THE ISRAELI SUPREME COURT PROJECT

at

CARDOZO LAW SCHOOL

The Israeli Supreme Court Confronts the Brave New World of Reproductive Technology

CONTINUING LEGAL EDUCATION MATERIALS

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Doe v. Ministry of Health

HCJ 4077/12 (February 5, 2013)

http://versa.cardozo.yu.edu/opinions/doe-v-ministry-health

ABSTRACT

This is a petition against the First and Second Respondents' decision not to permit the Petitioner (a single woman, born in 1974) to use sperm donations by an anonymous donor (the Third Respondent), which were preserved for her (for a fee). The Petitioner had her first daughter from the Third Respondent's donation. She is now interested in undergoing an additional insemination process with that same donation in order to ensure a full genetic match between her children. The Respondents' decision was made in light of the donor's decision to withdraw his consent and his donation due to changes in his worldview – becoming a "Ba'al Tshuva", i.e. an observant Jew – so that sperm donations he had made in the past would no longer be used. It should be noted that the consent form sperm donors (currently) sign is silent on a donor's right to change his mind. The Petitioner argues that the Respondents' decision to prevent her from using the sperm donations that were preserved for her violates both her constitutional and contractual rights, is unreasonable, and must be overturned. Generally, the Petitioner's arguments may be divided into two categories – the first, is on the public law level, primarily in terms of violating her right to parent. The second are arguments on the civil law level, including claims stemming from contracts between the parties, property rights and others. The donor claims he has autonomy rights in terms of deciding whether his sperm can be used.

The High Court of Justice (in a decision authored by Justice Rubinstein, with Justices Barak-Erez and Amit, concurring) rejected the Petition for the following reasons:

Justice Rubinstein: Needless to say that the High Court of Justice – as well as the attorney for the Respondents and even the anonymous donor himself – sympathizes with the Petitioner, who wishes that her children, conceived with the help of sperm donations, will carry the same genetic code. However, the donor's position and his personal autonomy must prevail. As much as we understand the Petitioner's arguments in terms of civil law, contract law, even in terms of administrative law, and her reliance interest – as values, these cannot dominate over personal autonomy in these circumstances. The donor formed his position as a "Ba'al Tshuva" and it seems his position has a religious aspect. But even absent the religious aspect, one's position reached thoughtfully – although it did not occur to him in the past when he decided based on whatever considerations to donate sperm – that he does not wish for there to be any additional children in the world whom he did not choose and whose mother he did not choose, with whom he would have no relationship, and whom he would not raise is understandable. This is even if he owes them no duty under existing law (and incidentally, it is possible that under Jewish law, even if they have no right to his support, they may have a right to his estate). The autonomy aspect eclipses other considerations.

The right to parent is seemingly a significant value in and of itself, it is natural and primal and holds a top spot on the human list of priorities. This is joined by the autonomy reflected in the personal choices that come along with the right to parent. The right not to parent, on the other

hand, does not include a protected independent value, but is designed to protect one's personal autonomy in electing it (that is, electing not to parent, or not to co-parent with a particular man or woman). It should be noted that even those who support defining this right as merely an interest apparently still view it as one that must be legally protected.

However, limiting the Petitioner's right to be impregnated by a particular person, or her right to a child with a particular genetic background is not a violation of the right to parent. This limit does not reach the core of the right to parent – the actual ability to enter the class of parents – and to bear a child. At most, and this is highly doubtful, this is a limitation at the periphery protected by the right to autonomy (without addressing, at this point, the issue of the scope of this protection, and whether indeed the right was infringed and whether under proper balancing it is worthy of protection).

Still, and if presumably according to existing law the donor owes no financial, social or other duties to the child, it is clear that the harm to the donor in terms of genetically parenting additional children against his will constitutes a violation of his autonomy. In this context, it has been pointed out, among others, that the harm to the donor is not merely in inability to choose not to be a father, but also includes his autonomy to decide about his status as a father. In other words, a man who sees his genetic-biological parenthood, or "blood ties", as creating his moral obligations as a father, suffers injuries to his autonomy both in terms of lack of choice and in terms of failing to fulfill his duties according to his conscience or religious beliefs.

This is not to say that in any event a sperm donor's request not to use his sperm would prevail. The stage in which the request is made is relevant, even crucial. There may be good and weighty reasons not to permit a donor to change his mind and the Court lists these potential considerations (this is not an exhaustive list). Such was the situation in *Nachmani*, let alone when a pregnancy has already occurred. But outside of such circumstances, the right to change his mind and the violation of his right are weighty and tip the scale in his favor. Indeed, the donor gave consent and accepted payment, but it is not a regular "transaction", rather an issue that holds strong emotional aspects. The donor's conscience and feelings are a matter of values and cannot be quantified in the simple legal sense.

Even had we assumed that the issue is a violation of the Petitioner's autonomy to choose whom to parent with, she cannot prevail. This is a choice that needs the cooperation of two (whether within a marriage or other family unit, including – even if with significantly mitigated force – a same-sex family unit requiring a sperm donation) or some third party as a sperm bank, in order to be realized. Of course, these situations may be distinguished, and may under certain circumstances change the outcome, but in this matter there is no justification for the donor's interest to yield to that of the Petitioner's.

Protection for the Petitioner's right to have children of the same genetic code ends where it clearly conflicts with the donor's rights. In a regime of relative rights, there is no right that affords its holder absolute supremacy in its exercise. Therefore, the obvious interests at the basis of the Petitioner's claims succumb to the donor's right to autonomy.

Even had we assumed, for argument's sake, that the Petitioner's right to autonomy is violated, and Justice Rubinstein does not believe it was – in any event, not to a great extent – as distinguished from *Nachmani*, the conflict and determination here concerns the Petitioner's right to autonomy in the face of the donor's right to autonomy. In the conflict between these two autonomy rights is seems the donor should prevail because, from his perspective, we are dealing with "active" law – a use of his sperm, while for the Petitioner this is "passive" law – preventing the use of the donor's sperm.

Before concluding, Justice Rubinstein briefly adds Jewish law's perspective on the issue of sperm donation and the status of the donor. This analysis demonstrates that applying the law and principles mentioned above lead to the same outcome under contract law as well. Among others, Justice Rubinstein emphasized that the option of withdrawing a donation does not constitute a donor's "veto right" at every point in the process. The point of no return, where the balance of rights and interests shifts and the donor loses the legal possibility of terminating the contract and withdraw his donation, may change according to various considerations. In our case, several considerations lead to accepting the donor's withdrawal of consent, particularly a lack of any physiological link between the donation and the Petitioner at this stage.

The primary concern arising from this matter is the harm to the stability of sperm banks in Israel by permitting carte blanche to donors who may wish to pull their donations. The concern is that beneficiaries of donations, such as the Petitioner, who have requested that a specific sperm bank preserve additional donations for them, would discover this option is no longer guaranteed. The stability of this institution is a human and public interest of the highest order. The uncertainty that exists as a result of the tenuous statutory regulation, harms, from the outset, the public's possibility to rely on sperm donations. The cure for this is in the legislature's hands.

In the interim, and as a temporary measure, the Petitioners ought to amend donors' and beneficiaries' consent forms to ensure that all the parties involved know and understand their rights. As long as legislation that regulates and defines the possibility of a donor to withdraw consent is lacking, sperm banks must accurately present to beneficiaries the legal context in order not to guarantee what may not be realized.

Finally, the decision to donate sperm must be a result of deep thought and consideration. Donors must know that their informed consent to give sperm to another is relied upon by others who seek to plan their lives and produce offspring. This however, is not a decision that can be taken back easily, and the ability of withdrawing consent is in any event not guaranteed. It is contingent upon the stage of the process, that in the absent of a comprehensive statutory regime, is subject to the considerations detailed in the opinion.

Justice Barak-Erez joins the crux of the conclusions, and adds her position regarding some of the rationales behind them.

Justice Amit also joins the outcome, though in his opinion, in the conflict between the Petitioner and the donor through the lens of civil law alone, the Petitioner must presumably prevail. (The choice whether to opt for applying only civil law depends on the value-based issue of the weight we are willing to attribute to the sperm's uniqueness as "property".)

Nahmani v. Nahmani

CFH 2401/95 (September 12, 1996)

http://versa.cardozo.yu.edu/opinions/nahmani-v-nahmani-0

ABSTRACT

Facts: Ruth and Daniel Nahmani, a married couple, were unable to have a child because of an operation that Ruth underwent. They therefore decided to try in-vitro fertilization of Ruth's ova with Daniel‟s sperm, with a view to implanting the fertilized ova in a surrogate mother. Under Israeli law, surrogacy was not permitted and in-vitro fertilization was only permitted for implantation in the woman from whom the ova were taken. Because of the great expense of the in-vitro fertilization procedure in the United States, the couple petitioned the Supreme Court, sitting as the High Court of Justice, to allow the in-vitro fertilization procedure to be conducted in Israel, for the purpose of surrogacy in the United States. In that proceeding (HCJ 1237/91), a consent judgment was given allowing the in-vitro fertilization procedure to be done in Israel. The procedure was carried out at Assuta Hospital. Subsequently, Daniel left Ruth and went to live with another woman, who bore him a child. Ruth applied to Assuta Hospital to release the fertilized ova into her possession for the purpose of the surrogacy procedure in the United States, but Daniel opposed this. Assuta Hospital therefore refused to release the fertilized ova. Ruth applied to the Haifa District Court for an order against the hospital to release the fertilized ova, and in its judgment the District Court gave such an order.

Daniel appealed the judgment of the District Court to the Supreme Court. In the appeal (CA 5587/93), the Supreme Court, with a majority of four of the five justices that heard the case, allowed the appeal of Daniel Nahmani and reversed the order of the District Court. Ruth petitioned the Supreme Court to hold a further hearing of the appeal, and this further hearing was subsequently held before a panel of eleven justices.

Held: A majority of seven of the Supreme Court justices reversed the judgment in the appeal, with four justices dissenting.

(**Majority opinion — Justice Ts. E. Tal)** The husband was estopped from opposing the continuation of procedure by promissory estoppel, since he gave his consent, his wife reasonably relied on this consent, and she did so irreversibly, by fertilizing her ova with her husband's sperm. Furthermore, Jewish heritage, which is one of the fundamental principles of the Israeli legal system, considers having children an important value, whereas not having children is not considered a value at all.

(Majority opinion — Justice D. Dorner) The liberty of not having unwanted children is in essence secondary compared to the right to have children. Subject to this principle, the balancing between the rights of the parties is made by taking into account the current stage of the procedure, the representations made by the spouses, the expectations raised by the representations and any reliance on them, and the alternatives that exist for realizing the right of parenthood. In this case, the basic principles and considerations lead to a preference of the wife to be a parent over the right of the husband not to be a parent.

(Majority opinion — Justice E. Goldberg) In the absence of any normative arrangement, the case should be decided according to the basic value of justice. The just solution is the one that results in the lesser of evils. Justice demands that we do not, retroactively, undermine the position of someone who was entitled to rely on a representation of another, as the petitioner was entitled to do in this case.

(Majority opinion — Justice Y. Kedmi) Before fertilization, each spouse can change his decision to be a parent, and his basic right not to be a parent prevails over the contractual right of his partner to demand performance of the agreement between them. After fertilization, the right of the spouse wishing to complete the procedure of bringing the child into the world and to become a parent is strengthened by the fertilization of the ovum. From this point onward, the right of the spouse wishing to complete the process of bringing the child into the world overrides the right of the one wishing to destroy the fertilized ovum.

(Majority opinion — Justice Y. Türkel) The ethical weight of the right to be a parent is immeasurably greater than the weight of the right not to be a parent. Doing "ethical justice" compels us to prefer the former right to the latter.

(Majority opinion — Justice G. Bach) Where there is no express statute to guide us, we must avail ourselves of our sense of justice, and make our ruling according to what seems to us to be more just, in view of all the circumstances of the case before us. Even if the scales of justice were evenly balanced, then the fact that preferring Ruth's position created the possibility of granting life and bringing a living person into our world, would tip the scales.

(Majority opinion — Justice E. Mazza) The restriction that Daniel wishes to impose on Ruth's right to be a mother, although it appears to be a specific restriction, is really a quasi-general one, since Ruth has no real alternative to becoming a mother other than by use of her ova that were fertilized with Daniel's sperm. The restriction that Ruth wishes to impose on Daniel's right not to be a father against his will is a specific restriction. Imposing a specific restriction on Daniel's right is preferable to imposing a quasi-general restriction on Ruth's right to be a mother. The violation caused by the specific restriction to Daniel's right is, necessarily, less than the violation caused by the quasi-general restriction to Ruth's right. Where all other factors are equal, justice requires us to prefer the lesser violation to the greater violation.

(Minority opinion — Justice T. Strasberg-Cohen) Consent is required for each stage of the in-vitro fertilization procedure up to the point of no-return, which is the implantation of the ova in the woman's body. In the absence of such consent, Daniel cannot be compelled to consent to Ruth's aspiration against his will by means of a judicial order, either in the name of the law, or in the name of justice or in the name of life.

(Minority opinion — Justice T. Or) The consent of the parties to cooperate towards realization of an in-vitro fertilization procedure is a framework consent. It is founded on the basic assumption that the marital relationship between the parties will continue. But it does not include consent, ab initio, to all the stages and aspects of the fertilization procedure. The consent is based on the understanding that at each stage of the procedure the joint consent of both spouses will be required.

(Minority opinion — Justice I. Zamir) If, before the procedure began, Daniel were asked whether, if he separated from Ruth, he would consent to implantation of the ovum, which would make him and Ruth joint parents of a child, his answer, as a reasonable person, would be no. His initial consent to the procedure should therefore not be regarded as consent even in the circumstances of a separation. For the same reason, Daniel is not estopped from opposing the continuation of the fertilization procedure, since he never represented that he consented to the continuation of the procedure even if he separated from Ruth.

(Minority opinion — President A. Barak) Continuing consent is required for every stage of the fertilization procedure. This cannot be waived *ab initio* for reasons of public policy. Justice requires equality between the spouses in decision making. Refusing to give consent to the continuation of the fertilization procedure because the relationship has ended does not constitute bad faith.

Nahmani v. Nahmani

CA 5587/93 (March 30, 1995)

http://versa.cardozo.yu.edu/opinions/nahmani-v-nahmani

ABSTRACT

Facts: Ruth and Daniel Nahmani, a married couple, were unable to have a child because of an operation that Ruth underwent. They therefore decided to try *in-vitro* fertilization of Ruth's ova with Daniel's sperm and implanting the fertilized ova in a surrogate mother. Under Israeli law, surrogacy was not permitted and *in-vitro* fertilization was only permitted for implantation in the mother. Because of the great expense of the *in-vitro* fertilization procedure in the United States, the couple petitioned the Supreme Court, sitting as the High Court of Justice, to allow the *in-vitro* fertilization procedure to be conducted in Israel, for the purpose of surrogacy in the United States. In that proceeding (HCJ 1237/91), a consent judgment was given allowing the *in-vitro* fertilization procedure to be done in Israel. The procedure was carried out at Assuta Hospital.

Subsequently, Daniel left Ruth and went to live with another woman, who bore him a child. Ruth applied to Assuta Hospital to release the fertilized ova into her possession for the purpose of the surrogacy procedure in the United States, but Daniel opposed this. Assuta Hospital therefore refused to release the fertilized ova. Ruth applied to the Haifa District Court for an order against the hospital to release the fertilized ova, and in its judgment the District Court gave such an order.

Daniel appealed the judgment of the District Court to the Supreme Court.

Justice T. Strasberg-Cohen: Although a spouse's right to be a parent is a basic right, this right does not impose a duty on the other spouse to help realize this right. If a spouse does not perform the customary marital duties, these cannot be enforced and the only remedy is divorce. It is not proper legal policy to force someone to be a parent against his will.

The consent of Daniel Nahmani to the *in-vitro* fertilization procedure created a 'weak' agreement that cannot be enforced under the strict laws of contract. In addition, the consent to the procedure did not imply consent to continue the procedure even after a separation.

Vice-President Barak, Justice D. Levin, Justice I. Zamir all agree.

Justice Ts. E. Tal, dissenting: The husband was estopped from opposing the continuation of procedure by promissory estoppel, since he gave his consent, his wife reasonably relied on this consent, and she did so irreversibly, by fertilizing her ova with her husband's sperm.

Moshe v. The Board for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements Law

HCJ 5771/12 (September 18, 2014)

http://versa.cardozo.yu.edu/opinions/moshe-v-board-approval-embryo-carrying-agreements-under-embryo-carrying-agreements-law

ABSTRACT

The Petitioners are a female couple who wish to bring into the world a child by fertilizing an egg extracted from the body of the First Petitioner and implanted in the uterus of the Second Petitioner, who would carry the pregnancy and give birth. The Ministry of Health rejected their requests for the approvals of performing this procedure in Israel. Hence this Petition, which challenges various provisions in the Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756-1996 (hereinafter: the Surrogacy Law) and the Eggs Donation Law, 5770-2010 (hereinafter: the Eggs Donation Law). It should be noted that during the deliberations the Ministry of Health issued a new protocol, which allows the Petitioners to take the eggs out from Israel, perform the implantation abroad and be recognized as genetic biological co parents in Israel, but the Petitioners seek legal recognition to perform the entire procedure in Israel.

The High Court of Justice, by extended panel of seven Justices, rejected the petitions by a majority (President Grunis, Deputy President M. Naor and Justices E. Rubinstein and S. Joubran, against the dissenting opinions of Justices E. Arbel, E. Hayut and H. Melcer) for the following reasons:

Justice Rubinstein: The current legal situation existing today does not permit what the Petitioners request, because the Surrogacy Law and the Eggs Donation Law do not apply to such a case.

In regard to the Surrogacy Law, and as discussed in Justice Hayut's opinion, the obstacle the Petitioners face in terms of surrogacy is twofold. First, the Petitioners do not meet the definition of "intended parents" as established by the Surrogacy Law, whereby "intended parents" are "a man and a woman who are a couple" and thus they are not eligible to take this avenue in Israel. In this regard, the entire panel believes that the existence of current legislative processes to expand the circle of eligibility existing in the Surrogacy Law calls for judicial restraint and abstaining from judicial intervention in the provisions of the Surrogacy Law. Second, there is substantial doubt whether under the circumstances of this case the avenue of surrogacy – at the heart of which, currently, is severance of the relationship between the surrogate and the intended parents – fits their objectives. Here, Justice Rubinstein adds that referring the First Petitioner under the current state of the law to exercise her rights outside of Israel according to the new protocol, with all the inconvenience involved, does not automatically lead to unconstitutional violations of her right. To the extent concerning the Eggs Donation Law, the obstacle before the Petitioners is created by the demand that the recipient of the donation (the woman receiving the eggs) have a medical need for a donation, a requirement indicated by the legislative history, the purpose of the law and the primacy given by the Eggs Donation Law to physiological

parenthood, whereas the recipient of the donation in our case, as far as known, is a healthy woman.

[**Justice Hayut** and **Justice Arbel** are united in the opinion about the inherent inconsistencies between the avenue regulated by the Surrogacy Law and the medical procedure requested by the Petitioners. However they believe the Petitioners' wishes must be granted following other legal paths, as to which their opinions differ. **Justice Hayut**, who believes that the restrictions set in the Eggs Donation Law in this regard, do not meet the tests of the Limitation Clause in section 8 of Basic Law: Human Dignity and Liberty), proposed a constitutional remedy of reading into the Eggs Donation Law a general catch all section that authorizes, in addition to the exceptional cases detailed in the law, the exceptions committee to approve an egg donation when the committee has been satisfied that "under the circumstances there are exceptional and special reasons that justify doing so" and thus to permit what the Petitioners request. **Justice Arbel**, on the other hand, who believes that both the Eggs Donation Law and The Surrogacy Law do not apply to the case at hand, utilizes here the People's Health Regulations (In Vitro Fertilization), 5747-1987 (hereinafter the IVF Regulations) in a similar manner as to the *T.Z.* case.]

As for the constitutional position of Justice Hayut, the majority believes that the power Justice Hayut wishes to extend the exceptions committee, which makes it possible to approve an egg donation even to a recipient of a donation who has not demonstrated a medical need for the donation, and this inconsistently with section 11 of the Eggs Donation Law. This is an authority that the Legislature did not confer and the history of the Exceptions committee also makes it difficult to support this position and this even if to Justice Rubinstein's approach the Legislature (as opposed to the Court) should revisit granting the exceptions committee broader authorities than it has done. As for Justice Arbel's position, Justice Rubinstein distinguishes between this case and the *T.Z.* case in the fundamental element about the medical need of the recipient of the donation. In any event it was held that the IVF Regulations do not currently fit what is requested, following the legislation of the Eggs Donation Law.

Still, the majority opinion clarified that indeed removing the requirement for a medical need established in section 11 of the Eggs Donation Law should be considered in order to expand the circle of men and women eligible for an egg donation. However, such an expansion is first and foremost in the hands of the Legislature. The current state of the law, until amended legislation is passed cannot tolerate more than to which the State is willing to agree, that is – taking the eggs out from Israel without sanction.

Justice Melcer's position, according to which approving the Petitioner's request could have been resolved within the authority of the Exceptions committee under section 22(a)(2) of the Eggs Donation Law, did not receive detailed consideration by the majority. However, in light of his position being rejected, Justice Melcer joins the paths suggested by Justices Hayut and Arbel.

President Grunis agreed with Justice Rubinstein's opinion; **Justice Naor** and **Justice Joubran** also wrote concurring opinions.

FERGUSON v. McKIERNAN

596 Pa. 78 (2007)

Justice BAER.[1]

We are called upon to determine whether a sperm donor involved in a private sperm donation—*i.e.,* one that occurs outside the context of an institutional sperm bank—effected through clinical rather than sexual means may be held liable for child support, notwithstanding the formation of an agreement between the donor and the donee that she will not hold the donor responsible for supporting the child that results from the arrangement. The lower courts effectively determined that such an agreement, even where bindingly formed, was unenforceable as a matter of law. Faced with this question of first impression in an area of law with profound importance for hundreds, perhaps thousands of Pennsylvania families, we disagree with the lower courts that the agreement in question is unenforceable. Accordingly, we reverse.

Former paramours Joel McKiernan (Sperm Donor) and Ivonne Ferguson (Mother) agreed that Sperm Donor would furnish his sperm in an arrangement that, by design, would feature all the hallmarks of an anonymous sperm donation: it would be carried out in a clinical setting; Sperm Donor's role in the conception would remain confidential; and neither would Sperm Donor seek visitation nor would Mother demand from him any support, financial or otherwise. At no time prior to conception, during Mother's pregnancy, or after the birth of the resultant twins did either party behave inconsistently with this agreement, until approximately five years after the twins' birth, when Mother filed a motion seeking child support from Sperm Donor. The trial court, recognizing the terms of the agreement outlined above and expressing dismay at what it found to be Mother's dishonest behavior, nevertheless found that the best interests of the twins rendered the agreement unenforceable as contrary to public policy. Thus, the court entered a support order against Sperm Donor, which the Superior Court affirmed.

The trial court found, and the record supports,[2] the following account of the events leading up to this litigation. Sperm Donor met Mother in May 1991, when he began his employment with Pennsylvania Blue Shield, where Mother also worked. At that time, Mother was married to and living with Paul Ferguson (Husband), although whether their sexual relations continued at that point is subject to dispute. Mother was raising two children she had conceived with Husband, while he provided little if any emotional or financial support.

Later that year, Sperm Donor's and Mother's friendly relations turned intimate, and in or around November 1991 their relationship took on a sexual aspect. Mother assured Sperm Donor that she was using birth control, and the couple did not use condoms. Although Mother variously indicated to Sperm Donor that she was taking birth control pills or using injectable or implanted birth control, in fact she had undergone tubal ligation surgery in or around 1982, following the birth of her second child by Husband.

The parties continued their intimate relationship until some time in 1993, maintaining separate residences but seeing each other frequently. On more than one occasion during that span, they "broke up," only to reconcile after brief hiatuses. During the summer of 1993, however, their

relationship began to flag.

Early that year, Mother had consulted a physician regarding the feasibility of reversing her tubal ligation to enable her to conceive another child. In September 1993, after learning that her tubal ligation was irreversible,[3] Mother approached physician William Dodson at Hershey Medical Center, to discuss alternative methods of conception, specifically *in vitro* fertilization (IVF) using donor sperm followed by implantation of the fertilized eggs. Mother did not inform Sperm Donor of either consultation, and continued to mislead him by referring to one or more alternative methods of contraception she claimed to be using or considering using.

Toward the end of 1993, the parties' relationship had changed in character from an intimate sexual relationship to a friendship without the sexual component. At about that time, late in 1993, Mother broached the topic of bearing Sperm Donor's child. Even though Mother biologically was incapable of conceiving via intercourse due to her irreversible tubal ligation, and notwithstanding that the parties were no longer in a sexual relationship, she inexplicably suggested first that they conceive sexually. Sperm Donor, evidently unaware that the point was moot, refused. He made clear that he did not envision marrying Mother, and thus did not wish to bear a child with her.

Revising her approach, Mother then suggested that Sperm Donor furnish her with his sperm for purposes of IVF. Initially, Sperm Donor expressed his reluctance to do so. He relented, however, once Mother convinced him that she would release him from any of the financial burdens associated with conventional paternity; that she was up to the task of raising an additional child in a single-parent household and had the financial wherewithal to do so; and that, were he not to furnish his own sperm, she would seek the sperm of an anonymous donor instead.[4]

To that end, Mother continued her consultations with Dr. Dobson at Hershey Medical Center, at least once visiting Dr. Dobson with a male companion. Although the evidence is heavily disputed in this regard, the trial court found that representations were made to Dr. Dobson that the man accompanying Mother was Husband.[5] The trial court further found that Sperm Donor was not aware of these preliminary consultations. Moreover, most paperwork pertaining to the procedure was completed without Sperm Donor's knowledge or participation, an aspect of the case the trial court found reflective of Mother's "latent subterfuge."

On February 14, 1994, Sperm Donor traveled to Hershey Medical Center to provide a sperm sample.[6] This sample was used, in turn, to fertilize Mother's eggs, which then were implanted. The procedure succeeded, enabling Mother to become pregnant. Sperm Donor in no way subsidized the IVF procedure.

During Mother's pregnancy, Sperm Donor and Mother remained friends, visited regularly, and spoke frequently on the phone, although as noted their relationship was no longer sexual or romantic in character. The trial court found, however, that Sperm Donor attended none of Mother's prenatal examinations and did not pay any portion of Mother's prenatal expenses. Although both parties made an effort to preserve Sperm Donor's anonymity as the source of the sperm donation during the pregnancy, Mother admitted the truth to Sperm Donor's brother when he asked whether Sperm Donor was the father. Sperm Donor also admitted his own role in Mother's pregnancy to his parents when they confronted him, following their receipt of anonymous phone calls

insinuating as much.

In August 1994, Mother went into labor prematurely. "In a panic," as the trial court characterized it, Mother contacted Sperm Donor and asked him to attend the birth. Believing that she had no one else to turn to, Sperm Donor joined Mother in the hospital. Even during the birth on August 25, 1994, however, Sperm Donor maintained his anonymity regarding his biological role in the pregnancy, an effort Mother affirmatively supported when she named Husband as the father on the twins' birth certificates, and reinforced by the fact that Sperm Donor neither was asked, nor offered, to contribute to the costs associated with Mother's delivery of the twins.

Regarding Sperm Donor's and Mother's post-partum interactions, the trial court found that,

> [a]fter the twins were born, [Sperm Donor] saw [Mother] and the boys on a few occasions in the hospital. Approximately two years after the births, [Sperm Donor] spent an afternoon with [Mother] and the twins while visiting his parents in Harrisburg.[7] [Sperm Donor] never provided the children with financial support or gifts, nor did he assume any parental identity. [Sperm Donor] had no further contact with either [Mother] or the children until May 1999 when [Mother] randomly obtained [Sperm Donor's] phone number[8] and subsequently filed for child support.

Ferguson v. McKiernan, 60 Pa. D. & C.4th 353, 358 (Dauphin Cty.2002) (citations omitted).

In the years after Mother gave birth to the twins and before Mother sought child support, Sperm Donor moved to Pittsburgh, met his future wife, married her, and had a child with her. Indeed, Sperm Donor's wife was pregnant with their second child when she testified in the trial court in these proceedings.

Based on this recitation of facts, the trial court found that the parties had formed a binding oral agreement prior to the twins' conception pursuant to which Sperm Donor would provide Mother with his sperm and surrender any rights and privileges to the children arising from his biological paternity in return for being released of any attendant support obligation. The parties further agreed to keep secret Sperm Donor's genetic connection to the twins. The trial court found ample evidence of the parties' intention in this regard, and determined that Sperm Donor's provision of sperm and Mother's agreement to forego any right to seek financial support from Sperm Donor constituted valid consideration as a matter of law, rendering the agreement a binding contract specifying the parties' rights and obligations.

The trial court reached this conclusion based on its determination that, "by virtue of the attendant testimony and evidence," Sperm Donor's testimony was more credible than the competing account offered by Mother. *Id.* at 359. "[Sperm Donor's] testimony was consistent throughout the Court's proceedings, whereas [Mother's] testimony contained numerous inconsistencies and contradictions, not to mention intentional falsehoods, fraud, and deceit involving not only [Sperm Donor] but the hospital as well." *Id.* at 359–60. The trial court reinforced its point by highlighting numerous irregularities in Mother's testimony. *Id.* at 360–63.

The court nevertheless found the agreement unenforceable. Citing the Superior Court's holding in *Kesler v. Weniger,* 744 A.2d 794, 796 (Pa.Super.2000), that "a parent cannot bind a child or bargain away that child's right to support," the court found its discretion restrained.

> [T]his Court cannot ignore and callously disregard the interests of the unheard-from third party[,] a party who without their privity to this contract renders it void. No other party, albeit a parent, can bargain away a child's support rights. Although we find the Plaintiff's actions despicable and give [*sic*] the Defendant a sympathetic hue, it is the interest of the children we hold most dear. Accordingly, we hold that the Defendant's appeal from the Dauphin County Domestic Relations' determinations is denied, the Defendant is the legal father of the twins, and he is obligated to pay child support to the Plaintiff.

Ferguson, 60 Pa. D. & C.4th at 364. Relying on the support guidelines, based on Mother's monthly net income of $1947.61 and Sperm Donor's monthly net income of $5262.30, the court imposed on Sperm Donor an ongoing support obligation of $1384 per month effective retroactively to January 1, 2001, with a corresponding arrear of $66,033.66 due immediately upon issuance of the order.

