**From (Moral) Status (Of the Frozen Embryo) To (Relational) Contract and Biack Again to (Relational Moral) Status**

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**Abstract**

The already existing hundreds of thousands of superplus 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 these intertwined dilemmas. Applying this theory, I will challenge the conventional dichotomous conceptualization of the frozen embryo as either a person or a nonperson. Rather, I show that its legal and moral status should be determined as a derivative of the desired or undesired relationship between the progenitors, as 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 nonperson – an object. Consequently, I argue 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 supplies us with adequate contractual devices to address any problem 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, I contend that 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.

**Introduction**

At the end of 2020, some scientific and social media headlines announced that a miracle had occurred in October in Tennessee when a baby girl, Molly Gibson, was born after having been a frozen embryo for 27 years, setting a new record for the longest frozen embryo to have resulted in a birth.[[1]](#footnote-4) This new world record broke the previous record set by her older sister, Emma, who was also adopted by the same parents, Tina and Ben Gibson, after having been frozen as an embryo for 24 years.[[2]](#footnote-5) The full sibling girls had been created in October 1992, when Tina, their adoptive mother, was only one and a half years old.[[3]](#footnote-6) In our “frozen age,” it won’t 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 (hereinafter: 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]](#footnote-7) Sadly, however, even these cutting-edge fertility treatments, not to mention innovations leading to ectogenesis – an artificial womb[[5]](#footnote-8) – haven’t resolved the until now unresolvable moral and legal debates regarding the status of both the frozen embryo and the fetus. Consequently, even early in 2020, an Arizona court could not precisely define the moral status of the frozen embryo,[[6]](#footnote-9) settling on an “interim category that entitles them to special respect because of their potential for human life.”[[7]](#footnote-10)

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]](#footnote-11) I claim that between these two extreme poles, there is room for a much 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 mainly during the past decade in the legal and ethics fields as well as others.[[9]](#footnote-12) Nevertheless, both of these 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]](#footnote-13)

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 not, or something in between.

Indeed, in the recent legal literature, there have been some powerful calls for more flexibility and even mobility in defining frozen embryos.[[11]](#footnote-14) In light of relational ethics, which will be presented at length in Section 2, but which is basically a decision-making model that outlines four core principles: mutual respect, relational engagement, bringing knowledge back to life, and creating environment [[12]](#footnote-15) I will call for 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. Essentially, the legal and moral status of these embryos should no longer continue to 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.

I am fully aware of the conceptual and/or paradigmatic difficulty of dealing with the moral and legal status of both the frozen embryo and the fetus in one article.[[13]](#footnote-16) Not only have both been discussed in countless books and articles, but even today, these continue to be hotly debated issues. Nonetheless, relational ethics offers a new and intriguing perspective for addressing these issues, which not infrequently are intertwined and treated as one.[[14]](#footnote-17) 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 point at which human life begins, still holds to the firm view that full personhood begins at conception.[[15]](#footnote-18) 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. In this way, we are dealing with a relationship that is created even before the child is born. It is arguable then, that this results in merely an evolutionary and not a revolutionary difference between the religious Catholic approach and the relational approach.

On the more personal level, 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]](#footnote-19) 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 this introduction, this 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, I will extensively explore relational ethics and, more briefly, its 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 of the preceding interdisciplinary discussion provides the basis for Section 7, where I engage in a normative deliberation, describing the advantages of a disposition agreement, first and foremost in light of the relational contract, in determining the relational moral and legal status of frozen embryos in light of the special circumstances of various scenarios.[[17]](#footnote-20)

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 surplus 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 have simply lost contact with the fertility clinic for whatever reason.[[18]](#footnote-21) 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]](#footnote-22) or earmarked for research?[[20]](#footnote-23) In addition, disagreement and disputes may arise between the progenitors regarding the disposition of their frozen embryos during the period of time they are cryopreserved, which may last for years and even decades.[[21]](#footnote-24) Is it appropriate to deal with “custody” of frozen embryos?[[22]](#footnote-25) Do 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 of them? Which right should prevail, the right to procreate or the right not to procreate?[[23]](#footnote-26)

