

FROM (MORAL) STATUS (OF THE FROZEN EMBRYO) TO (RELATIONAL) CONTRACT AND BACK AGAIN TO (RELATIONAL MORAL) STATUS

YEHEZKEL MARGALIT*

ABSTRACT

The existing hundreds of thousands of unused frozen embryos, coupled with the skyrocketing rate of divorce, raise numerous moral, legal, social, and religious dilemmas. Among the most daunting problems are the moral and legal status of the frozen embryo; what should its fate be in the event of conflicts between the progenitors?; and whether contractual regulation of frozen embryos is valid and enforceable. This Article applies relational ethics, drawing on, inter alia, the relational contract to resolve such intertwined dilemmas. Applying this theory, this Article will challenge the conventional dichotomous conceptualization of the frozen embryo as either a person or a nonperson.

This Article will discuss why the legal and moral status of the frozen embryo should be determined as a derivative of the desired or undesired relationship between the progenitors, articulated in a mandatory disposition agreement. The progenitor who is interested in using the frozen embryo and bringing the child into the world defines it as a person, whereas the progenitor who opposes its usage determines its status as a nonperson – an object.

Consequently, this Article argues that in the event of an explicit disposition agreement, the contract should govern whether the frozen embryo will be used, discarded, adopted and/or earmarked for research. The relational contract provides adequate contractual devices to address any problems arising from changed circumstances or changes of heart. In those cases where there is no explicit disposition agreement, or when the explicit agreement does not stipulate what should be done with the embryos under special or unanticipated circumstances, the party interested in using the embryo should prevail. The recalcitrant progenitor, who is not interested in using the embryo and becoming a parent, should not be subject to a legal determination of parental status and its attendant responsibilities.

* Visiting Research Scholar, New York University Law School (2011–2012); Associate professor, Netanya Academic College, and Bar-Ilan University; PhD (Law); M.A. (Law); LL.B. Bar-Ilan University. Author of the books *THE JEWISH FAMILY – BETWEEN FAMILY LAW AND CONTRACT LAW* (2017); *DETERMINING LEGAL PARENTAGE – BETWEEN FAMILY LAW AND CONTRACT LAW* (2019); *PARENT-CHILD RELATIONSHIPS - BETWEEN FAMILY LAW AND CONTRACT LAW* (Bar-Ilan University Press, 2022) (Heb.) (forthcoming). Thanks to I. Glenn Cohen, Jonathan Herring, Pamela Laufer-Ukeles, Netanel Lipshitz, Efrat Ram-Tiktin and Nitzan Rimon-Zarfaty for their useful comments. The Article was presented to Bar-Ilan University's Interdisciplinary Research Group on the Ethics of Cryopreserved Fertilized Embryos in May 2021; The Israeli Contract Forum, Zefat Academic College, Israel in June 2021; The Law & Society Conference, Peres Academic Center; The Association for Israel Studies, Bar-Ilan University, both in June 2022.

I. INTRODUCTION

In October 2020, scientific and social media headlines announced that a miracle had occurred in Tennessee when a baby girl, Molly Gibson, was born after having been a frozen embryo for twenty-seven years, setting a new record for the longest frozen embryo to have resulted in a birth.¹ This new world record broke the previous record set by Molly's older sister, Emma, who was also adopted by the same parents, Tina and Ben Gibson, after having been frozen as an embryo for twenty-four years.² The two sibling girls had been created in October 1992, when Tina, the mother, was only one and a half years old.³ In our "frozen age," it will not be surprising if in the near future, the new world record will be much longer – perhaps even generations longer.

This breathtaking biomedical innovation highlighted the dilemmas that can occur in today's extensive preservation and donation of frozen embryos across the United States as well as in other countries throughout the world. In the U.S. context, according to the most recent official survey, based on the CDC's 2018 Fertility Clinic Success Rates Report, there were 306,197 Assisted Reproductive Technologies ("ART") cycles performed at 456 reporting clinics in the United States during 2018, resulting in 73,831 live births (deliveries of one or more living infants), for a total of 81,478 live-born infants. According to another estimate, "there are more than 620,000 cryo-preserved embryos in storage in the United States."⁴ Sadly, however, even these innovative fertility treatments, not to mention innovations leading to ectogenesis – an artificial womb⁵ – have not resolved the unresolvable moral and legal debates regarding the status of both the frozen embryo and the fetus. Consequently, even early in 2020, an Arizona court

1. Holly Honderich, *Baby Girl Born from Record-Setting 27-Year-Old Embryo*, BBC NEWS (Feb. 12, 2020), <https://www.bbc.com/news/world-us-canada-55164607> [<https://perma.cc/ANS7-C54U>].

2. See Caroline A. Harman, *Defining the Third Way - The Special-Respect Legal Status of Frozen Embryos*, 26 GEO. MASON L. REV. 515, 515 (2018).

3. See Ayelet Blecher-Prigat, *Echoes of Nonmarriage*, 51 ARIZ. ST. L.J. 1213, 1245-46 (2019); Ruth Zafran, *Reconceiving Legal Siblinghood*, 71 HASTINGS L.J. 749, 749 (2019-2020); Laura T. Kessler, *Family Law by the Numbers: The Story That Casebooks Tell*, 62 ARIZ. L. REV. 903, 917-18 (2020).

4. See Ctrs. Disease Control & Prevention, THE 2018 ASSISTED REPROD. TECH. NAT'L SUMMARY REP. (2018), <https://www.cdc.gov/art/pdf/2018-report/art-2018-national-summary-508.pdf> [<https://perma.cc/P5B3-H7MP>]; Harman, *supra* note 2, at 518. There are an estimated 800,000 frozen embryos, see *Frozen Embryos: The Law at a Crossroads* (Jan. 18, 2023), <https://www.m-mtlaw.com/insight-news/frozen-embryos-the-law-at-a-crossroads/> [<https://perma.cc/99E8-QJDF>] for the updated evaluation.

5. Eric Steiger, *Not of Woman Born: How Ectogenesis Will Change the Way We View Viability, Birth, and the Status of the Unborn*, 23 J. L. & HEALTH 143, 143 (2010); Jessica H. Schultz, *Development of Ectogenesis: How Will Artificial Wombs Affect the Legal Status of a Fetus or Embryo?*, 84 CHI.-KENT L. REV. 877, 877 (2010); Glenn Cohen, *Artificial Wombs and Abortion Rights*, 47 HASTINGS CTR. REP. 1,1 (2017).

could not precisely define the moral status of the frozen embryo,⁶ settling on an “interim category that entitles them to special respect because of their potential for human life.”⁷

This Article challenges the conventional conceptualization of the frozen embryo and the fetus in dichotomous terms as either having or not having personhood status.⁸ Between these two extreme poles, there is room for a more nuanced and relational moral status. The notion of “relational status” has long been the subject of a vast body of scholarly work, but the phrase “relational moral status” represents a much newer idea, having been raised during the past decade in the legal and ethics fields as well as others.⁹ Nevertheless, both concepts remain difficult to define precisely.

This Article offers a novel approach, using intent and contract, especially the relational contract, to define the relative moral and legal status of the frozen embryo (and the fetus). Under this approach, the two individuals involved in the fertility treatments should define the relational status of their own frozen embryo as they prefer to conceptualize their relationships with it through private, contractual arrangements.¹⁰

6. The need for a definitive status in this issue was extensively discussed by Bill E. Davidoff, *Frozen Embryos: A Need for Thawing in the Legislative Process*, 47 SMU L. REV. 131, 135-37 (1993).

7. *Terrell v. Torres*, No. CV-19-0106-PR, 2020 Ariz. LEXIS 25 (Jan. 23, 2020), quoting *Davis v. Davis*, *infra* note 35, at 597. For an academic discussion of this recent verdict, see Sarah B. Kirschbaum, *Who Gets the Frozen Embryos during a Divorce: A Case for the Contemporaneous Consent Approach*, 21 N.C. J. L. & TECH. 113, 133 (2019); Melissa B. Herrera, *Arizona Gamete Donor Law: A Call for Recognizing Women’s Asymmetrical Property Interest in Pre-Embryo Disposition Disputes*, 30 HASTINGS WOMEN’S L.J. 119, 128-31 (2019); Catherine Wheatley, *Arizona’s Torres v. Terrell and Section 318.03: The Wild West of Pre-Embryo Disposition*, 95 IND. L.J. 299, 299 (2020).

8. See Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, 33 WM. MITCHELL L. REV. 767, 769-85 (2007); Lee R. Collins & Susan L. Crokin, *Fighting ‘Personhood’ Initiatives in the United States*, 24 REPROD. BIOMED. ONLINE 689, 689 (2012); J. F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J. L. & MED. 573, 573 (2013).

9. See, e.g., in the context of the moral status of the fetus and the frozen embryo Catriona Mackenzie, *Abortion and Embodiment*, 70(2) AUSTL. J. PHIL. 136, 143 (1992); OLEG ARTEMENKO, *INSPIRATIONS FROM POTENTIAL: DOES HUMAN EMBRYO IN VITRO POSSESS FULL MORAL STATUS?*, 32 (Student thesis, Linköping University, Department of Culture and Communication, Centre for Applied Ethics, 2010); Kate Greasley, *Abortion, Feminism, and ‘Traditional’ Moral Philosophy*, PHIL. FOUND.’S MED. L. 120, 128 (2019).

10. For a slightly different usage of the term “relational status,” see Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor’s Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 338 n.448 (1999); (“Other possible means of proving traditional relational status such as legal adoption, equitable adoption, parentage by step-marital relationship, and other legal fictions based upon an alleged parent’s conduct toward the living or inter-utero child during the parent’s life [. . .]”).

Thus, the moral and legal status of the embryo in such cases should subjectively depend on, and be a derivative of, the individual autonomous parental intentions, articulated in their private agreement according to specified contractual stipulations, thereby, bypassing any determination of whether it is a person, or something in between.

Indeed, in the recent legal literature, there has been powerful calls for more flexibility in defining frozen embryos.¹¹ Considering relational ethics, which will be presented at length in Section 2, is a decision-making model that outlines two core principles: mutual respect, and relational engagement.¹² A more relational definition of the status of the frozen embryo and the fetus as a byproduct of the existing and impending relationship between them and their progenitors is warranted. The legal and moral status of these embryos should no longer be defined in dichotomous and objective terms, as has been traditionally accepted for decades. Instead, their status should be considered subjective and relational, which in the context of relational ethics, primarily depends on their current and future relationships with each contacting party, who have entered into a private agreement reflecting their interest in becoming (or not) the legal parent of the intended child.

Understanding the conceptual and/or paradigmatic difficulty of dealing with the moral and legal status of both the frozen embryo and the fetus is essential.¹³ Not only have both been discussed in countless books and articles, but even today, they continue to be hotly debated issues. Nonetheless, relational ethics offers a new and intriguing perspective for addressing these issues, which frequently are intertwined and treated as one.¹⁴ One of the most long-standing and substantive views on this issue is that of the Catholic Church, which rather than maneuvering along the slippery, and ever-changing slope of trying to identify a

11. See Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 159 (2005); *ibid*, *Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 369 (2007). See also Steiger, *supra* note 5, at 169. (“The first necessary step is to establish a firm legal categorization of embryos and fetuses, based on their stage of development. Embryos and pre-viable fetuses must be acknowledged as property [. . .] Fetuses that have reached viability must be recognized as full persons and citizens, protected by the state.”).

12. See Jean Chagnon, *Relational Ethics - A Framework for Ethical Practice in Rural Settings*, Minn. Psych. Ass’n, <https://www.mnpsych.org/relational-ethics> [<https://perma.cc/TJ7P-59BA>] (last visited Apr. 4, 2023).

13. See Wheatley, *supra* note 7, at 324 (“[w]hile abortion doctrine is a useful analogy, abortion and pre-embryo disposition are not the same thing”).

14. See, e.g., Hyun Jee Son, *Artificial Wombs, Frozen Embryos, and Abortion: Reconciling Viability’s Doctrinal Ambiguity*, 14 UCLA WOMEN’S L.J. 213, 213 (2005); Alyssa Yoshida, *The Modern Legal Status of Frozen Embryos*, 68 HASTINGS L.J. 711, 711 (2017); Madison Hynes, “*Who Gets the Children?*”: *Innovations in Reproductive Technology Create More Problems than Solutions for the Legal System*, 53 UIC J. MARSHALL L. REV. 163, 166 (2020) (“[. . .] the potential effect of overturning the monumental case *Roe v. Wade* could have on current American laws regarding the disposition of frozen embryos.”).

point at which human life begins, still holds to the firm view that full personhood begins at conception.¹⁵ This Article suggests that, instead of focusing on what is a life and when it begins, the future relationships between either the frozen embryo or the fetus and its intending parents must be examined in order to determine its relational moral and legal status.

Empirical sociological studies have demonstrated that infertility patients consider their frozen embryos as their own child no less than their pregnant counterparts conceptualize their fetus as their child.¹⁶ Therefore, treating these intertwined, albeit not identical issues in tandem may provide important insights. This Article will focus on the moral status of the frozen embryo and will address the moral status of the fetus as either a point of reference or as an additional ramification of the proposed analysis.

After the introduction, the Article begins the discussion in Section 1 by exploring two of the most troubling dilemmas in the field of in-vitro fertilization (IVF) – the difficulty of precisely defining the moral and legal status of both the frozen embryo and the challenges of its contractual regulation. In Section 2, relational ethics will explore the possible antecedent – relational autonomy – and examine the correct relationship of these concepts. Focusing on the moral and legal status of a fetus, Section 3 analyzes the issue from a legal perspective, and Section 4 from a philosophical viewpoint, examining the issues of personhood and potentiality. Section 5 explores the bioethical and sociological aspects of the issue, discussing biological ethics and relational ethics, while Section 6 turns to the perspective of Jewish law and the halakhic relational moral status of a frozen embryo. All the preceding interdisciplinary discussion provides the basis for Section 7, where the Article engages in a normative deliberation, describing the advantages of a disposition agreement in determining the relational moral and legal status of frozen embryos considering the exceptional circumstances of various scenarios.¹⁷

15. Therefore, surplus frozen embryos must not be destroyed and instead should be adopted by other infertile couples, as is the main theme of the snowflake adoption program. See Katheryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 WIS. WOMEN'S L.J. 179, 179 (2003); Karin A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, 1 U. ST. THOMAS J. L. & PUB. POL'Y 100, 101-19 (2007).

16. See, e.g., Yael Shalom & Yael Hashiloni-Dolev, *Fertility Patient's Views Regarding the Moral Status and the Appropriate Use of Frozen Pre-Embros*, 3 HEALTH L. & BIOETHICS 175, 179 (2010) (Heb.); Sheryl de Lacey, *Parent Identity, and 'virtual' Children: Why Patients Discard Rather Than Donate Unused Embryos*, 20(6) HUM. REPROD. 1661, 1661 (2005); Abigail Maguire, *An Examination into the Embryo Disposal Practices of Human Fertilization and Embryology Authority Licensed Fertility Centers in the United Kingdom*, 30(1) CAMBRIDGE Q. HEALTHCARE ETHICS 161, 168 (2021).

17. For a close discussion of the interplay of status and contractual regulation in the field of fiduciary, see the following seminal references: *Beach Petroleum v. Kennedy* (1999) 48 NSWLR 1, 188 (“[. . .] status based fiduciary relationship, the duty is not derived from status. As in all such cases, the duty is derived from what the solicitor undertakes [. . .]”); James Edelman, *When Do Fiduciary Duties Arise?*, 126 LQR 302, 302 (2010) (“Fiduciary duties [. . .] are not duties which

1. The Relational/Relative Moral Status of the Frozen Embryo (and the Fetus) and Its Contractual Regulation Challenges

The current surge in IVF usage and its inevitable byproduct – the accumulation of hundreds of thousands of unused frozen embryos – raises a myriad of ethical and legal dilemmas. Such as, what should be done with the unneeded frozen embryo if contact with its progenitors has been lost and they are no longer available, either because the couple has moved to another location or simply lost contact with the fertility clinic.¹⁸ In such cases, what is to be the fate of the abandoned frozen embryos – should they be discarded, put up for adoption by interested couples,¹⁹ or earmarked for research?²⁰ In addition, disagreements may arise between the progenitors regarding the disposition of their frozen embryos during the time they are cryopreserved, which may last for years and even decades.²¹ Is it appropriate to deal with “custody” of frozen embryos?²² Do

are imposed by law nor are they necessarily referable to a relationship or status. It is time to move from thinking of fiduciary duties as a matter of status to understanding them as based upon consent.”); *ibid*, *The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 21, 36 (Andrew S. Gold & Paul B Miller, eds., 2014) (“In various areas of the law of obligations [. . .] it was also thought that the obligation was imposed on a person due to that person’s status or office. That view is no longer held. Instead, status or office serves as a basis from which an implication can be drawn in an undertaking by the obligor.”).