A panel of the Superior Court affirmed the trial court's ruling in a unanimous opinion that echoed the trial court's ruling. *See Ferguson v. McKiernan,* 855 A.2d 121 (Pa.Super.2004). The Superior Court began with the premise that "[t]he oral agreement between the parties that appellant would donate his sperm in exchange for being released from any obligation for any child conceived, on its face, constitutes a valid contract." *Id.* at 123.[9] Like the trial court, however, the Superior Court found the agreement so formed to be unenforceable as against public policy, and rejected Sperm Donor's contract- and estoppel-based arguments. "Due to the fact the contract between appellee and appellant bargained away a legal right not held by either of them, ... but belonging to the subject children, the contract was not enforceable." *Id.* at 124 (citing *Kesler,* 744 A.2d 794).

Against this background, in which both of the lower courts found an agreement sufficiently mutual and clear to be binding, the lone question we face is as simple to state as it is vexing to answer. We must determine whether a would-be mother and a willing sperm donor can enter into an enforceable agreement under which the donor provides sperm in a clinical setting for IVF and relinquishes his right to visitation with the resultant child(ren) in return for the mother's agreement not to seek child support from the donor. In considering this pure question of law, our standard of review is *de novo* and the scope of our review is plenary. *See Pennsylvania Nat. Mut. Cas. Co. v. Black,* 591 Pa. 221, 916 A.2d 569, 578 (2007). We begin by reviewing the thorough arguments presented by the parties.

Sperm Donor argues first that Pennsylvania law and public policy precluding parents from bargaining away a child's entitlement to child support should not preclude enforcement of an otherwise binding contract where the bargain in question occurs prior to, and indeed induces, the donation of sperm for IVF and implantation in a clinical setting. Sperm Donor urges this Court to hold that the fact that the agreement was formed months prior to conception distinguishes this case from precedent preventing parents from bargaining away a child in being's right to seek child support. *See, e.g., Knorr v. Knorr,* 527 Pa. 83, 588 A.2d 503, 505 (1991)(holding that, while

"Parties to a divorce action may bargain between themselves and structure their agreement as best serves their interests," they may not bargain away the rights of their children to support). Sperm Donor emphasizes that he provided his sperm to Mother contingent on her promise not to seek child support in the future—that the promise was, in effect, a "but for" cause of the twins' conception and birth. Sperm Donor maintains that his and Mother's shared intention "was to cloak [their] agreement in the same legal protections that an anonymous sperm donor enjoys," and that "people should be free to enter into these agreements, in the interest of allowing people access to greater ... options concerning the areas of reproduction." Brief for Appellant at 16.

Sperm Donor contends that to uphold the Superior Court's ruling will call into question the legal status of all sperm donors, including those who donate anonymously through sperm banks. Sperm Donor buttresses his argument by reference to the Uniform Parentage Act (UPA), a proposed uniform law originally promulgated in 1973 by the American Bar Association and adopted, in some form, by at least nineteen states.[10] Sperm Donor observes that the UPA, which he acknowledges has not been adopted by this Commonwealth, does not require anonymity in the sperm donor context to protect the donor from subsequent parental responsibility and the child and parent from a donor's subsequent claim of parental privileges. Rather, the UPA provides unequivocally that "A donor is not a parent of a child conceived by means of assisted reproduction." UPA § 702. The Comment to § 702 elaborates: "The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. *In sum, donors are eliminated from the parental equation.*" UPA § 702 Cmt. (emphasis added).[11] Sperm Donor argues that the Commonwealth should not concern itself with the question of anonymity if the parties to the agreement themselves are not concerned. Sperm Donor also argues that an absolute holding of parental responsibility in this case threatens other contract-based alternative reproductive arrangements, such as adoption and institutional sperm donation, since the lower court rulings both plausibly may be read to hold that any contract denying a child the support of any biological parent necessarily violates public policy.

Mother, conversely, argues that this Court should uphold the lower courts' rulings that the best interests of the child preclude enforcement of the parties' contract, contending that "there is no basis for making an exception [to the best interests approach] merely because the children at issue were conceived in a clinical setting and the agreement was made prior to their conception." Brief for Appellee at 8. She argues that if this Court rules otherwise, it will act impermissibly in place of the General Assembly and contrarily to 23 Pa.C.S. § 5102,[12] which "mandates that without exception" all children shall be "legitimate" without regard to the marital status of their parents, and that children born out of wedlock shall enjoy all rights and privileges of children born to married parents. Brief for Appellee at 8.

Mother rejects Sperm Donor's reliance on UPA § 702, emphasizing that for over thirty years the General Assembly has failed to adopt the model act. The twins, Mother argues, are Sperm Donor's offspring pursuant to § 5102, and have the same right to his support they would have if Sperm Donor and Mother had conceived by sexual intercourse. Mother observes that the General Assembly, beginning in 1975, repeatedly has considered bills purporting to elaborate on the legal relationships spawned by reproductive alternatives, but none has made it out of committee.[13] Mother argues that the General Assembly's failure to enact these bills signals its "unwillingness ... to adopt the UPA provision which ... eliminates all sperm donors (except the spouse of the

donee) from the 'parental equation.' " Brief for Appellee at 10.

To reinforce her argument that this Court should decline to act in the absence of legislative guidance, Mother cites *Benson ex rel. Patterson v. Patterson,* 574 Pa. 346, 830 A.2d 966 (2003), in which this Court declined to impose a continuing support obligation against a deceased parent's estate. There, this Court observed that "it is not the role of the judiciary to legislate changes in the law which our legislature has declined to adopt." *Id.* at 967 (internal quotation marks omitted). In declining to impose a continuing support obligation on decedent's estate, we noted the then recent expansion of the duty of parents to support their minor children, *see generally* 23 Pa.C.S. § 4321 ("Liability for support"), coupled to the legislature's omission "to extend the duty of support to the estates of deceased parents," either "directly or inferentially," and concluded that we would exceed our authority to do so in lieu of the legislature. *Patterson,* 830 A.2d at 967–68. Mother maintains that to rule in favor of Sperm Donor would amount to judicial legislation of "that which the General Assembly has declined to enact," in violation of the institutional restraint animating our decision in *Patterson.* Brief for Appellee at 10–11.[14]

Mother's argument, for all its nuance, effectively relies on the same background principle that the lower courts found dispositive: that even mutually entered and otherwise valid contracts are unenforceable when the contracts violate clear public policy[15]—in this case, the Commonwealth's oft-stated policy not to permit parents to bargain away their child's right to support. Notably, neither the courts below nor Mother undertake the rigorous analysis called for by our caselaw governing the enforceability of contracts supposed to violate public policy,[16] relying instead on a tenuous analogy between the instant circumstances and those of divorce or other parenting arrangements arising in the context of sexual relationships.

This analogy, however, is unsustainable in the face of the evolving role played by alternative reproductive technologies in contemporary American society. It derives no authority from apposite Pennsylvania law, and it violates the commonsense distinction between reproduction via sexual intercourse and the non-sexual clinical options for conception that are increasingly common in the modern reproductive environment. The inescapable reality is that all manner of arrangements involving the donation of sperm or eggs abound in contemporary society, many of them couched in contracts or agreements of varying degrees of formality. *See* UPA Art. 7. Prefatory Cmt. (outlining the various reproductive alternatives available to parties seeking to raise children). An increasing number of would-be mothers who find themselves either unable or unwilling to conceive and raise children in the context of marriage are turning to donor arrangements to enable them to enjoy the privilege of raising a child or children, a development neither our citizens nor their General Assembly have chosen to proscribe despite its growing pervasiveness.[17]

Of direct relevance to the instant case, women, single and otherwise, increasingly turn to anonymous sperm donors to enable them to conceive either *in vitro* or through artificial insemination. In these arrangements, the anonymous donor and the donee respectively enter into separate contracts with a sperm bank prior to conception and implantation of an embryo or embryos. The contract releases the mother from any obligation to afford the sperm donor a father's access to the child for visitation or custody while releasing the donor from any obligation to support the child.[18]

Thus, two potential cases at the extremes of an increasingly complicated continuum present themselves: dissolution of a relationship (or a mere sexual encounter) that produces a child via intercourse, which requires both parents to provide support; and an anonymous sperm donation, absent sex, resulting in the birth of a child. These opposed extremes produce two distinct views that we believe to be self-evident. In the case of traditional sexual reproduction, there simply is no question that the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires. *See, e.g., Knorr,* 588 A.2d at 505 ("[Parent's] right to bargain for themselves is their own business. They cannot in that process set a standard that will leave their children short."); *Kesler,* 744 A.2d at 796 (same). In the institutional sperm donation case, however, there appears to be a growing consensus that clinical, institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor.[19] Between these poles lies a spectrum of arrangements that exhibit characteristics of each extreme to varying degrees—informal agreements between friends to conceive a child via sexual intercourse; non-clinical non-sexual insemination; and so on.

Although locating future cases on this spectrum may call upon courts to draw very fine lines, courts are no strangers to such tasks, and the instant case, which we must resolve, is not nearly so difficult. The facts of this case, as found by the trial court and supported by the record, reveal the parties' mutual intention to preserve all of the trappings of a conventional sperm donation, including formation of a binding agreement. Indeed, the parties could have done little more than they did to imbue the transaction with the hallmarks of institutional, non-sexual conception by sperm donation and IVF. They negotiated an agreement outside the context of a romantic relationship; they agreed to terms; they sought clinical assistance to effectuate IVF and implantation of the consequent embryos, taking sexual intercourse out of the equation;[20] they attempted to hide Sperm Donor's paternity from medical personnel, friends, and family; and for approximately five years following the birth of the twins both parties behaved in every regard consistently with the intentions they expressed at the outset of their arrangement, Sperm Donor not seeking to serve as a father to the twins, and Mother not demanding his support, financial or otherwise. That Mother knew Sperm Donor's identity, the parties failed to preserve Sperm Donor's anonymity from a handful of family members who were well acquainted with Sperm Donor and Mother alike, and Mother acted on her preference to know the identity of her sperm donor by voluntarily declining to avail herself of the services of a company that matches anonymous donors with willing mothers, reveal no obvious basis for analyzing this case any differently than we would a case involving an institutionally arranged sperm donation.

Assuming that we do not wish to disturb the lives of the many extant parties to anonymous, institutional sperm donation, we can only rule in Mother's favor if we are able to draw a legally sustainable distinction between the negotiated, clinical arrangement that closely mimics the trappings of anonymous sperm donation that the trial court found to have existed in this case and institutional sperm donation, itself. Where such a distinction hinges on something as trivial as the parties' success in preserving the anonymity they took substantial steps to ensure, however, we can discern no principled basis for such a distinction.[21]

Moreover, even if, *arguendo,* such a distinction were tenable, it would mean that a woman who wishes to have a baby but is unable to conceive through intercourse could not seek sperm from a man she knows and admires, while assuring him that he will never be subject to a support order

and being herself assured that he will never be able to seek custody of the child. Accordingly, to protect herself and the sperm donor, that would-be mother would have no choice but to resort to anonymous donation or abandon her desire to be a biological mother, notwithstanding her considered personal preference to conceive using the sperm of someone familiar, whose background, traits, and medical history are not shrouded in mystery. To much the same end, where a would-be donor cannot trust that he is safe from a future support action, he will be considerably less likely to provide his sperm to a friend or acquaintance who asks, significantly limiting a would-be mother's reproductive prerogatives.[22] There is simply no basis in law or policy to impose such an unpleasant choice, and to do so would be to legislate in precisely the way Mother notes this Court has no business doing.

Moreover, we cannot agree with the lower courts that the agreement here at issue is contrary to the sort of manifest, widespread public policy that generally animates the courts' determination that a contract is unenforceable. The absence of a legislative mandate coupled to the constantly evolving science of reproductive technology and the other considerations highlighted above illustrate the very opposite of unanimity with regard to the legal relationships arising from sperm donation, whether anonymous or otherwise. This undermines any suggestion that the agreement at issue violates a "dominant public policy" or "obvious ethical or moral standards," *Hall v. Amica Mut. Ins. Co.,* 538 Pa. 337, 648 A.2d 755, 760 (1994), demonstrating a "virtual unanimity of opinion," *Mamlin v. Genoe,* 340 Pa. 320, 17 A.2d 407, 409 (1941), *see generally supra* n. 16, sufficient to warrant the invalidation of an otherwise binding agreement.

This Court takes very seriously the best interests of the children of this Commonwealth, and we recognize that to rule in favor of Sperm Donor in this case denies a source of support to two children who did not ask to be born into this situation. Absent the parties' agreement, however, the twins would not have been born at all, or would have been born to a different and anonymous sperm donor, who neither party disputes would be safe from a support order. Further, we cannot simply disregard the plight of Sperm Donor's marital child, who also did not ask to be born into this situation, but whose interests would suffer under the trial court's order.[23]

The parties in this case agreed to an arrangement that to all appearances was to resemble—and in large part did resemble for approximately five years—a single-parent arrangement effectuated through the use of donor sperm secured from a sperm bank. Under these peculiar circumstances, and in considering as we must the broader implications of issuing a precedent of tremendous consequence to untold numbers of Pennsylvanians, we can discern no tenable basis to uphold the trial court's support order. Rather, we hold that the agreement found by the trial court to have been bindingly formed, which the trial court deemed nevertheless unenforceable is, in fact, enforceable.

Because we hold that the parties' agreement not to seek visitation or support is enforceable in this case, we reverse the Superior Court's order affirming the trial court's support order, and remand for further action consistent with this Opinion.

Former Justices NIGRO and NEWMAN did not participate in the decision of this case.

Chief Justice CAPPY and Justice CASTILLE join the opinion.

Justice SAYLOR, dissenting.

Section 5102 of the Domestic Relations Code prescribes that "[a]ll children shall be legitimate irrespective of the marital status of their parents," and, subject to limited exceptions not applicable here, "in every case where children are born out of wedlock, they shall enjoy all the rights and privileges as if they had been born during the wedlock of their parents [.]" 23 Pa.C.S. § 5102(a).

At the core of Appellee's arguments is the contention that the public policy controlling the outcome of this case is embodied in Section 5102's conferral of full rights and privileges upon all children born out of wedlock. The majority, however, dismisses such argument with the comment that this statute relates to a child's legitimacy but not his or her entitlement to support notwithstanding a contrary agreement between a mother and a sperm donor. *See* Majority Opinion, at 72–73, 940 A.2d at 1243–1244 n. 12. Section 5102(b), however, makes it clear that the relevant "rights and privileges" referenced in Section 5102(a) include benefits from the father. *See* 23 Pa.C.S. § 5102(b). Moreover, under the statute, the status as father may be determined by a court determination of paternity, *see id.,* which may be established by blood relation. *See* 23 Pa.C.S. § 5104.

I cannot join the majority opinion, as I believe that the Legislature has established the relevant public policy through the provisions quoted above "in every case" involving children born out of wedlock. 23 Pa.C.S. § 5102(a). I realize that a straightforward reading of the statute has potential ramifications for sperm donors in Pennsylvania beyond the unique circumstances presented here, as I believe the Legislature does as well, since it has previously considered various measures to mitigate the impact but has not yet acted to adopt any of these. I also recognize that, as between the mother and father in the present case, the equities do not favor the mother. My position is based on the respective roles of the representative and judicial branches.

Justice EAKIN, dissenting.

I respectfully dissent from the majority's conclusion appellee can bargain away her children's right to support from their father merely because he fathered the children through a clinical sperm donation. The majority concludes this is possible because the parties intended "to preserve all of the trappings of a conventional sperm donation ... [and] negotiated an agreement outside the context of a romantic relationship...." Majority Op., at 95, 940 A.2d at 1246. To this, I say, "So what?" The only difference between this case and any other is the means by which these two parents conceived the twin boys who now look for support. Referring to Joel McKiernan as "Sperm Donor" does not change his status—he is their father.

It is those children whose rights we address, not the rights of the parents. Do these children, unlike any other, lack the fundamental ability to look to both parents for support? If the answer is no, and the law changes as my colleagues hold, it must be for a reason of monumental significance. Is the means by which these parents contracted to accomplish conception enough to overcome that right? I think not.

The paramount concern in child support proceedings is the best interest of the child. *Sutliff v.*

Sutliff, 515 Pa. 393, 528 A.2d 1318, 1322 (1987). Parents are permitted to enter child support agreements where they negotiate, bargain, and ultimately establish valid child support payments. *See generally Knorr v. Knorr,* 527 Pa. 83, 588 A.2d 503, 504–05 (1991). While "[p]arties to a divorce action may bargain between themselves and structure their agreement as best serves their interests," *id.,* at 505 (citing *Brown v. Hall,* 495 Pa. 635, 435 A.2d 859 (1981)), the ability of parents to bargain child support is restricted:

> [Parents] have no power ... to bargain away the rights of their children.... They cannot in that process set a standard that will leave their children short. Their bargain may be eminently fair, give all that the children might require and be enforceable because it is fair. When it gives less than required or less than can be given to provide for the best interest of the children, it falls under the jurisdiction of ***101** the court's wide and necessary powers to provide for that best interest.

Id. (internal citations omitted).

I agree, as did the Superior Court, with the trial court's fundamental recognition that "it is the interest of the children we hold most dear." *Ferguson v. McKiernan,* 855 A.2d 121, 124 (Pa.Super.2004) (quoting Trial Court Opinion, 12/31/02, at 9). This Court possesses "wide and necessary powers to provide for [a child's] best interest." *Knorr,* at 505. "[P]arents have a duty to support their minor children even if it causes them some hardship." *Sutliff,* at 1322 (citation omitted).

The majority, with little citation to authority, relies on policy notions outside the record, such as "the evolving role played by alternative reproductive technologies in contemporary American society," Majority Op., at 93, 940 A.2d at 1245, and hypothetical scenarios concerning reproductive choices of individuals. *Id.,* at 93, 940 A.2d at 1245. These musings are thought-provoking, but are ultimately inapplicable to this case of enforceability of a private contract ostensibly negating a child's right to support—a contract our jurisprudence has long ago held to be unenforceable. This case has little or nothing to do with anonymous sperm clinics and reproductive technology.

Speculating about an anonymous donor's reluctance is irrelevant—there is no anonymity here and never has been. There was no effort at all to insulate the identity of the father—he was a named party to the contract! This is not a case of a sperm clinic where donors have their identity concealed. The only difference between this case and any other conception is the intervention of hardware between one identifiable would-be parent and the other.

The majority also references the Uniform Parentage Act (UPA). Our legislature has not adopted the UPA. This Court has held, "it is not the role of the judiciary to legislate changes in the law which our legislature has declined to adopt." *Benson ex rel. Patterson v. Patterson,* 574 Pa. 346, 830 A.2d 966, 967 (2003) (quoting *Garney v. Estate of Hain,* 439 Pa.Super. 42, 653 A.2d 21 (1995)). The "legislature ... has taken an active role in developing the domestic relations law of Pennsylvania," *id.,* at 968, and because it has not adopted the UPA, this Court should not consider it; the subject matter is within that body's purview. If anything, the failure to enact it speaks of

rejection of its principles, not acceptance of them.

Indeed, it is not our place to legislate, yet the refusal to recognize a traditional and just right to support because of "evolving" notions (which are not directly applicable to the facts) is surely legislation from the Court. To deny these children their right to support from their father changes long-standing law—if the legislature wishes to disenfranchise children whose conception utilizes clinical procedures, it may pass such a law, but we should not. The legislature can best undertake consideration of all the policy and personal ramifications of "evolving" notions and "alternative reproductive technologies in contemporary American society." Majority Op., at 93, 940 A.2d at 1245.

While conception is accomplished in ways our forbearers could never have imagined, and will in the future be accomplished in ways we cannot now imagine, that simply is not the issue with a private contract between these identifiable parents. We do not have anonymity—we have a private contract between parents who utilized a clinical setting to accomplish those private aims, the creation of a child. The issue is not anyone's ability or future reluctance to utilize anonymous sperm banks—the issue is the right of these two boys to support, and whether there are compelling reasons to remove that right from them. The children point and say, "That is our father. He should support us." What are we to reply? "No! He made a contract to conceive you through a clinic, so your father need not support you." I find this unreasonable at best.

This private contract involves traditional support principles not abrogated by the means chosen by the parents to inseminate the mother, and I would apply the well-settled precedent that the best interest of the children controls. A parent cannot bargain away the children's right to support. These children have a right to support from both parents, including the man who is *not* an anonymous sperm donor, but their father.

I would affirm the Superior Court, as the agreement here is against the public policy and thus unenforceable.

Notes

[1] This case was reassigned to this author.

[2] This Court is bound to a trial court's findings of fact to the extent that they are supported by competent evidence. *See Triffin v. Dillabough,* 552 Pa. 550, 716 A.2d 605, 607 (1998).

[3] The trial court frames it thus, and the record supports that finding. It is less clear, however, whether Mother actually underwent a procedure aimed at reversing the ligation, or simply was advised that reversal was not an option.

[4] In testimony uncontradicted by Mother, Sperm Donor stated that Mother preferred him to an anonymous sperm donor because "[s]he knew my background. She just knew my makeup, and just said that she preferred to have that anonymous donor known to her." Notes of Testimony, 8/20/2001,

at 22–23.

[5] This finding is supported not just by testimony but by inference, insofar as there appears to be no dispute that Dr. Dobson will assist in IVF only for women in stable marriages.

[6] Coincidentally, the paperwork for Mother's divorce from Husband was filed the same day.

[7] By then, Sperm Donor had moved to the Pittsburgh area.

[8] Although the court's characterization of the relevant interaction as "random" is not unfair, it risks being misleading. Evidently, Mother had occasion to contact Sperm Donor's office for business purposes. She discovered Sperm Donor's name and number as a consequence of that interaction, and proceeded to call him seeking support, claiming that welfare officials had pressured her to do so.

[9] The Superior Court's phrasing here is unfortunate because it is less than clear that a release from putative support obligation constitutes a benefit or forbearance sufficient to comprise legally enforceable consideration. The trial court, however, found that the parties' bargain in fact entailed Sperm Donor's commitment not to seek paternal privileges in exchange for Mother's agreement not to seek support. *Ferguson,* 60 Pa. D. & C.4th at 356. This finding of fact, which is disregarded by Mother in her effort to argue that consideration for the original agreement was lacking, Brief for Appellee at 11 ("[T]he only possible exchange of promises [prior to conception] would be the consent to donate the sperm and the donee's agreement to use it for the IVF procedure."), describes consideration sufficient to sustain an otherwise enforceable contract. *See York Metal & Alloys Co. v. Cyclops Steel Co.,* 280 Pa. 585, 124 A. 752, 754 (1924)("There is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not." (internal quotation marks omitted)); *cf. Stern v. Stern,* 430 Pa. 605, 243 A.2d 319, 321–22 (1968)(holding, in the context of a property settlement in a divorce, that "the family settlement was, itself, ample consideration"). That the mutual forbearance in question depends on the occurrence of a contingent event, *i.e.,* the birth of a child or children, does not change this analysis, as contracts often are designed to take effect only upon the occurrence of some future contingency. *See, e.g., Dora v. Dora,* 392 Pa. 433, 141 A.2d 587, 591 (1958)(finding enforceable a contract specifying the obligations of parties to a divorce even where that contract was to be performed only in the event of the later entry of a final divorce decree).

[10] Subsequent citations to the UPA will refer to it by "UPA" followed by a section number. The UPA, as amended through 2002, is available, in electronic form, at http://www.law.upenn.edu/bll/ulc/upa/final2002.htm (last reviewed, June 11, 2007). States adopting the UPA in some form include Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. *See* Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family,* 1996 UTAH L.REV. 93, 119 & nn. 94–95 (discussing artificial insemination and surveying states' laws regarding the legal status of a sperm donor). Although states adopting the UPA principally rely on the 1973 text, the 2002 revision does not differ materially with respect to the legal status of sperm

donors, hence all references to the UPA refer to the 2002 text.

[11] Notably, the UPA as drafted urges any sperm donor seeking to assert paternity over the offspring resulting from his donation to execute a writing manifesting that intent. UPA § 704(a); *cf. id.* § 704(b)(providing that a donor may be found to be father to the child if he and the mother cohabitate for two years and hold the child out as their own).

[12] Section 5102 ("Children declared to be legitimate") provides, in part:

> **(a) General rule.**—All children shall be legitimate irrespective of the marital status of their parents, and, in every case where children are born out of wedlock, they shall enjoy all the rights and privileges as if they had been born during the wedlock of their parents except as otherwise provided in Title 20 (relating to decedents, estates and fiduciaries).

23 Pa.C.S. § 5102. We reject Mother's invocation of this section, as the matter before us is not the twins' "legitimacy" but their entitlement to Sperm Donor's support notwithstanding the contrary agreement entered into by Mother and Sperm Donor.

[13] *See* House Bill 2520 (1975) ("Legitimation of Children Born by Artificial Insemination"); Senate Bill 408 (2005) ("Surrogate Parenting Agreements") (referred to Senate Judiciary Committee, March 14, 2005).

[14] Notably, neither Mother nor either Dissenting Opinion offers any counterargument to Sperm Donor's suggestion that a ruling in Mother's favor will call into question the legal relationships created in the context of commercial sperm donation. *See infra* n. 21.

[15] *See Mamlin v. Genoe,* 340 Pa. 320, 17 A.2d 407, 409 (1941).

[16] In assessing whether a contractual agreement violates public policy

> this Court is mindful that public policy is more than a vague goal which may be used to circumvent the plain meaning of the contract. *Hall v. Amica Mut. Ins. Co.,* 538 Pa. 337, 347, 648 A.2d 755, 760 (1994) [....]
>
> > Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy.... Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts ... contrary to public policy. The courts must be content to await legislative action.
>
> *Id.* at 347–48, 648 A.2d at 760 (citations omitted). This Court has further elaborated that:
>
> > It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring [that the contract is against public policy].
>
> *Mamlin v. Genoe,* 340 Pa. 320, 325, 17 A.2d 407, 409 (1941).

Eichelman v. N'wide Ins. Co., 551 Pa. 558, 711 A.2d 1006, 1008 (1998)(unbracketed modifications in original; bracketed ellipsis added).

[17] *See* Brashier, *supra* n. 10, at 183 n. 299 (citing a 1987 study that estimated 65,000 annual births via artificial insemination, approximately half of which occurred using donated sperm); *cf.* Centers for Disease Control and Prevention, Assisted Reproductive Technology Surveillance—United States, 2003 (May 26, 2006), *available at* http://www. cdc. gov/mmwr/preview/mmwrhtml/ss5504a1.htm (last reviewed June 11, 2007) (noting that a total of 122,872 alternative reproductive procedures resulting in the creation of embryos were reported to CDC in 2003, including 1413 pregnancies in Pennsylvania).

[18] At least one such contract goes even further, ensuring these protections by providing for the physical destruction of all records pertaining to a sperm donor's identity. *See Johnson v. Superior Court,* 80 Cal.App.4th 1050, 95 Cal.Rptr.2d 864, 867 (2000).

[19] As noted, *see supra* n. 13 and accompanying text, in the decades that such reproductive alternatives have been available, the absence of a strong public will of any sort has resulted in the failure of the General Assembly to enact any directly applicable legislation. Of course, this observation and others like it stop well short of suggesting there is no opposition to the practice. That a group of citizens disapproves of a practice, in any event, does not amount to a "virtually unanimous" public policy against it.

[20] *Cf. Kesler,* 744 A.2d 794 (declining to reverse a support award based upon a biological father's sperm donor theory, when the "sperm donation" in question was the product of sexual intercourse in the context of a long-term relationship).

[21] In this regard, Mr. Justice Eakin's Dissenting Opinion's vague, inconsistent effort to imply that a legally material distinction exists between the instant circumstance and institutional sperm donation is contradicted by the same Opinion's persistent indifference to the means by which a child is conceived. *Compare* Diss. Op. at 101, 940 A.2d at 1250 (Eakin, J.)("This case has little or nothing to do with anonymous sperm clinics and reproductive technology.") *with id.* at 100, 940 A.2d at 1249 ("Is the means by which these parents contracted to accomplish conception enough to overcome [a biological child's] right [to support]? I think not."), *id.* at 100, 940 A.2d at 1250 ("The only difference between this case and any other conception is the intervention of hardware between one identifiable would-be parent and the other."), *id.* at 102, 940 A.2d at 1251 ("This private contract involves traditional support principles not abrogated by the means chosen by the parents to inseminate the mother....").

> Nor can it be said that Mr. Justice Eakin's Dissenting Opinion would protect children of institutional sperm donation based upon its sporadic references to anonymity. In stark refutation of that claim, the Dissent observes that, "While conception is accomplished in ways our forbearers could never [have] imagined, and will in the future be accomplished in ways we cannot now imagine, *that simply is not the issue with a private contract between these identifiable parents.*" *Id.* at 102, 940 A.2d at 1251 (emphasis added). Nowhere does the Dissent qualify its reliance on identifiable parents. Thus, it would appear to follow, under the Dissent's reasoning, that, where a sperm donor's identity has been maintained by a sperm bank, that donor would be legally responsible in Pennsylvania to support every child that shares his DNA as a consequence of his donation, because surely a sperm bank's records, if subject to compulsory process, would render

all donors identifiable.

[22] *See In re Interest of R.C.,* 775 P.2d 27, 33 (Colo.1989) ("[A]nonymous donors are not likely to donate semen if they can later be found liable for support obligations, and women are not likely to use donated semen from an anonymous source if they can later be forced to defend a custody suit and possibly share parental rights and duties with a stranger.").

[23] Notably, as narrowly as our courts focus upon the best interests of children who appear before them, that focus does not operate to the absolute exclusion of all competing policies. The contractual release of biological parents' parental rights in the context of adoption, for example, may given certain contingencies disserve the adopted child's interest later in life in a particular case. Nevertheless, such releases are unequivocally binding. *See generally In re M.L.O.,* 490 Pa. 237, 416 A.2d 88, 89 (1980)(emphasizing the finality, under the Adoption Act, of a parent's voluntary relinquishment of parental rights). Furthermore, we have held that a child is precluded from continuing to enjoy the support of a deceased parent even where decedent's estate is entirely adequate to the task. *See Benson,* 574 Pa. 346, 830 A.2d 966.

The Delusion of Symmetric Rights

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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

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[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–CLL 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 decisions[12] (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 Strasbourg-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 Strasbourg-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' metaphor[44] 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 observation[46] 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. Kamminga (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 $\{U_1, U_2 \ldots U_k\}$ and named 'classes' of the same partition, such that the union of all Ui's is equal to U and the intersection of Ui and Uj is empty for any distinct Ui and Uj. 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, espying 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 glowing 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 inseparate 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 ou 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.