Since this article deals with the nexus between the moral and legal status of frozen embryos and its appropriate contractual arrangements, I will narrow my deliberation only to these intertwined fields. Indeed, there is no lack of contractual challenges and questions in this field. For example, if the couple has previously entered into disposition agreement, is it a binding contract and should it be enforceable?[[24]](#footnote-27) Even if there is an explicit agreement, what should happen if due to 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]](#footnote-28) What if one of them has changed their mind during the often long time from the freezing of the fertilized eggs till the disagreement emerges?[[26]](#footnote-29)

There is a huge controversy in the legal literature over whether the contractual regulation of the fate of frozen embryos offers more advantages[[27]](#footnote-30) or disadvantages.[[28]](#footnote-31) One of the most substantial dilemmas is the moral and legal status of frozen embryos. If we conceptualize them as a mere good that the progenitors possess, such private regulation appears to be logically appropriate, and in contrast, if the frozen embryos are treated as human beings, such property discourse and ownership are a priori irrelevant.[[29]](#footnote-32) This controversy involves three major views of the issue, which have arisen both in legal academia and in different jurisdictions in the United States. The first is a view of the frozen embryo as a human being to all intents and purposes, which has been explicitly recognized in Louisiana[[30]](#footnote-33) and New Mexico statutes.[[31]](#footnote-34) The second considers the frozen embryo as a mere commodity belonging to the progenitor.[[32]](#footnote-35) According to 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]](#footnote-36)

These three distinct categories have also been applied in the vast majority of the case, albeit mostly implicitly by the courts for almost three decades. The vast majority of cases have treated the frozen embryo as property explicitly or implicitly to varying degrees,[[34]](#footnote-37) three of them have treated it as an intermediate category of special character or deserving of special respect,[[35]](#footnote-38) and only one case has treated it as a person.[[36]](#footnote-39) But recently, one can find in the legal writing several interesting attempts to challenge this dichotomy.[[37]](#footnote-40) 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 control, or the property interests will be balanced against the personhood interests.[[38]](#footnote-41)

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. Instead of this misleading traditional conceptualization, we 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, personhood interests will prevail over property interests. Hence, one can claim 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]](#footnote-42)

In her companion article, Berg has differentiated between a juridical person[[40]](#footnote-43) and a natural person.[[41]](#footnote-44) Since one can find no express definition of “person” in either the U.S. Constitution or in its Supreme Court rulings, every jurisdiction can define 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 different ways depending on the purpose of the law, but no cohesive ‘law of persons.’”[[42]](#footnote-45) Furthermore, the term juridical person may be accorded different legal rights and protections. Since fetuses are already 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 different 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]](#footnote-46)

Similarly, and more germane to our discussion, 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, we should not consider conventional abilities or characteristics, but should focus on our mutual relationships with each other, especially caring relations, since our vulnerability and interdependency profoundly influence our humanity and define our moral status. As he puts it,

We should rather consider the value of relationships. All caring relationships are of moral value and therefore there is no valuing of persons per se: it 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 we are alone.[[44]](#footnote-47)

In his most recent article, Herring further elaborates that the relational approach teaches us that the moral value of personhood is not found in any individual characteristics, but rather in one’s relationships with others. Since individuals define themselves via their relations, these interconnections should constitute their identities through the legal recognition of these social interactions. That is the reason 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]](#footnote-48)

In Section 7, I will elaborate my own perception that the moral and legal status of the frozen embryo (as well as the fetus) are also based on a relational infrastructure. But, first and foremost, I turn now to exploring what “relational ethics” is, its presumptive antecedents, and their various possible implementations in various scientific fields.

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]](#footnote-49) She argues that men and women tend to conceptualize morality differently, as women tend to emphasize empathy and compassion rather than the notion of justice. One of the prominent originators of relational ethics is Nel Noddings, who, like many other feminists,[[47]](#footnote-50) acknowledges human relationships as well as a woman’s life experiences and how both of them influence self-decision-making. In brief, she claims that instead of trying to provide a systematic examination of the requirements for caring, we should support the three pillars of care – engrossment, motivational displacement, and the responsiveness of the person being cared for to the care.