18. Lynne M. Thomas, *Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There Be a Connection*, 29 ST. MARY’S L.J. 255, 260 n.14, 271 n.69 (1997); Paul C. II Redman & Lauren Fielder Redman, *Seeking a Better Solution for the Disposition of Frozen Embryos: Is Embryo Adoption the Answer*, 35 TULSA L.J. 583, 596-97 (2000); Gerard Letterie & Dov Fox, *Lawsuit Frequency and Claims Basis Over Lost, Damaged, and Destroyed Frozen Embryos Over A 10-year Period*, 1(2) F&S REP.’s 78, 78 (2020).

19. See Jessica L. Lambert, *Developing a Legal Framework for Resolving Disputes between Adoptive Parents of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes between Progenitors*, 49 B.C. L. REV. 529, 529 (2008); Redman & Fielder Redman, *supra* note 18; Bruce P. Blackshaw & Nicholas Colgrove, *Frozen Embryos And The Obligation To Adopt*, 34(8) BIOETHICS 857, 857 (2020). See *infra* note 112; see also Alex Polyakov & Genia Rozen, *Social Egg Freezing And Donation: Waste Not, Want Not*, 47 J. MED. ETHICS, E73, E73 (2021) (a recent survey conducted in Australia found that most women who have frozen their eggs will not be using them, which make them available for adoption. 4048 women have eggs in storage in Victoria — an increase of almost 30% since 2019. Of those, only 159 women came back to use their eggs in the last year — just 3.9%).

20. See Peter J. Burton & Katherine Sanders, *Patient Attitudes to Donation of Embryos For Research in Western Australia*, 180(11) MED. J. AUSTRALIA 559, 559 (2004); Catarina Samorinha & Susana Silva, *A Patient-Centred Approach to Embryo Donation for Research*, 5 ISR J. HEALTH POL’Y RES. 44, 44 (2016); Catarina Samorinha et al., *Factors Associated With the Donation and Non-Donation of Embryos for Research: A Systematic Review*, 20(5) HUM. REPROD. UPDATE 641, 641 (2014).

21. See, e.g., Daniel I. Steinberg, Note, *Divergent Conceptions: Procreational Rights and*

they “belong” to any of the progenitors, and if so, to whom exactly – the man who supplies the sperm, the woman who donates the ovum, or both? Which right should prevail, the right to procreate or the right to not procreate?²³

Indeed, there is no lack of contractual challenges and questions in this field. For example, if the couple has previously entered into a disposition agreement, is it a binding contract and should it be enforceable?²⁴ Even if there is an explicit agreement, what should happen if there are unforeseeable or changed circumstances, such as the breakdown of the couple’s relationship, the death of one of them, or the loss of legal capacity?²⁵ What if one party has changed their mind during the time from the freezing of the fertilized eggs until the disagreements emerge?²⁶

A controversy exists in the legal literature over whether the contractual regulation of the fate of frozen embryos offers more advantages²⁷ or disadvantages for the contracting parties.²⁸ One of the most substantial dilemmas

Disputes over the Fate of Frozen Embryos, 7 B.U. PUB. INT. L.J. 315, 315 (1998); Jennifer M. Stoller, *Disputing Frozen Embryos: Using International Perspectives to Formulate Uniform U.S. Policy*, 9 TUL. J. INT’L & COMP. L. 459, 459 (2001); Shelly R. Petralia, Note, *Resolving Disputes over Excess Frozen Embryos through the Confines of Property and Contract Law*, 17 J. L. & HEALTH 103, 103 (2002).

22. See Paula Walter, *His, Hers, or Theirs - Custody, Control, and Contracts: Allocating Decisional Authority over Frozen Embryos*, 29 SETON HALL L. REV. 937, 937 (1999); Peter E. Malo, *Deciding Custody of Frozen Embryos: Many Eggs are Frozen but Who is Chosen?*, 3 DEPAUL J. HEALTH CARE L. 307, 307 (2000); Mary Joy Dingler, *Family Law’s Coldest War: The Battle for Frozen Embryos and the Need for a Statutory White Flag*, 43 SEATTLE U. L. REV. 293, 293 (2019).

23. See, e.g., Mark C. Haut, Note, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493, 510-16 (1999); I. Glenn Cohen, *The Right Not to be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1115 (2008); *ibid*, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1135 (2008).

24. See John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 407 (1990); John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 989 (2001); Lambert, *supra* note 19, at 542-45, 558-63.

25. See Haut, *supra* note 23, at 519-22; Jennifer M. Dehmel, *To Have or Not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos*, 27 CONN. L. REV. 1377, 1400, 1405 (1995); Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 73-74, 99, 114 (1999).

26. See Coleman, *supra* note 25, at 90-95, 110-11; Robertson, *supra* note 24, at 414, 419-20, 424; Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One’s Mind*, 12 DUKE J. COMP. & INT’L L. 75, 75 (2002).

27. See, e.g., Mario J. Trespalacios, *Frozen Embryos: Towards an Equitable Solution*, 46 U. MIAMI L. REV. 803, 803 (1992); Melanie M. Lupsa, Comment, *Avoiding Forced Parenthood: A Practical Legal Framework to Resolve Disputes Involving the Disposition of Embryos*, 49 SETON HALL L. REV. 951, 951 (2019); Robertson, *supra* note 24.

28. See Lambert, *supra* note 19; Donna M. Sheinbach, *Examining Disputes Over Ownership*

is the moral and legal status of frozen embryos. If one conceptualizes them as property the progenitors possess, such private regulation is logically appropriate; and in contrast, if the frozen embryos are treated as human beings, such property discourse and ownership are a priori irrelevant.²⁹ This controversy involves three major views of the issue, all of which are arisen in legal academia and different jurisdictions in the United States. The first is a view of the frozen embryo as a human being for all intents and purposes, which has been explicitly recognized in Louisiana³⁰ and New Mexico statutes.³¹ The second considers the frozen embryo as a mere commodity belonging to the progenitor.³² The third viewpoint, the frozen embryo is neither a person nor a property but falls into an “interim category” that entitles it to “special respect.”³³

These three distinct categories have also been applied in most of the cases, albeit mostly implicitly by the courts for almost three decades. Most cases have treated the frozen embryo as property, explicitly or implicitly to varying degrees,³⁴ three of them have treated it as an intermediate category of special

Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles?, 48 CATH. U. L. REV. 989, 989 (1999); Stacie L. Provencher, *Family Law—States Should Create a Heightened Standard of Review for Contracts that Determine the Disposition of Frozen Embryos in Contested Divorce Cases*, 42 W. NEW ENG. L. REV. 295, 295 (2020).

29. For the close connection between the moral status and the appropriateness of the contractual usage, see Davidoff, *supra* note 6, at 159. (“For instance, where a court adopts the embryo-as-life theory, it may specifically negate the parties’ intent to discard in vitro embryos upon the occurrence of a specified event.”); Petralia, *supra* note 21, at 103. (“The dominion of property law suggests that the enforcement of contracts is eminent to communal survival.”); Harman, *supra* note 2, at 529 (“[. . .] under the property theory, in which the embryos are the property of the progenitors and are subject to their control. As such, the embryos can be the subject of a contract.”).

30. LA. REV. STAT. §§ 9:121-33 (1999); *see also* Berg, *Elephants*, *supra* note 11, at 369, 392; Berg, *Owning*, *supra* note 11, at 161; Thomas, *supra* note 18, at 286-87. For a discussion of this state’s stringent approach towards abortion, see Yehezkel Margalit & Pnina Lifshitz-Aviram, *Towards A New Archimedean Point of Maternal vs. Fetal Rights?*, 81 LA. L. REV. 447, 447 (2021).

31. N.M. STAT. § 24-9A-1(D) (2006) (discussed by Harman, *supra* note 2, at 526-28); Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407, 412-14 (2013).

32. *See* Berg, *Owning*, *supra* note 11; Tracy J. Frazier, *Of Property and Procreation: Oregon’s Place in the National Debate over Frozen Embryo Disputes*, 88 OR. L. REV. 931, 931 (2009); Herrera, *supra* note 7, at 125-28.

33. *See* Thomas, *supra* note 18, at 288-95; Harman, *supra* note 2, at 535-41; Provencher, *supra* note 28, at 298.

34. *See* York v. Jones, 717 F. Supp. 421, 425-27 (E.D.Va. 1989); Kass v. Kass, 235 A.D.2d 150, 150 (N.Y. App. Div. 1997), *aff’d* 696 N.E.2d 174 (1998); Litowitz v. Litowitz, 102 Wash. App. 934, 934 (Wash. App. Div.2 2000); *In re* Marriage of Witten, 672 N.W.2d 768, 768 (Iowa 2003); Roman v. Roman, 193 S.W.3d 40, 40 (Tex. App.-Houston 1st Dist., 2006); *In re* Marriage of Dahl & Angle, 194 P.3d 834, 834 (Or. Ct. App. 2008); Reber v. Reiss, 2012 PA Super 86, 42 A.3d 1131 (balancing-of-interests test); *In re* Marriage of Rooks, No. 16SC906, 2017 Colo. LEXIS

character or deserving of special respect,³⁵ and only one case, *Davis v. Davis*, has treated it as a person.³⁶ But recently, one can find in the legal writing several interesting attempts to challenge this dichotomy.³⁷ For example, in two companion articles, Jessica Berg has advocated the following novel approach:

It argues that “person” and “property” are not mutually exclusive designations, and one might recognize both property interests in, and personhood interests of, certain entities. Depending on the outcome of the personhood analysis, either property interests will be controlled, or the property interests will be balanced against the personhood interests.³⁸

Since personhood and property are mutually exclusive categories, she argues, what we get is a zero-sum game, which is not in any way appropriate in this situation. According to Berg, instead of this misleading traditional conceptualization, one should use a framework of combined property and personhood approaches. Property law may provide a more appropriate framework under which to analyze embryos, but as the embryo develops, personal interests prevail over property interests. Hence, one can argue that property analysis applies to both fetuses and frozen embryos, and this paradigm is much better than the prevailing legal rights discourse in resolving disagreements in this sensitive field.³⁹

286, [286] (Apr. 17, 2017) (balancing-interests test).

35. See *Davis v. Davis*, 842 S.W.2d 588, [588] (Tenn., 1992); *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 406 (Ariz. Ct. App. 2005) (“Given the interim status of pre-embryos and the special respect they should be accorded in certain situations [. . .]”); *McQueen v. Gadberry*, 507 S.W.3d 127, 132 (Mo. Ct. App. 2016) (“[. . .] frozen pre-embryos are marital property of a special character [. . .]”); *Terrell v. Torres*, *supra* note 7 (“interim category that entitles them to special respect because of their potential for human life.”).

36. See *Davis*, *supra* note 33, at 593. See also *A.Z. v. B.Z.*, 431 Mass. 150, 150 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707, 707 (N.J. 2001); *Szafranski v. Dunston*, 34 N.E.3d 1132, 1132 (Ill. App. Ct. 2015). Therefore, the Author disagrees with the claim that “Overall, most courts treat embryos as a special category of property—one that is not truly property,” Provencher, *supra* note 28, at 298.

37. See Kathleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 208-11 (1997). See also Robert J. Muller, *Davis v. Davis: The Applicability of Privacy and Property Rights to the Disposition of Frozen Preembryos in Intrafamilial Disputes*, 24 U. TOL. L. REV. 763, 791-803 (1993); Jens D. Ohlin, *Is the Concept of the Person Necessary for Human Rights*, 105 COLUM. L. REV. 209, 211 (2005); see Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 986-88 (1982).

38. *Owning Persons*, *supra* note 11, at 162, 184. (“Placing something on the continuum is, to a certain extent, subjective, and individuals may even conceive of something as personal in one context and fungible in another.”); see also Berg, *owning*, *supra* note 11, at 369, 392.

39. Berg, *Owning*, *supra* note 11, at 211-12, 217-19; see Alan Gewirth, *Human rights: Essays on Justification and Applications* 94 ETHICS 324-325 (1982); JEREMY WALDRON, THEORIES OF RIGHTS (Oxford Univ. Press 1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Bloomberg 2013); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (Cornell Univ.

In her companion article, Berg differentiated between a juridical person⁴⁰ and a natural person.⁴¹ Since one can find no express definition of “person” in either the U.S. Constitution or in Supreme Court rulings, every jurisdiction defines it differently, depending on its specific goal. As Berg argues, “It could be that there are simply a number of different areas of law that define persons in diverse ways depending on the purpose of the law, but no cohesive ‘law of persons.’”⁴² Furthermore, the term juridical person may be accorded different legal rights and protections. Since fetuses are considered as such in many states, they have specific, but not complete, rights:

As a result, we may choose to provide personhood protections for sentient fetuses without granting them the same rights as fully recognized natural persons. Juridical personhood is not a unitary concept; there are various kinds of juridical persons and different rights which may adhere. To the extent that states have discretion in determining which entities will be considered juridical persons, they may make different choices about the types of rights which they grant sentient fetuses.⁴³

Similarly, Jonathan Herring has developed the concept of relational personhood. His interesting and challenging contention is that in determining the moral status of the fetus and/or frozen embryo, one should not consider conventional abilities or characteristics, but should focus on mutual relationships with others, especially caring relations, since our vulnerability and interdependency profoundly influence our humanity and define our moral status. Herring states:

One should consider the value of relationships. All caring relationships are of moral value and therefore there is no valuing of persons per se: it

Press 2013).

40. See LEONARD W. SUMNER, *ABORTION AND MORAL THEORY* 57 (Princeton Univ. Press 1981); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 3 (UC Press 1985); Britta van Beers, *The Changing Nature of Law’s Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person*, 18 *GERMAN L.J.* 559, 565, 585 (2017).

41. Berg, *supra* note 11, at 393 (“If this is the case, then the lack of legal personhood recognition will not negate the moral claims of the entity in question. The entity may still have certain moral rights, and others will have moral obligations to respect those rights.”). For further academic discussion of the juridical person in the abortion context, see Jenny Teichman, *The Definition of Person*, 60(232) *PHIL.* 175, 177-82 (1985); Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39(4) *AM. J. L. & MED.* 573, 603 n.249 (2013); Ligia M. De Jesus, *The Inter-American Court on Human Rights’ Judgment in Artavia Murillo v. Costa Rica, and Its Implications for the Creation of Abortion Rights in the Inter-American System of Human Rights*, 16 *OR. REV. INT’L L.* 225, 243 (2014).

42. Berg, *supra* note 11, at 371. For a further discussion of these natural/juridical persons, see Margalit & Lifshitz-Aviram, *infra* note 73, *passim*.

43. Berg, *supra* note 11, at 400. See also the discussion of fetuses and embryos, *ibid*, at 388-402.

is relationships which generate value [. . .] Our greatest claim to moral value lies not in ourselves, but in relationships of care. Am I a person? By myself, no. Are we people? Yes, if we care. Together we are so much more than when we are alone.⁴⁴

In Herring's most recent article, he elaborates that the relational approach teaches us that the moral value of personhood is not found in any individual characteristics, but in one's relationships with others. [Relational Personhood] Since individuals define themselves through their relations, these interconnections should constitute their identities through the legal recognition of these social interactions. This is one of the reasons why the breakdown of marriages are treated as one of the saddest and most difficult events to overcome. As Herring writes:

It flows from the fact that people are in their very nature vulnerable, caring and relational that the basic moral value of being human is not found in a person's individual capabilities nor in their membership of the species, but rather in their relationships [. . .] It is their relationships, rather than any inherent characteristics, which have moral value and are deserving of especial moral status.⁴⁵

2. Relational Ethics and Relational Autonomy

Relational ethics is a variant of the broader subject of the ethics of care. Both hold that moral action should be centered on interpersonal relationships and care or benevolence. Carol Gilligan, considered the founder of the field of the ethics of care, emphasizes the importance of responding to the individual, since persons should be understood as being dependent and interdependent on others to varying degrees.⁴⁶ Gilligan argues that men and women tend to conceptualize morality

44. CHARLES FOSTER & JONATHAN HERRING, *IDENTIFY, PERSONHOOD AND THE LAW* 35 (Springer Cham 2017). For the importance of the relational aspect to the definition of personhood, see Harriet A. Harris, *Should we say that personhood is relational?*, 51(2) SCOTT J. THEOL. 214, 214 (1998); KENNETH J. GERGEN, *RELATIONAL BEING: BEYOND SELF AND COMMUNITY* (2009); JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* (2011).