Shahar Lifshitz*

Neither Nature nor Contract: Toward an Institutional Perspective on Parenthood Essay

Abstract: The official narrative of parental laws in Israel describes biological parenthood as the natural legal basis for determining parenthood, while recognizing legal adoption and surrogacy, in specific circumstances, as the sole official exception to the rule (and even then with some remnants of the biological connection). However, closer examination of parental laws in Israel, as well as in other countries, reveals that biological parenthood has in fact never served as the sole basis for recognizing parental status. Familial status, explicit and implicit agreements, and functional parenthood have all served, and continue to serve in many cases, albeit not always officially, as key parameters in determining the parental relationship and its consequences. The objection against the exclusivity of natural, biological parenthood has seemingly been strengthened in light of the challenge facing lawmakers through technological reproduction advances such as sperm donations, egg donations, and surrogacy. As a result of these recent developments, prominent scholars have begun to seek alternative definitions for the biological definition. One such approach, which was influenced by cultural feminism, attempts to determine the identity of the parent based on a concrete psychological relationship between the parent and the child. Another, more radical approach, views individual autonomy and the voluntary contract as the new basis for legal parenthood. In this essay, I argue that both alternatives – natural-biological and voluntary contract – do not sufficiently narrate the story behind determination of parenthood in Israeli law nor do they supply a sound normative basis for proper regulation of parental determination. In addition, I argue that while these approaches, which focus on the concrete psychological relationship between parent and child, add an important element to the discussion of parental determination, they are too focused on the private aspects of specific parent–child relationships and in doing so, these approaches overlook important elements of the proper legal regulation of parenthood. In light of this insufficiency, I suggest a social-institutional perspective of parenthood, one emphasizing that parenthood is not merely a matter of nature, but instead an artificial construct structured and

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designed by society. In addition, this approach rejects the current dissonance that exists between (1) the legal determination of parenthood; (2) the regulation of reproductive technologies, on the one hand, and the regulation of parenthood's content in the sense of regulating parental status vs. state and vs. children, on the other hand. This approach maintains that the legal and social definition of parenthood will inevitably affect the content of parenthood. Therefore, I argue that on a normative level, various decisions regarding regulation of reproductive technologies and the determination of parenthood must take into account not only the involved parties but also the manner the decision can affect the conception "who is a parent" and more importantly, the ethos of parenthood that the law should encourage.

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Introduction

In the seminal case of Anonymous v. Anonymous (Civil Appeal, 3077/90)[1] – discussing an unmarried father's refusal to acknowledge his legal status and duty to pay child support for his biological daughter – Supreme Court Justice Cheshin articulated an impressive manifest establishing the biological-genetic relationship as a natural basis for the legal definition of parenthood in Israel. In additional cases as well, the Court stated that biological parenthood is the natural parenthood recognized – though not created by – the state as well as society.[2]

1 Civil Appeal 3077/90 John Doe Plonit v. John Doe Ploni, 49(2) PD [1990] 578 (Isr.).

2 HCJ Further Hearing 7015/94 Attorney General v. Plonit, 50(1) PD 48 [1995] (Isr.).

> The law of nature is that the natural mother and father will hold their child, raise him, love him and care for his needs until he has grown into a man. This is the instinct of survival within us – the "call of blood," the primal yearning of a mother for her child – and it is common to man, animal beast and bird... this bond is stronger than any law, and lies beyond society, religion and state... state law did not create the rights of parents towards their children and towards the world. State law receives what is already made, and tells us to protect our innate instincts, and turns the "interests" of the parents, to a "right" ensured by law, to the rights of the parents to hold their children.

Id. at 102.

In this spirit, the Israeli legal system – like many others – invalidates agreements between biological parents signed prior to the birth of their child, stipulating that one of them – usually the husband – will not be legally recognized as the father.[3] Indeed, the Israeli legal system requires those who have entered parenthood unwillingly – what is known in parental jargon as "unintentional parenthood" or "fathers against their will" – to fulfill their basic obligations arising from parental status.[4]

Generally, the official narrative of parental laws in Israel describes biological parenthood as the natural legal basis for determining parenthood,[5] while recognizing legal adoption and in specific circumstances surrogacy[6] as the sole official exception to the rule[7] (and even then with some remnants of the biological connection[8]). However, closer examination of parental laws in Israel, as well as in other countries, reveals that biological parenthood has in fact never served as the sole basis for recognizing parental status. Familial status,[9] explicit and implicit agreements,[10] and functional

3 *See* CA 93/5464 Ploni v. Almoni, 48(3) PD 857 [1994] (Isr.).

4 *See* Fam. Ct. (Hi) 04/29051 Ploni v. Almoni (June. 29, 2006) Nevo Legal Database (by subscription) (Isr.) and Fam. Ct. (Jer)05/2470 S. Minor v. Almoni (Oct. 04, 2006) Nevo Legal Database (by subscription) (Isr.).

5 *See, e.g.* HCJ 6483/05 Kahadan v. Minister of the Interior (Aug. 09, 2010) Nevo Legal Database (by subscription) (Isr.). "The assumption in the Census Registration Law is that the registration of matters in the census concerning parenthood is based on the existence of a physical–biological relationship between the parents and the children. The law inherently excludes any such registration that is not based on biological parenthood." *Id.* at 13. *See also* Fam. Ct. (KY) 08/1180 Plonit v. Ploni (Apr. 27, 2011) Nevo Legal Database (by subscription) (Isr.) "According to existing law, a bond of fatherhood can arise from a biological finding or as the result of a process of adoption." *Id.* at 10.

6 *See* The Embryo Carrying Agreement (Approval of Agreement and Status of the New-born) Law, 5756–1996, SH No. 1577 p. 176 (Isr.).

7 The Child Adoption Law, 5741–1981, *§ 16* SH No. 1028 p. 293 (Isr.).

8 Inheritance Law, 5725–1965, § 16 SH No. 446 p. 63 (Isr.); Shaul Shohat, Menachem Goldberg, And Yechezkel Flomin, The Law of Succession (2005) [in Hebrew].

9 *See, e.g.* Pinhas Shifman, *The Status of the Unmarried Parent in Israel Law*, 12 Isr. L. Rev. 194, 194 (1977). *See* in length *infra* Section "The Erosion of the Myth of Natural Parenthood I: The Case of Children Born to Married Women through Extramarital Relations".

10 *See, e.g.* CA 449/79 Salma v. Salma 34(2) PD 779 [1980] (Isr.) (recognizing the commitment of a husband to provide for a child born to his wife through artificial reproduction with someone else's sperm, based on an implied agreement) verified. *See also* Fam. App. Req. 4751/12 Almoni v. Almonit,) Aug. 29, 2013) Nevo Legal Database (by subscription) (Isr.) in which the court recognized a husband's commitment to provide for the adopted child of his wife, even after they had separated and even thought the child was not officially adopted by him. I should point out that at least officially, these two verdicts are limited to child support but do not constitute a status of consensual parenthood. In this way, both verdicts demonstrate the tension between

parenthood[11] have all served, and continue to serve in many cases, albeit not always officially,[12] as key parameters in determining the parental relationship and its consequences.

The objection against the exclusivity of natural, biological parenthood has seemingly been strengthened in light of the challenge facing lawmakers – technological reproduction advances such as sperm donations, egg donations, and surrogacy.[13]

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the attempt to maintain the ethos of biological parenthood on the one hand, and the reality in which consent is increasingly becoming the basis for imposing parental obligations on the other. For extensive recognition of consensual parenthood in the United States, in which recognizing the parenthood of a non-biological father legally deems him the father, *see* Yehezkel Margalit, *Towards Determining Legal Parentage by Agreement in Israel*, 42 Heb. U. L. Rev. 835, 856–57,(2012) [in Hebrew]. *See also* at length *infra* Section "The Normative Meaning of Parenthood as a Social Institution". For an additional approach calling for the recognition of the unique status of the biological parent's partner, *see* Ayelet Blecher-Prigat & Daphna Hacker, *Strangers or Parents: The Current and Desirable Legal Status of Parents' Spouses*, 40 Heb. U. L. J.5, 5 (2011) [in Hebrew]. As I explain below, this approach is better suited to the approach presented here that attempts to differentiate between different types of familial institutions.

11 *See* 2 Pinhas Shifman,Family Law in Israel vol. II 94 (1989) [in Hebrew] supporting the recognition of a semi de-facto adoption with regards to social matters. *But see* CA 8030/96 Yehud v. Yehud 52(5) PD 865, 872 [1999] (Isr.), rejecting de-facto adoption with regards to inheritance law. *See also* CA (Jer.) 2399/01 Sela v. Basher (Dec. 19, 2001) Nevo Legal Database (by subscription) (Isr.) (A discussion of de-facto adoption with regards to the application of the Tenant Protection Act as a social right). *Id*. At 4. *See also* Fam. Ct. (KY) 08/1180 Plonit v. Ploni (Apr. 27, 2011) Nevo Legal Database (by subscription) (Isr.). For an overview of case law on the subject and extensive support of the functional definition of parenthood, *see* Ruth Zafran, *The Family in the Genetic Era: Redefining Parenthood in Families Created Through Assisted Reproduction Technologies as a Test Case*, 2 haifa l. rev. 223 (2006) [in Hebrew]. For the approach according to which psychological parenthood is bases on consensual parenthood, *see* Margalit, *supra* note 10. For more on these matters, *see* below, Section "The Erosion of Natural Parenthood II: The Case of Alternative Insemination".

12 Indeed, as I previously demonstrated, in practice case law agreed to base certain parental obligations on consensual or psychological constructs. However, case law in Israel has not yet based a comprehensive construction of consensual parenthood or de-facto adoption as parenthood.

13 To survey the difficulties in establishing a solid foundation for parenthood in light of new age technologies, *see* Elizabeth L. Gibson, *Artificial Insemination by Donor: Information Communication and Regulation*, 30 j. fam. l. 1 (1991); Judith Sandor, *Legal Approaches to Motherhood in Hungary*, *in* Creating the Child: The Ethics, Law and Practice of Assisted Procreation, 157(Donald Evans & Neil Pickering eds., 1996); Ivanyushkin Alexander Yakovleitch, *Bioethics and New Reproductive Technologies in Russia*, *in* Creating the Child: The Ethics, Law and Practice of Assisted Procreation 267 (Donald Evans & Neil Pickering eds., 1996); Robert Blank, *Regulation of Donor Insemination*, *in* Donor Insemination: International Social Science Perspectives 131 (Ken Daniels & Erica Haimes eds., 1998).

As a result of these recent developments, prominent scholars have begun to seek alternative definitions for the biological definition. One such approach, influenced by cultural feminism, attempts to determine the identity of the parent based on a concrete psychological relationship between the parent and the child.[14] Another, more radical approach, represented in this symposium and in a recent volume edited by Prof. Ertman,[15] but supported by other scholars as well, views individual autonomy and the voluntary contract as the new basis for legal parenthood. These approaches have entrenched themselves in Israeli legal scholarship,[16] and, in various contexts, within the legal discourse regarding the laws of parenthood.[17]

In this essay, I argue that both alternatives – natural-biological and voluntary contract[18] – do not sufficiently tell the story behind the determination of parenthood in Israeli law nor do they supply a sound normative basis for the proper regulation of parental determination.

In addition, I argue that while the approaches, which focus on the concrete psychological relationship between the parent and child, add an important element to the discussion of parental determination, they are too focused on the private aspects of specific parent–child relationships and in doing so, these approaches overlook important elements of the proper legal regulation of parenthood.

In light of this insufficiency, I suggest a social-institutional perspective of parenthood, one emphasizing that parenthood is not merely a matter of nature, but instead an artificial construct structured and designed by society. In

14 *See* Katharine T. Bartlett, *Re-expressing Parenthood*, 98 Yale L. J. 293 (1988); Nancy D. Polikoff, *This Child does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Geo. L. J. 459 (1990). The leading researcher of this position is Ruth Zafran. *See* Ruth Zafran; *Child to Whom do You Belong*: *The Flaws in the Existing Israeli Law Regarding Paternity*, 46 (B) Hapraklit 311, 311 (2003) [in Hebrew]; Zafran, *supra* note 11.

15 *See* Martha M. Ertman, Love & Contracts: The Heart of the Deal (2012); *see also* in this issue, Martha M. Ertman, *Unexpected Links between Baby Markets and Intergenerational Justice*, 8(2) L. Ethics Hum. Rts. (2014).

16 *See* Margalit, *supra* note 10.

17 A clear example of this is the "New Family" organization that has a significant public impact. At the heart of the organization's agenda is the legitimacy of a variety of family patterns and maximal recognition of the individual freedom of parents and those striving to be parents in the contexts of spousal and parent–child laws.

18 *See, e.g.* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 Cornell J. L. & Pub. Pol'y 1 (2004); *see also* Yehezkel Margalit *Redefining Parenthood – From Genetic Essentialism to Intentional Parenthood*, Colum. U. J. Bioethics 1 (2012), posing biological parenthood and contractual parenthood as two competing options.

addition, this approach rejects the current dissonance that exists between (1) the legal determination of parenthood; (2) the regulation of reproductive technologies, on the one hand, and the regulation of parenthood's content in the sense of regulating parent status vs state and vs children, on the other hand. This approach maintains that the legal and social definition of parenthood will inevitably affect the content of parenthood. Therefore, I argue that, on a normative level, various decisions regarding regulation of reproductive technologies and the determination of parenthood must take into account not only the involved parties but also the manner the decision can affect the conception "who is a parent" and more importantly, the ethos of parenthood that the law should encourage. Drawing upon an emerging construct of parenthood that combines parental responsibility, the autonomy of both parents and children, as well as a relational perspective on children–parents relationships[19] I demonstrate how this modern construct, when properly combined into the parenthood as-a-social-institution framework, should affect not only the children–parents relationship but also the determining of parenthood and the regulation of reproduction.

The Rise and Erosion of the Biological-Natural Parenthood Myth in Israeli Law

The Myth of Genetic Parenthood

In contrast to the myth according to which the legal definition of parenthood is merely a matter of nature,[20] many legal systems have traditionally based the

19 For the application of the relation theory with regards to child custody, *see* Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 Wm. & Marry Bill Rts. J. 1071 (2003); along with; Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 Va. J. Soc. Pol'y & L. 5 (2002). In continuing my approach according to which there should be a connection between the ethos guiding the regulation of parent–child relationships and the ethos guiding the determination of parenthood, I adopt these principles with regard to the laws of the determination of parenthood as well. I note that in these contexts, my approach follows in the footsteps of the approaches mentioned in *supra* note 10, which also seek to base the definition of parenthood on a relational theory regarding parent–children relationships.

20 *See supra* notes 1 and 2. For an example of the existence of this partial "myth" *see* the official report submitted by the Public Commission for Fertility and Childbirth [hereinafter Mor Yosef Committee], *available at* http://www.health.gov.il/PublicationsFiles/BAP2012.pdf (last visited Mar. 20, 2014). The report states that maintaining a biological connection between at

legal definition of parenthood, or at least of paternity, not on the biological test, but rather the spousal status test, according to which the father is the mother's husband. Accordingly, in these legal systems, children born of extramarital relations were deemed illegitimate and their biological fathers were not legally recognized as such.

In Israel, while much of the laws of personal status are regulated by religious law, paternity is considered by most religions to be a civil matter. The exception is that of Islam, according to which the definition of paternity is a matter of personal status, to be decided according to Islamic law. This serves as the backdrop for the legal case I describe at the outset, which examines the claim of a Muslim child born out of wedlock to legally recognize the paternity of her biological father – allowing her to sue for child support.

As previously stated, in accordance with existing law prior to the case, the Islamic law applies to both issues (paternity and child support). The common interpretation of Islamic law determines that a child born out of wedlock is not considered the biological daughter of the father – who therefore is not obligated to pay child support.

While these rules guided the Sharia court in the aforementioned case, Supreme Court Justice Cheshin reversed the religious court's decision in a dramatic ruling, arguing that even in areas in which formal law determines paternity according to religious law, a parallel track of civil paternity exists drawing on biological paternity. Cheshin based his ruling, inter alia, on the Basic Law: Human Dignity and Liberty,[21] as well as the natural right of children to a parent, and specifically one who will provide their basic needs. The ethos regarding the centrality of the natural-biological element in the definition of parenthood and the rights and obligations derived therefrom is significantly expressed in cases in which one of the parents – commonly the father – attempts to renounce parenthood in a prior agreement with the mother or when the father tries to evade parenthood by claiming it was forced upon him against his will.

In cases of the first type, Israeli case law, and other countries, has demonstrated a consistently resolute policy, stripping biological parents of the ability to renounce their parental obligations to their child and their legal status of parenthood.[22] This policy has been more strongly enforced when extramarital

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least one of the intended parents served as a principal goal of the committee (*id*. at 6.). *See also* Blecher-Prigat & Hacker, *supra* note 10, at 5.

21 Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391 p. 150, *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Mar. 20, 2014).

22 CA 664/71 Marchav v. Sherlin, 26(1) PD 701 [1971] (Isr.).

fathers attempt to renounce their parental status prior to or following birth. Case law has made it clear that such agreements harm public policy and are not to be validated.[23] Moreover, evidentiary rules create a presumption that a father who refuses to undergo DNA paternity testing is the biological father.[24]

Cases of the second type – known as "unintentional parenthood" – generally discuss circumstances in which an individual engaged in sexual relations with a partner who gave the false impression of using contraception. Courts[25] have insisted that the circumstances of unintentional parenthood do not justify evading parenthood and the obligations derived therefrom.

In conclusion of this section and in order to complete the picture, I mention that the emphasis on the biological aspect of parenthood and its description as part of "natural law" is particularly prominent within rulings preferring biological parents over parents designated for adoption – even when the child's bond with the adoptive parents was significantly more meaningful than that with the biological parents and when the adopting parents were seemingly better suited to fulfill the child's best interests. The court in such cases employed the rhetoric – "the cry of blood" as an expression of the natural aspect of parenthood.[26]

The Erosion of the Myth of Natural Parenthood I: The Case of Children Born to Married Women through Extramarital Relations

As we see briefly above, in cases of fathers of children born out of marriage, the determined statements regarding biological parenthood as natural parenthood and as the exclusive test for civil parenthood in Israeli law have been expressed in practice. However, children born to married women through extramarital relations do not benefit from the same practices. In some countries, these children are regarded as the children of the married husband. In Israel, however,

23 See supra note 3, but compare to Ruth Zafran, *More than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple – The Israeli View*, 9. Geo. J. Gender & L. 115–63 (2008). Zafran expresses her opinion that if the agreement was drafted and approved by the sides before the baby was born then it should be upheld by the court.

24 CA 548/78 Sharon v. Levi, 35(1) PD 736 [1980] (Isr.). *See also* Genetic Information Law, 5760–2000, SH No. 1766 p. 62 (Isr.) allowing in certain situations to force the conducting of this test.

25 Cal. Fam. Code-Sec Part. 3: Uniform Parentage Act [7600–7730] explicitly states that whoever "supplies the genetic data" in child birth cannot be freed of parental obligations.

26 *See supra* note 2. For more on the unique bond between a child and its biological parents, *see* Rhona Schuz, *The Right of a Child to be Raised by his Biological Parents-Lessons from the Israeli Baby of Strife Case*, 27 Child Legal Rts. J. 85 (2007).

in accordance with the biological-natural parenthood concept, the biological father – not the husband – should be recognized as the legal parent.[27] However, as Professor Shifman has demonstrated,[28] an entirely different arrangement has taken shape, leading in most cases to the recognition of the mother's husband, and not the biological father, as the legal father.

First, in contrast to the pressure applied to the assumed father to undergo DNA tests for children born to unmarried women, case law, and more recently legislation, have almost completely prohibited DNA paternity testing tests for children born to a married woman when the husband is not assumed to be the biological father.[29] Second, in absence of this option, the husband is considered the legal father based on evidentiary presumptions according to which in the absence of evidence to the contrary, the husband is the biological father based on the assumption that the women is sexually active with her husband.[30]

Originally, courts objected to paternity tests out of concern that these tests could reveal that the child was born to a married woman outside of marriage, and in these instance a Jewish child would be considered a bastard or *mamzer*. This issue is particularly important as the labeling of a child a bastard has dramatic and difficult consequences in its future,[31] significantly the limited ability to marry according to Jewish orthodox law. It should be stressed that according to Jewish law bastardy stems from illicit sexual relations and not from using alternative fertility treatments.[32] As such, it has been argued that DNA tests conducted to determine parenthood are actually detrimental to that child's welfare. The courts' focus on the fear of bastardy has been the target of much criticism in scholarly literature. Some critics argue that from the perspective of the child's best interests, the consideration of bastardy is too narrow and that certain circumstances justify conducting a paternity test, despite the fear of bastardy. In contrast, so argue the critics, there are other cases in which it is in the best interest of the child to avoid conducting the test, even when the fear of bastardy does not arise.[33] In addition, scholars point to the injustice caused to

27 *See* Zafran, *Child to Whom do You Belong*, *supra* note 14.

28 Shifman, *supra* note 9, at 194.

29 Shifman, *supra* note 11

30 For more on the evidentiary presumption that "[a] woman's sexual activity is preformed mainly with her husband," *see* Zafran, *Child to Whom do you Belong*, *supra* note 14, at 326.

31 Yehiel S. Kaplan, *From Best Interest of the Child to Children's Rights – Independent Representation of Minors*, 31 Mishpatim 623 (2001) [in Hebrew].

32 As noted by the Mor Yosef Committee, according to Jewish Law bastardy is only a product of illegal sexual relations, meaning that alternative ways of fertility cannot render a child a *mamzer*. *See supra* note 20, at 24–25.

33 For such criticism, *see* Shifman, *supra* note 11, at 48–49.

the husband who must bear the financial commitment[34] as well as the injustice to the biological father who cannot fulfill parenthood.

For a time, some trial court rulings, as well as certain elements within Supreme Court rulings, pointed to the weakening of the prohibition against DNA testing for the purpose of proving paternity. However, a legislative arrangement was passed a number of years ago within the framework of the Genetic Information Law[35] that strengthened the previous trend.[36] Moreover, another legislative barrier was placed as the law prohibits any man, other than the husband of the mother, to be registered as the child's father.[37] Finally, in a number of rulings, the family court determined that the legislative spirit dictates that DNA tests, as well as other evidence aimed at proving paternity outside of marriage, are to be prohibited as well. Despite there being signs again of a counter trend, it seems that at present, the option of attempting to prove the paternity of the biological father or non-paternity of the husband in an additional manner is rarely used. Accordingly, it can be said that in the case of a child born to a married woman outside of marriage, Israeli law ultimately adopts – even if in a somewhat roundabout way – the family test.

The Erosion of Natural Parenthood II: The Case of Alternative Insemination

While the case of a child born to a married woman outside of marriage illustrates the diminished status of the biological test in favor of the family status test, the case of sperm and/or egg donation – and in a somewhat different context, the case of surrogacy agreements – demonstrates that under certain circumstances biological parenthood yields to contractual considerations as well as the desire of the intended parents.

One of the most dramatic medical developments in recent decades has been the increased birthrate through alternative insemination of various kinds, of which the most relevant for our purposes are egg donation,[38] sperm donation, and surrogacy agreements.[39] The call to examine the regulation of this field is

34 For the circumstances in which the woman's husband can deny his parental obligation, *see* CA 1354/92 Attorney General v. Plonit, 48(1) PD 711 [1994] (Isr.).

35 Genetic Information Law, 5760–2000, SH No. 1766 p. 62 (Isr.), *see particularly* sect. 28e.

36 *See* Zafran, *supra* note 14, at 326–29; *see also* Margalit, *supra* note 10, at 849–51.

37 *See* Mor Yosef Committee, *supra* note 20, at 6 and 25. *See also* Margalit *supra* note 10, at 849–51.

38 Egg Donation Law, 5770–2010, SH No. 2242 p. 520 (Isr.).

39 *See* Embryo Carrying Agreement (Approval of Agreement and Status of the New-born) Law 5756–1996, SH No. 1577 p. 176 (Isr.).

especially pertinent in Israel – which is the country with the highest per capita use of fertility treatments in the world.[40]

Let us begin with the process of sperm donation – which has gained popularity worldwide as it is currently the most cost effective and efficient alternative fertility option available.[41] Sperm donations in Israel usually occur when a man donates his sperm to a sperm bank and that sperm is then used to fertilize a woman's egg. In the past, regulations were passed that made it difficult for unmarried woman to receive a sperm donation. However, as a result of a Supreme Court ruling, unmarried women, as well as lesbian couples, can now benefit from sperm donations.[42]

In a number of Western countries, the sperm donor's status is not the same as the legal father.[43] This position is supported by those in favor of strengthening the element of intent in determining parenthood[44] but criticized by those concerned with the best interests of children born to single-parent families.[45]

In Israel, however, in the absence of a direct provision regulating sperm donation, the biological-genetic test ostensibly applies, according to which the donor is considered the father for legal purposes.[46] However still, the fact that

40 *See* Kaplan, *supra* note 31 (citing the opinion that Jewish law does not prohibit the use of alternative fertility treatments).

41 Debora L. Spar, The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception (2006).

42 HCJ 998/96 Chakak v. Health Ministry (Feb. 11, 1997), Takdin Legal Database (by subscription) (Isr.).

43 *See* Ertman, *supra* note 15. Chapter 2 discusses the legal ability of a sperm donor to renounce his paternal responsibility by signing an agreement at the time of his donation. *See also* Yehezkel Margalit *Artificial Insemination from Donor (AID) – From Status to Contract and Back Again?*, 20(2) B. U. J. Sci. & Tech. L. (2014, forthcoming).

44 *See, e.g.* People v. Sorenson, 437 P.2d 495 (Cal. 1968), which calls for abandoning the biological test in the case of sperm donation. "The anonymous donor of the sperm cannot be considered the "natural father", as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney." As noted by the trial court, it is safe to assume that without defendant's active participation and consent the child would not have been procreated.

45 Some researchers call for the obligation of the donor to assume parental responsibility in a case where the child will be brought up in a single parent home. *See* Marsha Garrison, *Law Making for Baby Making: An interpretive Approach to the Determination of Legal Parentage*, 113 Harv. L Rev. 835, 902 (2000); David Popenoe, Life Without Father: Compelling New Evidence that Fatherhood and Marriage are Indispensable for the Good of Children and Society (1996).

46 Ruth Zafran, *The Family in the Genetic Era: Redefining Parenthood in Families Created Through Assisted Reproduction Technologies as a Test Case*, 2 Haifa L. Rev. 223, 258 (2006) [in Hebrew]. Although there is normally anonymity, Zafran is of the opinion that in the case of an identified sperm donor he is to be considered the father. For the status of the donor as a father by biological test and recognition of the right to resist further fertilization to not be a father, *see*

sperm donations in Israel are conducted anonymously[47] causes a reality in which the biological-genetic father is not recognized as such and is not obligated to fulfil parental commitments to their children.

And what is the status of the biological mother's partner? Here as well, reliance on the biological test makes it difficult to recognize the partner as the father. In spite of this difficulty, in many countries, in such cases the law rejects the biological test and views the partner of the biological mother as the legal father.[48]

Affected by the myth of genetic paternity, Israeli courts have yet to fully recognize the partner of the recipient as the father. Still, in specific instances the courts have recognized his parental responsibility through various contractual constructs such as implied consent to child support.[49] Moreover, there has been a significant voice in scholarly literature calling to fully acknowledge the status of the mother's partner as a parent,[50] based on the functional parenthood test.[51] Israeli courts have not fully adopted this position, but it has resonated within a number of its rulings.[52]

Nevertheless, even if Israeli legislation and courts have not formally abandoned the biological test even in cases of alternative insemination, the legitimacy of anonymous donation in Israeli law, as well as its partial regulation,

recently HCJ 4077/12 Plonit v. Department of Health,)Feb. 05, 2013) Nevo Legal Database (by subscription) (Isr.).

47 For more on the history of semen donations, *see* Ruth Landau, *The Management of Genetic Origins: Secrecy and Openness in Donor Assisted Conception in Israel and Elsewhere*, 13 Hum. Reproduction 3268 (1998).

48 American case law recognizes the ability of the mother's partner to assume full parental responsibility via an "opt in" contract. For more on the legal construct of such agreements, *see* Doe v. XYZ Co., 914 N.E 2d 117 (Mass. App. Ct. 2009), anonymous sperm donation the mother wishes to expose the father verified in Lexis Culliton v. Beth Israel Deaconess Med. Ctr. 756, N.E. 2d 113 (Mass. 2001); the donors of sperm and ova wanted to be registered as the child's parents Hodas v. Morin 814 N. E 2d 320 (Mass. 2004). *See also* Margalit, *supra* note 10.

49 *See supra* note 10. *See also* the critique of Ruth Zafran, *More than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple*, 3 Haifa L. Rev. 351, 358 (2007) [in Hebrew]. The practice, in place since 1989, requires the woman's partner to sign a specific agreement accepting responsibility for the child.

50 *See* Zafran, *supra* note 49, at 374 (examining justifications for breaking the paternal bond between the donor and the child including, among others, the best interests of the child and our aspirations to allow for the freedom to create families). But *Cf*. Shifman, *supra* note 11.

51 While Jewish Law's paternal test hinges explicitly on the biological test, the fact that the insemination was preformed artificially allows for the breaking of the paternal bond between the donor and the child. *See* Pinhas Shifman, *Establishing Parenthood for a Child Born through Artificial Insemination*, 10 Mishpatim 63, 71 (1980) [in Hebrew].

52 *See* in details the analysis in *supra* note 11.

opposes the biological test and all that stems from it including the rhetoric of "the cry of blood" and the natural commitment of the biological parent. This trend is expected to grow in the event that the conclusions of the Mor Yosef Committee are accepted and passed. The committee has called to recognize the partner of the owner of the fertilized egg as the father, as well as to formally sever the parental link between the donor and the child, even when a donation is not made in a completely anonymous fashion.[53] The abandoning of the biological test, at least in the genetic sense, is also reflected in Article 42(a) of the Egg Donation Law (2010) which states "a child born of an egg donation is the child of the recipient for all intents and purposes."[54]

In my opinion, there is a tension between the biological approach, including the objection to agreements in which the father attempts to opt out of his biological fatherhood, and the approach increasingly demonstrated by the courts regarding artificial reproduction. I now attempt to demonstrate this tension.

Previously, in vitro fertilization was only available for women who were interested in fertilizing the egg with their husband's sperm.[55] The Israeli Supreme Court overturned this in a decision that symbolizes the Israeli Supreme Court's[56] abandonment of the fear of creating "genealogical bewilderment,"[57] i.e. a child with no biological connection between himself and his parents and in doing so replaced the biological test that was previously used.

Note in the previous section, I demonstrate the manner Israeli law strongly rejects contracts in which partners agree to allow the biological father to renounce his legal status as a father and the rights and obligations derived therefrom. However this stance, which seems so intuitive at first glance, now justifies revisiting the aversion to agreements renouncing the biological father's parental status[58] after examining the implied contractual elements that form the basis for alternative fertility treatments, most notably sperm donations.

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53 *See* Mor Yosef Committee, *supra* note 20, at 6 and 35 (calling to establish a rule that sperm donation should never establish parental responsibility). *Cf*. U.S. case law that calls to abandon the biological test when sperm donation is the donor.

54 However, Article 42(b) states that this does not apply in marriage and divorce matters. *See supra* note 39.

55 Public Health (In Vitro Fertilization) Regulations 5747–1987, § 13 KT No. 5035, p. 987.

56 *See supra* note 42.