Some scholars have claimed that this ethics is a derivative of the more general notion of relational autonomy.[[48]](#footnote-51) As opposed to individualistic autonomy,[[49]](#footnote-52) 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 their close relationships with relatives and friends, and the support they provide.[[50]](#footnote-53) Consequently, we should conceptualize autonomy while taking into consideration that social background and environment influence individual decision-making capability. Since any person is immensely influenced by this social networking, and without it would find it very difficult to fulfill him or herself, this social influence should be accorded great importance, especially in cases where individual actions will, in turn, affect these social forces.[[51]](#footnote-54)

It is beyond the scope of this article to extensively elaborate on whether relational ethics is indeed a branch of relational autonomy or what precisely the relationship between these two notions is.[[52]](#footnote-56) In brief, both relational autonomy and ethics maintain that the person is not fundamentally isolated, but is a relational and caring interdependent being. Every person 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, persons are interdependent individuals and definitely not self-sufficient and independent individuals. 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. The abstract individuality is freed from any social and familial ties and specificities; thus, the autonomous person should be understood as a self-sufficient and independent individual, resulting in an independent and individualistic autonomy.[[53]](#footnote-57) It bears emphasizing that relational autonomy, like relational ethics, is gaining more and more influence in legal and ethical literature generally, and more specifically with regard to medical law[[54]](#footnote-58) and bioethics.[[55]](#footnote-59) 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]](#footnote-60) As she puts it:

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]](#footnote-61)

Whereas in her earlier writing during the 1980s, Noddings defined herself as writing through the prism of “feminine,” her later research has been written from the relational ethics perspective.[[58]](#footnote-62) As she explained in the preface to the 2013 second edition of her 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]](#footnote-63)

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 goodness and not with moral reasoning.[[60]](#footnote-64)

Basically, the principles of relational ethics of care emphasize the role of connection and feeling, and responding to the vulnerability or dependency of other beings. It argues that people relate with one another in their various roles and commitments; therefore it embraces values such as connectedness, cooperation, and mutual support. This unique mixture of relational ethics and the ethics of care has been implemented in a variety of fields, such as nursing,[[61]](#footnote-65) autoethnography,[[62]](#footnote-66) theology, and religious studies,[[63]](#footnote-67) as well as social work, cultural geography, social policy, infrastructural repair, narrative inquiry, intellectual disability, education, emergent creativity,[[64]](#footnote-68) and more. The possible 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 to the individuals involved in these relations, will be extensively discussed in the next section. To my knowledge, no legal article has 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 also been applied in the context of abortion.[[65]](#footnote-69) 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 our interconnectedness and the importance of preserving current and future relationships with the fetus, whatsoever 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]](#footnote-70) and therefore campaign endlessly to outlaw abortion at any cost.[[67]](#footnote-71) 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]](#footnote-72)

But in two companion articles, Herring recently claimed absolutely the opposite, asserting that there are reasonable justifications for this branch of ethics endorsing the right to abort in any case of unplanned or undesired pregnancy.[[69]](#footnote-73) This is obviously not an original argument of his, as some prominent writers, such as Celia Wolfe-Devine, have made this claim in the past.[[70]](#footnote-74) Arguably, however, Herring adds a very important layer to the discussion in elaborating that abortion should be conceptualized as no less than a “public good.”[[71]](#footnote-75) He 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]](#footnote-76) and drawing on the argued right to bodily integrity.[[73]](#footnote-77) Herring ‘s argument rests mainly on abandoning the human rights discourse, which is the dominant one today,[[74]](#footnote-78) 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 interconnections.[[75]](#footnote-79)

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 we should not focus on the reciprocal rights and obligations of the fetus in consideration of its specific moral status. Rather, it would be 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, but, instead, should be more relational and subjective. In any case where the pregnancy is intentional and desired, we should recognize this relationship 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 there should be no 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 foetus in a wanted relationship it accepts this relationship is deserving of especial moral status. But, where the relationship is unwanted, it has a different moral status and the legal response can be completely different.[[76]](#footnote-80)

In light of the foregoing discussion, I want to suggest another justification for the following rhetorical question by I. Glenn Cohen, which is actually 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]](#footnote-81) In this article, he reevaluated the prevailing wide consensus concerning the decriminalization of aborting a fetus resulting from a coerced sexual relationship.[[78]](#footnote-82) He logically asks what the difference is between the decriminalization of abortion in these two cases as opposed to its criminalization in all others. If the moral status of the fetus is akin to that of a person, then all abortions should be prohibited, since we should respect its most basic human right to be born, its inviolability;[[79]](#footnote-83) 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 – he 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]](#footnote-84)