45. Jonathan Herring, *Relational Personhood*, 1 KEELE L.J. 24, 24 (2020). For additional articles regarding relational personhood, see Annette Baier, *Cartesian Persons*, in *POSTURES OF THE MIND: ESSAYS ON MIND AND MORALS* 74, 74 (Annette Baier ed., 1985); Brenda Appleby & Nuala P. Kenny, *Relational Personhood, Social Justice and the Common Good: Catholic Contributions toward a Public Health Ethics*, 16(3) CHRISTIAN BIOETHICS: NON-ECUMENICAL STUDIES IN MED. MORALITY 296, 296 (2010); Chris Fowler, *Relational Personhood Revisited*, 26(3) CAMBRIDGE ARCHAEOLOGICAL J. 397, 397 (2016).

46. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (Harv. Univ. Press 2016) ; see also *MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL* (Carol Gilligan et al. eds., 1990); Carol

differently, where women tend to emphasize empathy and compassion rather than the notion of morality.

One of the prominent originators of relational ethics is Nel Noddings, who, like many other feminists,⁴⁷ acknowledges human relationships, women's life experiences, and how both influence one's decision-making. Noddings claims that instead of trying to provide a systematic examination of the requirements for caring, one should support the three pillars of care—engrossment, motivational displacement, and the responsiveness of the person receiving care to that care.

Some scholars claimed that this concept is derivative of the more general notion of relational autonomy.⁴⁸ As opposed to individualistic autonomy,⁴⁹ relational autonomy maintains that individuals are a part of a social network that assists them in executing their plans. Autonomy should also reflect the social and cultural backgrounds of a given person, as well as, ones' close relationships, and the support those relationships provide.⁵⁰ Consequently, one should conceptualize autonomy while taking into consideration that social background and environment influence a person's decision-making capability. Since individuals are influenced by their social environment, and without it, would find it difficult to fulfill oneself, this social influence should be accorded significant importance, especially in cases where individual actions will, in turn, affect these social forces.⁵¹

It is beyond the scope of this Article to extensively elaborate on whether

Gilligan, *Moral Orientation and Moral Development*, THE FEMINIST PHIL. READER 467, 467 (2008). For the consequent variants of Gilligan's work, including Noddings's work, see *Feminist Ethics*, STAN. ENCYCLOPEDIA OF PHIL. (May 27, 2019), <https://plato.stanford.edu/entries/feminism-ethics/> [<https://perma.cc/9GNG-P9DD>].

47. See CAROLE PATEMAN, *THE SEXUAL CONTRACT* (STANFORD UNIVERSITY PRESS 1988); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (THE NEW PRESS 2004).

48. See, e.g., *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* (Oxford Univ. Press 2000); John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117 PHIL. STUD.'S: AN INT'L J. PHIL. IN THE ANALYTIC TRADITION 143, 143 (2004); Andrea C. Westlund, *Rethinking Relational Autonomy*, 24(4) HYPATIA 26, 26 (2009).

49. The academic literature regarding this autonomy and its critique is enormous, below are landmark researches: ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 131 (OXFORD UNIV. PRESS 1969); MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* (OXFORD UNIV. PRESS 2003); John Christman, *Autonomy in moral and political philosophy*, STAN. ENCYCLOPEDIA PHIL. (June 29, 2020), <https://plato.stanford.edu/ENTRIES/autonomy-moral/> [<https://perma.cc/DE6J-EF6V>].

50. See DANIEL BELL, *COMMUNITARIANISM, AND ITS CRITICS* (CLARENDON PRESS 1993); Mark Kuczewski & Patrick J. Mccruden, *Informed Consent: Does It Take a Village? The Problem of Culture and Truth Telling*, 10 CAMBRIDGE Q. HEALTHCARE ETHICS 34, 34 (2001).

51. See, e.g., Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J. L. & FEMINISM 7, 7 (1989); CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (Harv. Univ. Press 1992); *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 236 (Oxford Univ. Press 2000).

relational ethics is indeed a branch of relational autonomy or what precisely the relationship between the two notions.⁵² In brief, both relational autonomy and ethics maintain that the person is not fundamentally isolated but is a relational and caring interdependent being. Everyone is profoundly affected by social and familial relationships, which provide the basis for developing individuality and particularity. To be a person is to be in relationships; therefore, people are interdependent individuals and are not self-sufficient. In contrast, the fields of individualistic autonomy and ethics hold that the individual is devoid of any personal relationships, and relationships among friends and family. Abstract individuality is freed from any social and familial ties and specificities; thus, the autonomous person should be understood as a self-sufficient, independent individual, resulting in an individualistic autonomy.⁵³

It is worth emphasizing that relational autonomy, like relational ethics, is gaining more influence in legal and ethical literature, specifically regarding medical law⁵⁴ and bioethics.⁵⁵ According to relational ethics, we should summarily reject the traditional ethical theory that conceptualizes the ethical individual as a rational and autonomous moral agent, who can independently judge the conflicting claims of others. This coherent and monolithic theoretical construct negates differences. Instead, Noddings argues for a more relational ontology, where the ethical self is a byproduct of relationships of caring with others. She emphasizes interdependence and the importance of maintaining relationships, especially between familial members and friends.⁵⁶ As Nodding

52. See, e.g., the following statements: “I too have argued for a relational ontology and even for relational autonomy,” NEL NODDINGS, *CARING: A RELATIONAL APPROACH TO ETHICS AND MORAL EDUCATION* 206 (2d ed. 2013); NEL NODDINGS, *THE MATERNAL FACTOR: TWO PATHS TO MORALITY* 111-12, 198, 242 (Univ. of Ca. 2010).

53. See Marilyn Friedman, *Autonomy, Social Disruption and Women*, *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 35, 40-41 (2000); VIRGINIA HELD, *THE ETHICS OF CARE: PERSONAL, POLITICAL, AND GLOBAL* 46 (Oxford Univ. Press 2006); Peter Ikechukwu Osuji, *Relational Autonomy in Informed Consent (RAIC) as an Ethics of Care Approach to the Concept of Informed Consent*, 21(6) *MED. HEALTH CARE & PHIL.* 101, 107-08 (2018).

54. See Carolyn McLeod & Susan Sherwin, *Relational Autonomy, Self Trust and Health Care for Patients Who Are Oppressed*, in *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 259, 259 (2000); Anita Ho, *Relational Autonomy or Undue Pressure? Family’s Role in Medical Decision Making*, 22 *SCANDINAVIAN J. CARING SCI.* 128, 128 (2008); Roy Gilbar, *Family Involvement, Independence, and Patient Autonomy in Practice*, 19(2) *MED. L. REV.* 192, 192 (2011).

55. See Anne Donchin, *Autonomy and Interdependence: Quandaries in Genetic Decision-Making*, in *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 236, 236 (2000); Leigh Turner, *Bioethics in a Multicultural World: Medicine and Morality in Pluralistic Settings*, 11 *HEALTHCARE ANALYSIS* 99, 99 (2003); JAMES LINDEMANN NELSON & HILDE LINDEMANN NELSON, *THE PATIENT IN THE FAMILY: AN ETHICS OF MEDICINE AND FAMILIES* 114-17 (Routledge 2014).

56. GRACE CLEMENT, *CARE, AUTONOMY, AND JUSTICE: FEMINISM AND THE ETHIC OF CARE*

states:

A relational ethic is rooted in and dependent on natural caring. Instead of striving away from affection and towards behaving always out of duty as Kant has prescribed, one acting from a perspective of caring moves consciously in the other direction; that is, he or she calls on a sense of obligation in order to stimulate natural caring [. . .] Because natural caring is both the source and the terminus of ethical caring, it is reasonable to use the mother-child relation as its prototype [. . .] Caring as a rational moral orientation and maternal thinking with its threefold interests are richly applicable to teaching.⁵⁷

Whereas in her earlier writing during the 1980s, Noddings defined herself as writing through the prism of “feminine,” and later research has been written from the relational ethics perspective.⁵⁸ Noddings explained in the preface to the second edition published in 2013 of her original 1984 book, *Caring*:

Hardly anyone has reacted positively to the word feminine here. In using it, I wanted to acknowledge the roots of caring in women’s experience, but [. . .] *Relational* is a better word. Virtually all care theorists make the relation more fundamental than the individual [. . .] Persons as individuals are formed in relation. I do not, however, want to lose the centrality of women’s experience in care ethics [. . .].⁵⁹

Such a shift from the “feminine” to the relational perspective eventually yields the more specific variant of the “relational ethics of care,” which was defined by Noddings as follows:

It is feminine in the deep classical sense-rooted in receptivity, relatedness, and responsiveness. It does not imply either that logic is to be discarded or that logic is alien to women. It represents an alternative to present views, one that begins with the moral attitude or longing for

2 (Routledge 1996); Nirmala Erevelles, *The “Other” Side of the Dialectic: Toward a Materialist Ethic of Care*, *DISABILITY AND DIFFERENCE IN GLOBAL CONTEXTS: ENABLING A TRANSFORMATIVE BODY POLITIC* 173, 175-77 (2011); and more generally Lawrence J. Walker, *Sex differences in moral reasoning*, 2 *HANDBOOK MORAL BEHAVIOR & DEV.* 333, 333 (2014).

57. Nel Noddings, *An Ethic of Caring and Its Implications for Instructional Arrangements*, 96(2) *AM. J. OF EDUC.* 215, 219-20 (1988); Madeleine Arnot & Jo-Anne Dillabough, *Feminist Politics and Democratic Values in Education*, 29(2) *CURRICULUM INQUIRY* 159, 172 (1999); MADELEINE ARNOT, *EDUCATING THE GENDERED CITIZEN SOCIOLOGICAL ENGAGEMENTS WITH NATIONAL AND GLOBAL AGENDAS* 40-41 (Routledge 2009).

58. *Compare* NEL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (Berkeley: Univ. of Ca. Press 1984); *with* Noddings, *supra* note 52.

59. Noddings, *supra* note 52. *See also* Nel Noddings, *A response*, 5(1) *HYPATIA: J. FEMINIST PHIL.* 120, 120 (1990). For the centrality of her research, see Sarah L. Hoagland, *Review: Some Concerns about Nel Noddings’ ‘Caring,’* 5(1) *HYPATIA* 109, 109 (1990); Rosemarie Tong, *Nel Noddings’s Relational Ethics*, *FEMININE AND FEMINIST ETHICS* 108, 1108 (1993).

goodness and not with moral reasoning.⁶⁰

The principles of relational ethics of care emphasize the role of connection, feeling and responding to the vulnerability or dependency of others. People relate with one another in their various roles and commitments; therefore, the principles of relational ethics embrace values such as connectedness, cooperation, and mutual support. This unique mixture of relational ethics and the ethics of care have been implemented in a variety of fields, such as nursing,⁶¹ autoethnography,⁶² theology, and religious studies,⁶³ social work, cultural geography, social policy, infrastructural repair, narrative inquiry, intellectual disability, education, emergent creativity,⁶⁴ and more. The possible

60. Noddings, *supra* note 52, at 2. For this branch of the ethics of care, see the following seminal articles: Helga Kuhse, *Against The Stream: Why Nurses Should Say "No" To A Female Ethics of Care*, 49(193) REVUE INT'L'S DE PHIL. 285, 301 (1995); Fiona Robinson, *Globalizing Care: Ethics, Feminist Theory, and International Relations*, 22(1) ALT.'S: GLOBAL, LOCAL, POL. 113, 118, 130 (1997); Carolyn Ellis, *Interviewing and Storytelling From a Relational Ethics of Care*, THE ROUTLEDGE INT'L HANDBOOK ON NARRATIVE & LIFE HIST. 431, 431 (2016).

61. See Sara T. Fry, *The Role of Caring in a Theory of Nursing Ethics*, 4(2) HYPATIA 87, 93-98 (1989); Randy Spreen Parker, *Nurses' stories: The Search for a Relational Ethics of Care*, 13(1) ADVANCES IN NURSING SCI. 31, 31 (1990); JOHN DUFFY, PROVOCATIONS OF VIRTUE: RHETORIC, ETHICS, AND THE TEACHING OF WRITING (Univ. Press of Co. 2019); Per Nortvedt et al., *The Ethics of Care: Role Obligations and Moderate Partiality in Health Care*, 18(2) NURSING ETHICS 192, 192 (2011).

62. Carolyn Ellis, *Manifesting Compassionate Autoethnographic Research: Focusing on Others*, 10(1) INT'L REV. OF QUALITATIVE RES. 54, 54 (2017); Arthur P. Bochner, *Heart of the Matter: A Mini-Manifesto for Autoethnography*, 10(1) INT'L REV. OF QUALITATIVE RES. 67, 77 (2017).

63. Karl E. Peters et al., *Reflections of a Naturalistic-Evolutionary-Practical Theologian in Conversation with Gallagher and Pangerl*, 26(3) AM. J. THEOLOGY & PHIL. 224, 234 (2005); ANNA F. BIALEK, VULNERABILITY AND ITS POWER: RECOGNITION, RESPONSE, AND THE PROBLEM OF VALORIZATION 28 (unpublished dissertation, Brown Univ. 2016).

64. See Mel Gray, *Moral Sources and Emergent Ethical Theories in Social Work*, 40(6) THE BRITISH J. SOCIAL WORK 1794, 1806 (2010); Sarah Wright et al., *Working with and Learning from Country: Decentering Human Authority*, 22(2) CULTURAL GEOGRAPHIES 269, 270 (2015); Gerry Mooney, *Book Review: Wilt Atkinson, Steven Roberts and Mike Savage (eds.), Class Inequality in Austerity Britain: Power, Difference and Suffering, Basingstoke: Palgrave Macmillan*, 33 CRITICAL SOC. POL'Y 575, 584 (2013); Vera Caine et al., *The Necessity of a Relational Ethics Alongside Noddings' Ethics of Care in Narrative Inquiry*, 20(3) QUALITATIVE RES. 265, 265 (2020); Charlotte Capri & Leslie Swartz, *The Right to Be Freepeople: Relational Voluntary-Assisted-Advocacy as a Psychological and Ethical Resource for Decolonizing Intellectual Disability*, 6(2) J. SOCIAL & POL. PSYCH. 556, 556 (2018); Orit Schwarz-Franco, *Touching the Challenge: Embodied Solutions Enabling Humanistic Moral Education*, 45(4) J. OF MORAL EDUC. 449, 449 (2016); Janneke Adema, *The Ethics of Emergent Creativity: Can We Move Beyond Writing as Human Enterprise, Commodity and Innovation?*, WHOSE BOOK IS IT ANYWAY? A VIEW FROM ELSEWHERE ON PUBLISHING, COPYRIGHT AND CREATIVITY 65, 75 (2019).

implementation of the relational ethics of care in the context of abortion, while focusing on the various rights and obligations relating to the relationship itself, and not the individuals involved in these relations, will be discussed in the next Section. To the author's knowledge, no legal articles have dealt with either the precursors to relational ethics, or this more specific branch of ethics in the context of the moral and legal status of the frozen embryo. The following theoretical and practical discussion in this Article should help fill this lacuna.

3. *The Law's Perspective – The Moral and Legal Status of an Un/Desired Fetus*

The relational approach, as a branch of the ethics of care, has been applied in the context of abortion.⁶⁵ On its face, in the legal scholarly literature, this branch of ethics, with its emphasis on care and responsibility for others, does not support the legitimacy of abortion. Rather, the relational approach focuses on interconnectedness and the importance of preserving current and future relationships with the fetus, regardless of its moral status. Thus, pro-life advocates focus on dependency of the fetus and the caring desire to assist it in fulfilling its most basic human interest to be born,⁶⁶ and therefore, campaign endlessly to outlaw abortion at any cost.⁶⁷ As Jonathan Herring observed:

It must be admitted that, at first sight, it might be thought that ethics of care would be opposed to abortion, and indeed, this is a line some ethics of care writers have taken.⁶⁸

However, in two companion articles, Herring recently claimed the opposite, asserting that there are reasonable justifications for this branch of ethics endorsing

65. See Diana Fritz Cates, *Caring for Girls and Women Who Are Considering Abortion: Rethinking Informed Consent*, MED. & THE ETHICS OF CARE 162, 162 (2001); MICHAEL SLOT, THE ETHICS OF CARE AND EMPATHY 16 (Routledge 2007); TOVE PETTERSEN, COMPREHENDING CARE: PROBLEMS AND POSSIBILITIES IN THE ETHICS OF CARE 12, 19, 144 (Lexington Books 2008).