57 *See* H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 Brit. J. Med. Psycho. 133 (1964).

58 American case law also shows disinclination to respecting "opt out contracts" of biological fathers in which the pregnancy came about through intercourse and not sperm donation. But *See* Ferguson v. McKiernan, 940 A. 2d 1236, 1239 (Pa. 2007).

Let us ask ourselves, what is the true source of society's aversion to these agreements? According to one option, the difficulty accepting agreements in which the genetic-biological father renounces his status and responsibility as a parent lies in the fact that this renunciation will cause the child to be raised in a single parent family. However, this option does not seem probable, for if Israeli law condemns the outcome of leaving a child to a single parent family, how is it that the Israeli High Court of Justice ruled not only against disallowing sperm donations for single mothers[59] but also opposed discrimination against single mothers as well as conducting economic or emotional capability tests based merely on the status of single mother.[60]

Therefore, we must consider a second alternative: Society's condemnation stems from the biological father's shirking of his natural responsibility. However, this argument is problematic for two reasons: First, it assumes that even after it has been agreed upon by all parties involved that the biological father will no longer be considered such, it can still not affect his biological status, and therefore his denial of paternity is deemed an improper act. Second, if indeed the biological father's denial of his child is an improper act in and of itself, why does Israeli law allow the mechanism of anonymous donations in a manner which allows the biological father to renounce his status and responsibility?[61]

To conclude, the examples of various attempts to establish parenthood in the cases of a child born from an extra-marital affair and that of a child born from donated sperm highlight the reality that Israeli law does not consistently adhere to a unified definition of biological parenthood.

The Contractual Alternative

The failure of the natural parenthood paradigm to account for the legal state of affairs in a number of the above contexts has led some scholars to recognize, in

59 *See Chakak v. Health Ministry*, *supra* note 42.

60 In a decision establishing a single mothers' right to enter into a surrogacy agreement, the court noted that single parent families have become an acceptable phenomenon in our culture– HCJ 2458/01, "New Family" (Mishpacha Chadasha) v. The Regulatory Board of Agreements (Havaada lishur Heskemim), 57(1) PD 419 [2002] (Isr.).

61 It is clear from the deliberations above that the calls for disconnecting the parental bond between the donor and the child emanate from more than just institutional concerns of causing a decrease in the amount of sperm donors. *See* Ayelet Blecher Prigat, *On Borders, Rights and Family*, 27 IYUNEY MISHPAT 539, 561 (2003) [in Hebrew]. However, I hold that if Israeli law honestly and consistently follows the biological test, it is unclear that the moral price of relieving the father from his commitment to his children is an appropriate one to pay.

certain situations, alternative definitions of parenthood, such as functional parenthood.[62] However, it seems that the most comprehensive alternative[63] to the natural-biological approach to parenthood lies in the voluntary contract approach, developed mainly in the United States, and as such it is based upon, for the most part, American law.

A distinct representative of this approach is Martha Ertman. Ertman is a firm believer in the fact that the contractual approach solves many complex cases in need of parental distinction and in turn provides maximum protection to children and their families.[64] Her approach can be summarized as she has so explicitly declared "love and contracts make a family."[65]

In a number of studies published in the last decade, Ertman has claimed that while on a declarative level Western legal systems often demonstrate a resolute stance against agreements determining legal parenthood, these agreements are actually recognized in far more cases than at first glance. Ertman discusses, among others, the case of sperm donation and contends that the relevant existing regulation is an expression of state recognition of the combined contractual relationship between the donor and the sperm bank, between the sperm bank and the recipient, and between the recipient and her partner.[66] Similarly, Ertman points to countries that recognize various surrogacy agreements as an example of legal recognition of agreements determining parenthood. Ertman does not stop there, suggesting state acknowledgement of additional types of agreements determining parenthood, including agreements for non-anonymous sperm donations and parental arrangements between two or three parties. Ertman contends that the fact that reproduction exchanges have

62 *See* Jill Handley Andersen, *The Functioning Father: A Unified Approach to Paternity Determination*, 30 J. Fam. L. 847, 847 (1991); Arlene Skolnick, *Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory and The Best Interest Standard*, *in* all our families: new policies for a new century 285 (Mary Ann Mason, Arlene Skolnik, & Stephen D. Sugerman eds., 2003). *See also* Ayelet Blecher-Prigat & Pamela Laufer-Ukeles, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 Geo. Mason L. Rev. 419 (2013). *See also* in the context of Israel, *supra* note 11.

63 However, I note an alternative approach in Israel, led by Ruth Zafran, supporting a relational approach to defending parenthood.

64 *See* Ertman, *supra* note 15, at 26 and 32. *See also* Margalit, *supra* note 10; Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, And the Limits of Family Law*, 34 Fla. St. U. L. Rev. 913, 957 (2006);

65 Ertman, *supra* note 15, at 12.

66 *Id*. at 28–30, notes that parenthood by contract is the law in most American states as evident by the adoption of the Uniform Parentage Act and the legality of donor opt in/opt out contracts. For additional examples of contractual or quasi-contractual recognition of parenthood, *see* Margalit, *supra* note 10.

made millions of new families in the last half century, with relatively few issues being brought to court, attests to the fact that the phenomenon is governed and functions through voluntary contracts between the sides. She adds that even when the cases are brought to court they are mainly decided by contractual doctrines and only in those cases that the agreements themselves pose a threat to public considerations are they voided.[67]

In the context of Israeli law, at least within the theoretical literature, some have attempted to apply the contractual model.[68] Despite this, a closer examination of the existing laws reveals a more ambivalent reality. In the case of sperm donation – which according to Ertman's analysis can be described from a consensual perspective – the Israeli legal system adopts, at least de jure, a biological approach that perceives the donor as the father. Yet, on a practical level, we have seen that overall Israeli law attempts to fulfill the wishes of the donor, at least the anonymous donor, not to obtain paternal status. In addition, Israel law allows quasi contractual constructs in order to cast parental obligations on the caregiving parent or the mother's partner.

Another example of contractual regulation of parenthood in existing law is the Embryo Carrying Agreement Law,[69] allowing the designated parents to enter an agreement with a surrogate mother. It should be noted that the Embryo Carrying Agreement Law sets imposing state regulation on many aspects of surrogacy agreements, such as regulatory board approval, such that it is difficult to state whether there is true contractual freedom in the matter.[70] In addition, according to the law, the agreement itself does not determine parenthood, and as such ultimately requires a parenting order.[71] Despite these sparse regulatory requirements, the example of surrogacy agreements makes clear that existing law in Israel as well is not entirely deterred by contractual regulation of parenthood.

The beginnings of acknowledging contractual regulation of parenthood integrate with a broader trend in Israeli society to fulfill the involved parties'

67 Ertman, *supra* note 15, at 38. Situations where the donor does not stay in the familial picture are coined "one shot exchanges." Ertman believes that family law should only disallow one shot exchange in extreme circumstances and should generally allow the sides to decide for themselves.

68 *See* Margalit, *supra* note 10.

69 Embryo Carrying Agreement Law, *supra* note 39.

70 For more on the issues stemming from the surrogacy laws, *see* Carmel Shalev, *Halakha and Patriarchal Motherhood – an Anatomy of the New Israeli Surrogacy Law*, 32 Isr. L. Rev. 51 (1998).

71 *See* Embryo Carrying Agreement Law, *supra* note 39, art. 12 (determining that even in surrogacy agreements in which the intended father donates his own sperm a parental order is required).

intent, and especially that of parties aspiring to parenthood, as a central, if not sole value, for parental determination and the regulation of artificial reproduction techniques.[72] This state of mind is connected to another trend in Israel and worldwide, allowing testament-like arrangements for one's sperm while making use of the deceased's sperm based on his direct and implicit instruction to a relative, an arrangement known in Israel as a "biological will." Similar to those who acknowledge contractual agreements determining parenthood, those who support biological wills also base their view on a moral approach that considers parental free will to be the decisive parameter determining parenthood.[73]

Toward a Social-Institutional Theory of Parenthood

The Shared Assumptions of the Natural and Contractual Approaches

Despite the obvious differences between the biological and contractual approaches determining parenthood, both approaches view parenthood as a private matter and deny the constructional aspect of parenthood. Thus, according to the biological approach, the definition of parenthood is perceived as a matter of nature and therefore, does not require a principled social resolution. Similarly, according to the contractual approach, the definition of parenthood is subject to an agreement between all involved parties, but it is not to be seen as an external, social, and public construct. The private perception of the determination of parenthood is of normative consequence, as these approaches focus on the parties' wishes to claim or renounce parenthood, but when determining parental identity or regulating reproduction do not integrate public considerations regarding the appropriate design of parenthood in our society.

In this part I suggest foundations for a competing approach. On a descriptive level, this approach views parenthood as an institution that is not individualized and private, but rather social and public. On a normative level, this approach analyzes the normative consequences of recognizing parenthood as a

72 *See supra* note 18 and notes 70–73.

73 *See* Mor Yosef Committee, *supra* note 20, at 6, and 46, and *infra* Section "Legal Regulation of Postmortem Conception – Reflections on Children as Memorial Monuments and Kaddish".

social institution surveying the considerations that should be expressed within the design of the laws for determining parenthood. In addition, I critique the existing dissonance between the laws of defining parenthood and parent–child laws and attempt to display a more nuanced and complex theory regarding the link between the legal definition of parenthood and the regulation of its content. Finally, I discuss the application of this model to private arrangements regarding the determination of parenthood, as well as the regulation of various methods of alternative reproduction in general.

Parenthood as a Social Public Institution

The attempt to display parenthood as a private relationship and the design of the laws for determining parenthood stemming from this perspective are insensitive to the status of parenthood as a social institution, an object of social norms, and the role of law within these contexts. In order to clarify this point, a brief sociological background is necessary. In sociological literature – with legal and economic literature following suit – there is much preoccupation with the subject of social norms. Without delving into existing subtleties between various definitions, a social norm is generally a behavioral standard designed and enforced by a social group in light of its values, through which it defines the expected behavioral pattern in a particular social context. As such, social institutions are commonly viewed in sociological discourse as a group of norms designing the accepted performance of social actions considered to be central in a given society. Social institutions establish a system of meanings and content commonly known as "culture." Through these meanings, humans organize their perceptions concerning their identity, their status, and their relationships with other humans. In recent years, legal scholars have focused on the way in which legal rules integrate with social norms, social institutions, and culture in general. They emphasize the dependency society has on law as well as the fact that the contents of law play an important role in determining the manner humans define the nature of their social relations.[74]

This has clear implications in the legal determining of parenthood. In contrast to the myth of biological parenthood, the historical and legal analysis in previous sections proved beyond doubt that the definition of parenthood has never been based solely on biological tests, but rather an artificial construct

74 *See* Peter L. Berger & Thomas Luckmann, The Social Construction of Reality – A Treatise In The Sociology Of Knowledge (1966); Clifford Geertz, The Interpretation Of Cultures (1973). For a legal examination, *see* Eric A. Posner, Law And Social Norms (2000).

deriving from social and moral considerations. As a result, the question of whether individuals will be accepted by others and allowed to function as parents is affected not only by specific personal preferences but also by the social construct of parenthood as an institution within their culture.

Legal regulation of parenthood plays a crucial role in this context, as the law is an important tool for designing social institutions. The role of law becomes especially important in cases of modern, relatively novel institutions, not yet fully developed in extralegal culture. Therefore, the law plays a vital role in the design of the institution of parenthood and its compatibility with recent, novel technologies of reproduction and family patterns that those technologies enable. The public aspect of such innovative parenthood is emphasized even more in states such as Israel, in which a substantial amount of medical treatments vital to the creation of innovative parenthood is funded by the state and its medical institutions.[75] Under circumstances in which artificial fertilization and the maintenance of sperm banks are carried out by public agencies, they are almost inevitably perceived by society as actions carried out under public auspices.[76] Therefore, actions concerning the creation of parenthood and its moral consequences will not be perceived by society merely as decisions by the involved parties, but rather as resolutions and actions taken by the state, or at the very least under its patronage, thereby designing the public perception as to what is proper and appropriate.[77]

The Normative Meaning of Parenthood as a Social Institution

The analysis of parenthood as a social construct, the role of law in designing parenthood, and the claim that innovative reproduction technologies require involvement and funding by the state and thus are perceived as state sponsorship and even moral approval are have important normative consequences.

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75 *See* Mor Yosef Committee, *supra* note 20, at 6 and 20. The committee acknowledged that while third party interference into pregnancy and fertility is clearly not ideal, when the couple requires involvement of an outside body in order to create a child, the considerations are altered due to the societal involvement.

76 *See id*. at 4–5. This is evident in numerous European countries where fertility treatments are publicly funded such as England and Germany and certain practices are more prominently promoted and others less as they hold wider social ramifications.

77 David Blankenhorn, Fatherless America: Confronting our Most Urgent Social Problem (1995). The author is of the opinion that in cases in which a third party donor is required the court should give less significance to the involved parties rights to autonomy and dignity.

First, the mere existence of the social institution of parenthood is a public interest, as social institutions contribute to stability and interpersonal communication and serve as a platform allowing social regulation of parenthood. Therefore, appropriate legal regulation of parenthood should seek to outline a variety of well-defined and distinguished institutions, such as donors, surrogacy, parents, the parent's partner, etc. in order to serve as a stable social anchor. Therefore, alongside the required flexibility aimed to ensure the autonomy of various individuals, the law should attempt to create a somewhat rigid framework of the various parental institutions in order to draw clear borders between them and other institutions eliminating confusion between the latter and parenthood.[78] For example, the law should set clear and firm rules as to when one is considered a sperm donor to which the status of parenthood does not apply, and when one is considered a father to which the obligations, rights, and responsibilities toward the child apply.[79]

Second, in adopting the private perspective, the natural approach – and to a greater degree the contractual one – focuses entirely on the involved parents' perspective while completely avoiding the wider public consequences to determination of parenthood, and more generally the ethos at the base of defining parenthood in that society. In this manner, the natural approach rejects the need to weigh public considerations when determining parental identity, as this identity has already been determined by natural consequences and cannot be changed. In comparison, the contractual approach, and more general approaches that primarily focus on the explicit and implicit intention of the adults involved, acknowledge that parenthood is not exclusively a biological matter. It, however, does hold that the law must disregard the public and public perceptions on decisions regarding reproduction and the determination of parental status.

In contrast, the approach recognizing the social construct of parenthood may make use of the definition of parenthood in order to push individuals toward specific behavior. For example, a public approach to parenthood may decide that parenthood as a result of surrogacy or alternative insemination will be recognized only if these processes were conducted in certain labs or carried out through specific procedures necessary to protect the health and dignity of participants.[80] The natural approach on the other hand, viewing genetics as the

78 For the approach that seeks to establish an intermediate stage between a parent and a functional parent, similar to that of a step-parent, *see* Blecher-Prigat & Hacker, *supra* note 5, at 6.
79 For the situations in which a sperm donor can be declared the father of the child in current Israeli legislation, *see* Zafran, *supra* note 11.
80 *See* Mor Yosef Committee, *supra* note 20, at 6 and 68 (suggesting the adoption of such a provision while citing numerous internal and external concerns).

natural basis of parenthood, cannot accept such regulation. Similarly, the contractual approach, focused on the parties and their voluntary agreement, would find it difficult to invalidate agreements reached outside of supervised institutions, where these agreements reflect the will of the actual participants.[81]

Third, while the private approaches to parenthood focus on the parties' rights, desires, and interests in a specific set of circumstances, acknowledging the social aspect of parenthood leads to the conclusion that the determination of parenthood in a specific case has wider consequences, not only toward the involved parties but also toward other cases. This effect could justify intervention in a parental arrangement when wider consequences deemed it appropriate.[82] Take for example, an adoption agency with a "product return" policy according to which the adopting parents could return the adopted child within a year of adoption. Beyond the specific harm to that child's best interests, if such a contractual rule was to be validated by the state, there would be far reaching consequences regarding the perception of the parenthood of adopting parents as well as the ethos that society wishes to build through the law, according to which an adopting parent is considered a parent for all intents and purposes.

Similarly, recognizing contractual arrangements in which the known biological father can, through an agreement with the biological mother, "opt out" of his obligations to his child may have far reaching consequences for the ethos according to which parental obligation is a total and unconditional matter. For instance, state approval and furthermore, state funding, of a sperm bank that allows non-anonymous sperm donations legally backed by an opt out clause establishing that the donor will never be considered a parent, may have severe consequences for the ethos according to which fatherhood cannot be renounced.

It should be emphasized that I do not argue whether or not the wider implications mentioned in these previous examples are positive or negative, but rather my intention is to show such consequences exist. Moreover, acknowledging them requires lawmakers to internalize the fact that they cannot evade the design of the social institution of parenthood and therefore must focus on the content, values, and interests they believe should lie at the heart of the institution of parenthood in our society.

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81 Such an approach negates the legitimacy of other suggestions of the Mor Yosef Committee such as not respecting surrogacy agreements that clearly involve exploitation.

82 This is clearly one of the main differences between my approach and that of Zafran's which requires that frequent ad hoc decisions be made.

The Dissonance between the Regulation of Reproduction and the Laws of Determining Parenthood on the One Hand and Parent–Child Laws on the Other

My previous conclusion, according to which lawmakers must take into account the effect that laws of determining parenthood have toward the design of the institution of parenthood in our society, conflicts with a dominant trend in legal discourse. This trend – influenced by the natural and contractual approaches toward the determination of parenthood – creates a dissonance between the regulation of reproduction and determination of parenthood on the one hand, and child–parent laws on the other, a dissonance which in my opinion could damage the proper ethos regarding parenthood in our society.

Parent–child laws have undergone dramatic change. In the past, children were perceived as the property of the parents, as the right to be a parent was considered to hold near constitutional significance.[83] However, even after time and this rhetoric has been replaced, the law still mainly spoke of parent–child laws in terms of parental rights. In contrast, during the twentieth century the approaches that focused on parental rights yielded to approaches that centered on the rights and the best interests of the children involved. According to these approaches, the parental right is not an ordinary right focused on the interests of its owner, but rather it is a right that imposes an obligation on the parents themselves to ensure the realization of the best interests of the children as well as their rights.[84] To date, 193 countries have ratified the Convention on the Rights of the Child,[85] which sets out different principles involving children's rights, including the best interests of a child. Moreover, in some countries, the concept of parental right has given way to the idea of parental responsibility as the key concept to describing the parent–child bond. The best interest of the child has become the main consideration in cases pertaining to fertility

83 CA 2401/95 Nahmani v. Nahmani, 50(4) PD 661 [1996] (Isr.). During this deliberation the right to be a parent was held in the highest esteem, and the judge even echoed the sentiment that "one who has no children is considered to be dead." However even during this period of supremacy of parental rights, the right to be a parent was not absolute and was balanced by consideration of the best interests of the child.

84 *See* Zafran, *supra* note 11 (calling for the tempering of establishment of parental responsibility in cases there is doubt as to the identity of one of the parents). Zafran feels that it is important for the child to have parents who are responsible to ensure their wellbeing. *See also* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centred Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1746 (1993).

85 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

treatments and its regulation.[86] The discussion has swayed so heavily to the side of the interests of the children that some of the modern liberal approaches in the matter reject the very existence of a protected interest of the parents with regards to their children, besides of course their interest to ensure their children's welfare.

In light of modern trends in parent–child laws, it has become clear that a dissonance between these laws and those of parental determination and regulation of reproduction exists. On the one hand, according to the natural-biological and contractual approaches the law should show disregard for the interests of the child in the regulation of reproduction and the determination of legal parenthood, but on the other hand it should focus solely on the welfare of the child and disregard the welfare of the parents following birth.

It seems to me that even from a philosophical analytical perspective, it is difficult to reconcile the complete recognition of the right to parenthood while utterly ignoring considerations in the best interest of the child before parenthood, together with a complete focus on the best interest of the child and the lack of recognition of a protected parental interest immediately following birth. However, for the purposes of this essay, focused on the social construct of parenthood, we shall put aside and not focus on this philosophical tension. What is indeed more pertinent is the possible effect of the laws of parental determination prior to birth – as well as the regulation of reproduction focused entirely on the potential parent, his needs and supposed desires[87] – including the desire for perpetuation and continuity after death, on the attempt to create a social ethos according to which children are not the property of their parents. According to such an ethos, children are not given to commodification and bequeathing and parental actions must focus on the interests of the children and not those of the parents for self-realization, continuity after death, or even preservation of a symbol of remembrance for their loved ones.

In light of the understanding that the various contents of the laws of determining parenthood, as well as the regulation of reproduction, may affect not only the question of parental identity but also the question of the substantive content of parenthood itself, the approach proposed in this essay views

86 *See* Assisted Human Reproduction Act 2(a), 2004 of Canada: "The health and wellbeing of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use."

87 Throughout numerous decisions Judge Ila Prokatshia raised the right to parenthood to constitutional proportions noting the sources of the right to be Basic Law: Human Dignity and Liberty (*supra* note 21) along with the right to autonomy and self-determination. *See* HCJ 377/05, Plonit and Ploni (the Intended Parents for Adoption of the Child) v. Biological Parents 60(1) PD 124 [2006] (Isr.); CA 3009/02 Plonit v. Ploni, 56(4) PD 872 [2002] (Isr.).

parenthood as a social institution and connects between – if not fully identifying one with the other – considerations regarding the laws of determining parenthood and the substantive content of parent-child laws. This approach holds that when regulating and determining parenthood, a cardinal consideration must be the perception of parenthood that the law wishes to endorse.

What in fact is that perception of parenthood that the law should promote and which as discussed above will affect the laws of determining parenthood? I briefly touch upon a few central characteristics, as I hope to expand upon the subject in future research.

First, the best interests of the child must be a guiding principle in parenthood laws.[88] Second, the term "parental rights" must be replaced by a more complex discourse centered on the concept of paternal responsibility,[89] emphasizing the unconditional commitment of a parent to fulfill the child's best interests and the unique authority and status granted to him in order to fulfill those interests as he perceives them.

Third, there is room to consider a separate, independent interest of parents to educate their children in a certain way or to maintain a relationship with them.[90] However, the defense of these interests is to be limited in any case in which their realization may harm the welfare or the child or make instrumental use of him.

Fourth, in the context of parent–child laws, the atomistic individualistic rhetoric of rights, emphasizing the confrontational aspect between the involved parties, is to be replaced with a discourse taking into account the complex relationships between family members, their shared interests and the attempt to resolve disputes in a manner suited to the needs and desires of the participants. In this final context, I should mention that in Israel, Dr. Ruth Zafran,[91] influenced by cultural feminism, has recently suggested an impressive relational model for determining parenthood, based on the ethics of care. According to Zafran, despite the fact that the law must recognize the separate autonomy of

88 For a model of children's rights and possible interpretations *see* Kaplan, *supra* note 31, at 17. *See also* Yehiel S. Kaplan, *The Rights of a Child in Israeli Court Decisions – The Beginning of the Shift from Paternalism to Autonomy*, 7 Hamishpat 303, 305 (2002) [in Hebrew].

89 *See* UN Convention on the Rights of the Child, *supra* note 85, arts. 7–9, expressing the right of every child to parents who will care for them.

90 Yair Ronen, *The Right of a Child to Identity and Belonging*, 26 Iyunei Mishpat 935, 935 (2004) [in Hebrew]. Ronen establishes the "right to parenthood" as a right to maintaining a long-lasting relationship.

91 For a comprehensive survey of Zafran's proposed method, *see* Zafran, *Child to Whom do you Belong, supra* note 14; Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 Am. U. J. Gender, Social Policy & L. 163 (2010).

parents and children, there is reason to criticize the reduction of existing discourse to the rhetoric of colliding rights, and to prefer emphasizing the ongoing relationship and shared interests of the parties. Zafran objects to the determination of a singular principle guiding the determination of parenthood (biological, functional or contractual) and attempts to suggest a number of guidelines related to the desires of both parties, the de-facto relationship forged between them, the attempt to cause the least possible amount of damage and the best interests of the child as the guiding criteria for determining parenthood.

While Zafran does not connect between the issues of determining parenthood and parent–child laws and does not discuss the way in which the laws of parental determination affect the perception of parenthood in our society,[92] the values she presents as guiding the laws of parental determination certainly seem worthy. However the relational approach as presented by Zafran focuses on the relationship between the specific, concrete parent and child. Therefore, Zafran's model does not give enough consideration to the wider social implications of the definition of parenthood stemming from the fact that parenthood is not a natural or contractual relationship nor a social construct, and the proposed definition's effect on the perception of parenthood in society. As such, this approach focuses nearly exclusively on the concrete relationship between the specific parent and child without considering how decisions regarding parental status and the acceptance of certain arrangements and agreements regarding parenthood could affect the perceptions of parenthood in our society. Therefore, Zafran ultimately recommends in too many cases, making ad hoc decisions that do not lend themselves to offer a stable social perception concerning the questions of who is a parent and what is the meaning of parenthood. In addition, the "relationship" model suggested by Zafran, focusing on the specific relationship between the caregiving parent and the child, is biased in favor of considerations in the best interest of the child ex-post, after the birth, while allowing less room for considerations of dictating behavior ex ante, such as attempting to ensure orderly procedures to create parenthood, and a promise to care for all involved in the process.

Moreover, Zafran's emphasis on the concrete context sometimes leads her to support certain consensual arrangements that may indeed reflect the will of the parties involved, but at the same time may undermine social ethos worthy of promotion. Therefore, while I do adopt the basic principles of Zafran's view, I believe they are to be integrated within the institutional framework suggested in the current essay.

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92 Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 879 (1984).

In the next chapter I discuss several applications of my approach. In doing so I focus mainly on the distinction between the biological and contractual approaches; however, I also examine in a number of contexts the way in which the public institutional approach may lead to a different perspective and different conclusions than the existing relational approach when it is not supported by institutional considerations.

Applications

The Social Distinction between a Donor and a Parent and the Distinction between Legitimate Sperm Donation and a an Invalid Agreement to Evade Parental Obligations

In previous sections we touched on the difficulties facing the natural approach – which places genetic parenting as the sole basis for determining parenthood – to explain the willingness of existing law to defend certain practices such as egg and sperm donation that eventually allow genetic parents to evade parental status and the obligations it entails. In addition, we have noted that the contractual approach has a hard time explaining the reasons the law invalidates explicit and voluntary agreements in which the biological parents of a child born of ordinary sexual relations agree that one of them will not be considered a parent, while at the same time rendering valid a similar agreement, according to which a sperm/egg donor will not be considered a parent.

In my view, the social perspective regarding parenthood may explain this "puzzle." According to this approach, the law seeks on the one hand, to maintain the ethos according to which parental commitment does not require the consent of the parent, while on the other hand, it promotes technologies of sperm and/or egg donation in order to allow those who cannot reproduce naturally to realize their parenthood. For this purpose, the law has developed two distinct social categories. One is the category of parent, toward which the ethos that parental commitment is not dependent on will and is cogently applied. Alongside this category, the law creates a social category of "donor," distinct from that of a parent and towards which the parental obligations do not apply from the outset.[93]

93 *See* Michael Serazio *Seminal Case*, Houston Press (Mar. 10, 2005), http://www.houstonpress.com/2005-03-10/news/seminal-case/. The author lists situations in which the American courts will allow a donor to assume parental responsibility via an "opt in contract."

However, according to the social approach to parenting, the mere declaration of the existence of two separate social institutions – parent and donor – is insufficient. In order to reinforce the distinction between the father and the donor, all while maintaining the ethos of parental obligation, certain clear characteristics of the donor category should be maintained while clearly differentiating between itself and the parent category.

One type of distinction may be based on an objective test focused on the procedure preceding birth: According to this option, a parent is one who gave birth to a child as a result of natural sexual relations, while a donor is one who gave birth to a child as a result of alternative insemination.[94] However, this distinction is not sufficient, as in the case of those requiring alternative insemination for the purpose of parenthood, no one would consider the insemination itself as negating the parental status.

Against this backdrop, we may offer a second institutional distinction based on the subjective will of the donor. According to this distinction, a parent is one who has had sexual relations and/or used an artificial technique of reproduction in order to become a parent, while a donor is one who has had sexual relations and/or used an artificial technique of reproduction in order to enable others[95] to become parents.[96] However, this distinction still fails to explain why one who engages sexual relations accompanied by an agreement that he is not going to be considered a parent, will still be considered as such according to existing law.

In light of the failure of the previous criteria – the objective one discerning between reproduction through natural sexual relations and an artificial process of alternative insemination as well as the subjective distinction focused on the donor's motivation – one may consider combining the two. According to such a proposal, a donor is simply one who donated sperm in a laboratory out of the desire to help others become parents.

However, it seems to me that settling for the combination of donating in a laboratory together with the original desire of the donor that others will use his sperm, is not enough in order to create a clear and total distinction between the institution of parents and that of donors and will ultimately undermine the institution of parenthood. Consider for example the cases described in Ertman's book of a known donor (a donor who maintains the relationship with

94 *See* the rhetoric used in Kesler v. Weniger 744 A. 2d 794 (Pa. Super Ct. 2000).

95 *See* Tex. Code Fam. 160, 702 (West 2001) (defining a donor as someone who performs an act to assist in reproduction).

96 *See* Zafran, *supra* note 49, at 374 (discerning between a donor and a parent through subjective intention).

the mother and sometimes even with the child as well).[97] Would a person who is in contact daily with his children not be considered a father in public perception? And if that is the case, would not such a legal state of affairs, allowing such a person to enter agreements renouncing their status as parents or renewing them as they wish, seep towards regular parenthood and harm its unconditional and total nature. Against this backdrop, I would suggest anonymity – and as a result the distance between the donor and the child, certainly until adolescence – as an additional property of the institution of donors. In this way, the difference between parent and donor would be clearer and it would be emphasized that a person aware of the existence of his children will never be able to fully renounce them even by way of private contract between the parties involved.

Indeed, the probation on choosing the sperm/egg donor entails a reduction of the range of options available to the men and/or women requiring artificial insemination, however it does not prevent them from realizing their dreams of parenthood. In my opinion the price of reducing the option of non-anonymous donation is justified in light of the damage to the institution of parenthood that may occur as a result of a state of affairs in which the law allows one to willingly renounce his biological child known to him. This price is certainly justified when considering the danger towards the welfare of the children who, instead of receiving a stable family framework, will be exposed to an in between status of father-donor-friend of the mother.