I have recently suggested elsewhere that we should replace (or supplement) the human rights discourse in the abortion discussion with the obligations,[[81]](#footnote-85) commitments,[[82]](#footnote-86) and responsibilities[[83]](#footnote-87) discourses, following traditional Jewish ethics.[[84]](#footnote-88) I concluded that:

In our opinion, we should differentiate between whether consensual or nonconsensual sex, including possible 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]](#footnote-89)

What these two statements share is 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]](#footnote-90) I now claim that the relational ethics point of view may significantly strengthen this argument. In any case of either rape or incest, the pregnancy is obviously unplanned, and the resulting child will be undesired, so the relationship between it and the gestational mother inevitably will be devoid of caring by the latter for the former. This is the typical relationship that is meaningless morally, and the legal system should not invest it with any rights for the fetus and/or obligations for the mother.

Because the main thrust of the ethics of care is to promote caring relationships that will support mutual dependency and flourishing, the cases of pregnancy arising from rape or incest definitely will not feature caring and may even be detrimental to the resulting child, so it would be best to terminate the relationship by aborting the fetus. In other words, this ethical approach should encourage the law to recognize the gestational mother as the legal mother of the fetus only when it is a result of consensual sexual relations, and it should allocate rights and responsibilities to ensure that this relationship is upheld and maintained. Alternatively, in cases of rape and incest, since that relationship is unintentional and, by definition, not a caring one, it does not have any moral value and may be terminated by abortion.[[87]](#footnote-91)

Since the implementation of relational ethics has not been discussed in the legal literature regarding frozen embryos, I want to elaborate on its possible application in Section 7 the main normative chapter of this article. Before that, however, I would like to explore also the philosophical, bioethical-sociological and Jewish law aspects of our discussion, respectively, in the next three chapters.

4. The Philosophical Aspect – Personhood and Potentiality

Relational ethics has been discussed in length in the philosophical literature. Although relational conceptions of morality have existed for centuries, for example, in African[[88]](#footnote-92) and Asian moral philosophies,[[89]](#footnote-93) 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/or other sharing bonds.[[90]](#footnote-94) As Metz and Clark Miller have succinctly defined it, “[…] relationalism 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.” And more extensively:

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. Similar to holism, though, a relational account accords no moral status to an entity merely on the basis of its intrinsic properties. A relational theory implies that a being warrants moral consideration only if, and because, it exhibits some kind of other‐regarding property, one that is typically intentional or causal.[[91]](#footnote-95)

Since the late 1980s, relationalism has traditionally been deeply intertwined with feminist ethics, mainly the ethics of care, but it can be found also in many other branches of feminist ethics. More generally, care ethics can serve as the infrastructure for a variety of ethics, sentimentalist, ethical or deontological.[[92]](#footnote-96) 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*) to “relational” (*Caring: A Relational Approach*) in the 2013 second edition,[[93]](#footnote-97) emphasizing the interconnection of individuals through care, rather than the supposed gendered nature of caring.

I will now focus on one of the philosophical deliberations of the relational approach most relevant to the context of the frozen embryo. Jennifer McKitrick explored the issue of disposition and potentialities, which has been discussed extensively in the literatures of both bioethics and philosophy.[[94]](#footnote-98) She analyzes the substantial difference regarding 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]](#footnote-99)

In my opinion, her statement is another possible interpretation of relational ethics. We should not adhere solely to a biological parameter in determining the moral status of the frozen embryo, since such an inquiry should yield a similar conclusion in regard to 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 interrelational potentiality 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]](#footnote-100)

As was discussed extensively in Section 3, the same conclusion should be reached regarding the moral status of an undesired pregnancy. If the fetus is desired, its relationship with its gestational mother is characterized by care, its moral status is akin to that of a person, and the legal system should recognize her as the legal mother of the resulting child with all the derivative parental rights and obligations. But if the fetus is not desired, if there are no current caring relations, and none can be expected when it is born, such non-caring relationships are not morally valuable and they should not be recognized legally by determining the gestational mother as the legal mother of the resulting child with all the attendant responsibilities. Likewise, as we will see in our discussion of Jewish law in Section 6, the moral status of the frozen embryo is primarily dependent on the intention of its progenitors regarding whether or not 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 similar to 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]](#footnote-101) 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]](#footnote-102) is based on “(individual) biological” ethics,[[99]](#footnote-103) 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]](#footnote-104) with no consideration being taken of its social connections and networks with others.[[101]](#footnote-105)

The more innovative attitude and the one more relevant to our 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]](#footnote-106) This system of ethics accords great importance to the relational networks and familial relationships of the birthing woman and/or the family to whom or to which the fetus will be born – how the 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.