66. See Robert F. Drinan, *The Inviolability of the Right to Be Born*, 17 W. RES. L. REV. 465, 465 (1965); George Schedler, *Women's Reproductive Rights: Is There a Conflict With a Child's Right To Be Born Free From Defects?*, 7(3) J. of Legal Med. 356, 356 (1986); Shiva M. Singh et al., *Fetal Alcohol and the Right to Be Born Healthy*. . . , 5 FRONTIERS IN GENETICS 356, 356 (2014).

67. See, e.g., Pamela S. Katlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 858 (1993). For the pro-life movement, see CAROL MASON, KILLING FOR LIFE: THE APOCALYPTIC NARRATIVE OF PRO-LIFE POLITICS, (Cornell Univ. Press 2002) ; ZIAD W. MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS, (Univ. of Chi. Press 2010); Joonas Räsänen, *Why Pro-Life Arguments Still Are Not Convincing: A Reply to My Critics*, 32 BIOETHICS 628, 628 (2018).

68. Jonathan Herring, *The Termination of Pregnancy and the Criminal Law*, HOMICIDE IN CRIM. L.: A RESEARCH COMPANION 136, 145 (2018). See also HELD, *supra* note 53, at 1; Jonathan Herring, *Caring*, 159 L. & JUST. - CHRISTIAN L. REV. 89, 100 (2007). For a supplemental recent discussion of the responsibility angle regarding the abortion, see Margalit & Lifshitz-Aviram, *supra* note 31, *passim*, and more extensively at Margalit & Lifshitz-Aviram, *infra* note 73.

the right to abort in any case of unplanned or undesired pregnancy.⁶⁹ This is not an original argument of his, as some prominent writers, such as Celia Wolfe-Devine, have made this claim in the past.⁷⁰ Arguably, however, Herring adds an important layer to the discussion in elaborating that abortion should be conceptualized as no less than a “public good.”⁷¹ Herring also claims that the ethics of care is a more convincing reason to support abortion than the prevailing longstanding justifications of the right to choose, the basic human right which underpins the pro-choice movement,⁷² and drawing on the argued right to bodily integrity.⁷³ Herring’s argument rests mainly on abandoning the human rights discourse, which is the dominant one today,⁷⁴ and which considers the gestational mother and the fetus as rivals. Instead, we should treat pregnancy as the ultimate intertwined relationship composed of both biological and psychological

69. See Herring, *The Termination*, *ibid*; compare Jonathan Herring, *Ethics of Care and the Public Good of Abortion*, 2 U. OXFORD HUM. RIGHTS HUB J. 1, 8 (2019) (“But Wolf-Devine is correct that such powerful justifications for abortion rights, sit a little uncomfortably with the language of care and relationality promoted by ethics of care.”); with Eugenie Gatens-Robinson, *A Defense of Women’s Choice: Abortion and the Ethics of Care*, 30(3) S. J. PHIL. 39, 39 (1992).

70. Celia Wolfe-Devine, *Abortion and the “Feminine Voice”*, 3(3) PUB. AFF.’S Q. 81, 81 (1989). See also Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117, 2117 (1999); EILEEN MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (Oxford Univ. Press 1996).

71. Herring, *supra* note 69, *passim*. See also Karen S. Conway & Michael R. Butler, *State Abortion Legislation as a Public Good—Before and After Roe V. Wade*, 30(4) ECON. INQUIRY 609, 609 (1992); Karyn G. Gordon, *Securing the Public Good and Private Rights: State Constitutional Free Speech Guarantees and Anti-Abortion Protest Activity on Privately-Owned Clinic Property*, 23 RUTGERS L.J. 1053, 1053 (1992). For the close contention that abortion is a moral good, see Katie Watson, *The Art Of Medicine Abortion as a Moral Good*, 393 THE LANCET 1196, 1196 (2019).

72. See Suzanne Staggenborg, *Coalition Work in the Pro-Choice Movement: Organizational and Environmental Opportunities and Obstacles*, 33 SOC. PROBLEMS 374, 374 (1986); Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 AM. SOCIO. REV. 585, 585 (1988); SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* (Oxford Univ. Press 1991).

73. For an academic discussion of this substantial claim for endorsing abortion, see Christyne, L. Neff, *Women, Womb, and Bodily Integrity*, 3 YALE J. L. & FEMINISM 327, 327 (1990-1991); RUTH A. MILLER, *THE LIMITS OF BODILY INTEGRITY: ABORTION, ADULTERY, AND RAPE LEGISLATION IN COMPARATIVE PERSPECTIVE* (Routledge 2007).

74. For the dominance of this discourse also in the context of abortion, see Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 HUM. RIGHTS QUARTERLY 1, 1 (2003); Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8(2) HUM. RIGHTS L. REV. 249, 249 (2008); Johanna B. Fine et al., *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, 19(1) HEALTH & HUM. RIGHTS 69, 69 (2017).

interconnections.⁷⁵

More specifically, Herring enlisted the variant of the “relational ethics of care,” discussed above at the end of Section 2, to support his contention that one should not focus on the reciprocal rights and obligations of the fetus in consideration of its specific moral status. Rather, it is preferable to inquire what rights, obligations, and responsibilities are owed with respect to this interconnected relationship. Consequently, the rights and obligations of the parties involved in the abortion should not be a clear-cut byproduct of the “absolute” status of the fetus, instead, it should be more relational and subjective. Regardless, where the pregnancy is intentional and desired, this relationship should be recognized and grant it consequent rights and obligations.

In contrast, when pregnancy is undesired and unintentional, the moral and legal status of the relationship is meaningless and should not have rights and obligations stemming from it. As Herring concluded in a companion article: the relational approach offers a solution for these concerns. Through her care and love for the fetus in a wanted relationship it accepts this relationship is deserving of especial moral status. However, where the relationship is unwanted, it has a different moral status, and the legal response can be completely different.⁷⁶

Considering the foregoing discussion, the Author suggests justification for the following rhetorical question by I. Glenn Cohen, which is the title of one of his articles – “Are all Abortions Equal?” My basic argument is that relational ethics may support the uncontested agreement regarding the exceptions to the criminalization of abortion for rape and incest, anchored in several U.S. jurisdictions, as well as in the Hyde Amendment, which prohibits the use of federal funding for abortion.⁷⁷ In his article, Cohen reevaluated the prevailing

75. See Jonathan Herring, *The Loneliness of Status: The Legal and Moral Significance of Birth*, in BIRTH RIGHTS AND RITES 97 (Fatemeh Ebtehaj et al. eds., 2011); JONATHAN HERRING, CARING AND THE LAW (Bloomsbury Pub. 2013); Sarudzayi Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L. REV. 187, 187 (2016).

76. Herring, *The Termination*, *supra* note 68, at 148. See also Herring, *Ethics of Care*, *supra* note 69, at 1-2 (“The promotion of caring relationships requires both the support and sustenance of care; but also the termination of relationships which are not nurturing or marked by care. This is especially important if people are hindered by non-caring relationships from entering caring ones.”).

77. See I. Glenn Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*, 43(1) J. L. 87, 87 n.4-5 (2015); See Heather Boonstra & Adam Sonfield, *Rights Without Access: Revisiting Public Funding of Abortion for Poor Women*, THE GUTTMACHER INST. 8 (2000), <https://www.guttmacher.org/gpr/2000/04/rights-without-access-revisiting-public-funding-abortion-poor-women> [https://perma.cc/HEM5-5QGX] (discussing Hyde Amendment and the rape and incest exceptions.); Stanley K. Henshaw et al., *Restrictions on Medicaid Funding for Abortions: A Literature Review*, THE GUTTMACHER INST. (2009), <https://www.guttmacher.org/report/restrictions-medicaid-funding-abortions-literature-review> [https://perma.cc/EZ8W-QWKK]; Brooke McGee, *Pregnancy as Punishment for Low-Income Sexual Assault Victims: An Analysis of South Dakota’s Denial of Medicaid-Funded Abortion for Rape and Incest Victims and Why the Hyde Amendment Must Be Repealed*, 27 GEO.

wide consensus concerning the decriminalization of aborting a fetus resulting from a coerced sexual relationship.⁷⁸ Cohen logically asks what the difference between decriminalization of abortion in cases of coerced sexual relationships is, as opposed to criminalization in all other cases. If the moral status of the fetus is akin to that of a person, then all abortions should be prohibited, to respect the most basic human right to be born, its inviolability;⁷⁹ but if the fetus does not enjoy full personhood, are not all abortions equally permitted? After refuting each of the prevailing justifications for this dichotomy – gestation plus trauma and gestation plus self-defense – Cohen suggests the following:

A final argument to save the rape and incest exceptions, and in general the one I find the most persuasive, flips the argument on its head in a Hohfeldian way: instead of discussing under what circumstances women have (rape and incest) or do not have (all other cases) a right to abort, we ask under what circumstances they owe a duty to the fetus to gestate it and suggest that no duty is owed uniquely in the circumstances of rape and incest.⁸⁰

Moreover, the Author suggests the replacement (or supplement) of the human rights discourse in the abortion discussion with the obligations,⁸¹ commitments,⁸²

MASON U.C.R. L.J. 77, 77 (2016).

78. One of the most prominent scholars in the abortion field differentiated several decades ago between the abortion of a pregnancy resulting from rape, where it is permissible, from all other abortions. See Judith J. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF.'S 47, 49 (1971). For the rape and incest exceptions, see, for example, Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17 (2016); Caitlin E. Borgmann, *The Meaning of Life: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551 (2009), passim; Caitlin E. Borgmann, *Roe v. Wade's 40th Anniversary: A Moment of Truth for the anti-Abortion-Rights Movement*, 24 STAN. L. & POL'Y REV. 245, 247, 260 (2013).

79. For this latter notion, which may be interpreted as a right not to perish, but for a good reason, see Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J. L. & HUM. 195, 195 (1995); Richard Stith, *On Death and Dworkin: A Critique of His Theory of Inviolability*, 56 MD. L. REV. 289, 289 (1997); Raanan Gillon, *Is There A 'New Ethics Of Abortion'?*, 27 J. OF MED. ETHICS ii5, ii5 (2001).

80. Cohen, *supra* note 77, at 96; see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 16 (1913-1914) (discussing the "Hohfeldian way"). For the extent to which this genuine conception of rights has massively influenced legal thinking, see Max Radin, *A Restatement, of Hohfeld*, 51 HARV. L. REV. 1141, 1141 (1938); Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 975 (1982); Pierre Schlag, *How to Do Things with Hohfeld*, 78 LAW & CONTEMP. PROBS. 185, 185 (2015).

81. See Diane Jeske, *Families, Friends, and Special Obligations*, 28 CAN. J. PHIL. 527, 527 (1998); THE LAW OF OBLIGATIONS: CONNECTIONS AND BOUNDARIES (Andrew Robertson ed., 2004); Sarah Clark Miller, *Need, Care and Obligation*, 57 ROYAL INST. OF PHIL. SUPP. 137, 137 (2005).

82. See, e.g., BARBARA D. WHITEHEAD, THE DIVORCE CULTURE: RETHINKING OUR

and responsibilities⁸³ discourses, following traditional Jewish ethics.⁸⁴ As a result, one should differentiate between whether consensual or nonconsensual sex, including misuse of contraceptive methods, such as condom failure, has yielded the pregnancy. In the first scenario the new discourses should be superior, whereas in the latter the women's rights discourse should govern.⁸⁵

The above statements share the assumption that in the case of coerced sexual relationships, the woman owes no duty to the fetus to gestate it, and therefore, her rights discourse should govern.⁸⁶ However, the relational ethics point of view may significantly strengthen this argument. In a case of rape or incest, the pregnancy is unplanned, thus, the resulting child may be undesired, therefore, the relationship between the gestational mother and the child may lack requisite care. As such, the legal system should not invest with any rights for the fetus and/or obligations for the mother in such a morally meaningless relationship.

Because the premise of the ethics of care is to promote caring relationships, which support mutual dependency and flourishing, the cases of pregnancy arising from rape or incest may not be loving or caring, resulting in harm to the child. Therefore, terminating the relationship by aborting the fetus may be the sound option. In other words, this ethical approach should encourage the law to recognize the gestational mother as the legal mother of the fetus, only when the pregnancy is a result of consensual sexual relations, and rights and responsibilities should be allocated to ensure that this relationship is upheld and maintained. Alternatively, in cases of rape, the relationship is unintentional, therefore does not have any moral value and may be terminated by abortion.⁸⁷

COMMITMENTS TO MARRIAGE AND FAMILY (Vintage Books 1997); GILLIAN DOUGLAS, OBLIGATION AND COMMITMENT IN FAMILY LAW (Bloomsbury Pub.2018); Helen Hall, *Obligation and Commitment in Family Law*, 180 LAW & JUST. - CHRISTIAN L. REV. 103, 103 (2018).

83. See ERIK H. ERIKSON, INSIGHT AND RESPONSIBILITY (W.W. Norton & Co. 1994); JOHN MARTIN FISCHER & MARK RAVIZZA, RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY (Cambridge Univ. Press 2000); HANNAH ARENDT, RESPONSIBILITY AND JUDGMENT (Random House LC 2009).

84. See Moshe Silberg, *Law, and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 311 (1961) ("the law itself does not only order relationships between man and man but also between man and God. The system in its entirety is religious in origin and therefore involves obligations to God."); HAIM H. COHN, HUMAN RIGHTS IN JEWISH LAW 18 (Ktav Pub. H. Inc. 1984); DAVID NOVAK, COVENANTAL RIGHTS: A STUDY IN JEWISH POLITICAL THEORY 27 (Princeton Univ. Press 2009).

85. Margalit & Lifshitz-Aviram, *supra* note 73; see also Margalit & Lifshitz-Aviram, *supra* note 30, at 379 ("[. . .] in the vast majority of cases, at least where the child is a result of consensual relations, the right of the fetus to be born should prevail.")

86. See Cohen, *supra* note 23; Julia Dalzell, *The Impact of Artificial Womb Technology on Abortion Jurisprudence*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 327, 347 (2019).

87. See Herring, *Caring*, *supra* note 75; Herring, *Ethics of Care*, *supra* note 69; Herring, *The Termination*, *supra* note 68.

4. *The Philosophical Aspect – Personhood and Potentiality*

Relational ethics have been discussed in philosophical literature. Although relational conceptions of morality existed for centuries, for example, in African⁸⁸ and Asian moral philosophies,⁸⁹ it is only recently that it has been treated as an independent type of Western philosophy. This system of ethics has been defined as being comprised of moral status, virtue, and right action, as constituted by beneficent connections and other sharing bonds.⁹⁰ As Metz and Clark Miller stated, “relationism is the idea that moral status is constituted by some kind of interactive property between one entity and another, which property warrants being realized or prized.” Metz and Clark Miller explained:

According to a relational theory, something can warrant moral consideration even if it is not a group or a member of one, or for a reason other than the fact that it is a member. Like holism, though, a relational account accords no moral status to an entity merely based on its intrinsic properties. A relational theory implies that a being warrants moral consideration only if, and because, it exhibits other regarding property, one that is typically intentional or causal.⁹¹

Since the late 1980s, relationism has traditionally been deeply intertwined with feminist ethics, the ethics of care, which can also be found in many other branches of feminist ethics. Generally, care ethics can serve as the infrastructure for a variety of ethics, sentimentalist, ethical, or deontological.⁹² Indeed, as described above in Section 2, the Gordian knot between feminist ethics and relational ethics has been cut, as is well reflected in the change of title of Nel Nodding’s 1984 book *Caring* from “feminine” (*Caring: A Feminine Approach*)

88. See PETER PARIS, *THE SPIRITUALITY OF AFRICAN PEOPLES: THE SEARCH FOR A COMMON MORAL DISCOURSE* (1995) (discussing the ancient African notion of “Ubuntu”); Gessler Muxe Nkondo, *Ubuntu as a Public Policy in South Africa: A Conceptual Framework*, 2 INT’L. J. AFR. RENAISSANCE STUD. 88, 88 (2007); Thaddeus Metz, *An African Theory of Moral Status: A Relational Alternative to Individualism and Holism*, 15 ETHICAL THEORY & MORAL PRAC. 387, 387 (2012).