Supervising the Use of Technologies of Reproduction due to Age and Capacity

One of the issues facing lawmakers dealing with technologies of reproduction is that of the state's legitimacy to screen those who wish to receive these services

97 Ferguson v. McKiernan, 940 A.2d 1236 (Pa. S Ct. 2007) coined by Ertman to be the "case of the friendly donor." The discussion in the text focuses mainly on the distinction between the consensual and social approaches, concerning the status of the non-anonymous sperm donor. In my opinion, this issue may expose the differences between the social approach and the functional parenthood approach. The latter focuses on de-facto relationships forged between the involved parties and fulfilling their desires as much as possible. Therefore, it is safe to assume that this approach will honor an agreement in which the non-anonymous donor agrees with the biological mother that he will not be defined as a father. In contrast, as I argued extensively, from the social perspective, the damage caused to the institution of parenthood by the existence of the non-anonymous donation may justify invalidating such an agreement, even if it reflects the will of most of the parties involved as well as the practice created by the agreement.

for reasons of age, capacity to function as a parent, etc.[98] Traditionally the main legitimate reason for intervention was presented as defending the best interests of the child to be born through these methods.[99] The Mor Yosef Committee, when discussing the legitimacy of establishing an age limit for publicly funded fertility treatments, stressed the fact that foresight is required to overlook the current rights of the parents and ensure that the child is raised by parents who are equipped to do so. However, this argument has been attacked by analytical philosophers demonstrating the non-identity problem (see for example Professor Heyd's fascinating article in the current symposium).[100] According to this argument, in order to oppose technologies of reproduction for reasons concerning the best interest of the child, we must assume that this child is better off not having been born at all rather than being born into the current circumstances.[101]

For example, Glen Cohen[102] has recently argued that unless the state's failure to intervene would foist upon the child a "life not worth living," any attempt to alter whether, when, or with whom an individual reproduces cannot be justified on the basis that harm will come to the resulting child, since but for that intervention the child would not exist.[103] Therefore, according to this argument, even when technologies of reproduction are intended to enable a difficult life, or one of unconventional conditions, society must refrain from intervening in these techniques in the name of the best interest of the child, save for those extreme cases in which we truly believe that one is better off not having been born.[104] As the Mor Yosef Committee noted when discussing this issue, the concept of protecting the best interests of the child is of different

98 For a study of the success rates and risks involved in advanced age fertility treatment *see*: Centre for Chronic Disease Prevention & Health Promotion, Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports 30, 33 (2008).

99 *See* Mor Yosef Committee Findings, *supra* note 20, at 29, which lists situations in which a person's ability to receive fertility treatment is influenced by age, and where in certain cases the treatment which is usually publicly funded will require payment.

100 *See* in this volume, David Heyd, *Parfit on the Non-Identity Problem, Again*, 8 (1) L. & Ethics Hum. Rts. (2014).

101 Marjorie Mcguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An opportunity for Gender Neutrality*, 1990 Wis. L. Rev. 297, 322, 327 (1990). Shultz believes that the courts should only interfere in situations of extremely extenuating circumstances.

102 Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 Minn. L. Rev. 423 (2011).

103 *See* Mor Yosef Committee, *supra* note 20, at 6 and 19; The *European Society of Human Reproduction and Embryology* allows for fertility treatments even in cases where it is clear that the parents will not be able to provide the child with the best possible care.

104 *See id*. adopted the "middle ground approach" denying treatments only in those situations in which the prospective child will be placed in extremely difficult conditions.

stature when discussing the cases of a person yearning to become a parent compared with custody disputes.

Viewing parenthood as a social institution may assist us in avoiding the barrier preventing us from opposing reproduction in the name of the child not yet born. Affected by the private perception of parenthood, the existing approaches focus solely on the relations between the potential parent and the theoretical child. In contrast, the social-institutional approach to parenthood argues that the justification for regulating reproduction is not the protection of a specific child, but rather the institution of parenthood as a whole. As I previously explain, the institution of parenthood requires balance between the interests of the parents and their commitment to the children as well as a distinction between the privileges and responsibilities of parenthood. Indeed, there are differences in the emphasis and balance between the interests of the parents and the children in the planning stage and following birth. During the planning stage of a pregnancy, the legitimacy of a parent to grant his personal interests crucial status is more appropriate than in the state of affairs following birth. However, the social-institutional approach rejects the ability to completely disconnect between the ethos of parent–child relations and the ethos of reproduction. Therefore, giving complete legitimacy to any and all types of fertility treatments, even where – while not reaching the level of "better to have not been born" – there is the potential for a difficult and miserable life may reflect a problematic social message regarding the proper balance between the interests of parents and their responsibilities towards their children. Hence, in situations of potential elderly parents, or in cases of reasonable concern over the capacity of the person receiving treatment, fostering the ethos of parenthood as responsibility justifies limiting the state's assistance in technology of reproduction. The Mor Yosef Committee has proposed in this regard the establishment of a regulatory board in order to gauge whether the best interests of a prospective child is jeopardized by allowing those specific candidates to receive fertility treatments, along with pre-determined situations in which medical refusal to treat is justified.[105]

Recognizing Surrogacy Overseas

Lacking a suitable solution for same-sex couples, unmarried couples, and individuals, many of those wishing to become parents look abroad and wish to enter surrogacy agreements, some of which involve egg donation as well. Upon their

105 *Id.* at 22.

return, the couple seeks legal recognition of their recently attained parenthood. Much of the existing case law attempts to define the laws of parenthood in such cases, determining that the laws of egg donation and surrogacy do not directly apply to such couples according to the biological approach. Therefore, with regard to fathers of children born of their sperm, the biological approach usually dictates automatically that following a certain procedure, known as an overseas parental procedure, these fathers will be recognized as parents. The position expressed concerning mothers is different: First, in the spirit of the genetic-biological approach, existing law distinguishes between cases of surrogacy including the intended mother's egg, and between cases of surrogacy combined with an egg donation. In the first case, the genetic mother will usually be recognized as the mother, while in the second, she will be required to undergo adoption.[106]

In contrast, the "New Family" organization – representing the consensual position in Israel, which is focused on almost complete fulfillment of the will of the intended parents – wishes to promote a policy that views overseas surrogacy as a path to bypass legislation, entirely founded on the recognition given to parenthood in foreign countries. In one case,[107] the family court adopted this approach; however, the decision was overturned in the appeal to the district court.[108]

A heated public debate recently took place in Israel when the courts discussed the case of a severely disabled woman who, through a difficult process of

106 *See* most recently Fam. Ct. (TA) 07/60320 T.Z et al. v. Attorney General (Mar. 4, 2012) Nevo Legal Database (by subscription) (Isr.) (discussing the registration of a lesbian partner who donated an egg to her spouse as an additional mother of the minor). From this discussion it seems that a biological relationship is a precondition for recognizing, ex-ante, the parenthood of both partners. For another indication of the staying power of the genetic-biological approach, *see* Fam. Ct. (Ta) 11-10-10509 Y.P. v. Attorney General (Mar. 5, 2012) Nevo Legal Database (by subscription) (Isr.) and Fam. Ct. (Ks) 11-09-21535 S.A. v. Attorney General (Jun. 17, 2012) Nevo Legal Database (by subscription) (Isr.). *See also* Fam. Ct. (Ta) 12-07-21170 Ploni v. Attorney General (Feb. 03, 2013) Nevo Legal Database (by subscription) (Isr.). In these cases, the court ruled that in the event that the intended mother has the genetic makeup, and the surrogate has no link to the newborn based on her geographic location, there is no need for an additional legal procedure to recognize the genetic mother as the legal mother. In contrast, in cases where the surrogate took part in the egg donation, existing case law requires adoption in order to recognize the parenthood of the intended motherhood in cases of surrogacy performed overseas. For a discussion of these matters, *see* Zafran, *supra* note 11.

107 *See* App. Fam. Ct. (TA)12-38 Plonit v. Attorney General (Nov. 9, 2012) Nevo Legal Database (by subscription) (Isr.)

108 App. Fam. Ct. (TA) 12-11-43811 Attorney General v. Plonit (May 9, 2013) Nevo Legal Database (by subscription) (Isr.)

both egg and sperm donation, entered a surrogacy agreement with a family member.[109] After the family member gave birth, the child was taken for adoption by social services. The media dedicated a number of articles in which the intended mother described herself as the initiator of the "project" of the birth of the child. She complained that, because of the desire to punish her after the fact for not working according to the rules, the child will eventually be taken away from her.

From a biological point of view, it is clear that the initiator cannot be viewed as the mother. In contrast, from a consensual perspective, it is clear that she is the mother, and considering that, it is not surprising that "New Family" supported the intended mother's position. The functional approach also tends to support this position, as clearly most of the ties currently exist between the mother and the child.

The social approach can add to the discussion of this case – similar to the discussion of overseas surrogacy – a number of perspectives not emphasized enough by the theoretical approaches.

First, as opposed to the philosophical approaches viewing the right to parenthood as almost illimitable and opposing to regulation of fertility services due to considerations in the best interest of the future child, the public approach argues that we must examine the effect of recognizing parenthood in a given situation on the institution of parenthood. Therefore, despite the sympathy and the natural tendency toward the initiating mother in this case, this approach is deterred by the commercial, property oriented rhetoric through which she described her relationship to the child in the courts and in her interviews with the media throughout the case, and also by the negative influence of such rhetoric on the institution of parenthood. In addition, despite the pain involved, the public approach will argue that it is the state's obligation to examine whether this mother could realistically provide the child with the requisite standard of care, and that if the answer is negative, preferring her motherhood over the future wellbeing of the minor may send a problematic message regarding the institution of parenthood in general. I note that Justice Geula Levin's ruling in this case reflects, in my opinion, the correct message, emphasizing the public aspects of parenthood and the need for regulation.[110]

Second, and more generally, the contractual approach, as well as the functional approach, often focuses on the involved parties, and less on the wider

109 Fam. Ct. (BS) 12-12-50399 A.M. I. v. Jane Doe (Jun. 20, 2013) Nevo Legal Database (by subscription) (Isr.)

110 *Fam. Ct. (Ta) 12-07-21170 Ploni v. Attorney General*, *supra* note 106 (clearly criticizing the lack of regulation concerning this matter).

consequences of policy decisions. In contrast, I hold that granting extensive legitimacy to overseas surrogacy and fertility treatments that are not governmentally supervised in "third world" countries, all while severely damaging the individual rights of mothers, is highly problematic. Therefore, I welcome the conclusions of the Mor Yosef Committee that wish to create a supervised track of overseas surrogacy and create incentives to use this track.

At this point I must emphasize that in the existing legal reality, in which the law completely alienates and excludes the option for same-sex couples to fulfill their right to parenthood, is a terrible situation that must be corrected. However, one injustice should not be corrected by another injustice, and a situation in which the state recognizes almost any creation of parenthood, while reflecting the right to parenthood, completely ignores the effect of realizing this right on the design of the institution of parenthood, and also grants legitimacy to processes causing severe harm to the human rights of those involved in surrogacy.

Legal Regulation of Postmortem Conception – Reflections on Children as Memorial Monuments and *Kaddish*

In conclusion of this section, I suggest a rudimentary approach to cases of postmortem conception through the use of sperm cells extracted from the deceased prior to his death or even posthumously. In existing law, the central criterion for postmortem use of sperm cells is the explicit or assumed desire[111] of the deceased.[112] It must be made clear that the postmortem use of sperm cells is inherently different than a case of a sperm donation, as here the subjective intention of the deceased was to leave behind offspring to carry on his name, and not to assist others in this goal. However, there are rules as well as suggestions to expand this ability to grandparents under the assumption that one wants to leave behind something to continue them. In this spirit, in the Mor Yosef Committee report, Professor Kasher[113] describes the human will to leave life behind, or in Jewish terminology *Kaddish*, as justification for determining a default permission of postmortem use of sperm cells even in cases where the deceased left no written or verbal request to do

111 Attorney General's Instruction, *Postmortem Use of Sperm Cells*, Instruction # 1.2202 (Oct. 27, 2003) [in Hebrew], http://index.justice.gov.il/Units/YoezMespati/HanchayotNew/Seven/12202.pdf.

112 *See* Mor Yosef Committee, *supra* note 20, at 44, requiring that the court establish that the posthumous use of sperm reflects the will of the deceased himself and not any third party.

113 *Id.* at 50.

so.[114] Professor Kasher operates under the assumption that it is the subconscious will of all humanity to leave behind children in the world.

The issue of postmortem conception is a complex one as evident by the fact that many countries either limit the cases it is allowed or prohibit it altogether.[115] At this time, I have not yet formed a concrete opinion on the subject. However, as someone who joined Ruth Zafran in the call to base parenthood on continuing relationships and care, the view of sperm as inheritance as well as that of children as memorial monuments and perpetuation, even when under the circumstances there is no real bond between the parent and his children, is troubling and may have a negative effect on the design of the concept of parenthood in our society. This potentially crippling influence on the ethos of parenthood as one of a continuous relationship and responsibility toward the child serves as the very basis of Prof. Kasher's opinion for flexibility in allowing postmortem use of sperm. Prof. Kasher maintains that the parental bond of a father to his child differs from that of a mother, as the essence of the relationship does not hinge upon him being present to raise the child, but rather suffices with a genetic bond between the two.[116]

In Israel for example, the "New Family" organization has recently developed a "product" called a biological will. I have reservations regarding the inheritance related terms of "will" and "bequeathing" which also contribute to the objectification of children. The combination of the objectifying language with the view of the child as an object independent of any real relationship with his parents is very troubling. As said before, I have yet to fully develop an alternative coherent model dealing with postmortem parenthood and for now, presenting the issues that may trouble those wishing to view parenthood as a social institution in today's reality will suffice.

The Social Understanding of the Institution of Parenthood: Individual Autonomy and the Fear of Public Aggression

Those supporting private ordering/contractual regulation of parenthood are very wary of state supervision of reproduction techniques as well as state

114 *Id*. at 47.

115 English law requires written approval of the deceased. *See* Article 3 of the Human Fertilization and Embryology Act 1990 (c 37), s. 3. Many countries have called not to allow, in any circumstances, the postmortem use of sperm, *see* G. Bahadur, *Death and Conception*, 17 Hum. Rep. 2769, 2775 (2002).

116 *See* Mor Yosef Committee, *supra* note 20, at 46–47.

intervention within the content of the parenthood agreements reached by the involved parties. Their arguments are divided into two. First, in principle, they contend that regulating unique reproductive technologies as well as intervening in the content of private arrangements harms the autonomy of the involved parties.[117] Second, as Martha Ertman noted, the history regarding this subject is not promising and full of examples in which public intervention within reproduction ultimately becomes biased towards minority groups, such as same-sex couples. She brings examples of extreme government intervention in the ability of people to become parents from pressuring low income families to use contraceptives as a pre-condition for receiving welfare,[118] to states trying to pass legislation banning homosexuals from adopting or serving as foster parents.[119]

Both fears are not unfounded and should be taken into consideration when designing the regulation of parenthood. Nevertheless, I insist that rejecting the public aspect of parenthood as well as presenting it as a private matter unrelated to the public at large, is not the proper solution. I hope to illuminate this issue with an example from a related field I recently dealt with, namely the debate regarding same-sex marriages.

Within the existing literature on the subject, those who support same-sex marriage often tend to emphasize the private-contractual dimension of marriage and the illegitimacy of state intervention in such a private matter.[120] In contrast, those opposing same-sex marriage emphasize the public element of marriage. They wonder whether those who support same-sex marriage would at the same

117 *See* Ertman, *supra* note 15. While she does not believe that any right is absolute, Ertman believes that allowing for expanded autonomy of the parties involved is the lesser of two evils when countered with overzealous government regulation.

118 Board of Trustees of the American Medical Association, *Requirements or Incentives by Government for the Use of Long Acting Contraceptives*, 267 J. Am. Med. Ass'n 1818, 1820 (1992).

119 The practice was invalidated in Arkansas Department of Human Services v. Cole, 2011 Ark. 145, 380 S.W.3d 429 at 24–25 (2011). For a comparative review of homosexual parental rights, *see* P. Batens & A. Brewaeys, *Lesbian Couples Requesting Donor Insemination: An Update of the Knowledge with regard to the Lesbian Mother Families*, 7 Hum. Repr. Update 512, 512 (2001). For the law in Israel, *see* Miri Bombach & Ronli Shaked, *A Revolution in the Institution of the Right to Parenthood: Considerations in the Israeli Society Discussion Regarding Homosexual Parenthood*, 26 Refua V'Mishpat 121, 129 (2002) [in Hebrew].

120 Naomi R. Cahn, Test Tube Families: Why the Fertility Market Needs Legal Regulation (2009). Cahn repeatedly calls on the abolishment of "outdated" definitions of families. *See also* Frank van Balen & Henny Bos, *Children of the New Reproductive Technologies: Social and Genetic Parenthood*, *Patient Education and Counseling*, 81 Patient Edu. & Couns. 429, 429 (2010), a study aimed at proving that children that grow up in the framework of an "alternative" family do not experience any psychological damage as a result.

time support polygamous marriage or marriage between siblings. Supporters of same-sex marriage struggle to reject the threat of breaching the borders of the institution of marriage that is posed by expansion of the private-contractual discourse.

In my opinion, those who criticize the private approach to marriage are correct in that they argue that recognition of same-sex marriages may affect not only the specific couple, but also the collective social understanding of marriage. Therefore, they are also correct in that public responsibility toward the social institution of marriage requires examining whether same-sex marriages have a positive or damaging influence on the public at large. This type of examination involves public considerations that are not taken into account by the private/neutral approaches. However, it is at this point that I part ways with those who oppose same-sex marriage.

In current legal discourse, the use of public rhetoric serves the "traditional" camp in its argument aimed against the recognition of same-sex marriage. In my view, however, it is a mistake to assume that the public nature of marriage necessitates non-recognition of same-sex marriages. On the contrary, one can think of a number of public considerations in favor of officially recognizing same-sex relationships. These considerations include; the desire to provide an appropriate framework for raising children growing up within this family unit, the desire to allow same-sex couples an economically stable framework for managing an intimate relationship, and finally, the desire to moderate the gender-related implications and patriarchal practices still identified with marriage, and, in doing so, designing marriage as an egalitarian institution. Therefore, the discussion regarding recognition of same sex couples must contain not only an examination of individual rights, but additionally a reference to the social meaning of supposedly private agreements and to the manner in which recognition of same sex relationships could affect the institution of marriage.

In my opinion, the issue of same sex marriage can teach an invaluable lesson to those currently dealing with the issue of establishing parenthood. Indeed, history has taught us that the public establishment of parental rights poses certain dangers. However, this research has proven that lack of public discourse is not only undesirable but impossible. Therefore, I believe that the true aim that should stand before future lawmakers in the subject of parenthood is not the rejection of the public aspect of parenthood, as such a rejection is impossible and inappropriate, but rather the attempt to manufacture

a conception of parenthood taking into account values of personal autonomy and ethics of care, with constant willingness towards dynamism[121] and rejecting stereotypes of less conventional lifestyles not grounded in a modern, analytical and pluralistic system of arguments.[122]

121 *See* Mor Yosef Committee, *supra* note 20, at 57, 61. The committee boldly stated that although by nature two men cannot reproduce, society should embrace technological advancements to make their dreams a reality.

122 *See* Zafran, *supra* note 49, at 380 (acknowledging that an institutional response is necessary in light of the modern day approach that is accepting of homosexuality).

Family of dead Israeli soldier can use his sperm

Court grants parents the right to impregnate stranger with son's sperm

Keivan Cohen, 20, was shot dead in 2002 by a Palestinian sniper in the Gaza Strip. He was single and left no will. But at the urging of his parents, a sample of his sperm was taken two hours after his death and has been stored in a hospital since.

When the family tried to gain access to the sperm, however, the hospital refused, on the ground that only a spouse could make such a request. Arguing that their son yearned to raise a family, his parents challenged that decision in court. And on Jan. 15, after a four-year legal battle, a Tel Aviv court granted the family's wish and ruled that the sperm could be injected into a woman selected by Cohen's family.

The ruling also ordered the Ministry of Interior to register any children born as a result of the insemination as children of the deceased.

"On the one hand I'm terribly sad that I don't have my boy; it's a terrible loss," Rachel Cohen said in an interview in Monday's Chicago Tribune. "But I'm also happy that I succeeded in carrying out my son's will." . . .

Precedent-setting decision

Irit Rosenblum, a family rights advocate who represented the Cohen family, said the ruling was significant because it set a precedent for those seeking to continue bloodlines after death.

At the trial, Rosenblum presented testimony, including video recordings, in which Cohen expressed his desire to have children.

"He always said he wanted children," she told The Associated Press. "But there were no regulations in the law that deals with using sperm from dead people."

Rosenblum said soldiers increasingly have been leaving sperm samples, or explicit instructions on post-mortem extraction, before heading to battle.

She said she knew of more than 100 cases of Israeli soldiers who, before last summer's war with Lebanese guerillas, asked to have their sperm saved if they were killed. American soldiers have also begun donating sperm before heading to Iraq, she said.

"I think it is a human revolution," Rosenblum said. "Ten years ago, who would believe that a human being can continue after he has died. I think it is great for humanity."

Rosenblum said the woman who is to act as surrogate mother has requested to remain anonymous.

"She's like family to us," Rachel Cohen told the Tribune. "Cruel and good fate brought us together."

Associated Press, http://www.nbcnews.com/id/16871062/#.WJT3qvK_Y5s (1/29/2007)

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DYING TO BE A FATHER:

LEGAL PATERNITY IN CASES OF POSTHUMOUS CONCEPTION

Ruth Zafran*

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I. INTRODUCTION

Consider the following case: a baby girl is conceived through artificial insemination of her mother, with sperm from the mother's late spouse, and is born more than a year after the spouse's death. The mother requests that her late spouse, the child's genetic father, be declared the legal father. Should the request be granted? Does it matter whether the sperm was harvested prior to the spouse's death or soon after his unexpected demise? Does it matter if he had specifically expressed his intention that his sperm would—or would not—be so used? And what if the mother has remarried by the time the baby is born? This article seeks to answer these questions.

The literature to date on Post Mortem Conception (PMC) has considered other aspects of the matter, such as the conditions under which sperm may be harvested and used after death[1] or the child's economic rights; namely, her status as heir[2] and her eligibility for

1 Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility and Inheritance*, 33 HOUS. L. REV. 967, 979–82 (1996); Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 544–55 (1993); Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?*, 3 DEPAUL J. HEALTH CARE L. 39, 65–68 (1999); Kathryn Venturatos Lorio, *From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV. 27, 37–45 (1996).

2 *See, e.g.*, James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743 (1998); Chester, *supra* note 1; Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L. J. 234 (2005); Joshua Greenfield, *Dad Was Born A Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities*, 8

Social Security survivor's benefits.[3] It has given little, if any, direct consideration to the determination of parenthood per se, an aspect which has been discussed only as an adjunct to the pecuniary elements of the issue. But the determination of paternity affects more than questions of financial rights and obligations. It plays an important role in shaping the child's identity and in fashioning the familial relationship between the child and her relatives, including the husband's parents, his siblings or his other children. This article will therefore put the question of paternity at center stage, and will address the derivative issues of social security, inheritance and the like only to the extent that they may be relevant.

This article proceeds from the premise that PMC is not prohibited by law. It considers neither the propriety of this form of conception nor how (if at all) the use of this sort of assisted reproductive technology should be regulated by the state.[4] The article will also refrain from discussing the various technologies available for harvesting sperm posthumously and the ethical questions each raises.[5] Suffice it to say, for our purposes, that assisted reproductive

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MINN. J. L. SCI. & TECH. 277 (2007); Summer A. Johnson, *Babies with Bucks – Posthumously Conceived Children Receive Inheritance Rights*, 36 MCGEORGE L. REV. 926 (2005); Jamie Rowsell, *Stayin' Alive: Postmortem Reproduction and Inheritance Rights*, 41 FAM. CT. REV. 400 (2003); Cindy L. Steeb, *A Child Conceived After His Father's Death?: Posthumous Reproduction and Inheritance Rights. An Analysis of Ohio Statutes*, 48 CLEV. ST. L. REV. 137 (2000); Kayla VanCannon, *Fathering a Child from the Grave: What Are the Inheritance Rights of Children Born Through New Technology After the Death of a Parent?*, 52 DRAKE L. REV. 331 (2004); Melissa B. Vegter, *The "ART" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent Before Posthumously Conceived Children Can Inherit from Deceased Parent's Estate*, 38 VAL. U. L. REV. 267 (2003).

3 *See, e.g.*, Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV 251 (1999); John Doroghazi, *Gillett-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L.Q. 1597 (2005); Karen Minor, *Posthumously Conceived Children and Social Security Survivor's Benefits: Implications of the Ninth Circuit's Novel Approach for Determining Eligibility in Gillett-Netting v. Barnhart*, 35 GOLDEN GATE U. L. REV. 85 (2005).

4 For an interesting discussion about the "legitimacy" of posthumous parenthood, see Chester, *supra* note 1; Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L. J. 1081, 1127–32 (1996); Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J.L. MED. & ETHICS 347 (1999).

5 *See* J. Dostal et al., *Post-mortem Sperm Retrieval in New European Countries: Case Report*, 20 HUMAN REPROD. 2359 (2005) (discussing procedures for retrieving sperm post-mortem); Kerr, *supra* note 1, at 45; Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*,

technologies enable conception to take place even after the provider of the gamete has died. Gametes can be harvested and cryopreserved (frozen) prior to the provider's death or retrieved from him post-mortem, and then used, through artificial insemination[6] or, if needed, in vitro fertilization,[7] to impregnate a woman with genetic material (sperm, egg or fertilized egg) whose providers are no longer alive.

This article will advance a conceptual framework with which to approach the determination of parenthood in PMC cases. In Part II, I provide an overview of the typical scenarios in which conception can occur after death. In Part III, I survey the current state of statutory and case law and identify the shortcomings of each in dealing with the issue at hand. Part IV introduces the Intent Model and the Genetic Model suggested in the literature of other assisted reproductive technologies contexts as ways of approaching the matter of legal parenthood. After discussing their appealing characteristics, I demonstrate their inadequacy in cases of PMC. Part V suggests a unique conceptual framework—the Relational Model—that provides a more nuanced basis for the determination of parenthood. I then apply The Relational Model to the various PMC scenarios so as to demonstrate its usefulness in resolving conflicts that may arise. Finally, in Part VI, I touch on some practical questions related to the determination of paternity, such as inheritance and social security benefits, by providing some preliminary thoughts about how these issues should influence our thinking and how they should be decided with regard to PMC children.

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46 Ariz. L. Rev. 91, 94 (2004); Strong, *supra* note 4. *See generally* Banks, *supra* note 3, at 268 (discussing the medical procedures that allow for conception after the death of the gamete provider); Cappy Miles Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 FERTILITY & STERILITY 512 (1980); Rowsell, *supra* note 2; Shai Shefi et al., *Posthumous Sperm Retrieval: Analysis of Time Interval to Harvest Sperm*, 21 HUMAN REPRODUCTION 2890 (2006); Carson Strong, Jeffrey R. Gingrich & William H. Kutteh, *Ethics of Postmortem Sperm Retrieval: Ethics of Sperm Retrieval After Death or Persistent Vegetative State*, 15 HUMAN REPROD. 739 (2000).

6 *See* LAWRENCE J. KAPLAN & ROSEMARIE TONG, CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE 220–28 (MIT Press 1994) (discussing artificial insemination in general).

7 *See id*. at 256–66 (discussing In Vitro Fertilization (IVF) in general).

II. CONCEPTION AFTER DEATH—THE POSSIBLE SCENARIOS

PMC can take place after the death of the genetic father, the genetic mother, or both genetic parents.[8] In the most frequently encountered situation, the genetic father has died and conception is requested by the person with whom the deceased had enjoyed a serious romantic relationship—his wife, fiancée, or cohabitating significant other.[9] Any such individual, without regard to formal marital status, will be referred to as a "partner". Accordingly, this paper focuses primarily on those cases.[10]

For purposes of this paper, I define conception as the beginning of (in vivo) pregnancy. In light of this definition, situations in which the pregnancy began before the father's death fall outside the scope of the discussion. The situation of post-mortem birth (as distinct from post-mortem conception) has been known since time immemorial and has long been treated by the law.[11] By and large, when the pregnancy starts before death, parenthood is determined by the usual tests, which need not be altered on account of the death.[12] Accordingly, this situation is considered here only to the limited extent it offers a useful analogy.

In the first cluster of PMC scenarios the woman wishes to use sperm that were frozen and stored in a sperm bank *before* the man's death. Typically, either of two scenarios accounts for the sperm being in storage. First, the couple may have been dealing with fertility problems; in that event, the death may have taken place while the couple was undergoing fertility treatments or after they had

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8 See in detail throughout this part.

9 For different cases, see *infra* note 22 and accompanying text.

10 On the variety of PMC situations, see Dostal, *supra* note 5; Johnson, *supra* note 2, at 929; Strong, *supra* note 4, at 347.

11 In most states, a child born less than three hundred days after the mother's husband's death—an interval suggesting that the pregnancy began while the husband was still alive—will be presumed to be the late husband's son or daughter, just as if the child was born while the husband was still alive. *See* references cited *infra* note 42. For the unique question of post-mortem birth by mothers, see John A. Robertson, *Emerging Paradigms in Bioethics: Posthumous Reproduction*, 69 IND. L. J. 1027, 1050–64 (1994); Daniel Sperling, *Maternal Brain Death*, 30 AM. J. L. & MED. 453 (2004).

12 *See infra* notes 39–42 and accompanying text.

terminated the treatments for one reason or another.[13] Alternatively, the sperm deposit may have taken place prior to the initiation of chemotherapy or radiation treatments for cancer to preserve some sperm unaffected by the treatments.[14] In all of these cases, there could be either an explicit directive regarding use of the sperm in the event of the man's death or else evidence of the deceased's implicit intent. Such evidence, whether explicit or implicit, is more likely to be found in the second scenario, when the man is confronting a life-threatening situation. It is possible that he acted simply to preserve potent sperm in order to be able to choose, after recovery, whether to procreate, but the chances are greater in this scenario that he also contemplated the use of his sperm even in case of death. In the first scenario, when the sperm was deposited as part of fertility treatments, there is usually a clear indication that the man wanted to become a father, but that does not necessarily imply that he intended to become a father after death (or even once the fertility treatments end).

In the second cluster of cases, conception occurs through the use of sperm retrieved soon *after* the man's death.[15] If not forbidden by law or regulation,[16] usable sperm can be retrieved within hours after death.[17] Existing storage techniques allow for the woman to be artificially inseminated immediately or later. It may be presumed that

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13 The fertility problems may have led the couple to use in vitro fertilization, in which case the genetic material may be stored as a frozen fertilized egg rather than as frozen sperm. That factor might bear on whether the woman should be allowed to use the genetic material after the man's death but not necessarily on the issue of parenthood. Robertson, *supra* note 11, at 1045; Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Reproduction*, 75 N.C.L. REV. 901, 954–65 (1997).

14 The Ethics Committee of the American Society for Reproductive Medicine, *Fertility Preservation and Reproduction in Cancer Patients*, 83 FERTILITY AND STERILITY 1622 (2005); Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 292 (2006). Cryopreservation of sperm might also be used by a soldier before going into active duty or by workers who are going to be exposed to toxic substances. Karin Mika & Bonnie Hurst, *One Way to be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 995–96 (1996).