As we saw in the interdisciplinary discussion in the previous chapters, so, too, in the bioethical-sociological literature, a parallel shift can be found – from an individualist to a much more relational conceptualization of the fetus/frozen embryo. In the past, the dominant approach employed an individualistic perspective,[[103]](#footnote-107) treating the fetus/frozen embryo as an individual entity with no connections and/or relationships either to its mother or other family members. This perception as applied to abortion focused 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]](#footnote-108)

Opposing this traditional one-dimensional and actually illusory description of the fetus are numerous justifications for treating the fetus as only one of many factors in the more general equation of the pregnancy.[[105]](#footnote-109) The close and unique physical interrelationship between the gestating woman and her fetus has been described as an almost mystical bond.[[106]](#footnote-110) During the pregnancy, the woman and her fetus are actually a single profoundly intertwined entity and cannot be separated, especially as far as the fetus is concerned, so we should not ignore the special bonds that the fetus has with its mother. We are well advised to treat the fetus as part of a much broader human relationship and award these relations moral and legal recognition. We 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 actually one human entity whose interests we should evaluate, and definitely not two opposing human rivals.[[107]](#footnote-111) As Iris M. Young expresses it:

Pregnancy 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]](#footnote-112)

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

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]](#footnote-113)

Therefore, I support Claudia Wiesemann’s conclusion:

[...] the intrinsic, ontological definition of the human embryo is not helpful in determining its moral status. In order to be meaningful, every definition has to make reference 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]](#footnote-114)

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

The *halakhic* (Jewish law) status of the fetus[[111]](#footnote-115) 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 totally different from that of Catholicism. Whereas in the latter, full personhood begins at conception,[[112]](#footnote-116) 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 more and more akin to a full person, acquiring its personhood status as its identity changes.[[113]](#footnote-117) As far as I know, 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 and/or destroyed, and it has a full right to inherit from its progenitors when it finally comes into the world.[[114]](#footnote-118)

Between these two extremes there are some special *halakhic* approaches, which may be defined, to varying degree, as relational. Let’s begin our discussion with the following statement regarding the abortion by one of the most important Jewish thinkers in our generation, Aharon Lichtenstein:

The question of abortion involves areas in which […] the personal circumstances are often complex and perplexing. In such areas there is room and in my opinion 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 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]](#footnote-119)

Although Lichtenstein is well-known as a conservative *halakhic* authority (*posek*) in the abortion field, in this passage, he doesn’t 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 mainly 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 essentially a consequence of the condition and situation of the woman asking for the abortion.[[116]](#footnote-120) In other words, since the woman’s “personal situation” plays a large 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]](#footnote-121) Put differently, the “subjectivity of the fetus”/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 of religions.[[118]](#footnote-122)

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]](#footnote-123) That child, if a male, and all his descendants cannot marry a Jewish woman unless she herself is a *mamzer* or proselyte.[[120]](#footnote-124) 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. I claim that 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* foetus 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* foetus has as much to do with prevention of *mamzerim* being born as it does with the mental and physical welfare of the mother.[[121]](#footnote-125)

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 and/or destroyed, some argue that this is absolutely prohibited, as claimed by one of the most prominent Jewish authority in the United States, David J. Bleich:

… 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]](#footnote-126)

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 them unless there was an acute need to do so, and even then, only under extreme restrictions.[[123]](#footnote-127) 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]](#footnote-128) (emphasis added – YM)

From his perspective, there is no dichotomous definition of the frozen embryo as either or not a person – 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 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. He also claims that its status is relational, deriving directly from whether or not its progenitors intend to use it to procreate. If the main goal in creating it 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,

Fertilized 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]](#footnote-129)

The relational aspects of this unique Jewish approach were summarized by Yechiel M. Barilans:

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]](#footnote-130) (emphasis added – YM)

Elsewhere, I have pointed to a related *halakhic* subjectivity – the determination of legal motherhood in egg donation and surrogacy. In brief, 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. I have 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 as I prefer to define it, determining parenthood by agreement (hereinafter: DLPBA) – may establish the legal motherhood. As I elaborated:

Thus, there appears to be no agreed determinative factor in establishing *halakhic* maternity […] Since there are two possible factors in establishing legal maternity – genetic and gestational – there is more room for applying my normative model of DLPBA in determining *halakhic* maternity.[[127]](#footnote-131)

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, Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law, 1996:

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]](#footnote-132)

The most pertinent question, then, is 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. I now turn to this challenging normative discussion.