89. See, e.g., Chenyang Li, *The Confucian Concept of Jen and the Feminist Ethics of Care: A Comparative Study*, 9 HYPATIA 70, 70 (1994) (example of relationism in Asian Confucianism); RUIPING FAN, *RECONSTRUCTIONIST CONFUCIANISM: RETHINKING MORALITY AFTER THE WEST* (2010); CHENYANG LI, *THE CONFUCIAN PHILOSOPHY OF HARMONY* (2013).

90. See Wendy Austin, *Relational Ethics*, in *THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH METHODS* 749 (Lisa Given ed. 2008).

91. Thaddeus Metz & Sarah Clark Miller, *Relational Ethics*, in *INTERNATIONAL ENCYCLOPEDIA OF ETHICS* 1, 2 (Hugh LaFollette ed. 2016). See also VANGIE BERGUM & JOHN DOSSETOR, *RELATIONAL ETHICS: THE FULL MEANING OF RESPECT* (2005); Wendy Austin, *Ethics in a Time of Contagion: A Relational Perspective*, 40 CAN. J. NURSING RES. 10, 10 (2008).

92. See Slot, *supra* note 65; Raja Halwani, *Care Ethics and Virtue Ethics*, 18 HYPATIA 161, 161 (2003); SARAH CLARK MILLER, *THE ETHICS OF NEED: AGENCY, DIGNITY, AND OBLIGATION* (2012).

to “relational” (*Caring: A Relational Approach*) in the second edition,⁹³ emphasizing the interconnection of individuals through care, rather than the supposed gendered nature of caring.

Focusing on one of the philosophical deliberations of the relational approach most relevant to the context of the frozen embryo, Jennifer McKittrick, explored the issue of disposition and potentialities, which has been discussed extensively in the literatures of bioethics and philosophy.⁹⁴ McKirtick analyzes the substantial difference between the embryo’s potentiality between one that is placed in the womb and its duplicate in vitro. She reasoned that while the former has the potential to become a person, the latter lacks it, due, *inter alia*, to the following:

However, another factor is necessary for successful implantation—people with the desire and resources to have the embryo implanted. If so, then the potentialities of frozen embryos depend on interests and resources of would-be fertility clinic patients. An egg selected for implantation would have different potentialities than one not selected [. . .] It seems that there a sense in which an unwanted embryo has diminished potential as compared to its perfect duplicate with willing and able parents.⁹⁵

One should not adhere solely to a biological parameter when determining the moral status of the frozen embryo, such an inquiry may yield a similar conclusion regarding the analogous in-vitro embryo, if it also has medical “available means” for being implanted in any nurturing uterus. Rather, we should retain its relational status as being desired or not. If its progenitors are interested in obligating themselves to a committed and caring relationship vis-à-vis the embryo, the in-vitro embryo should be defined as having the potential to become a person and consequently enjoy the moral status of a person. Without these conditions, it lacks the interrelation potential to become a person and therefore should not be considered akin to a person, and its moral status is much lower than that of a desired embryo.⁹⁶

93. See text accompanying *supra* note 58.

94. See, e.g., STEPHEN MUMFORD, *DISPOSITIONS* (2003); BARBARA VETTER, *POTENTIALITY: FROM DISPOSITIONS TO MODALITY* (2015); see also GIORGIO AGAMBEN & DANIEL HELLER-ROAZEN, *POTENTIALITIES: COLLECTED ESSAYS IN PHILOSOPHY* (1999).

95. Jennifer McKittrick, *Dispositions and Potentialities*, in *POTENTIALITY: METAPHYSICAL AND BIOETHICAL DIMENSIONS* 49, 65 (John P. Lizza ed., 2014). See also JACOB C. EARL, *WHAT WE OWE TO THOSE WE MAKE: A CAUSALIST ACCOUNT OF PROCREATORS’ PARENTAL OBLIGATIONS* 138 (unpub. dissertation, Georgetown Univ. 2017); JENNIFER MCKITRICK, *DISPOSITIONAL PLURALISM* (2018).

96. See Nicolas Delon, *Moral Status, Final Value, and Extrinsic Properties*, 114 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 371, 377 (2014) (presenting a contentious philosophical argument) (“To conclude, then, moral status can depend on extrinsic properties on which EFV [extrinsic final value] supervenes (P4). Hence, though intrinsic properties, responsible for welfare, surely matter, some extrinsic properties give rise to EFV which, when impartially endorsable, can ground EMS [extrinsic moral status].”). For a further discussion of the nexus of relational ethics and the ethical disposition, see Gray, *supra* note 64.

In Section 6, the moral status of the frozen embryo is primarily dependent on the intention of its progenitors regarding whether to bring the child into the world. In the first scenario, where it is a wanted embryo, its moral status is akin to that of a person, and it should not be discarded, whereas in the second scenario, where its progenitors have no interest in it, it is an unwanted embryo, its moral status is like that of a mere good or article, and it can be discarded.

5. The Bioethical and Sociological Point of View – Between (Individual) Biological Ethics and Relational Ethics

The notion of “subjectivity of the fetus” is well established in the literature of both bioethics and sociology,⁹⁷ where one can find two central attitudes toward the moral status of the frozen embryo and the fetus. The first view, and the more accepted one for the past several decades,⁹⁸ is based on “(individual) biological” ethics,⁹⁹ which places the fetus/frozen embryo at the center of the moral and legal deliberations as an autonomous and individual being. Its status derives exclusively from a variety of biological/scientific factors, such as conception, implantation, cell differentiation, the early formation of a human-shaped fetus, quickening, and viability,¹⁰⁰ with no consideration being taken of its social connections and networks with others.¹⁰¹

The more innovative attitude, and the one more relevant to this discussion, is that of “relational (social) ethics,” which conceptualizes the fetus/frozen embryo as a part of its broader social relationships and networks with other individuals, mainly its family members.¹⁰² This system of ethics accords great importance to the relational networks and familial relationships of the birthing woman and the family to whom or to which the fetus will be born—how the

97. Yael Hashiloni-Dolev & Noga Weiner, *Reproductive Technologies and the Moral Status of the Embryo: A View from Israel and Germany*, 30 SOC. HEALTH & ILLNESS 1055, 1055 (2008); R. J. Gerber, *Abortion: Parameters for Decision*, 82 ETHICS 137, 147 (1972); SUSAN BORDO, *UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY* 85 (2004).

98. Thus, the history of the conceptualization of the fetus reflects the history of the medical authority. See Luker, *supra* note 40; BARBARA DUDEN, *DISEMBODYING WOMEN: PERSPECTIVES ON PREGNANCY AND THE UNBORN* (1993); Kathryn P. Addelson, *The Emergence of the Fetus*, in *FETAL SUBJECTS, FEMINIST POSITIONS* 26 (Lynn M. Morgan et al. eds. 1999).

99. See LAWRENCE J. KAPLAN & ROSEMARIE TONG, *CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE* 150-52 (1996).

100. See JOSEPH FLETCHER, *HUMANHOOD: ESSAYS IN BIOMEDICAL ETHICS* 15 (1979); Sarah Franklin, *Fetal Fascinations: New Dimensions to the Medical-Scientific Construction of Fetal Personhood*, in *OFF-CENTRE: FEMINISM AND CULTURAL STUDIES* 190 (Sarah Franklin et al. eds., 1991); CHRISTOPHER KACZOR, *THE EDGE OF LIFE: HUMAN DIGNITY AND CONTEMPORARY BIOETHICS* (2005) (discussing such a scientific approach).

101. See Hashiloni-Dolev & Weiner, *supra* note 97, at 1064.

102. For this notion in the bioethical-sociological literatures, see, e.g., Lynn M. Morgan, *Fetal Relationality in Feminist Philosophy: An Anthropological Critique*, 11 *HYPATIA* 47, 47 (1996); Tanja Krones et al., *What is the Preimplantation Embryo?*, 63 *SOC. SCI. & MED.* 1, 1 (2006).

mother will relate to the fetus, whether the baby will be desired by its family, and so on. It describes humanness as a product of cultural reactions and practices, as opposed to the prevailing Western individualist conception of morality.

A parallel shift can be found—from an individualist to a much more relational conceptualization of the fetus or frozen embryo. In the past, the dominant approach employed an individualistic perspective,¹⁰³ treating the fetus or frozen embryo as an individual entity with no connections or relationships either to its mother or other family members. This perception, as applied to abortion, focuses on balancing the interests and rights of the different individuals involved, which inevitably results in a clash between the fetus and its mother. However, this decontextualized perception of the embryo has been criticized:

None of the perspectives considered so far take into consideration the relationship of the persons and the embryos involved in the context of reproductive technology. Most ethical reasoning, be it libertarian, deontological, feminist, or utilitarian separates the embryo from the mother or vice versa.¹⁰⁴

Opposing this traditional one-dimensional and illusory description of the fetus are numerous justifications for treating the fetus as only one of many factors in the more general equation of pregnancy.¹⁰⁵ The close and unique physical interrelationship between the gestating woman and her fetus has been described as an almost mystical bond.¹⁰⁶ During the pregnancy, the woman and her fetus are a single, profoundly intertwined entity and cannot be separated, especially as far

103. See, e.g., RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (2011). See also Jacquelyn Ann K. Kegley, *Using Genetic Information: The Individual and the Community*, 15 *MED. & L.* 377, 377-86 (1996); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *YALE L.J.* 1394, 1394 (2009).

104. Tanja Kronen & Gerd Richter, *Preimplantation Genetic Diagnosis (PGD): European Perspectives and the German Situation*, 29 *J. MED. PHIL.* 623, 635 (2004); see also Claudia Wiesemann, *Relational Ethics and the Moral Status of the Embryo*, in *PROGRESS IN SCIENCE AND THE DANGER OF HUBRIS: GENETICS, TRANSPLANTATION, STEM CELL RESEARCH* 117, 120 (Constantinos Deltas et al. eds. 2006).

105. Wiesemann, *supra* note 104, at 122-23. (“The human being can thus be described as a being whose teleology it is to become a human individual but who for the period of nine months depends on the intimate bodily relationship to another human being . . . Human individuality is a mode of existence that makes a reference to other human beings. It does not simply rely on intrinsic but also on relational properties.”).

106. Margaret F. Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 *VA. L. REV.* 2377, 2383 n.22 (1995); see also Marshall H. Klaus & John H. Kennell, *MATERNAL-INFANT BONDING: THE IMPACT OF EARLY SEPARATION OR LOSS ON FAMILY DEVELOPMENT* (1976); Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 *WM. & MARY J. WOMEN & L.* 423, 435 (2014); YEHEZKEL MARGALIT, *DETERMINING LEGAL PARENTAGE – BETWEEN FAMILY LAW AND CONTRACT LAW* 51 (2019).

as the fetus is concerned, so one should not ignore the special bonds that the fetus has with its mother. One should not ignore these special bodily and psychological interconnections that cannot be found in any other human relationship. The health and wellbeing of either mother or fetus deeply affects the other and vice versa. These are one human entity whose interests we should evaluate, and not two opposing human rivals.¹⁰⁷ As Iris M. Young expresses it, “[p]regnancy challenges the integration of my body experience by rendering fluid the boundary between what is within, myself, and what is outside, separate. I experience my insides as the space of another, yet my own body.”¹⁰⁸

This special biological and psychological oneness, which renders the fetus physically a part of its mother, has been extensively discussed in literature. The mother-fetus bond during pregnancy is profoundly meaningful, and this Gordian knot cannot easily be divided in two. As stated by Margaret Little:

To be pregnant is to be *inhabited*. It is to be *occupied*. It is to be in a state of physical *intimacy* of a particularly thorough-going nature. The fetus intrudes on the body massively; whatever medical risks one faces or avoids, the brute fact remains that the fetus shifts and alters the very physical boundaries of the woman’s self. To mandate continuation of gestation is, quite simply, to force continuation of such occupation.¹⁰⁹

Therefore, the Author supports Claudia Wiesemann’s conclusion:

the intrinsic, ontological definition of the human embryo is not helpful in determining its moral status. To be meaningful, every definition must refer to the context of the embryo and to the telos of its development . . . the contextualized definition of the human embryo should ideally refer to its relational status as being the child of *somebody*.¹¹⁰

107. See Herring, *Ethics of Care*, *supra* note 69, at 21; Herring, *The Termination*, *supra* note 68, at 144; Jonathan Herring & P.-L. Chau, *My Body, Your Body, Our Bodies*, 15 *MED. L. REV.* 34, 34 (2007).

108. IRIS M. YOUNG, ON FEMALE BODY EXPERIENCE: “THROWING LIKE A GIRL” AND OTHER ESSAYS 49 (2005). See also FEMINISM AND PHILOSOPHY ESSENTIAL READINGS IN THEORY, REINTERPRETATION, AND APPLICATION 409 (Nancy Tuana & Rosemarie Putnam Tong eds., 1995); Virginia Schmied & Deborah Lupton, *The Externality of the Inside: Body Images of Pregnancy*, 8 *NURSING INQUIRY* 32, 38 (2001).

109. Margaret O. Little, *Abortion, Intimacy, and the Duty to Gestate*, 2 *ETHICAL THEORY & MORAL PRAC.* 295, 301 (1999). See also BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD 89 (1989); Anne Elvey, *The Material Given: Bodies, Pregnant Bodies and Earth*, 18 *AUSTL. FEMINIST STUD.* 199, 208 (2003).

110. Wiesemann, *supra* note 104. See also Lynn M. Morgan & Beth A. Conklin, *Babies, Bodies, and the Production of Personhood in North America and a Native Amazonian Society*, 24 *ETHOS* 657, 657 (1996).

6. *The Jewish Law's Perception – The Halakhic Relational Moral Status of the Frozen Embryo*

The *halakhic* status of the fetus¹¹¹ and the frozen embryo has been extensively discussed in Jewish law and a deep discussion is beyond the scope of this Article. In brief, the general Jewish perception of the embryo, especially *in vitro*, is entirely different from that of Catholicism. Whereas in the latter, full personhood begins at conception,¹¹² in Judaism, the moral status of the frozen embryo is acquired over time. Thus, from the moment of fertilization until birth, the fetus gradually becomes increasingly akin to a full person, acquiring its personhood status as its identity changes.¹¹³

To the Author's knowledge, there is only one exception to this traditional Jewish perspective, that being the unique academic approach of Yossi Green, who claims, similarly to the Catholic conception, that the frozen embryo should be treated as a person to all intents and purposes, including in inheritance law. According to him, the frozen embryo should not be thawed or destroyed, and it has a full right to inherit from its progenitors when it finally comes into the world.¹¹⁴ Between these two extremes there are some special *halakhic* approaches, which may be defined, to varying degrees, as relational. One of the most important Jewish thinkers in our generation, Aharon Lichtenstein stated:

The question of abortion involves areas in which . . . the personal circumstances are often complex and perplexing. In such areas there is room and an obligation for a measure of flexibility. A sensitive posek recognizes the gravity of the personal situation and the seriousness of the halakhic factors . . . He may reach for a different kind of equilibrium in assessing the views of his predecessors, sometimes allowing far-reaching

111. See AVRAHAM STEINBERG, *ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS: A COMPILATION OF JEWISH MEDICAL LAW ON ALL TOPICS OF MEDICAL INTEREST 1* (Fred Rosner trans., 2003); YECHIEL M. BARILAN, *JEWISH BIOETHICS: RABBINIC LAW AND THEOLOGY IN THEIR SOCIAL AND HISTORICAL CONTEXTS* 159-86 (2014); Yehezkel Margalit, *Abortion in Jewish Law* (on file with the author).

112. See Katheryn D. Katz, *Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation*, 18 *WIS. WOMEN'S L.J.* 179, 179 (2003); Karin A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, 1 *U. ST. THOMAS J. L. & PUB. POL'Y* 100, 101-19 (2007)..

113. See Avraham Steinberg, *Jewish Perspectives*, in *THE EMBRYO SCIENTIFIC DISCOVERY AND MEDICAL ETHIC* 21 (Shraga Blazer & Etan Z. Zimmer eds., 2005); DANIEL B SINCLAIR, *JEWISH BIOMEDICAL LAW: LEGAL AND EXTRA-LEGAL DIMENSIONS* 60-61 (2003); Barilan, *supra* note 111.