15 Janet J. Berry, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231, 248–50 (1997); Andrea Corvalan, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 ALB. L. J. SCI. & TECH. 335, 354 (1997).

16 *See infra* notes 89–92 and accompanying text.

17 In some instances, it can be retrieved even after two or three days. Dostal, *supra* note 5; Sharona Hoffman, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575, 593 (2004).

in most cases of after-death retrieval, there will be no explicit expression of intent concerning postmortem fathering; evidence of a desire to become a parent does not necessarily encompass becoming a parent after death. As we will see later on, the element of intention has a bearing on the determination of legal paternity.[18]

An additional pertinent variable in all of these cases may be the existence of another person who wishes, as part of his relationship with the mother, to become a parent of the resulting child. Though such cases are uncommon, the woman who conceives by the deceased's sperm may come to be, at the time of the insemination or later during the pregnancy, in a meaningful relationship with a new partner. She may or may not be legally married to that person, but in either event, he may ask (with her concurrence) to be declared the father. The discussion below analyzes the implications of this variable and considers whether the presence of the new partner should affect the conclusion regarding the status of the deceased genetic father.[19]

Notwithstanding the complexity of the multiple scenarios and their distinctive characteristics, they lend themselves to analysis on the basis of two ubiquitous factors: that of *intent*, and that of *affiliation*. The Intent Factor examines the intention of all relevant parties (the mother, the sperm provider, and the mother's new partner, if any) regarding the gamete. It asks what they intended to do with the gamete—in particular, who was intended to become the parent of the child—and what their present intentions are. The factor is not limited to past intention or to overt manifestations; it takes account both of the sperm provider's presumed intention[20] and of the wishes of the mother and her new partner at a later time.[21] The Affiliation Factor explores the precise link between the child born as a result of the PMC and the individuals asking to be declared his or

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18 As the name implies, it is the main factor in the Intent Model; it is also among the factors to be considered in the Relational Model, both discussed later. *See infra* Part IV.C. and Part V. correspondingly.

19 *See infra* Part V.B.3,4.

20 *See infra* Part V.B.2.

21 Here I view intent more broadly than does the Intent Model. I include current intention as well as original; assumed intention as well as overt. Compare to the Intent Model. *See infra* Part IV.C.

her parents. It inquires into the relationships (genetic, care-giving, etc.) between the child and the person asking (or being asked) to be recognized as the parent.

These factors, which organize the factual variables, are useful not only in mapping the scenarios but also in determining legal parenthood. As I demonstrate in Part III, the Intent Factor and the Affiliation Factor (though not necessarily so termed or so defined) figure prominently in the discussion of legal parenthood. Some writers identify them as the principal, or even the exclusive, criteria of legal parenthood. They also play a role, albeit a less prominent one, in the Relational Model I outline here.

Before ending this survey of PMC through sperm donation, it is worth mentioning that post-mortem conception with the deceased's sperm can theoretically occur without the surviving spouse's consent or even where there is no spouse at all.[22] If not proscribed by law or by regulation,[23] the parents of the deceased may ask to retrieve their son's sperm in order to use it to impregnate a surrogate mother or a woman who agrees to become the mother of their grandchild.[24] Although we lack reliable data regarding the prevalence of each of these scenarios, case law and media coverage suggest that the grandparent case just noted is rare. I therefore will not discuss it in detail, though the reasoning presented below would apply to it as well.

PMC may also involve the use of a deceased woman's eggs,[25] either frozen before her death or retrieved soon after.[26] In either case,

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22 *See* Laura A. Dwyer, *Dead Daddies: Issues in Postmortem Reproduction*, 52 RUTGERS L. REV. 881 (2000); Cappy Miles Rothman, *Live Sperm, Dead Bodies*, 20 ANDROLOGY 456 (1999). For an example of a case in which the parents of a dead Israeli soldier asked to use his sperm in order to bring a grandchild into the world, see MSNBC.com, Family of Dead Israeli Soldier Can Use His Sperm, http://www.msnbc.msn.com/id/16871062/ (last visited Mar. 8, 2008).

23 At the time of this writing, no state has enacted any such statute or promulgated any such regulation. The matter is therefore left to private ordering by the fertility clinics.

24 The impregnated woman might prefer to use their son's sperm rather than a donation from a sperm bank.

25 Bailey, *supra* note 2, at 788; The Ethics Committee of the American Society for Reproductive Medicine, *Posthumous Reproduction*, 82 FERTILITY AND STERILITY 260 (2004); Evelyne Shuster, *The Posthumous Gift of Life: The World According to Kane*, 15 J. CONTEMP. HEALTH L. & POL'Y 401, 415–16, 418–19 (1999).

26 The reliability of both techniques remains questionable. The Ethics Committee of the American Society for Reproductive Medicine, *Fertility Preservation and Reproduction in Cancer*

the woman's partner (whether or not her husband) may wish to use the eggs to become a father, with the assistance of another woman.[27] Physiological and cultural considerations make these cases less common than those involving post-mortem use of sperm. Moreover, the technique requires enlisting the services of a surrogate mother, a factor that casts the question of parenthood in a different light. Accordingly, the discussion here, as noted, will focus on PMC using sperm from a deceased man, primarily when requested by the deceased's spouse.

III. DETERMINING PARENTHOOD – COMPLEX ISSUES, INADEQUATE LAW

A. The Complexity of the Issue

Any use of assisted reproduction may pose complex questions of parenthood, and those complexities are compounded in PMC cases by the pre-pregnancy death of one parent. It is not uncommon for assisted reproduction to involve more than two individuals taking part in the process of conception. Two men (the genetic father and the intended-nurturing father)[28] may play fatherhood roles; and two or even three women (the genetic mother, the gestational mother and the intended-nurturing mother)[29] may share motherhood functions. These individuals are potentially competing parents, and they may seek clarification of their status and relationship to the child. In cases of PMC, of course, one of the progenitors is physically absent.

Any PMC poses one of two typical problems. On the one hand,

Patients, 83 FERTILITY AND STERILITY 1622 (2005); Cyrene Grothaus-Day, *Pipette to Cradle, from Immortality to Extinction*, 7 RUTGERS J. LAW & RELIG. 2, n. 37–38 (2005); Hoffman, *supra* note 17, at 597–98; Michael R. Soules, *Posthumous Harvesting of Gametes – A Physician's Perspective*, 27 J. L. MED. & ETHICS 362 (1999). *But see* the latest reports suggesting some positive breakthroughs in this field: *Labs Mature Eggs from Girls with Cancer, available at* http://www.boston.com/yourlife/health/women/articles/2007/07/02/labs_mature_eggs_from_girls_with_cancer/.

27 We also know of a few cases involving the use of fertilized eggs with both genetic parents having died. *See, e.g.*, Steeb, *supra* note 2, at 149 (discussing the dispute over the Rios's fertilized eggs in Australia).

28 In cases of artificial insemination by sperm donation.

29 In cases of in vitro fertilization by egg donation and in cases of surrogacy.

there may be more candidates for paternity (in theory or de-facto) than are needed or than the law can recognize, and these candidates may contest each other's claims to legal fatherhood. On the other hand, there may be fewer candidates for the parenthood task than needed or expected. The difficulties rest upon the common presumption that a child should have two parents – one mother and one father, no more and no less.[30] As I will suggest later on, this is not the only possible presumption, and the law might recognize the possibility of more than two legal parents.[31] Even then, however, similar complications arise, and the law will have to determine the status of the potential parents, frame their formal relationships with the child, and sometimes oversee the ways in which the parents cooperate with one another.

The need, on the one hand, to choose among multiple potential claimants of parental ties and, on the other, to ensure that every child has care-giving legal parent(s) requires consideration of several questions: What are the boundaries of the family? Is parenthood exclusive? Can parent-child relations take a variety of forms (that is, do all parents bear the same roles, duties, responsibilities, and legal status vis-à-vis the child)?[32]

It is self-evident that the determination of parenthood is a matter of vital importance to the individuals directly involved – the potential parents, their relatives, and (especially) the newborn child. But the matter also has broader implications for society as a whole. Its cultural, sociological and philosophical dimensions bear on the meaning of family as a basic social structure and on our fundamental understanding of family relations.

B. The Existing Legal Framework

Despite (or because of) its complexity, the question of

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30 Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

31 *See* Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83 (2004); Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127 (2000). *See generally* Bartlett, *supra* note 30.

32 Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006).

parenthood in cases of PMC has not been comprehensively addressed by the law. Few states have legislated with specific regard to the matter, though a growing number have legal provisions that bear on some aspects of the issue. Some states have legislated more generally regarding the recognition of parenthood;[33] others have dealt solely with inheritance issues.[34] Social Security benefits, another important fiscal aspect of the issue, are governed by federal law;[35] the pertinent statute does not refer explicitly to PMC children and, accordingly, they are treated pursuant to the general provisions.[36] As explained below, PMC has been discussed in a few court decisions. One of them, detailed here, focuses on the right to use sperm after its provider's death and does not analyze the question of parenthood.[37] Others deal with the child's rights under intestate succession laws and the Social Security Act.[38] Most of the decisions are by lower courts; none are by the Supreme Court of the United States.

In view of the range of legal arrangements regulating the various aspects of PMC, our search for the legal principles that define parenthood in these cases must begin with a review of the law on defining parenthood in general and of its applicability to the cases at hand. We then examine the statutory solutions enacted in the few states that have addressed the matter, as well as the legal consequences of statutes enacted to deal with other aspects raised by PMC children. Finally, we turn to the pertinent case law, which stands to shed light on matters left unregulated by statute and on how the courts have interpreted the relevant statutes.

1. General Principles

Under commonly accepted rules governing parenthood—derived from the common law or established by statute—when a child is conceived during the parents' lives, the genetic father is

33 *See infra* notes 50–64 and accompanying text.

34 *See infra* notes 66–68 and accompanying text.

35 *See infra* note 70 and accompanying text.

36 *See infra* notes 70–74 and accompanying text.

37 *See infra* notes 79–85 and accompanying text.

38 *See infra* notes 93–121 and accompanying text.

recognized as the legal father.[39] Until relatively recently (a few decades ago) the rule was by and large limited to parents who were married; the biological father was recognized as the legal father by virtue of his status as the mother's husband.[40] Today, prevailing law recognizes the genetic father's paternity even when he was not married to the mother (although not necessarily when the mother is married to someone else).[41] That the child is born after the father's death does not automatically preclude his recognition as the father; typically, if the child is born within three hundred days of the father's death she will be recognized as his child for all purposes.[42]

In most cases of PMC, however, the man will have died more than three hundred days before the child's birth; the exception is the relatively unusual case in which conception occurs only a few days after the man's death. Accordingly, the man's paternity would not be recognized, at least not under the generally applicable law.[43] It is important to mention that under generally applicable law, if the mother had remarried by the time of birth, the current husband is presumed to be the legal father.[44]

Assuming that the law is silent on the relationship between the time of death and the determination of paternity, a posthumously-conceived child filing a paternity suit may come up against strict statute of limitation requirements that preclude establishment of paternity after the man's death.[45] Other limitation provisions may bar

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39 Heather Faust, *Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of Presumption of Legitimacy and Paternity By Estoppel on the Admissibility of Blood Tests to Determine Paternity*, 100 DICK. L. REV. 963 (1996); Jacobs, *supra* note 32, at 809–11.

40 Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1 (2004); Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J. L. & PUB. POL'Y 29 (2003).

41 Michael H. v. Gerald D., 491 U.S. 110, 125–26 (1989). *See generally* Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246 (2006).

42 Greenfield, *supra* note 2, at 278–80; Knaplund, *supra* note 5, at 97; Vegter, *supra* note 2, at 278–82. Other statutes are stricter and recognize the man as legal father only if the pregnancy began before his demise.

43 Bailey, *supra* note 2, at 781; Minor, *supra* note 3, at 103.

44 *See* Baker, *supra* note 40 (discussing the marital paternity presumption); Laurence J. McDuff, *The "Inconceivable" Case of Tierce v. Ellis*, 46 ALA. L. REV. 231 (1994).

45 Kristine S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 KAN. L. REV.

financial claims resulting from the determination of parenthood, such as claims for inheritance[46] or for survivor's Social Security benefits. Still, a child (on her own behalf or through her mother) may ask the court to resolve the parenthood question even when financial claims are barred.[47] Courts may acknowledge the child's interest in knowing and legally resolving her father's identity for "intangible psychological and emotional benefits"[48] and therefore allow her to press a paternity claim even when the time for monetary relief has passed. In most cases the interval for bringing claims against the estate is shorter than that for paternity claims themselves.[49]

2. *State and Federal Legislation*

Several states have enacted legislation dealing specifically with the parenthood of PMC children. The Uniform Status of Children of Assisted Conception Act, approved by the National Conference of Commissioners on Uniform State Laws in 1988, refers to PMC in section 4(b), providing that: "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."[50] This provision denies the deceased's status as father,[51] but it has not been explicitly adopted by any state. A similar provision was enacted by North Dakota, but was repealed in 2005.[52] According to the current code in North Dakota, enacted in light of the 2002 version of the Uniform Parentage Act,[53] if an individual dies before placement of his or her eggs, sperm, or

627, 639–42 (2005).

46 *Id*. at 645–47; *see also* Vegter, *supra* note 2, at 294–95.

47 Knaplund, *supra* note 45, at 655.

48 Fazilat v. Feldstein, 848 A.2d 761 (N.J. 2004).

49 Uniform Parentage Act §7 (1973); Helen Bishop Jenkins, *DNA and the Slave-Descendant Nexus: A Theoretical Challenge to Traditional Notions of Heirship Jurisprudence*, 16 HARV. BLACKLETTER J. 211, 217 (2000); *see also Fazilat*, 848 A.2d 761.

50 Uniform Status of Children of Assisted Conception Act § 4(b) (1988).

51 In its comment to section 4(b), the National Conference of Commissioners clarifies that "[o]f course, an individual who wants to explicitly provide for such children in his or her will may do so." *Id*. It is noteworthy that this is the customary law. Steeb, *supra* note 2, at 156–57; VanCannon, *supra* note 2, at 350–51.

52 This provision was enacted also in Virginia but was later repealed. *See infra* note 61.

53 Uniform Parentage Act § 707 (2002).

embryos, the deceased individual is not a parent of the resulting child unless consented specifically otherwise.[54]

The same provision has been enacted in at least six other jurisdictions (Colorado,[55] Delaware,[56] Texas,[57] Utah,[58] Washington,[59] and Wyoming[60]); in all of them, the deceased individual will not be deemed the legal parent unless he or she specifically so consented.

A few states have enacted slightly different provisions. The Virginia statute declares:

> [A]ny person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.[61]

It is evident, according to this section, that the status of a PMC child is not dependent upon the marital status of the parents.

California enacted a detailed provision clarifying the conditions in which a child conceived posthumously could be "deemed to have been born in the lifetime of the decedent."[62] The act imposes several requirements: (1) the decedent must have declared in writing and before a competent witness that his or her genetic material is to be used for posthumous conception; (2) the decedent must have designated a specific person to control the use of the genetic material; (3) a notice must be sent to the person who has the power to control the distribution the decedent's property or death benefits within four months of the death; and (4) the genetic child of the decedent must

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54 N.D. CENT. CODE § 14-20-65 (2007) (also referenced as The Uniform Parentage Act).

55 COLO. REV. STAT. § 19-4-106 (2005).

56 DEL. CODE ANN. tit. 13, § 8-707 (2007). The Delaware statute is distinctive regarding the identity of the person who can use the gamete; unlike the other state statutes, it is not restricted to spouses and refers to an "individual."

57 TEX. FAM. CODE ANN. § 160.707 (Vernon 2007).

58 UTAH CODE ANN. § 78-45g-707 (2005).

59 WASH. REV. CODE ANN. § 26.26.730 (LexisNexis 2007).

60 WYO. STAT. ANN. § 14-2-907 (2007).

61 VA. CODE ANN. § 20-158 (2006).

62 CAL. PROB. CODE § 249.5 (Deering 2007).

have been in utero within two years of the death.[63] Although the California arrangement is restrictive, its provisions are well-equipped to deal with foreseeable difficulties, especially with regard to the distribution of the decedent's estate.[64]

Despite their differences, all the statutory provisions detailed here, drawn from at least nine states, require the deceased's explicit consent to the post-mortem conception. In the absence of such consent, it appears these jurisdictions would not recognize the deceased as the legal father of any genetic offspring conceived after his death.

In the absence of specific provisions to the contrary regarding inheritance or Social Security benefits, the establishment of paternity in a PMC situation (under the provisions just discussed or others) should confer on the offspring the same status, benefits and rights as those enjoyed by offspring conceived during the parents' life. As mentioned earlier and detailed later, some limitations may nevertheless impede the effectuation of these benefits, especially when a prolonged time has elapsed since the death.[65]

Only a few states have enacted provisions dealing specifically with intestate succession in PMC cases. Virginia denies the inheritance entitlements of the PMC child.[66] Louisiana recognizes the child's intestate succession rights, as long as she was born to the surviving spouse within three years of the death and in accord with the decedent's written authorization.[67] Florida denies the child any

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63 *Id*.

64 *See* Johnson, *supra* note 2 (discussing the California statute). *Compare infra* notes 194, 196 and accompanying text.

65 *See supra* notes 45–49 and accompanying text and *infra* text accompanying note 194.

66 According to Virginia law "a child born more than ten months after the death of a parent shall not be recognized as such parent's child for the purposes of," inter alia, "intestate succession." VA. CODE ANN. § 20-164 (2007).

67 LA. REV. STAT. ANN. § 9:391.1 (2007):

> Notwithstanding the provisions of any law to the contrary, any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three years of the death of the decedent.

claims against the decedent's estate unless she has been provided for by the decedent's will.[68]

Also of note is the Restatement's position towards inheritance by PMC children. The Restatement of the Law, Third, Property (Wills and Other Donative Transfers), "takes the position that, to inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit."[69] Importantly, there is no requirement here for an explicit statement by the deceased authorizing post-mortem use of his genetic material; all that is needed is circumstantial evidence of his intent that the child inherit.

Survivor's benefits under the Social Security Act[70] [henceforth "the Act"] are, of course, a matter of federal law. To be entitled to survivor's benefits, the offspring must be a "child" as defined in the Act,[71] but most of the Act's definitions of "child" do not suit the PMC situation.[72] According to the Act an applicant is deemed a "child": (1) if the insured and the other parent underwent a marriage ceremony that would have been valid but for certain legal impediments; (2) if the insured had acknowledged paternity in writing; (3) if the insured had been decreed by a court to be the parent; (4) if the insured had been ordered to pay child support; or (5) if there is satisfactory evidence that the insured was the applicant's parent and was living with or supporting the applicant at the time of death.[73] It is clear that

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68 "A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will." FLA. STAT. ANN. § 742.17(4) (LexisNexis 2006). Interestingly, Florida has enacted detailed provisions concerning the destiny of eggs, sperm and pre-embryos in events of divorce or death of their providers. The provision declares that "[a]bsent a written agreement, in the case of the death of one member of the commissioning couple, any eggs, sperm, or preembryos shall remain under the control of the surviving member of the commissioning couple." FLA. STAT. ANN. § 742.17 (3) (LexisNexis 2006).

69 RESTATEMENT (THIRD) OF PROPERTY § 2.5 (1999).

70 42 U.S.C.S. § 402.

71 42 U.S.C.S. § 416(e); *see also* Doroghazi, *supra* note 3, at 1606–12.

72 42 U.S.C.S. § 416(h).

73 *Id*.

none of these alternatives for establishing status as a legal "child" of the insured can be used when the insured parent has already died at the time the child was born. Another alternative under the Act relies on state law; it stipulates that:

> In determining whether an applicant is the child . . . [of an] insured individual for purposes of this title, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured is dead . . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such.[74]

The Act thus allows state intestacy laws to serve as a "back-door" basis for establishing parenthood under the Act. As was shown earlier, these laws, if they deal with the matter at all, take a restrictive view of the PMC child's intestacy rights. As Professor Banks accurately sums it up, "a literal interpretation of the Act provides only one plausible, albeit unlikely, means for most posthumously conceived children to qualify for survivor's benefits."[75] Moreover, by relying on state law in such a manner, the Act raises issues of non-uniform treatment of posthumously conceived children.[76] While diversity is one of federalism's virtues, it is unclear whether a legal scheme that allowed for such differential treatment could be squared either with the federal policy underlying the Social Security Act or with the requirement to provide all children, including those born after their parents' death (regardless of when conceived), the equal protection of the laws.[77]

3. Court Decisions

Given these statutory provisions on both intestacy and Social

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74 42 U.S.C.S. 416(h)(2)(A).

75 Banks, *supra* note 3, at 258–59.

76 The constitutional doctrine of full faith and credit holds that although "credit must be given to the judgment of another state," it stresses that it "does not compel a state to substitute the statutes of other states for its own statutes." Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998).

77 *See generally* Pickett v. Brown, 462 U.S. 1 (1983); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna, 406 U.S. 164 (1972). *But cf.* Mathews v. Lucas, 427 U.S. 495 (1976).

Security entitlements and the absence of comprehensive regulation of PMC parenthood, court decisions over the past decade or so have been rather generous towards PMC children.[78] As detailed below, courts have dealt with aspects of PMC in several leading cases, and have shown support for the procedure itself and for the child's right to inherit or to receive social security benefits.

One such example is the *Hecht* case, which has attracted attention because of its unusual circumstances.[79] The case dealt with the legal force of a man's decision that his non-marital partner could use his sperm after his death.[80] More specifically, the dispute revolved around the partner's wish to use the sperm, deposited by the deceased in a sperm bank (explicitly for the partner), before he jumped to his death.[81] The man's two adult offspring from a former marriage objected and asked the court to order the frozen sperm destroyed.[82] The lower court entered an order to that effect, and the deceased's girlfriend, Miss Hecht, sought review.[83] The California Court of Appeal accepted her appeal in principle and remanded the case, paving the way for post-mortem insemination of an unmarried woman.[84]

The *Hecht* court made two noteworthy points, one pertaining to the legal "status" of the sperm and the other to the limits on PMC usage. Regarding the classification of the sperm, the court said that the "decedent had an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute 'property' within the meaning of Probate Code. . . ."[85] With respect to

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78 *But see* Stephen v. Barnhart, 386 F. Supp. 2d 1257, 1264–65 (2005).

79 Hecht v. Superior Court, 16 Cal. App. 4th 836 (1993).

80 *Id*.

81 *Id*. at 840.

82 *Id*. at 843–44.

83 *Id*. at 839.

84 An important precedent mentioned by the *Hecht* court and by commentators was *Parpalaix v. CECOS*, a French case from 1984, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction, T.G.I. Creteil, Aug. 1, 1984, Gaz. Pal. 1984, 2, pan. jurispr., 560]. The case was apparently the first to address the right of a widow to the sperm of her deceased husband. Corvalan, *supra* note 15, at 339-41; Gail A. Katz, *Parpalaix c. CECOS: Protecting Intent in Reproductive Technology*, 11 HARV. J. LAW & TECH. 683 (1998).

85 Hecht v. Superior Court, *supra* note 79, at 850; *see* Bailey, *supra* note 2 (discussing the status

the Post-Mortem Conception procedure, the court declared, for the first time, that using the deceased's sperm to inseminate his unmarried partner would not contradict the "public policy of California," a conclusion negated neither by her "status as an unmarried woman[,]"[86] nor by the death of the sperm's "owner," the genetic father.[87] Disputes regarding partners' wishes to use a decedent's sperm came before the courts in at least one other case, but a decision on this specific matter was not reached.[88]

It is difficult to know whether the paucity of PMC cases addressing the question of the legal power to use sperm of the deceased reflects agreement among family members, the small number of instances in which women have wanted to use these procedures, or the accommodating practices of clinics that have allowed harvesting and use of sperm. The partial data that have been assembled suggest that the number of requests to harvest and/or use sperm is not negligible.[89] Clinics differ in their positions on such requests. It appears from their reports that while some readily grant them, others do not.[90] As a practical matter, people working in the area have indicated that, absent binding regulation[91] or explicit prohibition, most physicians would authorize post-mortem harvesting and use of sperm.[92]

The few other cases dealing with PMC discuss the rights and benefits of children who were born through that procedure.[93] In

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of gametes and whether they may be bequeathed).

86 *Id*. at 855.

87 *Id*. at 858.

88 Hall v. Fertility Institute of New Orleans, 647 So. 2d 1348, 1351–53 (1994).

89 Johnson, *supra* note 2, at 929; Knaplund, *supra* note 5, at 93–94; Strong, *supra* note 4, at 347.

90 Johnson, *supra* note 2, at 929; Knaplund, *supra* note 5, at 95.

91 Carson Strong, *Consent to Sperm Retrieval and Insemination after Death or Persistent Vegetative State*, 14 J. L. & HEALTH 243 (1999/2000).

92 Ronald Chester, *Double Trouble: Legal Solution to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS L. J. 451 (2000).

93 The first case to come before the courts was probably *Hart v. Shalala*, No. 94-3944 (E.D. La. filed 1994), which was eventually resolved out of court. The Social Security Administration, which initially denied a claim for Social Security benefits for Judith Christine Hart, a baby girl born to the late Edward Hart more than a year after his death, announced that the benefits would be granted and the case returned to the Administration without a court ruling. On that case, see Banks, *supra* note 3.

Kolacy, the Superior Court of New Jersey dealt with the status of twins born to their mother using her deceased husband's sperm stored before his death.[94] The court found that the twins were the genetic offspring of their father and declared them the legal heirs of their deceased father under New Jersey intestacy law.[95] The court reached this conclusion on the basis of the legislative intent to enable children to receive the property of a parent after the parent's death.[96] Absent any statute dealing directly with PMC children, and given this general statutory intent, the court granted the decedent's genetic children the legal status of heirs.[97] It is important to note two factual matters stressed by the *Kolacy* court. First, the court found that the deceased's had conveyed his desire that his wife use his sperm after his death to bear their children, and it appears to have relied, at least in part, on his intentional conduct directed toward bringing children into the world after his death.[98] Second, the man left no assets and had no estate at the time of death.[99] Accordingly, recognizing the children as heirs raised no estate administration problems and no conflicts with competing parties; it was significant only insofar as it paved the way to their securing Social Security benefits.[100] The court suggested, however, that when there are assets to be distributed, it would be fair and constitutional to impose limits (such as time limits) on the rights of PMC children to inherit.[101]

In *Woodward* (2002), the Supreme Judicial Court of Massachusetts was asked by the U.S. District Court to offer its opinion on a similar question: Does Massachusett's law on intestate succession confer succession rights on PMC children?[102] After thoroughly analyzing and construing the legislative intent behind the Massachusetts intestacy statute, which does not deal with PMC children explicitly,[103]

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94 *In re* Estate of Kolacy, 332 N.J. Super. 593, 596 (2000).

95 *Id.* at 596.

96 *Id*. at 602.

97 *Id*. at 605.

98 *Id*.

99 *Id*. at 602.

100 *In re* Estate of Kolacy, 332 N.J. Super. at 603.

101 *Id*.

102 Woodward v. Comm'r of Soc. Sec., 435 Mass. 536, 537 (2002).

103 *Id*. at 544–45. Although the posthumous children provision of Massachusetts' intestacy

the Court designed the following test: posthumously conceived children may enjoy succession rights under the Massachusetts intestacy law where, as a threshold matter, a genetic relationship between the child and the decedent is demonstrated and where it is established that the decedent affirmatively consented both to posthumous conception and to the support of any resulting child.[104] Even where such circumstances exist, the court clarified, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child.[105]

The *Woodward* test was designed in light of an inferred legislative intent to address three substantial state concerns: the best interests of the child; the state's interest in the orderly administration of estates; and the reproductive rights of the genetic parent.[106] The first, an overriding legislative concern, leads (at least in principle) to the recognition of the child's inheritance rights, no less than those of a naturally conceived child.[107] The second interest calls for prompt, accurate and final administration of intestate estates; it requires certainty of filiation between the decedent and his heir and calls for limiting the time within which a claim against the intestate estate may be raised.[108] The third pertains to the decedent's reproductive rights, protecting the individual's freedom from forced parenthood.[109] The intent is to make sure that the father, in the specific case, wanted to have children after death.[110]

A clear and unequivocal decision was handed down by the U.S.

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statute, MASS. GEN. LAWS. ch. 190, § 8 (2007) says: "[p]osthumous children shall be considered as living at the death of their parent," one may assume it did not intend to deal with PMC children, since its year of enactment is 1836.

104 *Woodward*, 435 Mass. at 557.

105 *Id*. In that specific case the court did not have to determine the time limitations.

106 *Id.* at 545.

107 *Id.* at 545–46.

108 *Id*. at 536.

109 For the converse protection (that is, protection of the freedom to become a parent), see Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

110 *Woodward* has been dealt with extensively in the literature. *See* Amy L. Komoroski, *After Woodward v. Commissioner of Social Services: Where do Posthumously Conceived Children Stand in the Line of Descent?*, 11 B.U. PUB. INT. L.J. 297 (2002); Susan C. Stevenson-Popp, *"I Have Loved You in My Dreams": Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, 52 CATH. U.L. REV. 727, 743 (2003).

Court of Appeals for the Ninth Circuit in *Gillett-Netting v. Barnhart*.[111] In that case, a man deposited sperm prior to undergoing cancer treatments, and his widow, more than one and a half years after his death, bore children using that sperm; the court held the children to be the legitimate children of the deceased. The court noted that in Arizona (the state of domicile) "every child is the legitimate child of its natural parents and is entitled to support . . . as if born in lawful wedlock."[112] Under Arizona law, then, the genetic father who was married to the mother would be treated as the natural parent and would have a legal obligation to support his child if he were alive, even though the child had been conceived using in vitro fertilization.[113] The Ninth Circuit went on to hold that a child who is legitimate under applicable state law should be treated as a legitimate child for purposes of the Social Security Act as well, and should be granted survivor's benefits like any other child.[114] *Gillett-Netting* is probably the most expansive decision on the status of PMC children,[115] recognizing them as no less legitimate than children conceived when their parents were alive. It passes their father's name on to them, grants them Social Security benefits pursuant to the federal act, and recognizes their ability to inherit from the deceased father under state law.[116] Interestingly, the court disregarded the fact that the father's death in fact dissolved the parents' marriage. It proceeded on the fiction that when the children were conceived and born the marriage was still effective, and it therefore declares the children to be "legitimate."

The most recent PMC case at the time of this writing is *Stephen v. Barnhart*, decided in Florida in 2005.[117] Contrary to the cases previously discussed, this decision denied a PMC child Social Security survivor's benefits. As mentioned, under Florida law, a PMC child may not claim rights against a decedent's estate unless declared

111 371 F.3d 593 (9th Cir. 2004).

112 *Id*. at 598.

113 *Id*. at 599.

114 *Id*.

115 Not all commentators are satisfied with that decision, especially with its reasoning. *See* Doroghazi, *supra* note 3; Minor, *supra* note 3.

