, relevant considerations are suppressed and any result might ensue. Both a decision for alienation (as in the first *Nachmani* decision), and one for interrelation (as in *Skokie*), could be perceived as following from 'autonomy', because autonomy sometimes means the liberty to relate to others and sometimes the liberty to withdraw from them. The argument from symmetry masks the inability of formal considerations to solve such problems, and facilitate the false presentation of value determinations as neutral.

So far, we have explored the putative symmetry between opposite rights held by different individuals (who come into conflict). But the argument from symmetry may be discussed in another context—where the legal system faces two potential opposite decisions of the same individual, for example, the right to live *vis-à-vis* the right to die. The question here is whether the law should treat these opposite decisions in the same manner, as they allegedly reflect symmetrical rights.⁶⁷ Here too, the argument from symmetry neglects important features of the examined phenomena and creates a powerful illusion of equality. Despite the seemingly symmetric position, a decision to quit life is much more important than a decision to go on living, if only due to its irreversibility. This is not an opinion on active euthanasia, but merely an attempt to stress that formal considerations are invalid arguments for it.

In the context of abortions, the argument from symmetry can easily be taken *ad absurdum*. In *Roe v Wade*,⁶⁸ the American Supreme Court recognized a woman's right to perform an abortion based on protection of her personal

⁶⁶ For another criticism of *Skokie* as a decision where the issue of neutral principles is left begging the question, see L. H. Tribe, *Constitutional Choices* (1985) at 219–20.

⁶⁷ A similar view was expressed by R. E. Robinson and J. C. Smith, 'The Logic of Rights', 33 *U Toronto Lj* 267 (1983). This article poses the argument that the liberty to do X necessarily entails also the liberty to do non-X.

⁶⁸ *Roe v Wade*, above n 10.

autonomy. Obviously, the legal system also recognizes the right of a pregnant woman not to abort her fetus, yet only the most zealous pro-choice adherents would argue that these two rights should be equally protected.

The concept of symmetry has an unquestionable redeeming value in many legal contexts. To a large extent, the adversarial system is rooted in the notion of symmetry. However, the first *Nachmani* decision stumbled onto an obstacle in the application of this notion that is rather common in the discourse on rights. The explicit or implicit recourse to the argument from symmetry is a recurrent feature of this discourse, deserving much attention and cautious handling.