114. See Yossi Green, *Post Modern Procreation by Means of IVF and Ibum And Haliza*, 2 *NETANYA ACAD. COLL. L. REV.* 207, 230-40 (2002); Yossi Green, *Shall the Fertilized Ovum be Considered an Embryo Regarding the Law of Inheritance?*, 1 *NETANYA ACAD. COLL. L. REV.* 393, 393 (2000); YOSSIE GREEN, *PROCREATION IN THE MODERN ERA: LEGAL AND HALACHIC PERSPECTIVES* (2008).

positions to carry great weight and other times ignoring them completely. He might stretch the halakhic limits of leniency where serious domestic tragedy looms or hold firm to the strict interpretation of the law, when as he reads the situation, the pressure for leniency stems from frivolous attitudes and reflects a debased moral compass.¹¹⁵

Although Lichtenstein is well-known as a conservative *halakhic* authority (*posek*) in the abortion field, in this passage, he does not treat the fetus from a dichotomous point of view as either a person or not but expresses a more nuanced and relational perspective. According to Lichtenstein, the moral status of the fetus depends on the specific circumstances of each case, leaving room, and even an obligation, for the adjudicator to be much more flexible and lenient. This is not a “one size fits all” *halakhic* decision based on the fetus’s ontological definition, but a consequence of the condition and situation of the woman asking for the abortion.¹¹⁶

In other words, since the woman’s “personal situation” plays a significant role in *halakhic* decision-making on abortion, there is the option of reaching a subjective ruling in each situation. When “serious domestic tragedy looms,” the judge or arbiter has the freedom to stretch the limits of *halakhah*, clearly echoing the relational approach’s emphasis on the contextual nature of the moral decision.¹¹⁷ Put differently, the “subjectivity of the fetus” or relational approach may be found also in Judaism, and even in one of its most conservative authorities, despite Judaism being one of the most formalistic religions.¹¹⁸

115. Aharon Lichtenstein, *Abortion: A Halakhic Perspective*, in 25 TRADITION 3, 11 (1991); see also Alan Jotkowitz, *Abortion and Maternal Need: A Response to Ronit Irshai*, 21 NASHIM J. JEWISH WOMEN’S STUD. & GENDER ISSUES 97, 103 (2011); Benjamin Gesundheit, *Fate and Judaism—Philosophical and Clinical Aspects*, in KNOWING ONE’S MEDICAL FATE IN ADVANCE: CHALLENGES FOR DIAGNOSIS AND TREATMENT, PHILOSOPHY, ETHICS AND RELIGION 80 (Manuel Battegay et al. eds., 2012).

116. See more extensively at Alan Jotkowitz, “*Halakhah Loved Not the Parents Less, But the Child More*”: R. Aharon Lichtenstein On Abortion, 47 TRADITION 137, 150-56 (2015); Alan Jotkowitz, *On the Methodology of Jewish Medical Ethics*, 43(1) TRADITION J. ORTHODOX JEWISH THOUGHT 38, 50 (2010); Alan Jotkowitz et al., *Abnormalities Mild with Fetuses for Abortions*, 12 ISRAEL MED. ASS’N J. 5, 7-8 (2010).

117. For the *halakhic* jurisprudence of other decisions regarding this issue, see JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN 23 (1984) (not leaving much room for the impact of the human and social factors on *halakhic* decision making); ELLIOT N. DORFF, MATTERS OF LIFE AND DEATH: A JEWISH APPROACH TO MODERN MEDICAL ETHICS 412 (1998) (differentiating between a rule-based ethic and a situational ethic).

118. For this substantial character of Judaism, see, e.g., AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW; FORMALISM AND FLEXIBILITY IN JEWISH CIVIL LAW (1991); Leon Sheleff, *The Formalism of Jewish Law and the Values of Jewish Heritage*, 25 TEL AVIV U. L. REV. 489, 489 (2001-2002) (Heb.); Avishalom Westreich, *Flexible Formalism and Realistic Foundationalism: An Analysis of the Artificial Procreation Controversy in Jewish Law*, 31 DINE ISRAEL 157 (2017) (Heb.).

This relational perspective can be found also in one of the most central concerns of Judaism—the legitimization of abortion on the grounds of extramarital sex, to prevent the birth of a *mamzer* (“bastard”). According to Jewish law, when a married woman has a sexual relationship with another Jew to whom she is not married, the offspring is regarded as a *mamzer*.¹¹⁹ That child, if a male, and all his descendants cannot marry a Jewish woman unless she herself is a *mamzer* or proselyte.¹²⁰

The birth of a *mamzer* has well-known and far-reaching *halakhic* ramifications for the newborn, which can cause his parents and the whole family great shame and place a heavy psychological burden on them. It is therefore permitted, according to some prominent *halakhic* authorities, to abort the fetus. While the moral status of the fetus severely restricts the option of abortion, the resulting *mamzer*’s inevitably sour relationship with his family challenges this prohibition. This result is based on the same grounds as that of the relational approach. The choice between prohibiting and allowing the abortion of the same fetus obviously stems from a relational and not an individualist point of view. As was claimed by Daniel B. Sinclair:

Even in the *mamzer* fetus cases, the main rationale behind the permissive rulings was the saving of the mother from the adverse effects, both psychological and physical, of giving birth to tainted progeny [. . .] it is certainly arguable that the abortion of a *mamzer* fetus has as much to do with prevention of *mamzerim* being born as it does with the mental and physical welfare of the mother.¹²¹

An interesting variety of similar opinions can be found concerning the *halakhic* status of the frozen embryo. While the vast majority of *halakhic* authorities have ruled that it can be thawed or destroyed, some argue that this is

119. See Ben Zion Schereschewsky, “*Mamzer*” in THE PRINCIPLES OF JEWISH LAW 435-38 (Menachem Elon ed., 1975); Pamela Laufer-Ukeles, *The Lost Children: When the Right to Children Conflicts with the Rights of Children*, 8 L. & ETHICS HUM. RTS. 219, 242-45 (2014). For the concept and importance of purity and holiness that should be part of the conjugal relationship, see Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law*, 29 U. TOL. L. REV. 409, 413-16 (1998). For a social anthropological criticism of the politics of *mamzerut*, see SUSAN M. KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 78-80 (2000).

120. See more extensively at YEHEZKEL MARGALIT, THE JEWISH FAMILY – BETWEEN FAMILY LAW AND CONTRACT LAW 140 (2017); Yehezkel Margalit, *Towards Establishing Parenthood by Agreement in Jewish Law*, 26 AM. U. J. GENDER SOC. POL’Y & L. 647, 653-54 (2018).

121. Sinclair, *supra* note 113, at 59-60. See also Hashiloni-Dolev & Weiner, *supra* note 97, at 1059. For a discussion of the severe and dramatic results of being labeled a *mamzer*, which can consequently put social pressure and “religious duress” on his mother, see Yehezkel Margalit, *Bargaining in the Shadow of Get Refusal: How Modern Contract Doctrines Can Alleviate This Problem*, 36 OHIO ST. J. ON DISP. RESOL. 153, 176-80 (2020). For another aspect of the Jewish and Israeli relational ethics’ point of view, see DEBORAH LUPTON, THE SOCIAL WORLDS OF THE UNBORN 76 (2013).

absolutely prohibited, as claimed by one of the most prominent Jewish authorities in the United States, David J. Bleich, who stated, “There are no obvious grounds for assuming that nascent human life may be destroyed simply because it is not sheltered in its natural habitat, i.e., its development takes place outside the mother’s womb.”¹²²

Likewise, about five years ago, a detailed ruling was handed down that, for the first time, dealt with a mutual request to destroy the frozen embryos after the dissolution of a couple’s marriage. The Rabbinical Court in Tel Aviv absolutely prohibited destroying frozen embryos unless there was an acute need to do so, and even then, only under extreme restrictions.¹²³ But a careful reading of the countless Jewish texts that have been written regarding this issue since the advent of the first IVF baby in 1978 reveals a more complicated point of view, which can also be defined as relational. The following statement was delivered by Hayyim D. Halevi, the former Chief Rabbi of Tel Aviv-Jaffa:

All ova that are fertilized in vitro do not have the legal status of an embryo; one does not violate the Sabbath on their behalf, and *it is permissible to discard them if they were not chosen for transfer*, since the law of abortion only applies to [an embryo] in the womb . . . In vitro, there is no prohibition whatsoever.¹²⁴

From his perspective, there is no dichotomous definition of the frozen embryo as either a person or not—the doctrine of fetal personhood being “all or nothing”—and its moral status merely depends on its telos and destination. If the intent of its progenitors is to discard it, it has no *halakhic* significance and can be destroyed. But if the intention is to become parents by transferring and implanting

122. David J. Bleich, *In Vitro Fertilization: Questions of Maternal Identity and Conversion*, 25 TRADITION 82, 97 (1991); as mentioned by Aaron L. Mackler, *In Vitro Fertilization, in RESPONSA: 1991-2000, THE COMMITTEE ON JEWISH LAW AND STANDARDS OF THE CONSERVATIVE MOVEMENT* 519 (K. Abelson & D. Fine eds., 2002); Aaron L. Mackler, *An Expanded Partnership with God? In Vitro Fertilization in Jewish Ethics*, 25 J. RELIGIOUS ETHICS 277, 290 (1997); Aaron L. Mackler, *Jewish Perspectives on Embryo and Stem Cell Research*, in RELIGIOUS PERSPECTIVES ON BIOETHICS 147, 149 (Mark Cherry ed., 2013).

123. Rabbinical Court (TA) 1049932/8 Anonymous v. Anonymous 1, 28-29 (unpub. July 20, 2016) (Isr.). For an academic discussion of this verdict, see Margalit, THE JEWISH FAMILY, *supra* note 120, at 153 n.84. But compare with the opinion of Judge Shlomo Dichovsky, who claims that the frozen embryo has an independent right to be born and consequently the Rabbinical Court should, only orally, push the insubordinate party to release it to the other party who is eager to become a parent.

124. Hayyim D. Halevi, *On Fetal Reduction and the Halakhic Status of In Vitro Embryos*, 47 APPLIED SOC. SCI. INDEX & ABSTRACTS 14, 15 (1990) (Heb.) (emphasis added). For a similar ruling, see Yitzhak Zilberstein, *The Evaluation of the Pre-embryo Before Implantation for Prevention of Defective Embryos and Gender Determination*, 51 APPLIED SOC. SCI. INDEX & ABSTRACTS 54, 56 (1992) (Heb.). See also David M. FELDMAN & FRED ROSNER, COMPENDIUM ON MEDICAL ETHICS: JEWISH MORAL, ETHICAL AND RELIGIOUS PRINCIPLES IN MEDICAL PRACTICE 51 (6th ed. 1984); Shalom & Hashiloni-Dolev, *supra* note 16, at 179.

it in the woman's womb, it is more akin to a person, and destroying it is prohibited. A similar perception can be found in the writing of Mordehai Eliyahu, the former Chief Rabbi of the State of Israel, who uses a similar litmus test regarding the moral status of the frozen embryo. Eliyahu claims that the frozen embryo's status is relational, deriving directly from whether its progenitors (or at least by its producers, where they are created for use by others than the progenitors) intend to use it to procreate. If the main goal in creating the frozen embryo is for it to become a new life, it should not be discarded, since it can potentially yield a living baby, but if its destination is anything other than procreational, it can be thawed. As he puts it, "[f]ertilized ova that have been designated for transfer to a woman's uterus should not be destroyed, since a live fetus will develop from them, but fertilized ova that have not been designated for transfer may be discarded."¹²⁵

The relational aspects of this unique Jewish approach were summarized by Yechezkel M. Barilan:

This is an illuminating example of *Halakhah's* empiricist and *relational approach*, even at the expense of obvious metaphysical considerations. The rabbis . . . ignoring completely the question – “what kind of creatures are they?” Consequently, extracorporeal embryos in vials bear no special status in Jewish law.¹²⁶

The Author previously pointed to a related *halakhic* subjectivity—the determination of legal motherhood in egg donation and surrogacy. There are two possible reliable factors for establishing *halakhic* motherhood—the genetic element embedded in the egg donation, and the physiological element of the gestational mother. This Article argued that this *halakhic* subjectivity allows more room for taking into consideration the intent of the individuals who were involved in the “creation” of the resulting child, who should be recognized as its legal parents. Therefore, in any case of egg donation, where the genetic mother and the gestational mother are different individuals, the intentional parenthood—or determining parenthood by agreement (“DLPBA”), as coined by the Author—may establish the legal motherhood.

Thus, there appears to be no agreed-on determinative factor in establishing

125. Mordehai Eliyahu, *Destroying Embryos and Fetal Reduction*, 11 TEHUMIN 272, 272-73 (1990) (Heb.), as discussed by Mackler, *An Expanded Partnership with God?*, *supra* note 122; Mackler, *Jewish Perspectives*, *supra* note 122; Gideon A. Weitzman et al., *Genetic Counseling for the Orthodox Jewish Couple Undergoing Preimplantation Genetic Diagnosis*, 21 J. GENETIC COUNSELING 625, 626 (2012).

126. Barilan, *supra* note 111, at 153 (emphasis added). For a broader discussion of the nexus of the relational approach and Judaism, see RON WOLFSON, *RELATIONAL JUDAISM: USING THE POWER OF RELATIONSHIPS TO TRANSFORM THE JEWISH COMMUNITY* (2013); Renée Schlesinger, *Clinical Social Work with Orthodox Jews: A Relational Approach*, in *RELATIONAL SOCIAL WORK PRACTICE WITH DIVERSE POPULATIONS* 179 (Judith B. Rosenberger ed., 2014); Tanya Zion-Waldoks, *Politics of Devoted Resistance: Agency, Feminism, and Religion among Orthodox Agunah Activists in Israel*, 29 GENDER & SOC'Y 73, 73 (2015).

halakhic maternity . . . Since there are two factors in establishing legal maternity – genetic and gestational – there is more room for applying my normative model of DLPBA in determining *halakhic* maternity.¹²⁷

DLPBA should also determine the *halakhic* maternity in any case of surrogacy, where, not infrequently, the intending mother is also the genetic mother. Furthermore, the intending father must also be the genetic one, according to *halakhic* restrictions, which were anchored as one of the central prerequisites in the Israeli surrogacy law:

Therefore, *a priori*, there is no particular problem in determining the intended parents, who in most cases are also the genetic parents, as the legal parents of the resulting child . . . since there is no definitive *halakhic* determination as to who should be designated the legal mother in cases of IVF and surrogacy, there is more room for applying DLPBA as a means for recognizing the intended and genetic mother as the legal mother due to her initial agreement to serve as the legal mother of the conceived child.¹²⁸

The question remains whether the initial intentions of the progenitors, which not infrequently are formalized in an explicit agreement, can influence and perhaps even determine the moral status of the frozen embryo.

7. Towards a Relational Moral Status of the Frozen Embryo¹²⁹

i. General

In this normative Section, the essential thrust of the Article, the Author enlists

127. Margalit, THE JEWISH FAMILY, *supra* note 120, at 157. For a broader discussion of DLPBA as the best normative model for determining legal parenthood in various scenarios, see Margalit, DETERMINING LEGAL PARENTAGE, *supra* note 106. For its practical implementation in domestic and international surrogacy arrangements, see respectively Margalit, *In Defense of Surrogacy Agreements*, *supra* note 106; Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J. L. & POL'Y 41, 41 (2016).

128. Margalit, THE JEWISH FAMILY, *supra* note 120, at 160; Margalit, *Towards Establishing Parenthood by Agreement in Jewish Law*, *supra* note 120, at 676. For the massive influence of Judaism on the regulation of the Israeli surrogacy law, see Carmel Shalev, *Halakha and Patriarchal Motherhood - An Anatomy of the New Israeli Surrogacy Law*, 32 ISR. L. REV. 51, 51 (1998); Rhona Schuz, *Surrogacy in Israel: An Analysis of the Law in Practice*, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 35 (Rachel Cook et al. eds., 2003); 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, 129 n.70 (2008). For a related call to differentiate the *halakhic* motherhood for various contexts, see Avishalom Westreich, *Changing Motherhood Paradigms: Jewish Law, Civil Law, and Society*, 28 HASTINGS WOMEN'S L.J. 97, 104-95, 111-14 (2017).