116 *Gillett-Netting*, 371 F. 3d at 599.

117 Stephen v. Barnhart, 386 F. Supp. 2d 1257 (2005).

an heir in the decedent's will.[118] Also, a PMC child's eligibility for Social Security survivor's benefits depends on the child's intestacy rights under state law.[119] On that basis, the magistrate judge in *Stephen v. Barnhart* denied Social Security survivor benefits to the PMC child, who was not mentioned in a will.[120] Alternative mechanisms provided by the Act for establishing entitlement to survivor's benefits were not relevant in that case and, as noted, are rarely relevant to PMC cases in general.[121]

The lack of comprehensive legislation and uniform regulation and the manner in which the issue is now handled all call for reform.[122] They generate uncertainty, to the detriment of both the parent wishing to conceive posthumously and the prospective child. Although courts make an evident effort to afford rights to the PMC child and equate her status to that of "natural" offspring, there is a danger she will nonetheless be considered an "illegitimate child" and denied her rights.[123] Judicial decisions, although relatively accommodating, are narrowly drawn. They fit the specific facts before the court and, *Gillett-Netting* notwithstanding, tend to avoid broad declarations of PMC children's rights. Equally troublesome, when there is a statute that regulates the issue, courts may find themselves compelled by it to deny the child's right or entitlement.

IV. SUGGESTED SOLUTIONS

A. General Assessment of the Suggested Solutions

The models currently appearing in the literature were originally designed to determine parenthood in Assisted Reproductive Technology cases in general. Only later, and to a very limited extent,

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118 *See supra* text accompanying note 68.

119 *See supra* text accompanying note 74.

120 *Barnhart*, 386 F. Supp. 2d 1257, 1258 (2005). I doubt that decision can be reconciled with *Gillett-Netting*. *See* discussion *supra* text accompanying note 94.

121 *See supra* notes 70–74 and accompanying text.

122 Doroghazi, *supra* note 3; Margaret Ward Scott, *A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproduction Wild*, 52 EMORY L. J. 963 (2003).

123 *See*, *e.g.*, Steeb, *supra* note 2.

were the models applied in the specific context of PMC.[124] In this part, I consider whether these models can be of use to PMC children seeking to have their parentage resolved.

A variety of factors can bear on the parenthood determination, and most of the existing models select one of those factors as the decisive one to focus on.[125] The "Intent Model," for example, suggests that the determination of parenthood should be based primarily on the individual's intention to become or avoid becoming a parent.[126] The "Genetic Model" bases parenthood largely on the genetic connection and favors holding the progenitor to be the parent.[127] Other models give weight to pregnancy;[128] to marital status;[129] to the de-facto relationship between the parent and the child;[130] and to the child's best interests.[131]

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124 *See, e.g.*, Lisa M. Burkdall, *Dead Man's Tale: Regulating the Right to Bequeath Sperm in California*, 46 HASTINGS L.J. 875, 897–99 (1995).

125 Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 882 (2000).

126 *See infra* Part IV.C. (discussing the Intent Model).

127 *See infra* Part IV.B. (discussing the Genetic Model).

128 This model, which is relevant in cases of egg donation and surrogacy, favors the gestational mother because of the special bond she develops with the fetus during the pregnancy and as a result of delivery. For that unique bond, see DIANE E. EYER, MOTHER-INFANT BONDING: A SCIENTIFIC FICTION (1992); MARSHEL H. KLAUS & JOHN H. KENNELL, MATERNAL INFANT BONDING (1976); Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521 (1988); John L. Hill, *What Does It Mean to Be a 'Parent'? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 394–400 (1991); Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in American Society*, *in* BEYOND BABY M: ETHICAL ISSUES IN NEW REPRODUCTIVE TECHNIQUES 9 (Dianne M. Bartels ed., 1990).

129 This traditional model stresses the value of marriage and prefers the married spouse over the genetic parent. *See* Phillip Cole, *Biotechnology and the 'Moral' Family*, *in* THE FAMILY IN THE AGE OF BIOTECHNOLOGY 47 (Carole Ulanowsky ed., 1995); Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523 (2000).

130 This model holds the psychological parent to be the legal parent. *See* Jill Handley Andersen, *The Functioning Father: A Unified Approach to Paternity Determination*, 30 J. FAM. L. 847 (1991); Arlene Skolnick, *Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory, and the Best Interests Standard*, *in* ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 236 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., 1998).

131 Bartlett, *supra* note 30, at 944–61; Janet L. Dolgin, *Suffer the Children: Nostalgia Contradiction and New Reproductive Technologies*, 28 ARIZ. ST. L. J. 473 (1996); Melinda A. Roberts, *Parent and Child Conflict: Between Liberty and Responsibility*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 485 (1996); Eric P. Salthe, *Would Abolishing the Natural Parent Preference in Custody Disputes Be in Everyone's Best Interest?*, 29 J. FAM. L. 539 (1990).

By their very nature, single-factor models fail to confront the full complexity of the issue at hand and the multitude of factors that bear on the decision. Parties' legitimate interests may pull in different directions, and the weight each factor is accorded may vary with the circumstances presented. It seems to me almost impossible to adhere to a rigid single-factor model that would resolve the question of parenthood in all cases.

Of the models listed previously, the two leading ones that might be applied in PMC cases are the Intent Model and the Genetic Model. The otherwise attractive De-facto Parent Model is inapposite when determination of parenthood is sought soon after birth. At that point, the child has not (yet) established a meaningful relationship with any father and therefore lacks a true de-facto (psychological) father who can be recognized as a legal parent. As I have argued elsewhere, avoiding delays is important when recognizing parenthood. It promotes certainty and stability in a matter of import to the lives of child and parents alike.[132] A model for determining parenthood therefore would be deficient if it required deferring that determination until after de-facto parenting had been established. In the following sections I examine the Genetic Model and the Intent Model and consider their potential applicability in PMC cases.

B. The Genetic Model

The Genetic Model regards the genetic relation as the main factor determining parenthood.[133] It posits, in principle, that the man whose sperm was used for conception should be declared the legal father and the woman who provided the ovum should be declared the legal mother.[134] In justifying this view, supporters of the model cite the exclusiveness of the genetic material (which originates from one man and one woman) and its importance in the creation and development

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132 Ruth Zafran, *More Than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple – The Israeli View*, GEO. J. GENDER & L. (*forthcoming* 2008).

133 Shoshana L. Gillers, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 699–701 (2001); Hill, *supra* note 128, at 389–93.

134 Although this model stresses the importance of the genetic relation, it usually requires the genetic provider to be identified (known) in order to be declared a legal parent. Accordingly, it might not recognize anonymous sperm or egg donors as legal parents.

of the child throughout her life.[135] Some proponents emphasize the unique link between the genetic provider and his offspring, the similarities they share, and the sense of continuity that bonds them.[136] Others highlight the ownership element, regarding the genetic provider's ownership of his body parts as affording him the right to "claim" the resulting child.[137] Still others cite the child's best interests; they maintain it is good for the child to know his origins and to establish his identity with reference to his ancestors.[138] Finally, some argue that the singular connection that binds a genetic parent to his offspring will result in the genetic parent providing the child the best possible home.[139] In a way, this argument sees the connection between biological relatives as one that yields instinctive care.

Applying the Genetic Model in a PMC case would point to the deceased sperm provider as the legal parent—sometimes a reasonable solution. But what if the mother (who is both the bio-genetic intended mother and the legal mother) is sharing her life with a new partner at the time of delivery, and she and her new partner want the new partner to be recognized as the legal father? There being no doubt as to the identity of the genetic father, application of the Genetic Model would preclude the latter result.

Whatever the outcome in such a case should be, it seems unconvincing and superficial to declare the dead man to be the father simply because he provided the sperm.[140] It is neither fair nor wise to disregard the wishes of the mother and her current partner, if any, especially when that partner will likely play a significant role in the

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135 Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 276–77 (1995).

136 Hill, *supra* note 128, at 389–90.

137 *See* RUSSELL SCOTT, THE BODY AS PROPERTY (The Viking Press 1981) (discussing gametes as property); William Boulier, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693 (1995); Robert P. S. Jansen, *Sperm and Ova as Property*, 11 J. MED. ETHICS 123, 124 (1985); Remigius N. Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT'L. & COMP. L. REV. 19 (2002); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000).

138 Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 330 n.30 (2004); Gillers, *supra* note 133, at 700.

139 James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 867 (2003).

140 For a discussion of different contexts, see Bartholet, *supra* note 138.

child's life.

Moreover, some aspects of the rationale for the Genetic Model undercut its applicability in PMC cases. Because the genetic father has died, one can no longer speak of the "instinctive bond" between him and the child or presume that he will provide the best possible care. Beyond that, automatically recognizing the genetic father entails recognizing his family (parents, siblings, offspring) as well. If relations between those family members and the mother were strained—for example, if the deceased's family objected to the use of the sperm and *ipso facto* to the birth of the child—it might be unwise, and even contrary to the best interests of the child, to take the Genetic Model as holy writ.

It should be stressed that I do not mean to discredit the importance of genetics. The bio-genetic relation is an important consideration in defining family relations. It should play a significant role in determining parenthood in cases of coital reproduction and serve as a powerful barrier against state intervention to sever that relationship. But it loses some of its force in those cases of assisted reproduction when more than two parties take part in bringing the child into the world, and in PMC cases where a genetic parent has died. The absence of one of the bio-genetic parents and the possible presence of another person playing a parental role warrant careful examination of whether the strict Genetic Model should be applied.

From a broader perspective, it appears that the Genetic Model is based on the exaggerated importance that Western culture ascribes to biological origins and genetic identity.[141] It invokes the myth of blood relation—"blood is thicker than water"—and considers relation by blood (that is, bio-genetic kinship) to be superior to any other.[142] The

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141 Assigning excessive weight to genetic affiliation may be problematic per se, as it both mirrors and reinforces the power of genes as a major factor in human existence. Genetic essentialism may lead an individual reflecting on his life to downplay the significance of nurture and of life experiences. *See* DOROTHY NELKIN & M. SUSAN LINDEE, THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON (W.H. Freeman 1995); Rochelle Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 315–16 (1992).

142 ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (Houghton Mifflin Co. 1993); SUSAN M. KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 74–77 (Arjun Appadurai et al. eds., Duke Univ. Press 2000); DAVID M. SCHNEIDER, A CRITIQUE OF THE STUDY OF KINSHIP 165–77 (The Univ. of Michigan Press 1984); Brenda Almond, *Family Relationships and Reproductive Technology*, *in* THE FAMILY IN THE AGE OF BIOTECHNOLOGY 13 (Carol Ulanowsky ed., 1995); Hill, *supra* note

traditional belief that "blood matters" has been reinforced by developments in genetic research, which suggest that genotype plays a major role in shaping the life course of human beings. These research developments receive extensive media attention, gain prominence in popular culture and academic writing, and thus come to mold cultural attitudes toward the family and parenthood.[143] Taken to its limit, however, the concept underlying the Genetic Model stands to jeopardize familial relationships in all their richness. Holding genetics to be more important than human relations can lead to the devaluation of care as a key factor in defining and organizing family relations.

C. The Intent Model

The Intent Model was developed primarily to facilitate choosing between competing would-be parents in cases of surrogate motherhood, especially when the surrogate mother, during pregnancy or after delivery, changes her mind and asks to keep the baby. The model ascribes preponderant significance to the intention of the contracting persons at the time the surrogacy agreement was signed.[144] In doing so, it recognizes the importance of reliance, stresses the significance of legally binding agreements, and reflects

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128, at 389–90; Katheryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733 (1994); Marilyn Strathern, *Displacing Knowledge: Technology and its Consequences for Kinship*, *in* LIFE IN THE CONTEXT OF HIGH TECHNOLOGY MEDICINE 65 (Ian Robinson ed. 1995); Brenda Almond, *Family Relationships and Reproductive Technology*, *in* THE FAMILY IN THE AGE OF BIOTECHNOLOGY 13 (Carol Ulanowsky ed., 1995).

143 The importance of the bio-genetic connection is reflected in the heroic efforts of some parents to bear a biological child—sometimes through endless attempts to conceive by assisted reproduction—rather than adopt. For many, adoption is considered a last resort. Even today, many stigmatize an adoptee as inferior to a biological offspring. The lack of blood connection to the adoptive parents is thought not only to make the child less "theirs" but also to call into question the child's own genes, derived from neglectful and accordingly "flawed" ancestors. *See generally* E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 16 (Harvard Univ. Press 1998); JUDITH S. MODELL, A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICES AND PRACTICES IN AMERICAN ADOPTION 6, 129 (Berghahn Books 2002).

144 *See* CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 120–145 (Yale Univ. Press 1989) (discussing the Intent Model); Schiff, *supra* note 135; Marjorie M. Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV 297 (1990); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 639–48 (2002).

the fundamental freedom of individuals to contract. Not only does such an approach respect the contracting parties; it is mindful as well of the overall societal interest in maintaining the availability of surrogacy as a vital mechanism by which couples with fertility problems can become parents and by which alternative families may be formed by single fathers and homosexual couples.[145] But there is more to the Intent Model than freedom and inviolability of contract. Some proponents view intention as a predictor of good parenting, drawing a link between the desire to become a parent and the willingness to care properly for the child.[146]

Nevertheless, the Intent Model suffers from some drawbacks. For one, its premise has worrisome implications: to determine parenthood on the basis of intent makes the parent-child relationship appear to be a negotiated one that can be conditional and even disposable. It views the child as goods to be traded, as a commodity that can be handed over contractually. Though largely symbolic, these characteristics can influence the parent-child relationship in a manner that has practical consequences.[147]

Beyond these general conceptual difficulties, application of the Intent Model to PMC cases is problematic. Whose intention is determinative, and at which point in time? Is it the deceased's original intention? The intention of the current partner, if any? Of the mother? If the mother's intent is crucial, should it be as manifested at the time of the conception or as updated at the time of birth?

As noted, the Intent Model was devised to deal with surrogacy, and it therefore stresses the intention at the time the contract was signed. In surrogacy cases the original intent is maintained at least until conception takes place, at which time the intent is visibly manifested and confirmed. In PMC cases, the absence of a contract means we cannot point to the moment at which the agreement regarding PMC was crystallized, but we can still attempt to ascertain

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145 Storrow, *supra* note 144, at 641.

146 Susan Golombok, *Families Created by the New Reproductive Technologies: Quality of Parenting and Social and Emotional Development of the Children*, 64 CHILD DEV. 285, 296 (1995); Schiff, *supra* note 135, at 281.

147 Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 272 (2002).

intent—at least of the mother—at the time of conception. It will be difficult, however, to determine the genetic father's intent at that time, and the same may be said of the woman's new partner, who may not yet have entered the scene. But even if these obstacles are overcome and the original intention is ascertained, would it make sense to disregard the intention formed later, at the time of birth? Is there a good reason not to take account of the new circumstances at the time of birth, circumstances that may be critical to the child's life experience in the future?

V. THE RELATIONAL MODEL

A. Defining Parenthood in Light of the Relational Model – General Discussion

The weaknesses of the foregoing models and the associated deficiency in current law warrant introduction of an alternative: the Relational Model. This model has affinities to the relational theory first espoused by Carol Gilligan[148] in the context of developmental psychology. Gilligan's identification of the "Ethic of Care" led to important advances in moral philosophy, and her ideas later influenced other fields, including law.[149] Although some writers have suggested resorting to relational theory to regulate the use of assisted reproduction in general,[150] its use in devising solutions to the parenthood definition problems raised by PMC has thus far been left unexplored.[151]

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148 CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (Harvard Univ. Press 1982).

149 *See generally* SEYLA BENHABIB, SITUATING THE SELF – GENDER, COMMUNITY, AND POSTMODERNISM IN CONTEMPORARY ETHICS 178–202 (Routledge 1993); GRACE CLEMENT, CARE, AUTONOMY, AND JUSTICE – FEMINISM AND THE ETHIC OF CARE (Westview Press 1996); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (Univ. of California Press 1984); SELMA SEVENHUIJSEN, CITIZENSHIP AND THE ETHIC OF CARE – FEMINIST CONSIDERATION ON JUSTICE, MORALITY, AND POLITICS (Routledge 1998); JOAN C. TRONTO, MORAL BOUNDARIES – A POLITICAL ARGUMENT FOR AN ETHIC OF CARE (Routledge 1993); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

150 *See* Patrick Healy, *Statutory Prohibitions and the Regulation of New, Reproductive Technologies Under Federal Law in Canada*, 40 MCGILL L. J. 905, 910 (1995) (discussing the use of relational theory in the context of assisted reproductive technologies).

151 The regulation of post-mortem conception itself (as distinguished from determining the

The model proposed here subscribes to the premise that the relational theory generates considerations applicable to the resolution of legal disputes and, in particular, family conflicts.[152] The model derived from this premise – The Relational Model – is unique in at least two ways.[153] First, it has at its core the need to maintain and protect nurturing relationships. Second, it steers clear of rigid rules, blindly applied abstract conceptual principles, and sharply defined hierarchal rights. Instead, it offers a nuanced analysis of the facts of each case, thus allowing greater flexibility in analyzing the disputants' unique characteristics and distinctive relationships.

This mode of analysis is well suited to the family context and the complicated issues presented by its regulation.[154] Beyond that, it may be vital for the continuation of the family as a thriving social construct in general.[155] Preserving the family as a place of mutual caring and enduring responsibilities is essential for children and adults alike.[156] The relational perspective puts this type of family—a caring family—at the center. It constructs legal rules in light of these characteristics and strives to apply them in a sensitive way that promotes accomplishment of their purposes.

The Relational Model considers three main factors as governing the determination of parenthood in PMC cases (and, perhaps, in other cases of assisted reproduction in which parenthood is unresolved). First, it looks to ensure that the conditions exist for establishing the relationship in the first place. Second, it is concerned that the relationship, once established, be structured in a way that responds to the needs of all meaningfully involved parties in the best

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paternity of the resulting child) has been dealt with briefly from the relational perspective, Belinda Bennett, *Posthumous Reproductive and the Meaning of Autonomy*, 23 MEL. U. L. REV. 286, 298–307 (1999).

152 Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C.L. REV. 1323 (1995); Kavanagh, *supra* note 31.

153 SEVENHUIJSEN, *supra* note 149, at 59–60; ROBIN WEST, CARING FOR JUSTICE 50–61 (1997); Philip Alcabes & Ann B. Williams, *Human Rights and the Ethic of Care: A Framework for Health Research and Practice*, 2 YALE J. HEALTH POL'Y L. & ETHICS 229 (2002).

154 For a discussion of this approach in the context of the lawyer/client relationship, see Paul J. Zwier & A. B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383 (1996).

155 *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 574 (1983).

156 Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L. J. 293, 297–98 (1988).

(or most nurturing) way. Third, in the event of clashes between parties' needs and interests, the model aims to afford precedence to the needs and interests of the dependent parties—in our context, the best interests of the child.

The importance of the family, for the daily welfare of human beings and for society at large,[157] underlies the model's First factor, which calls for the laws related to family life to be crafted in a way that facilitates the formation of a family—specifically, a parent-child relationship. This factor will thus evaluate any proposed legal regulation (or any proposed resolution of a conflict) by enquiring into whether it will promote or hinder the formation of a family in a specific case or in general. This factor will favor the legal solution that offers – or at least does not interfere with – the basic conditions necessary for fulfilling the desire to bring a child into the world (with the intention of caring for him or her). Preference will be given to those solutions that facilitate the realization of the wish to become a parent and secure the formation of the parent-child relationship. An important step directed to that end is the legal recognition of parenthood so as to guarantee the full range of legal protections afforded to families and family members.

But securing the formation of families is only the first step toward ensuring meaningful family life. Importantly, the Relational Model strives to make sure that the relations between family members, especially between parents and children, are formed in a way that advances the underlying values of the relationship: stability, nurture and responsibility. This Second factor characterizes much of family law, which must always take account of how legislative and judicial actions affect the family and familial relations. Cases must be resolved in ways that ensure formation of the best possible family relations—lasting, mutual and responsible relations.[158] Since this factor is focused on the quality of the relations, it assigns little or no importance to how those relations are formally framed or to the genetic connection between parent and child; these considerations are of interest only insofar as they may indicate the character of the

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157 Jason Mazzone, *Towards a Social Capital Theory of Law: Lessons from Collaborative Reproduction*, 39 SANTA CLARA L. REV. 1, 8–10 (1998).

158 *Id.*; *see also* Mary Midgley & Judith Hughes, *Are Families Out of Date?, in* FEMINISM AND FAMILIES 55 (Hilde L. Nelson ed., 1997).

relationship itself. It follows that the family promoted by the Relational Model is not necessarily the traditional one. It stresses, instead, the substantive qualities of care, concern, dependability and mutual responsibility. In the context of determining parenthood, this principle suggests that the parent who has (and is expected to have) the most meaningful relationship with the child be declared the legal parent.

The Third factor is focused on the child and her needs,[159] reflecting the Relational Model's commitment to the child's welfare and the struggle to advance her best interests.[160] As Matthew Kavanagh states, "an ethic of care asks that we focus on those who are most vulnerable – the recipients of care. . . .The focus must be moved from parents to their children. . . .Without such a focus, it is impossible to assure that the needs of those most vulnerable, and most often silenced, will be heard and met."[161] The family is the core of the child's being; her life, physical existence, and welfare revolve around it.[162] In light of the significance of family relations for children, the goal is to ensure that the child enjoys the best possible family atmosphere by declaring the legal parents to be those who have the most significant actual and potential relationships with her; that is, those who will, it is hoped, realize her needs in the best possible way. Unlike the other approaches to determining parenthood (in particular the Intent Model), the Relational Model stresses the child's needs and interests rather than the potential parents' "rights."

Focusing on the child's best interests does not mean that the parents' needs and intentions are irrelevant. Realizing the parents' wishes can promote the child's best interests, for the needs of parent

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159 *See* Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child Centered Model for Adoption Policy*, 68 TEMPLE L. REV. 1649 (1995); Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman, *Introduction*, *in* ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 1, 1 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., 1998).

160 For related ideas see Barbara B. Woodhouse, *'Are You My Mother?' Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER. L. & POL'Y 107 (1995); Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

161 Kavanagh, *supra* note 31, at 124.

162 Neil S. Binder, *Taking Relationships Seriously: Children, Autonomy and the Right to a Relationship*, 69 N. Y. U. L. REV. 1150 (1994).

and child are intertwined in their day-to-day experience. Making sure that the parent (as a caregiver) is content can promote the child's welfare as well.[163] Moreover, the parents' needs are of more than instrumental importance; promoting the foundation of families and the quality of the relations among family members serves the interests of adults as well as of children. But it must be stressed that the child and her needs are at the heart of the decision and must be favored in resolving any clash of interests.

Note that the Relational Model is not meant simply to select for the child the best possible parents in every potential case. When the identity of the legal parents is clear—as where the child was born to her biological parents who wish to raise her as their own—there is neither need nor desire to use this model. In such cases it would be a rare exception to declare someone other than the bio-genetic parent to be the legal parent, and that should be done only in accord with the stringent standards of adoption law. The Relational Model is suggested for use only in complicated cases, where parenthood is unclear and there exist multiple candidates, all with parental affinity to the child.

As mentioned earlier, the intention factor and the affiliation factor, which involve factual matters, may figure indirectly in the Relational Model's process of resolving the normative question, that is, determining the legal parent. The intention to bring a child into the world and the effort to carry out that intention—sometimes through unconventional means—may indicate the quality of a relationship that has already been formed or would be built in the future. Similarly, the affiliation factor—taking account of the type of link that exists between the PMC child and the individual who wishes to be declared as his parent—may have a bearing on the relationship between the parties. The affiliation might be genetic, intended (that is, based solely on the desire and effort to become a parent), or psychological (in cases when parent-like bond has already been created).[164] Any of these affiliations (and, especially, combinations of them), may represent the special bond between the child born through PMC and the individual asking to be declared the

163 Kavanagh, *supra* note 31, at 124.

164 In cases of surrogacy, which are not part of the discussion here, the affiliation can be based on gestation.

parent. In the context of the Relational Model, these factors are used as indicators of the present relationship and predictors of the foreseeable relationship between the child and her (would-be) legal parent.

The Relational Model is a standards-based model; in that sense, it differs from the other two models we have considered. The Genetic Model is rule-based, deploying a firm rule that looks only to genetic identity. The Intent Model, to be sure, turns on individual appraisal, but that appraisal considers only one factor. In contrast, the Relational Model aims for a decision grounded on a varied array of factors and standards, some of them "soft" rather than hard and fast, and it applies those standards in a way that takes account of the circumstances of the individual case. This does not imply, it should be clear, that the court has unfettered discretion in every case that comes before it. First, the model does not preclude legislative guidance; on the contrary, it contemplates legislative formulation of guiding principles.[165] These principles are grounded on various presumptions; at the same time, they embody the model's normative commitment to advancing the considerations described above (that is, promotion of family relations and family responsibility and protection of the child). In other words, the standards on which the model is grounded will contribute to determining the legal result that will be reached. Accordingly, a legal regime that aims to embody the Relational Model will leave considerable discretion to the agency responsible for applying the law—be it a registry official or a court—but the scope of that discretion will be limited by the obligation to promote the standards that are reflected in the model.

B. Defining Parenthood in Post-Mortem Conception – Applying the Relational Model

Because the Relational Model, by definition, is sensitive to the facts and idiosyncrasies of each case, its operation can be illustrated only if the pertinent facts are outlined in some detail. Accordingly, I begin by describing possible scenarios in which the relationships to be considered are played out. The scenarios were chosen to represent the array of conflicts that might arise between the potential

[165] *See supra* text accompanying note 156.

contestants for legal parenthood.

The departure point for the discussion is the basic plot: a child is born to her mother through the use of sperm which was obtained from the mother's late spouse soon after his death.[166] The couple had been married for a few years and enjoyed a normal relationship. They were hoping to have children in the future and were taking actions toward that goal. They had never discussed the possibility of PMC. Accordingly, there was evidence neither of the man's desire to become a father after dying nor of his objection to it.

At this point, the path forks, depending on the presence or absence of another man wishing to be declared the legal father. Consider first the scenario in which there is no such other man. In that event, there are no competing "fathers" to choose between; the only question is whether to declare the deceased genetic father to be the legal father or to rest content with a sole legal parent, the mother.

In the second scenario, which I discuss in detail below, the mother is involved at the time of birth in a new meaningful relationship. The current partner wants to be declared the legal father and intends to care for the new-born and fulfill her needs. The mother, too, wants him to become the legal father. The question then is who should be declared the father: the deceased genetic father, the intended father, neither, or both?

1. The Status of the Deceased in the Absence of Another Paternity Candidate

The rationale underlying the Relational Model would usually favor a result that strengthens the network of familial relationships, providing these relationships reflect and are designed to promote nurturing. In the absence of unusual circumstances, therefore, the Relational Model would suggest that the deceased genetic father be recognized as the legal father. Even when deceased, the genetic father stands to play an important role in the child's personal narrative, in her identity and even in her psycho-social welfare.[167] Declaring the

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166 No question is posed regarding maternity. By all lights and on every model, the legal mother here is the woman who bears the child: she is the genetic mother; she carried the pregnancy; and she intends to be the child's parent throughout life.

167 This assumes that personal characteristics of the father (or his family) were not ones that would harm the psychological development of the child, and that recognition would not

genetic parent to be the legal parent can also enhance the child's financial condition and reinforce her economic safety net by adding support from the genetic parent's estate or from his extended family.[168] Even more importantly, declaring the deceased to be the parent may open the door to meaningful relationships with the deceased's family members[169]–grandparents, uncles, aunts, cousins and sometimes even half-siblings from a previous relationship.

The foregoing conclusion is supported by the three factors central to the Relational Model, noted above. With reference to the first—facilitating the establishment of families—the claim pressed here pertains, admittedly, not to the use of the deceased's sperm (since it already took place) but to the legal recognition of paternity. Therefore, it does not affect directly the very formation of the family or the legal conditions necessary for bringing a child into the world. Nevertheless, that legal recognition is far from meaningless. First, the expectation that the deceased's paternity will be recognized after-the-fact may bolster *ab initio* the mother's decision to use the sperm to bring a child into the world—that is, to endeavor to expand the family. Second, and more abstractly, legal recognition of paternity has both symbolic and substantive importance.[170] To a substantial extent, it has the capacity to establish the family as a recognized entity. Clearly, the first substantive step in establishing the family is the act of bearing the child; but an additional important step is the one that grants legal recognition as a family to the biological-psychological unit. That recognition promotes the family's social acceptance and ensures it various types of economic support and legal protection. Beyond that, it can well be argued that post-mortem birth through the use of the deceased spouse's sperm constitutes the direct continuation of an existing family (his and his wife's) and a realization of their family relationships. That aspect bears as well on the second factor of the Relational Model, next discussed—the

generate severe psychologically harmful disputes.

168 That may not always be the case. *See supra* Part III.B.2. and *infra* Part VI. The discussion assumes that it is unlikely that the child will suffer adverse economic consequences from the recognition, although reality may produce unusual circumstances when that assumption does not apply.

169 Such relationships may develop even if their status as family relationships is not legally recognized. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 60–61 (2000).

170 Strong, *supra* note 91, at 256–57.

fostering of family relations.

As just noted, recognizing the biological father's legal paternity affords continuity to the family that had been formed by the mother and her late husband. The birth and legal recognition can bolster, both *ab initio* and after the fact, that family's relationships as they existed at the time of the husband's death and as they exist at the time of the paternity decision. Looking beyond the continuity of that nuclear family, recognition of the father's paternity may strengthen ties within the child's extended family. Assuming the deceased father's family favors the birth and that the mother wishes its involvement, recognition of legal paternity may promote recognition of the extended family's ties to the child and enhance the part they play in her life. In some cases, of course, the father's extended family or the mother herself may oppose that recognition and involvement, and the father's family may even object to the bearing of the child. That might be the case, for example, if the mother and her late husband's family are embroiled in some conflict or if the deceased has children from a previous marriage who oppose the birth on financial or other grounds. Nevertheless, depending on the intensity of the objection, it is possible that legal recognition may provide, in the long term, a basis for the formation of emotional ties between the child and her grandparents, aunts and uncles, and paternal half-siblings. Moreover, to the extent it is the father-child relationship that is at issue, legal recognition can ultimately provide it a substantive and symbolic grounding. Although we are obviously not speaking here of a parental relationship in its full significance, for the father has died and cannot play a tangible, physical part in the child's life,[171] recognition of the relationship is not thereby divested of all meaning. Formal registration of the genetic father's parenthood with the government's vital statistics agency will simplify the child's future interactions with administrative agencies, from the school board to the motor vehicle regulators. It will spare her the dissonance and embarrassment of being labeled "father unknown" when she knows the label is inaccurate. It will also reinforce the life narrative sketched for her by her mother and, on occasion, enhance her economic condition by conferring on her rights as an heir and other insurance benefits as well.