129. For a related title, see Jeanne Louise Carriere, *From Status to Person in Book I, Title I of the Civil Code*, 73 TUL. L. REV. 1263, 1263 (1999).

the notion of relational contract as it applies to our issue—the status of the frozen embryo. This Article will explore how this modern and unique contract better resolves the two abovementioned problems in the frozen embryo field—their moral and legal status—and how to contractually regulate which of their progenitors may control them. Relational contract is also greatly influenced by relational ethics, although the precise relationship between them has not been sufficiently discussed in the legal literature.¹³⁰

As was briefly elaborated above in Section 1,¹³¹ one of the major problems stemming from the dilemma over the moral and legal status of the frozen embryo is how to contractually determine custody of it and whether to enforce the contract, explicit or oral, if any such exists, against the will of one of the parties. Regarding this dilemma, there are three primary approaches: (1) the contractual approach, which endorses the enforcement of contracts signed prior to undergoing IVF treatment; (2) the contemporary mutual consent model, which requires the agreement of the two progenitors for any disposition of the frozen embryos; and (3) the balancing of constitutional rights regarding procreative autonomy.¹³²

Primarily, the advantages of a disposition agreement and briefly recall the pitfalls of contractual ordering in this sensitive field are worth mentioning. Subsequently, the Author will elaborate on the main aspects of the relational contract and how it provides considerable assistance in resolving these drawbacks. Finally, the question of “can one use the relational contract to determine the legal status of the frozen embryo?” will be addressed.

ii. The Advantages of a Disposition Agreement

Elsewhere,¹³³ the Author extensively argued that in the field of IVF in

130. For an academic discussion of the nexus of relational ethics and relational contract, see Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139, 162 (1988) (“Although the feminist writers have not focused much on contracts, their thesis is most relevant [to relational contract theory]”); Lúcia Helena Barbosa de Oliveira, A LOCALIZED RE-DEFINITION OF LEGAL JUSTICE: THE FEMININE OF THE SOUTH IN THE EARLY CONSTITUTIONAL TRANSITION AND ITS PRACTICE BY THE CONSUMER PROTECTION OFFICE OF THE MPDFT-BRASILIA-BRAZIL - A FRAMEWORK FOR CROSS-BORDER DISPUTES IN EC CONSUMER LAW AND POLICY 15, 76, 88-89 (2009); Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 CARDOZO J. L. & GENDER 437, 455-60, 470-75 (2013).

131. See text accompanying *supra* note 24-26.

132. For a discussion of these rights, see Lambert, *supra* note 19, at 541-48; Lupsa, *supra* note 27, at 954-61; Wheatley, *supra* note 7, at 306-11; Walter, *supra* note 22, at 969 (enumerating four models for the resolution of any conflict regarding their disposition – a contract analysis, the implied contract theory, the bundle of rights balancing test, and the criterion of exclusive control to the biologic donors). Alex M. Johnson, *The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements*, 43 SW. L. REV. 191, 213 (2013) (“recount[s] the five prevailing views among academics[.]”).

133. Margalit, DETERMINING LEGAL PARENTAGE, *supra* note 106, at 114. See also Yehezkel

general, and especially with disposition agreements regarding frozen embryos, intentional parenthood, or DLPBA have many advantages. Such agreements provide the parties, the fertility clinic, and the court with clarity, certainty, efficiency, and flexibility regarding the deliberate intentions of the individuals involved in this process. Such an agreement may effectively minimize the length and bitterness of any potential future dispute, while providing appropriate guidelines and tools for achieving the best and most just solution if such disagreement eventually arises.

In these intimate scenarios, the parties who “possess” the genetic material(s), and not the court or any other extension of the state, are the most fit to determine what the embryo’s fate will be. The enforceability of such agreements ensures the parties’ seriousness, which induces them to diligently negotiate their desires, intentions, and commitments, and accordingly reduces the possibility of conflicts later. Recognizing the legality of such agreements may enormously assist courts in enforcing private arrangements without unnecessarily invading the intimate sphere of those couples and their opposing interests. It may dramatically reduce the unethical use of frozen embryos, which has the potential to harm the contractual parties, and provide maximum flexibility in adjusting each given arrangement to the desires, agreements, and intentions of the specific parties.¹³⁴

As mentioned above in Section 1,¹³⁵ two of the main shortcomings of such private ordering concern a change of mind by one of the progenitors, the parties to the contract, and unforeseeable or changed circumstances. These two contractual drawbacks can deprive contractual ordering of any of its advantages and render the whole of the contract void, or at least dramatically impair its enforceability.

iii. Relational Contract

This theory, arguably a branch of relational ethics, emerged in the 1970s as a reaction to classical contract law’s limitations; some even argue that it is a “mirror image” of the traditional contract model and the answer to current real-

Margalit, *To Be or Not to Be (A Parent)? - Not Precisely the Question; the Frozen Embryo Dispute*, 18 *CARDOZO J. L. & GENDER* 355, 355 (2012). For the dilemma of whether the enforcement of any given contract yields certainty and reduces complexity, or it offers a false (and expensive) promise of certainty, see Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 *COLUM. L. REV.* 1377, 1377 (2010).

134. For additional implementations of DLPBA in other scenarios concerning the dilemma of how to determine the legal parentage of the resulting child, in same-sex couples, in innovative fertility treatments, and in artificial insemination from donor, see Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 *WHITTIER J. CHILD & FAM. ADVOC.* 39, 39 (2013); Yehezkel Margalit & John Loike, *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 *HARV. J. L. & GENDER* 107, 107 (2014); Yehezkel Margalit, *Artificial Insemination from Donor (AID) – From Status to Contract and Back Again?*, 21 *B. U. J. SCI. & TECH. L.* 69, 69 (2015).

135. See text accompanying *supra* note 25-26.

world situations that arise.¹³⁶ The relational contract theory was fueled by the criticism of Ian R. Macneil following empirical studies on the gap between the initial contractual rights and obligations, and those that are applied during the contract's performance.¹³⁷

The conception of the ideal contractor under classical contract law was a self-sufficient, informed, and autonomous agent, who is free to contract with everyone and to dictate his own stipulations as he wishes. The keystone of this conception is the separateness and individual autonomy of each party to the contract and not the values of connection and relationship. The values promoted by this classical theory are therefore self-interest, free markets, self-sufficiency, and personal profit maximization.¹³⁸ In contrast, the relational contract emphasizes the relational dimension of the contracting process, which is characterized by cooperation, trust, flexibility, and even altruism.¹³⁹

The relational contract is designed to promote other values that are central to our flourishing as human beings: mutuality, relationships, and interdependency. One should not treat the other party as merely a source of potential profit, but as a vulnerable person with whom we should contract fairly. In fact, one should ensure fairness and be sensitive to the context of the relationship accompanying any given contract. The contract should promote a relationship with fair sharing of the gains and losses, acting in good faith by recognizing each other's vulnerability, and cooperating with each other through any hardships one may encounter.¹⁴⁰

Indeed, many sociologists and psychologists also contend that there are extrinsic relational factors that influence the contract's performance, primarily the importance of keeping promises, consideration of the other's needs, and the parties' readiness to cooperate.¹⁴¹ This pertains less to discrete short-term

136. See Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 812 (2000).

137. Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 570 (1985). For an extensive discussion of the relational contract, see Margalit, *supra* note 106, at 452-56.

138. See Peter Linzer & Patricia A. Tidwell, *The Flesh-Colored Band Aid-Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791, 791 (1991); SHARON THOMPSON, *PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE* 132-33 (2015); JONATHAN HERRING, *VULNERABLE ADULTS AND THE LAW* 226-28 (2016).

139. See Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 482 (1985); *IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL, AND NETWORK CONTRACTS* (David Campbell et al. eds., 2003); Mindy Chen-Wishart, *Beyond Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis*, in *MAPPING THE LAW: ESSAYS IN MEMORY OF PETER BIRKS* 201, 220 (Andrew Burrows & Alan Rodger eds., 2006).

140. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1065 (1985); Linzer & Tidwell, *supra* note 138; Herring, *supra* note 138, at 257-62.

141. For the phrase "mirror image," see Eisenberg, *supra* note 136, at 812. For further

transactional contracts than it does to long-term contracts between two stable contracting parties, which represent a long-term extra-contractual relationship that develops mutual interests, expectations, and interdependency. The unique long-term relationship, which may be driven by public values, such as justice, solidarity, dependency, and fairness, requires close cooperation and even altruistic motivations.

According to the common relational contract theory, the interdependency of the parties causes them to assign less weight to the initial planning and documentation of the contract and its stipulations, and more weight to the flexible, reciprocal, and considerate behavior of the two sides. This means that the agreement is dynamic and should not be inspected solely now of its execution, but throughout its performance as well. When changed circumstances occur, the sides should consider each other's needs and not insist on following the terms of the initial agreement. Instead, they should adjust the agreement to new circumstances in recognition of the dynamic and flexible character of the modern contract.

It is difficult to speak today about one singular relational contract theory, since one can find a variety of theories developed by scholars in research literature.¹⁴² Likewise, the prevailing contention is that in any given contract, one can find some aspects of the relational contract, and as contracts reflect more and more of the relational contract's special character, one should treat that given contract in a more communal and public attitude.¹⁴³ Scholars disagree as to whether the relational contract deserves special regulation in addition to the classical and modern law models,¹⁴⁴ or whether it fits into the latter model.¹⁴⁵

discussion, see Ewan McKendrick, *The Regulation of Long-Term Contracts in English Law*, in GOOD FAITH AND FAULT IN CONTRACT LAW 305, 312 (Jack Beatson & Daniel Friedmann eds., 1995); see also Stuart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55, 57 (1963). For empirical studies, see, e.g., Gordon, *supra* note 137, at 560. For a survey of sociological and psychological research, see Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 465 (1985); Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity, and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 44 (2003).

142. For further discussion on the various relational contract theories in Macneil's writing, see Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 881 (2000).

143. See Ian Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 738-40 (1974); Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854, 854 (1978); Ian Macneil, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 28 (1980); Ian Macneil, THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL (David Campbell ed., 2001).

144. See Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 251 (1995).

145. See McKendrick, *supra* note 141, at 332; Eisenberg, *supra* note 141, at 806; Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 848 (2000).

Scholars also disagree on how this sort of contract should be operatively implemented.¹⁴⁶ Despite the vast amount of scholarly literature, the relational contract theory has yet to reach full maturity, and, to date, it has been applied mostly in the long-term contract realm. Some scholars nonetheless anticipate that the relational contract will gain greater influence.¹⁴⁷ Today, many practical implementations of this theory can be found in various legal relationships, specifically in the fields of insurance, employment, arbitration,¹⁴⁸ and biotechnology.¹⁴⁹

Thus, the relational contract theory should be applied to disposition agreements as well. The special relationship embodied in this unique contract, which includes contracting parties who are not necessarily married spouses, is very subjective, complex, close, and intimate. Likewise, this sensitive and complicated arrangement may be long-term, since very often it is not clear when it will expire, whether it will achieve its goal, or when exactly it will do so. There is even the possibility that if the current IVF cycle is successful, the sides will agree on a second.

A compelling argument can be made that the disposition agreement conforms to the typical characteristics of relational contract theory and therefore should be treated as a relational contract. In addition, the contracting parties may not be well trained or aware of all the various nuances of the contract and the difficulties inherent in the fertility treatment process, the pregnancy process, and the delivery. Moreover, often one or both progenitors may not be represented by a lawyer and may blindly rely on the adhesion contract dictated by the fertility clinic. A flexible and just contractual theory that accounts for the special and subjective characteristics of the contracting parties, the possibility of a change of heart, the possibility of changed circumstances, and all the other additional contractual or legal factors may be most appropriate for the contractual ordering of this field.¹⁵⁰

146. See Jay M. Feinman, *The Insurance Relationship as Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 554 (2009).

147. See Gordon, *supra* note 137, at 566.

148. For a similar modern implication, see Gordon, *supra* note 137, at 556-59.

149. See Walter W. Powell, *Networks of Learning in Biotechnology: Opportunities and Constraints Associated with Relational Contracting in a Knowledge-Intensive Field*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 251, 252-53 (Rochelle Cooper Dreyfuss et al. eds., 2001).

150. For a related call to define a disposition agreement as a relational contract, see Johnson, *supra* note 132, at 229 ("none to date has acknowledged that the agreement or 'contract' entered into by the parties to dispose of gametic material is made by the parties who have already embarked upon another long term relational contract - the contract of marriage."). For a similar understanding regarding a surrogacy contract, see Margalit, *In Defense*, *supra* note 106, at 454-56. See also Flavia Berys, *Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour*, 42 CAL. W. L. REV. 321, 345-47 (2006); Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 LAW & SOC'Y REV. 143, 148 (2015) ("Surrogacy is a doubly relational contract").

This innovative concept needs to be honed in several respects. A disposition agreement may encounter difficulties, such as the dissolution of the progenitors' relationship or their divorce, loss of legal capacity, the death of one of the parties, or the progenitors' unexpected success in achieving a child from natural intercourse. Mutual expectations, obligations, and reliance on the contract may vary over time, since it is almost impossible to foresee all the possible changed circumstances, which may easily cause a change of heart. The essence of a disposition agreement is to privately order a very personal and complicated relationship that is not a common economic transaction by its very nature, and embodies substantial personal, social, and psychological needs. It is also difficult to evaluate and estimate its full and appropriate consideration. The contractual obligations are not always transferable to someone else, and they are supported by a social support system with especially important values, such as the right of procreation. The importance of cooperation is therefore substantial, and there is even a readiness for altruism.

Because the relational contract theory holds that at the initial contract execution stage, there is no ability to foresee and formulate all the appropriate obligations and rights attendant upon the contractual relationship, the de facto performance of the contract should be mandatory only in specific cases where it is ultimately deemed necessary.¹⁵¹ The relational contract theory may support and even strengthen the notion that the parties may withdraw from one or more of the contractual obligations embedded in the disposition agreement. This is true not only after the contract's execution and prior to the beginning or success of the fertility treatments, where the balanced interests still enable one of the sides not to fulfill their contractual obligations.

The relational contract theory may create parental obligations, rights, and even the granting of parenthood status itself due to an implied agreement following de facto guardianship. My line of reasoning means that the implication of the relational contract theory may require, if necessary, flexible adjustment of the contractual obligations ex-post, in addition to the initial obligations that were agreed upon ex-ante. These potential adjustments and the need for flexibility may then allow for change to the initial agreement where there is a change of heart or changed circumstances and the de facto performance of the contract by both sides, explicitly or implicitly, indicates that the parties agree to change the initial agreement. Practically speaking, even if the initial agreement had stipulated that the frozen embryos should be used, donated to another couple, used for research, or destroyed, the performance of the contract may, under given circumstances, dictate a different result following and according to the parties' change of minds.

151. Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091-92 (1981); Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 649 (2010). See also Johnson, *supra* note 132, at 240 ("Indeed, it is quite obvious and apparent that the parties who made the agreement, stylized by most courts as a 'contract,' are not in the same place or, more to the point, same relationship that they were in at the time they made the agreement. In brief, at the time of making the agreement one would presume that the parties are in an amicable long-term cooperative relationship that is the epitome of a relational contract.").

a. Relational Ethics, Relational Contract and Relational Status

In recent legal literature, one can also increasingly find a conceptualization of the spousal relationship as a relational contract.¹⁵² It is worth noting that in his early writings, Macneil conceptualized the marriage contract as a relational contract.¹⁵³ But, in stark contrast to the prevalence of this implementation in the spousal relationship, it is sorely lacking in the parent-child relationship. The Author explored this possibility in several of my previous articles and a forthcoming book.¹⁵⁴ There is no doubt that nothing compares to the strong relational aspects of both the parent-child and spousal relationships, since there is nothing “as important and relational as raising a child.”¹⁵⁵ This is a lifetime commitment and endeavor for the couple, the two progenitors, which has been illustrated by the well-known observation that “[i]t takes a village to raise a child,” as some scholars have put it.¹⁵⁶ As has been further elaborated,

Our parenting is inherently and deeply co-operative with the caring (whether we describe it as parenting) of our partners. Our parenting makes no sense without a consideration of our partner’s role . . . We may offer those children—but not others—an adequate level of parenting. Even then we could only really answer the question by reference to the parenting we are able to offer our children in the context of the relationships, community and society which are all involved in parenting.¹⁵⁷

Recently, it has been claimed that there is nothing inherent in marriage that renders the married couple the legal parents of the child, but rather, legal

152. See Macneil, *The Many Futures of Contracts*, *supra* note 143, at 720-21. See also Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1230-32 (1998); Robert Leckey, *Relational Contract and other Models of Marriage*, 40 OSGOODE HALL L.J. 1, 1 (2002); Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, *passim* (2015).

153. See Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, *supra* note 143, at 857-58; see also Gordon, *supra* note 137, at 569 (conceptualization of relational contract theories in terms of marriage in the writings of Macneil and Macaulay). See also Margalit, *supra* note 121.

154. See Yehezkel Margalit, *From the Tender Years Doctrine to the Approximation Rule – Between Family Law and Contract Law*, 15 HAIFA L. REV. 15 (2021); YEHEZKEL MARGALIT, PARENT-CHILD RELATIONSHIPS - BETWEEN FAMILY LAW AND CONTRACT LAW (Bar-Ilan Univ. Press, 2022) (Heb.) (forthcoming). See also Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 551 (1999).

155. Johnson, *supra* note 132, at 214, n.186-87 and accompanying text.

156. JANE COWEN-FLETCHER, IT TAKES A VILLAGE (1994); DOES IT TAKE A VILLAGE? COMMUNITY EFFECTS ON CHILDREN, ADOLESCENTS, AND FAMILIES (Alan Booth & Ann C. Crouter eds., 2001); HILLARY RODHAM CLINTON, IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US (2006).

157. Foster & Herring, *supra* note 44, at 37-38.

parentage is found in the relationship between every, often two, individuals that have agreed to mutually raise a child, even if they are not officially married.¹⁵⁸ Indeed, the relational approach emphasizes the ongoing caring, interdependency, and committed relations of the individuals who intend to mutually raise the child, rather than the official status of their relationship. Hence, only an intending parent who is committed to such a long-term relationship should be determined as the legal parent of the resulting child.¹⁵⁹ The other side is that any progenitor who is not interested in obligating him or herself with this lifetime commitment should not be determined as the legal parent. This is not only due to the individual's right not to procreate, but because under the relational approach, such a non-caring relationship toward the second individual, and consequently toward the resulting child, should not be morally recognized by legally imposing on that individual the status and obligations of a legal parent.¹⁶⁰

The mutual relational responsibilities and commitments of the two individuals raising the child to maturity, whether they are married to each other or not, constitute an around-the-clock relationship based on commitment, dependency, and care.¹⁶¹ These relational features were extensively explored in Section 3 in the pregnancy and abortion context regarding only the pregnant woman, but they are even more salient regarding the resulting child and the two individuals raising the child. Indeed, the relational notions of commitment, responsibility,¹⁶² and obligation¹⁶³ have become central in the past decades in the

158. Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J. L. & GENDER 119, 119, 176 (2018). (“Existing laws and legal scholarship have focused either on biology or on intent but have overlooked relationships . . . This Article’s primary goal has been to introduce the relationship between the conceiving adults as an additional key factor in making parentage determination. Adding relationships as a factor emphasizes reliance, equality, and commitments[.]”). See Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL’Y 1, 1 (2009) (for the relational traits of a variety of angles of the parent-child relationship); Ruth Zafran, *Children’s Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER SOC. POL’Y & L. 163, 1163 (2009-2010); Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 741 (2016).

159. See Berg, *Owning*, *supra* note 11, at 161. (“Nonetheless, some contracting parents may make the argument that the embryo in question is closely linked to their senses of self, and these arguments should be taken seriously.”).

160. For my previous call to differentiate between three typical statuses of legal parent—full parental, partial parental and non-parental—depending on the range of their parental undertakings, see Margalit, *supra* note 133, at 372-74; Yehezkel Margalit, *Bridging the Gap Between Intent and Status: A New Framework for Modern Parentage*, 15 WHITTIER J. CHILD & FAM. ADVOC. 1, 26-28 (2016); Margalit, DETERMINING LEGAL PARENTAGE, *supra* note 106, at 163-68.

161. For a recent survey of the strengthening of the responsibilities and commitments discourses in the child-parent context, see Margalit & Lifshitz-Aviram, *supra* note 73, at IIIc.

162. See Julie Wallbank, *Parental Responsibility, and the Responsible Parent: Managing the “Problem” of Contact*, in RESPONSIBLE PARENTS AND PARENTAL RESPONSIBILITY 296 (Rebecca Probert et al. eds., 1st ed. 2009). See also John Eekelaar, *Parental Responsibility: State of Nature or Nature of the State?*, 13 J. SOC. WELFARE & FAM. L. 37, PINCITE (1991); Jonathan Herring,

context of the parent-child relationship. As Wiesemann argued,

Parenthood is a good example for a human relationship that cannot be grasped by resorting to rights or even duties. It is a life-long responsibility based on unconditional love for the child . . . Loving care cannot be put into the language of rights or duties. If we attempt to put the moral meaning of loving care into the language of rights and duties, we will miss the essential point.¹⁶⁴

That is the case concerning not only the fetus in its mother's uterus, but also the frozen embryo. Since raising the resulting child will be a lifetime relational commitment, obligation, and responsibility for its progenitors, society should respect any mutual agreement between them. If both are interested in bringing the child into the world by themselves (or donating it to another infertile couple), the relationship of the intended parents toward each other (themselves or the "adopting" parents) and mutually toward the resulting child will be nurturing and marked by care. Consequently, the moral and legal status of the given frozen embryo should more closely resemble that of a person, as Nel Noddings claimed about its relational ontology, where the ethical self is a consequence of the relationship of caring with others, and as also concluded in the bioethical-sociological literature, discussed above in Section Five.¹⁶⁵ Similarly, Claudia Wiesemann argues that:

A relational ethics approach focusing on the meaning of parenthood can replace the ethics of rights and duties where appropriate . . . but this is also the case before birth, when rights cannot be meaningfully applied to the embryo/fetus because it is not a fully individualized human being. The close bodily relationship of the woman to the fetus during pregnancy requires employing an ethics of care and responsibility.¹⁶⁶

In contrast, if the progenitors are mutually interested in thawing or destroying the frozen embryo, or at least donating it for research, its ontology should be more akin to that of property, as we have seen in the Jewish law's conception in Section 6. In brief, one can conclude that if the progenitors intend to implant the

Parental Responsibility, Hyper-Parenting and the Role of Technology, in THE OXFORD HANDBOOK OF LAW, REGULATION AND TECHNOLOGY 404 (Roger Brownsword et al. eds., 2017).

163. See the following seminal research: John Eekelaar, *Are Parents Morally Obligated to Care for their Children?*, 11 OXFORD J. L. STUD. 340, 340 (1991); MAVIS MACLEAN & JOHN EEKELAAR, THE PARENTAL OBLIGATION (1997); Merle H. Weiner, *Caregiver Payments, and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135, 135 (2014).

164. Wiesemann, *supra* note 104, at 124. Compare with Onora O'Neill, *Begetting, Bearing, and Rearing*, in HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 25 (Onora O'Neill & W. Ruddick eds., 1979); Onora O'Neill, *The 'Good Enough Parent' in the Age of the New Reproductive Technologies*, in THE ETHICS OF GENETICS IN HUMAN PROCREATION 33 (Hille Haker & Deryck Beyleveld eds., 2000).

165. See Noddings *supra* note 52, 56 and accompanying text.

166. Wiesemann, *supra* note 104, at 125.

embryo in the woman's womb, it should be treated as a person and must not be thawed, but if the mutual agreement is not to use it, its ontology and moral status is not that of a person, and it can be destroyed. Put differently, there is no point in bringing the embryo into existence when both of its potential intending parents are not interested in such non-caring relationships.¹⁶⁷

Therefore, a disposition agreement should be mandatory and should not be left to the discretion of the progenitors whether to enter it.¹⁶⁸ Moreover, in any case of an explicit mutual agreement either to use or destroy the frozen embryos, such a contract should be morally binding and legally enforceable. Not only does it clearly reflect the initial intentions of the two parties whether to become the legal parents of the resulting child, but the notion of DLPBA can be employed to determine the ontological status of the given frozen embryos considering relational ethics. The intrinsic contractual pitfalls of a change of heart or changed circumstances may find their appropriate answers in relational contract theory, which is also a byproduct, to some degree, of relational ethics.

In any scenario where there is no explicit disposition agreement, or when the explicit contract has not stipulated what should be done with the frozen embryos under extreme exceptional circumstances, the party who is interested in using them should prevail. Since this party is eager to become the parent of the resulting child, practically speaking, this party is treating the frozen embryo as a "human becoming,"¹⁶⁹ the ontological status of which is akin to that of a person considering relational ethics. Since bodily integrity and social relationships are deeply realized in legal parenthood, the latter should be considered in any ethical analysis regarding the moral status of frozen embryos.¹⁷⁰ This individual invests

167. For a similar argumentation, see Johnson, *supra* note 132, at 232 ("To tie these two separating individuals together over the life of a child to be born on the cusp of or after separation seems needlessly cruel for all concerned, including the prospective child. Indeed, it seems like a recipe for a familial disaster.").

168. For a similar conclusion, see ESHRE TASK FORCE ON ETHICS & LAW, *The Cryopreservation of Human Embryos*, 16 HUM. REPROD. 1049, 1049 (2001). For my previous calls to obligate the progenitors to anchor in an explicit contract their initial agreement regarding the fate of their mutual genetic material, see Margalit, *supra* note 133, at 386-88; Margalit, DETERMINING LEGAL PARENTAGE, *supra* note 106, at 254-57. See also in the context of surrogacy agreements, Margalit, *In Defense of Surrogacy Agreements*, *supra* note 106, at 466. For a similar call by another scholar, see Malo, *supra* note 22, at 332, 334.

169. For a discussion of this phrase in the context of embryos, see Lawrence C. Becker, *Human Being: The Boundaries of the Concept*, 4 PHIL. & PUB. AFF. 334, 337 (1975); PHILIP HEFNER, TECHNOLOGY AND HUMAN BECOMING (2003); Berg, *Elephants and Embryos*, *supra* note 11, at 389.

170. Wiesemann, *supra* note 104, at 117-18, at 123 ("Thus, in order to define the moral status of the embryo we have to analyse the moral meaning of parenthood."); See also Jennifer Nedelsky, *Property in Potential Life--A Relational Approach to Choosing Legal Categories*, 6 CAN. J. L. & JURIS. 343, passim (1993); Jason Scott Robert & Françoise Baylis, *Crossing Species Boundaries*, 3 AM. J. BIOETHICS 1, 4 (2003) ("in sum, even though biologists are able to identify a particular string of nucleotides as human (as distinct from, say, yeast or even chimpanzee), the unique identity

in their present relationship with the frozen embryos and their forthcoming parent-child ongoing caring, interdependency, and committed relations. Therefore, the law should recognize this “in-process” child-parent relationship by allocating rights and obligations to ensure that these present and future relations are upheld and maintained.¹⁷¹ This conclusion is the pillar of the Arizona Legislature’s recent shift to the presumption of giving the frozen embryos to the party who wants to bring one or more into the world.¹⁷²

The reverse situation is that the party who is opposed to using the frozen embryos is not interested in bringing any child into the world. Since that party is not interested in establishing present relations with the frozen embryo and, as a result, there will not be any mutual caring relations, that (non)existing relationship lacks any moral value. The legal system should not recognize that party as the legal parent of the resulting child, with all the attendant parental rights and obligations, and s/he should be free to find another caring relationship.¹⁷³ For that recalcitrant progenitor, the moral status of the frozen embryo is merely as a good or article, like other properties; therefore, the balancing interests of the two progenitors should morally incline toward the side that awards them status akin to a person, and legally, this interest should prevail.

Consequently, since the relational approach dictates our parental rights and obligations as deriving from the relations and not from the mere biological legal status of frozen embryos, the party that is interested in obligating him/herself with caring, interdependency, and committed relations by bringing the resulting child into the world and raising it should be legally recognized as its legal parent to all intents and purposes. The party that is not interested in using the embryo and becoming a parent should not be defined as its legal parent and should not be burdened with any attendant obligations or awarded any rights.

The foregoing relational approach lends great support to my compromise call published a decade ago.¹⁷⁴ Considering the human rights discourse, the Author

of the human species cannot be established through genetic or genomic means.”); Kathleen Hammond, *Relationally Speaking: The Implications of Treating Embryos as Property in a Canadian Context*, 32 CAN. J. FAM. L. 323, 323 (2019).

171. See Herring, *The Termination of Pregnancy and the Criminal Law*, *supra* note 68, at 145; Herring, *Ethics of Care*, *supra* note 69, at 13; and more extensively Herring, *CARING AND THE LAW*, *supra* note 75, at 11-45.

172. ARIZ. REV. STAT. ANN. § 25-318.03(A) (2018) (inspired by *Terrell v. Torres*, No. CV-19-0106-PR, 2020 Ariz. LEXIS 25 (Jan. 23, 2020)).

173. See Lois Tonkin, *Haunted by a Present Absence*, 4 STUD. MATERNAL 1, 1 (2012); Herring, *Ethics of Care*, *supra* note 69, at 13-15 (“The law is not in the business of coercing relationships through threat of legal sanction, as that undermines the very goodness of a mutually respectful caring relationship.”); Herring, *The Termination of Pregnancy and the Criminal Law*, *supra* note 68, at 147-51 (“the law’s response should be to facilitate the parties to escape from that relationship and to be free to form other relationships if they are able to.”).

174. For a further discussion of relational concerns/grounds regarding frozen embryos, see Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, in *PROPERTY RIGHTS* 259 (Ellen Frankel Paul et al. eds., 1994) (arguing on relational grounds against a property right in

argues that the party who is opposed to continuing the fertilization would have to accept the status of non-parenthood, without any parental rights or obligations. In this way, the couple could arrive at an agreement that fertilization may continue without prejudicing the party opposed to the idea of forced parenthood, while giving the interested party the frozen embryos, enabling them to become the legal parent of the resulting child with all the consequent parental ramifications.¹⁷⁵ The Author in this Article states:

Dispositions should be given full legal backing and should be enforced whenever necessary. Even so, this compromise suggestion should be accompanied by legislation that would limit the inflexibility and the extent of the disputes that accompany such disagreements by providing the solution of granting non-legal parenthood to the subordinate spouse.¹⁷⁶

To summarize, one suggested solution is to respect the initial agreement of the two progenitors, preferably anchored in an explicit mandatory disposition agreement. This agreement can indicate whether the frozen embryos should be used, donated to another couple, used for research, or destroyed. If there is no such mutual agreement, when the contract did not explicitly regulate such a disagreement, or when the contract is unenforceable, it should be interpreted in favor of the party who awards them status akin to a person by allocating parental status solely to them. The recalcitrant progenitor, who is not interested in using the frozen embryos and becoming a parent, should not be determined as its legal parent.¹⁷⁷

III. CONCLUSION

The already existing hundreds of thousands of unused frozen embryos, coupled with the skyrocketing rate of divorce, raise a myriad of moral, legal,

human bodies and body products); Judith D. Fischer, *Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View*, 32 LOY. LA. L. REV. 381, 381 (1999).

175. Margalit, *supra* note 133, at 389. *See also* Margalit, DETERMINING LEGAL PARENTAGE, *supra* note 106, at 242-43.

176. Margalit, DETERMINING LEGAL PARENTAGE, *supra* note 106, at 242; Margalit, *supra* note 133, at 374.

177. Such twofold regulation, giving the contract first place, and otherwise balancing the interests of the two parties, has been implemented in several verdicts, such as *Szafranski v. Dunston*, 34 N.E.3d 1132, 1132 (Ill. App. Ct. 2015) (“Thus, we hold that a court should look first to any existing agreement expressing the spouses’ intent regarding disposition of the couple’s remaining pre-embryos in the event of divorce. In the absence of such an agreement, a court should seek to balance the parties’ respective interests [. . .]”); *In re Marriage of Rooks*, 429 P.3d 579, 579 (Colo. 2018). For an academic discussion of it, see Petralia, *supra* note 21; Harman, *supra* note 2, at 544 ([a] possible application of the relation approach in this balancing test can be found in the following statement – “Instead, courts should look more broadly and consider the interests of the progenitors, the IVF facility, and society at large when conducting the balancing test[.]”).

social, and religious dilemmas. Some of the most vexing problems are the moral and legal status of the frozen embryo and what its fate should be in case of disagreement between the progenitors, and whether contractual regulation of the frozen embryo is valid and enforceable. This Article have enlisted relational ethics—inter alia through one of its contractual implementations, the relational contract—to resolve these intertwined problems. According to this theory, the status of the frozen embryo is primarily based on the present and future mutual relations of commitment, caring, and interdependency of the relevant individuals toward each other and the resulting child.

On the grounds of the mutually desired or undesired caring relations between the two contracting parties, in any case of an explicit disposition agreement, the contract should govern. In any case of change of heart or changed circumstances in the de facto performance of the contract by both sides, the relational contract, which is a product of relational ethics, supplies us with adequate contractual solutions. In any scenario where there is no explicit disposition agreement or when the explicit agreement has not stipulated what should be done with the frozen embryos under extreme extraordinary circumstances, the Author concludes that the party who is interested in using them should prevail. Since the moral status of the frozen embryo is a direct byproduct of the caring and committed relationships of each progenitor toward it and toward the other party, only the one who treats it as a person by obligating him/herself to a lifetime of caring should be its legal parent. The other party, who treats it as a mere good or article, should not have any parental rights and obligations.