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171 Robertson, *supra* note 11, at 1032 (1994).

It thus appears that recognizing the genetic father's legal parenthood can bolster relationships between the genetic parents, between the father and child, and between the child and the father's extended family. It is important to note, of course, that this general conclusion may be negated in some sets of circumstances; in those cases, recognizing legal parenthood may fail to strengthen nurturing family relationships and may even impair them. Where one or another party's objection to the birth or recognition of the genetic father's legal paternity is sufficiently strong, the interest in promoting family relationships might well suggest declining recognition of that paternity. That result seems particularly appropriate where it is the mother herself who objects to recognizing the genetic father's legal paternity. In these circumstances, and in view of her serving as the primary caregiver, her strong objection may well be the decisive factor that tips the balance against recognizing the genetic father's formal paternity.

Finally, the third factor—the best interests of the child—will also favor recognizing the late father's paternity in most (though, again, not all) cases. Whatever one thinks of the claim raised by some that a child might be better off not having been born at all into a fatherless situation[172] – a claim I believe entirely unfounded[173] – once the child is born, his or her welfare must serve as the paramount consideration in determining parenthood. As noted earlier, recognizing the genetic father as the legal father will give the child a name; round out her life narrative; enable her to respond with certainty to her own and others' questions regarding her origins; provide a basis for economic support; and open the door to the formation of family relationships

172 A situation called by Ruth Landau "planned orphanhood." Ruth Landau, *Planned Orphanhood*, 49 SOCIAL SCIENCE AND MEDICINE 185, 185–87 (1999); *see also* Shuster, *supra* note 25, at 414.

173 Even if it is maintained (or demonstrated) that birth into a fatherless situation will harm a child emotionally, this harm is a far cry from the harm that could support a morally defensible claim to non-existence. Moreover, the harm discussed here is speculative: it is not clear that all children born to a single mother under such circumstances will suffer. It is therefore difficult to argue on behalf of a particular child before he or she is born that he or she would be better off not being born at all. Lastly, as a matter of logic, the "best interests of the child" are relevant only when there is a child; but here, the thrust of the claim is that there should not be a child at all. This ethical conundrum is called "the non-identity problem." John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J. L. & MED. 7, 13–14 (2004).

with her late father's extended family. In short, in most cases, such recognition will serve as a meaningful step to promote her emotional and economic wellbeing.

Of course, the child whose paternity is being determined is not the only one whose best interests must be taken into account. Application of the Relational Model requires consideration of any other children who will be affected by the decision, as well. Where additional children are involved—children born to the deceased during his lifetime—their best interests may dictate that their father will not be recognized as the legal father of the child conceived after his death. As a practical matter, opposition can be expected to arise, by the nature of things, when there are other children who were born to the father by a different woman. These children could argue (on their own initiative or urged on by their mother) that recognizing the post-mortem child could impair their standing as heirs or as social security beneficiaries, diminishing their shares in their father's estate or in the maximum per-family social security benefit. These arguments deserve to be taken into account, but they do not generally overcome the interest in recognizing the genetic father's paternity. From the moment the PMC child comes into the world, it seems to me, we should strive to recognize her as her genetic father's child and she should enjoy the associated rights as heir or beneficiary—even if that impairs, her half-siblings' legacies. With regard to non-financial matters, there may be intangible concerns about recognizing the PMC child as the sister of her father's previous offspring, but I doubt one could persuasively argue that her siblings would be harmed in an emotional or a symbolic sense by recognition of her status. While the child's siblings may prefer to ignore her existence or may even ask to impede her realization of her economic rights, viewing the matter through the lens of the Relational Model will show that recognizing the PMC child can potentially lead to the formation of family relationships—a potential that will warrant, in most cases, affording that recognition.

Before concluding this part, I must stress that my proposal here with regard to PMC cases should not be seen as having any bearing on the status of sperm donors vis-à-vis single-mothers and same sex families. I do not at all mean to suggest that a single-parent family is inherently incomplete, that in every case a child must have a legal father, or that single-parent families should be discouraged. As

mentioned earlier, a leading principle underlying the Relational Model is the importance of facilitating the creation of families. If the family chosen by the mother(s) is a single-mother family or a female same-sex family, this is, in principle, the family that should be recognized by law. A contrary position might impede the creation of families in the first place, deterring not only mothers but also potential sperm donors and thereby constraining the mother's opportunity for family life. That would be a harmful and intolerable result.

2. The Deceased's Assumed Intention to Father His Child

Before proceeding to the second scenario, the deceased's intentions and desires regarding fatherhood warrant some further discussion. In the scenario described above, it has been assumed that the late husband intended, or at least wanted, to father a child of his own. But it is not always evident that that is so. Furthermore, the scenario described above portrayed the couple as having had a good lasting relationship and having planned to have children in the foreseeable future. Again, this may not always be the case. However, if these assumptions are met, we can conclude that the man had a "general" intention to become a parent and father a child with his wife. Nonetheless, we have no specific indication of his views regarding posthumous parenthood. In cases where the sperm is retrieved before the man's death, we may have clearer evidence of his intentions,[174] but in the majority of posthumous sperm retrieval cases, we likely will have no concrete information. Under these circumstances, it is suggested to establish a rebuttable presumption that the genetic father intended to bring a child into the world even after his death.[175] This rebuttable presumption rests on some generalized value judgments – outlined in the next paragraph – which may be refuted in some cases but which nonetheless hold in most others, and therefore may ground this presumption as a matter of default.

All other things being equal, we can assume that most people

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[174] We can draw inferences about his intention from the very fact of the deposit or from its circumstances; there may also be an explicit statement of intent in a declaration or record signed before or soon after the deposit.

[175] For an opposite position, see Bennett, *supra* note 151, at 304–05; Schiff, *supra* note 13, at 963.

who saw their future as including birthing children and raising them will be consoled by the knowledge that, should they die, their memory, if not their genetic line, will be maintained and preserved through their descendants. It is legitimate to assume that if faced with death a person would seek ways to ensure continuity (of his genes and the memory of his persona), and should this person be in a stable and long lasting relationship, such ways will include fathering a child.[176] While it might be too strong a claim to suggest that most people would prefer to procreate, it is still the case that a large percentage of married people of the relevant ages do.[177] Whereas the desire to procreate includes, in ordinary circumstances, the wish to become an active parent, it is not far fetched to assume that the desire to procreate realized by most couples of the relevant age does not evaporate upon knowledge that active parenting will be denied on account of death. Therefore, it seems legitimate to adopt, as a default position, the presumption that the wish to procreate includes the wish to bring a child to the world even after death. This conclusion is consistent with the premise underlying the spousal relationship. After all, spousal relationship – or at least the ideal type thereof – relies on mutual love, responsibility and respect. If this is indeed the case, we may assume that the deceased man would have trusted his partner with the decision whether or not to pursue with the conception and pregnancy; should her deep wish would be to give birth to and mother his child after his demise, we may assume that the man would have wanted his partner to be in a position to do so.[178]

As noted, the presumption would be a rebuttable one, yielding in the face of evidence to the contrary. Indeed, the same relational perspective that gives rise to the presumption also calls for its refutability: it respects the man's wish not to father a child without

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176 From this perspective, the weight of the presumption may be diminished where the father already has children who were born during the course of his life, whether from the same woman or from previous partners.

177 JASON FIELDS, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003 4 (2004), http://www.census.gov/prod/2004pubs/p20-553.pdf.

178 Carson Strong, who supports the idea of "inferred wishes" to retrieve sperm after death, reasons by analogy to the case of post-mortem organ donation, Strong, *supra* note 4, at 348, and to decisions regarding patients in a persistent vegetative state, Strong, *supra* note 91, at 259. *See also* Rothman, *supra* note 22.

being able to realize a full parental relationship with her.[179] Accordingly, despite the general conclusion that the deceased sperm provider should be recognized as a father, there may be cases in which the model implies the contrary result. The propriety of going forward with the posthumous conception when it is known that the sperm provider would object is a matter beyond the scope of this article; my own view is that the conception should not take place. But, if a child is nevertheless conceived and born despite the sperm provider's evident objection, declaring him to be the legal father would appear to be unjustified and incompatible with the Relational Model, which calls for bolstering meaningful relationships. Imposing parenthood against the will of the deceased father in a PMC case would contravene the interest in creating and strengthening flourishing familial relations[180] and might well have the opposite effect by seeming to trivialize those relationships. The deceased sperm provider should be recognized as a legal father when the birth is a manifestation of the relationship between him and the mother and when it is the continuation of the family they would have raised together had he not died. The rebuttable presumption obviates direct evidence of that intention in every case, but where there is evidence to the contrary, recognizing his legal paternity would be inconsistent with the premises of the Relational Model.

3. Determining Fatherhood When the Mother Has a New Partner

Applying the Relational Model to the second scenario—in which the mother is living with a new partner—suggests, in my view, a clear conclusion regarding the new partner's status. On the premise that he participated in the decision to conceive, or at the very least accompanied and supported the mother during the pregnancy, he is the intended father and should be declared the legal father. As explained later, his status as such may be acknowledged along with that of the genetic father.

Looking for guidance to the factors underlying the Relational Model—securing the conditions for establishing families, promoting

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179 This rationale also dictates a presumption that the decedent would not have wanted to beget a child when circumstances do not allow him to ensure her minimal financial needs even—or, perhaps, especially—when he is no longer alive.

180 Mazzone, *supra* note 157.

intra-family relationships based on mutual responsibility, stability and nurture, and securing the best interests of the child—we may say it is better for a child to have two parents than one; it is better for her to have a parent who wants to function as such; and surely it is better to have that parent be alive. Although the intended father (that is, the mother's new partner) is not the genetic father, under this scenario he supported the birth of the child and wanted to take part in her care and nurturing. He is the bio-genetic mother's partner,[181] he has accompanied her through the pregnancy and delivery, and he is there to stay. It is he who will be viewed by society as the father; more importantly, it is he who will be regarded as the father by the child herself. Clarifying his status as a legal parent reinforces that reality, thereby nurturing family relationships and advancing the best interests of the child. Resembling in some ways the recognition of the mother's husband as father in cases of sperm donation,[182] recognition of the current spouse as legal father is not just best for the child—it is right for the parents.

Having decided that formal recognition of the mother's new partner may well be necessary and desirable, we face another question: must that recognition be provided automatically and as soon as the child is born? And, must it be done through some unique mechanism, or can we rely on the adoption process and recognize paternity once that process has run its course?

Although parenthood could be established through the adoption procedure, that is not an optimal solution from the perspective advanced here. The purpose of this paper is to consider postmortem conception and suggest, *ab initio*, the ideal scheme for resolving the associated paternity issues, both procedural and substantive. The laws that govern adoption were not drafted with postmortem conception in mind, and it is no surprise that the mechanism they establish is far from optimal for cases involving PMC. I have

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181 For the purpose of paternity recognition, the marital status of the couple should not be of great significance. The focus should be on the actual relationships involved, both between the mother and the man who wishes to become the father and between that man and the child. A legal framework for the couple's relationship may facilitate the process, enabling a faster determination of the partner's relationship with the mother, but it should not change his status at the end of the day.

182 William Joseph Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 89 (1990).

suggested, for reasons presented earlier, that the mother's partner should be recognized as the legal father at the time of birth, and the adoption procedure is too ponderous to allow for that result. It entails temporary, monetary, and emotional costs, and it could result in complications in cases of change of mind. It subjects the recognition of parenthood to a court's discretion and interferes with the family's autonomy. Moreover, in a social-cultural atmosphere that perceives adoption as somehow a "second-rate" form of parenthood, reliance on that mechanism will needlessly stigmatize both child and parent. As we will see, there exist some PMC cases in which the father's status ought to be declared by court. Where the man "joins" the family after the birth of the child, for example, a court might find it proper to use the adoption procedure, with the discretion it affords the court, to decide whether the man should be acknowledged as a parent. But in the other cases discussed here, the father's status should be declared by law and acknowledged formally and routinely, without court intervention, at the time of birth.[183]

As just suggested, the general rule that the mother's partner should be declared the father may need to be tempered in certain cases, depending on when the man came into the picture. Recognizing the new partner as the father when he agreed to the conception from the outset is straightforward and intuitive. His intention at the time of conception and of birth, his support during the pregnancy, his emotional investment, and his own expectations all warrant declaring him to be the father for the reasons described earlier. The same conclusion is valid, I believe, when he becomes the mother's partner after conception but before the child's birth. Although he did not take part in the decision to conceive, his intention and actions through the pregnancy and at the time of birth can ground his status as parent.

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183 A clear legal determination enhances the stability of the unit into which the child is born and should be useful in resolving any disputes that might arise. Whatever one's view on the substantive issues, all might agree that the matter should be legally resolved. The desire for legal regularization is consistent with the desire to ease, to the extent possible, the need to resolve family disputes. A lack of regularization could open the door to conflict among those competing for parental status, lead to increased litigation, and threaten the welfare of the child, who would be born into a state of legal, if not familial, uncertainty. Regularization cannot preclude a family crisis, but it can ease its prompt resolution and may avoid litigation by encouraging settlement.

When the man joins the family following the child's birth, however, his status becomes less certain, and it is doubtful that he can categorically be deemed the legal father. In these circumstances, the court should be asked to consider the circumstances of the particular case. The court will have to examine the nature of the parties' relationships, the motivations underlying the request to recognize the new spouse's paternity, and the child's relationships to the significant figures in his life. The older the child, the greater the likelihood that he has formed parent-child relationships with other individuals. In such circumstances, the court must be certain that recognizing the mother's new partner as legal father will not impair the significant relationships already formed by the child. As already mentioned, the best course in these cases may be to pursue adoption as the mechanism for recognizing the new partner's paternity. The court will have to be satisfied that the adoption itself and the form it takes (for example, open adoption that preserves family relationships with the genetic father's family) are for the best interests of the child.

More complicated questions might arise where the mother and her new partner have separated by the time of the child's birth, or where at least one of them objects to the new partner's recognition as the father. If they both object and he is no longer part of the family, he clearly should not be declared the legal father. In these circumstances, their joint objection to recognition is, as a practical matter, self-executing; unless otherwise determined by law,[184] when neither he or the mother approach the relevant state agency or the court and ask for declaration or recognition, no such recognition will ensue. When the mother and her partner disagree, the court should rule on the basis of the considerations identified above and weigh the pros and cons of declaring the man to be the legal father.

Although it takes into account the intentions and desires of the parties, the Relational Model looks to other considerations as well. The decision must assign decisive weight to the child's needs and examine the effect of the fatherhood determination on overall family relationships. Declaring the former partner to be the legal father might be the only means of establishing a tangible father-child relationship, but it might have ill effects on the mother-child

[184] For instance, if the mother and the intended father married prior to birth, the child may be considered the husband's legal child.

relationship or on the family's harmony as a whole. The decision must consider whether it is the (former) partner himself or the mother who objects to his recognition, the reasons for the objection, and its intensity. A family divided into two hostile households is unlikely to offer a good atmosphere for the development of sound family relations, and when there is no significant relationship between the child and the former partner, the price of recognizing him is unlikely to be worth paying.

The status granted the deceased genetic father may also bear on the decision regarding the former partner. Declaring the deceased to be a father (as I have already suggested would be proper in the first scenario and suggest below would be proper in the second scenario as well) might tip the balance against recognizing the former partner in a disputed case. Recognizing the genetic provider as a father in the second scenario might satisfy the child's needs for a life story, for emotional support (especially by the members of the father's extended family, if they will be playing a role in her life) and for financial resources. It is important to recall that as much as we try to portray the possible scenarios in advance, reality is much more varied. Similarly, real-life conclusions must be tailored carefully case by case and adjusted to suit the specific circumstances.

Finally, let me clarify the need for formal, legal recognition of the mother's partner's paternity. Why is de-facto, functional fatherhood insufficient?

It seems to me that de-facto parenthood fulfills neither the child's needs nor those of the de-facto parent—at least not entirely. Even in a smoothly functioning family, (the contrary situation is discussed below) formal, legally recognized parenthood has practical and symbolic importance. As a practical matter, the father's formal recognition gives him the ability to discharge in full his obligations and rights with respect to the child, vis-à-vis both the state and other individuals. He will not need court approval or authorization for his actions and he will be able to act independently of the other parent, as in every legally recognized family. From a symbolic point of view, formal recognition would afford public approval to the parent-child relationship, thereby offering emotional reassurance to all parties.

When the family is in crisis, however, formal recognition becomes crucial, not merely important. If the parents separate or one of them dies, formal recognition is necessary to ensure continuity of

the parent-child relation and protect the child's rights. For example, if a de-facto (that is, not legally recognized) father dies intestate, the child may find it difficult to claim status as an heir.[185] If it is the mother who dies, the de-facto father may find himself forced to prove his status to the state or to third parties seeking to oust him from the family. If the mother and the de-facto father separate, the mother may try to sever his connection with the child and take the child away from the only father she knows.[186] The former partner will then find himself fighting for his status and his rights. The legal battle can be expected to take some time, during which the de-facto father and (more importantly) the child will be unable to maintain their relationship. The harm occasioned by such a forced and unjustified separation is self-evident. Naturally, the argument in favor of formal recognition of legal parenthood is relevant in other family contexts as well, whether heterosexual or alternative.[187] It is possible as well that the matter may be resolved within the context of legislation that comprehensively and satisfactorily addresses the status of step-parents within a family. Recognizing a step-father as the legal father in circumstances paralleling those described here (that is, automatically and immediately upon the child's birth) in a way that would afford him legal standing identical to that of any other legal father, could also provide a satisfactory resolution in cases of post-mortem birth.

4. Are Two Fathers Too Many?

As has been shown, application of the Relational Model calls for (1) recognition of the genetic father as legal father where there is no other candidate; and (2) recognition of the intended father as a legal father at time of birth, when both he and the mother favor doing so. What is much less clear is the proper status of the deceased genetic father when the mother's current partner is declared to be the legal father. Should one of these fathers take precedence over the other?

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185 The problem might arise as well where the father in his will leaves a bequest to "my surviving children" without naming them.

186 In the opposite case, the de-facto father might want to step out of the child's life. He may ask to avoid responsibility for the child and leave the child without the financial support she is accustomed to.

187 See, for example, the case of same-sex motherhood, as discussed in Zafran, *supra* note 132.

Should we favor the relationship with the intended father – who stands to be the social father and plays the paternal role in the child's life – over the relationship that could have existed with the deceased father, even though his genetic contribution, image and emotional pull also stand to play a role in writing the child's life story?

On the premise that parenthood is not an exclusive status, this competition could be avoided by concluding that both men should be recognized as legal fathers. I see no persuasive reason to preclude such shared parenthood in our context (and, for that matter, in other contexts as well[188]). As already explained, acknowledging the genetic father's status, especially when doing so is supported by the mother and the intended father (her new partner), is the appropriate course of action; but so is recognition of the intended father. Most of the difficulties that arise from the recognition of three parents who are all alive would not be posed in our case, when the genetic father is dead. Because the genetic father is not physically present and is not part of day-to-day life, his recognition imposes little burden on family life. The child will not be faced with demands to divide her emotions or loyalty, and she can actually enjoy both worlds. This conclusion might change, of course, in the event of strained relations between the mother (and her new partner) and the extended family of the deceased.

Contrasting our case with that of anonymous sperm donation is helpful. Unlike the case of sperm donation, the deceased man here had a meaningful relationship with the mother. In most cases (ideally, in all cases), use of the sperm would have been in accord with his explicit or implicit wish. Moreover, the sperm was provided under the assumption that the man (now deceased) will father his descendants and give them his name. Consequently, it is not far fetched to assume that the deceased's family might want to be present in the child's life. In some cases they might have also been involved in the decision to bring the child into the world, and have assisted in the procedure or provided support during the pregnancy. There is a clear difference between the deceased father in our case

188 *See* Bartlett, *supra* note 30 (discussing different contexts); Jacobs, *supra* note 32; Kavanagh, *supra* note 31; John C. Sheldon, *Surrogate Mothers, Gestational Carriers and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 MAINE L. REV. 523, 547 (2001); Candace M. Zierdt, *Make New Parents But Keep the Old*, 69 N.D. L. REV. 497 (1993).

and the anonymous sperm donor, and this difference supports the conclusion that the former should be recognized as a legal father along with the intended father, while the latter should not be. While it is the child's best interests that should predominate, we can see that recognition of the deceased genetic father is warranted in its own right.

VI. LEGAL AND FINANCIAL CONSEQUENCES

Most of the literature on PMC has considered the child's economic rights—her status as heir, and her eligibility for Social Security survivor's benefits. It has given little if any direct consideration to the determination of parenthood per se; that has been discussed only as an adjunct to the financial aspects of the issue. As is evident in the preceding pages, I have taken a different course here by focusing primarily on the determination of parenthood. Having sketched what I believe to be the proper outcomes regarding legal paternity in various PMC situations, the need arises to confront some practical aspects regarding the child's status and rights vis-à-vis both the person(s) determined to be her legal father and the pertinent state agencies.

The determination of legal parenthood entails the full panoply of rights and obligations associated with paternity and affects the child's relationship with state agencies and third parties. Recall that the solution proposed above calls for recognizing the willing mother's partner (that is, the de-facto parent) as the legal father without requiring a formal process of adoption. This proposal goes beyond the current law which recognizes the husband at the time of birth as the legal father;[189] it would recognize the mother's cohabitating partner even in the absence of marriage and when no genetic connection between father and child exists. As the result of such recognition, the mother's partner assumes full paternal status, equal to that of any other legal father. He bears the duty to support the child and has the rights and obligations of legal guardianship. Likewise, the child's standing, with regard to future inheritance or social security benefits, is recognized as it would be had the father

[189] *See supra* notes 39–41.

been the biological or adoptive father.

Recognizing the paternity of the deceased father—as sole father if no new partner entered the picture prior to birth; otherwise as co-father—poses more complicated questions. First, such recognition requires that statutes be amended or that courts and administrative agencies take the position that it is legally available and advisable. Furthermore, the fact that the genetic father is no longer alive obviously limits the scope of the parental rights and responsibilities to be examined; given the father's physical absence, no issues need be resolved with respect to such matters as his visitation rights or involvement in child rearing decisions. But that does not mean that recognizing his paternity will be a matter of symbolism only, having no substantive consequences. First, in jurisdictions that recognize the rights and obligations of extended family members, the paternity determination will affect those rights and obligations, and procedures will have to be devised to grant extended family members standing in the case. Beyond these matters, two of the issues that remain pertinent—the child's rights to intestate succession and Social Security benefits—were referred to earlier in the article and have been the subject of initial regulation in some states.[190] These two issues, which are likely to generate future debate and conflict, warrant some further consideration here in light of the substantive proposal being advanced.

Once paternity is recognized—even if post-mortem—the child should enjoy equal rights as an heir.[191] Clearly, where the father refers to the child in his will, his express directive must be honored and the child granted whatever bequest is specified.[192] In the absence of a will, the child should be treated the same as any other descendant.[193] That equality, however, is not without some reservation. Allowing for inheritance or intestate succession by one who has not yet been born complicates or may even preclude distribution of the estate. It is possible, for example, that the potential child may remain unborn, mere frozen sperm, for a prolonged or

190 *See supra* Part III.B.2.

191 *See* Bailey, *supra* note 2 (providing extensive discussion on the inheritance aspects).

192 This is already the case today. *See supra* note 51.

193 Banks, *supra* note 3.

indefinite time because the mother has not yet proceeded with the conception and the pregnancy. If that is the situation at the time the estate is distributed, be it by will or by statute, will the frozen sperm be deemed legally capable of inheriting? And if the child is born after the estate has been distributed, will she have a claim for her equal share from the various heirs? Such questions threaten the certainty of estate dispositions and may impair society's interest in rapid, effective settlement of estates as well as the potential heirs' economic interests. Leaving the matter unregulated may also frustrate the wishes of the deceased.

It seems to me—though this is by no means the last word on the subject—that the default rule should be to set a portion of the estate aside for the PMC child, subject to certain preconditions designed to minimize the host of difficulties that might arise. First, the mother (that is, the deceased's widow or surviving partner), should be obligated to inform the executor or administrator of the estate, at the first possible opportunity,[194] that she is considering using the deceased's sperm. That condition will substantially limit the number of cases in which distribution of the estate is affected, since in most cases no such intention will exist. In the very few cases where such notice is given, the administrator or executor would be required to plan accordingly. The second condition would limit the time during which a PMC child's inheritance rights would be assured. Without attempting here to define that time precisely, I would suggest it be no longer than four to five years from the time of death.[195] If, during that time, the woman failed to inform the executor that she was pregnant by the deceased's sperm, the executor would be free to distribute the portion of the estate set aside for the PMC child.[196] During that interval, the court or the executor would have to ensure that the other

194 A somewhat similar condition was set in California, which imposed a four-month deadline for sending the notice. *See supra* notes 62–64 and accompanying text.

195 In setting the deadline to be imposed, two conflicting interests must be kept in mind: the allotted time should be short enough to avoid excessive interference with the efficient settlement of estates, but also long enough to avoid undue pressure on the mother to become pregnant too soon. She must be allowed a reasonable time to move beyond her intense mourning for her deceased partner and to come to as well-reasoned a decision as possible with regard to bearing the child.

196 Compare to the condition that was set in California. *See* CAL. PROB. CODE § 249.5 (Deering 2007) and *supra* text accompanying note 62.

heirs received the portions of their legacies not subject to potential challenge from the PMC child and that the value of the estate was preserved. Under this proposal, a child born without notice of pregnancy having been given within the prescribed time would be unable to share in the genetic father's estate, if the estate had already been distributed.

The child's eligibility for Social Security benefits should likewise be no different from that of any other child of the deceased. The law should provide that offspring born from the deceased's sperm (assuming, of course, the genealogy can be so demonstrated) should be eligible for support to the same extent as any other child orphaned of his or her father. In this context, moreover, I see no need for as rigid a time limit as in the case of inheritance rights; indeed, it may be that no time limit at all is necessary. Separate inquiry is needed, of course, into the economic consequences of imposing another group of eligible claimants, however small, on an already stressed Social Security system seen by some as approaching collapse.[197] That study will require data on the incidence of PMC, the likely number of claimants under the rule I am suggesting, and the fiscal strength of the Social Security System. The last factor, however, should bear not on the offspring's eligibility itself, but only on whether and how to limit the eligibility period in a manner that treats all survivors equally.

One interesting suggestion in the literature calls for the eligibility of a PMC child to be determined case by case.[198] According to this suggestion, if the benefit-allocating agency determined, on the facts of the particular case, that the deceased, had he lived, would have wanted to support the child in question, it would find her eligible for survivor's benefits. This "constructive support" would appear to be recommended by the Relational Model for determining parenthood, for it well suits two of that model's principles: deciding each case on the basis of its particular circumstances and emphasizing the obligations that flow from family relationships. That said, I still favor treating eligibility for Social Security benefits on a class basis: once

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197 *See* Banks, *supra* note 3, at 308. For an updated estimation, see *The Future of Social Security, Testimony Before the S. Comm. on Aging*, 109th Cong. (2005) (statement of Douglas Holtz-Eakin, Dir., Cong. Budget Ofc.), http://www.cbo.gov/doc.cfm?index=6068&type=0.

198 Banks, *supra* note 3, at 372.

their paternity has been legally determined, PMC children should be treated as belonging to the same class as other children. I consider this preferable because, for one thing, the Relational Model will have already been deployed at an earlier stage, in the course of determining paternity itself. Second, it would be burdensome and perhaps unfair to require, in each instance, a difficult evidentiary proceeding to establish a child's eligibility for benefits or inheritance. Finally, application of the Relational Model itself dictates that a man recognized as legal father in a PMC situation bears, in principle, all the obligations of any other father—even if his demise results in some of these obligations being carried out by the state. To put it differently, the recognition of paternity means that society—like third parties or family members whose inheritance might be affected—must act in a manner that respects that paternity.

Finally, attention should be paid to the consequences of recognizing both the deceased genetic father and the mother's new partner as legal parents. Is the child entitled to dual sets of rights? If not, what is the standard for determining whom she inherits from and on whose account she is eligible for Social Security survivor's benefits? Without exhausting the discussion, I believe it possible to recognize the child as the heir of both men. Dual inheritance is not unprecedented, having been recognized in adoption situations;[199] and it seems even more justified here,[200] given the legal recognition of both men's paternity.[201] As for Social Security survivor's benefits, an analogy can be drawn from the case of adoption by a stepparent. A child adopted by her stepfather (that is, her mother's second husband) does not thereby lose eligibility for benefits as her deceased father's survivor; that is the case even if she receives child-support from the stepfather, whether as a member of his household or as the recipient of court-ordered child-support payments.[202] The same rule should apply in our case.

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199 Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family,* 1996 UTAH L. REV. 93, 152–53 (1996); Vegter, *supra* note 2, at 273–74.

200 For a critical perspective, see Brashier, *supra* note 199, at 144–45.

201 Goodwin, *supra* note 2, at 276.

202 42 U.S.C.S. § 402(d); Stephen D. Sugarman, *Reforming Welfare Through Social Security*, 26 U. MICH. J.L. REFORM 817, 847–48 (1993).

VII. CONCLUSION

Scientific developments and increased social acceptance have made possible the use of assisted reproductive technologies to create alternative families. Although this is a positive change—a change that enhances the individual's capacity to fulfill herself, promotes happiness, and promises greater social equality—it is a change accompanied by complex challenges. One of the most significant of those challenges is determining parenthood in cases of post-mortem conception. In these situations, one of the genetic parents is dead and, as a further complication, an additional person (the new partner) may participate in the creation of the family and wish to be recognized as a legal parent. Also involved may be the extended family, which may support the arrangement enthusiastically or object strenuously to it. The situation will clearly be an emotional one for the widow who wishes to become a mother (or has already become one) and will be extremely important for the child and her well being.

The techniques for PMC have been available and used for almost thirty years. Nevertheless, PMC has not yet been the subject of comprehensive legislation or regulation, in part because defining parenthood in these situations is a complex and controversial matter.[203] But these difficulties make a clear and definitive regulatory regime even more essential. The absence of such a scheme will promote inconsistency and uncertainty, leading, in turn, to excessive litigation and the associated emotional costs, which can run especially high in family disputes. Leaving controversial decisions in policy matters to the courts, without proper statutory guidelines, may undermine the courts' standing in the public eye. It is the legislature's role, as an elected body with the capacity to devise comprehensive societal solutions, to resolve issues such as these. Courts are able to tailor the application of enacted policies to the particular cases at hand, but effective court action requires the enactment of a comprehensive legislative scheme.

I have sought here to outline such a scheme and have proposed use of a Relational Model to guide the difficult decisions expected down the road. In contrast to the other models currently prevailing, the Relational Model is multi-dimensional enough to reflect the

[203] Lorio, *supra* note 1, at 28–29.

complexity of the issue while lending itself to flexible implementation in a manner that can better realize the needs and interests of all concerned.