7. Towards la Relational Moral Status of the Frozen Embryo[[129]](#footnote-133)

1. General

In this normative section, the essential thrust of the entire article, I want to enlist the notion of relational contract as it applies to our issue – the status of the frozen embryo. I intend to explore how this modern and unique contract much 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. As this chapter’s title explicitly suggests, it is also greatly influenced by relational ethics, although the precise relationship between them has not been sufficiently discussed in the legal literature.[[130]](#footnote-134)

As was briefly elaborated above in Section 1,[[131]](#footnote-135) 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 or not 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: the contractual approach, which endorses the enforcement of contracts signed prior to undergoing IVF treatment; the contemporary mutual consent model, which requires the agreement of the two progenitors for any disposition of the frozen embryos; and the balancing of constitutional rights regarding procreative autonomy.[[132]](#footnote-136)

First and foremost, I want to enumerate the advantages of a disposition agreement and briefly recall the pitfalls of contractual ordering of this sensitive field. Subsequently, I will elaborate the main aspects of the relational contract and how it provides considerable assistance in resolving these drawbacks. Finally, I will turn to the most troublesome and challenging question of the article – can we use the relational contract to determine the legal status of the frozen embryo?

1. The Advantages of a Disposition Agreement

Elsewhere,[[133]](#footnote-137) I have extensively argued that in the field of IVF in general, and especially with respect to the issue of disposition agreements regarding frozen embryos, intentional parenthood, or DLPBA as I have coined it, has 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 in the event that 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 on. 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 particular desires, agreements, and intentions of the specific parties.[[134]](#footnote-138)

As mentioned above in Section 1,[[135]](#footnote-139) 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/changed circumstances. These two contractual drawbacks can totally deprive contractual ordering of any of its advantages and render the whole of the contract void, or at least dramatically impair its enforceability. I turn now to exploring the relational contract and its main aspects, which may assist us enormously in resolving these contractual problems.

1. 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-world situations that arise.[[136]](#footnote-140) 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 eventually applied during the contract’s performance.[[137]](#footnote-141)

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]](#footnote-142) In contrast, the relational contract emphasizes the relational dimension of the contracting process, which is characterized by cooperation, trust, flexibility and even altruism.[[139]](#footnote-143)

The relational contract is designed to promote other values that are central to our flourishing as human beings: mutuality, relationships, and interdependency. We should not treat the other party as merely a source of potential profit, but rather as a vulnerable person with whom we should contract fairly. We 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 hardship either may encounter.[[140]](#footnote-144)

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]](#footnote-145) This pertains less to discrete short-term 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 solidary behavior of the two sides. This means that the agreement is dynamic and should not be inspected solely at the moment 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 very difficult to speak today about one singular relational contract theory, since one can find a variety of theories developed by scholars in the research literature.[[142]](#footnote-146) 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, we should treat contracts in a more communal and public manner.[[143]](#footnote-147) Scholars disagree as to whether the relational contract deserves special regulation in addition to the classical and modern law models,[[144]](#footnote-148) or whether it fits into the latter model.[[145]](#footnote-149) Scholars also disagree on how this sort of contract should be operatively implemented.[[146]](#footnote-150) In spite of 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 it will gain greater influence.[[147]](#footnote-151) Already, today, many practical implementations of this theory can be found in various legal relationships, specifically in the fields of insurance, employment, arbitration,[[148]](#footnote-152) and biotechnology.[[149]](#footnote-153)

In my opinion, 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 strong 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 of the 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]](#footnote-154)

This innovative conception 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 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 very 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 very 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 real 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]](#footnote-155) 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 his or her contractual obligations, but I contend that this option is crucial and applicable even after the pregnancy begins or the child is born.

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, and/or 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.

1. Relational Ethics, Relational Contract and Relational Status

In recent legal literature, one increasingly can also find a conceptualization of the spousal relationship as a relational contract.[[152]](#footnote-157) It is worth noting that in his early writings, Macneil conceptualized the marriage contract as a relational contract.[[153]](#footnote-158) But, in stark contrast to the prevalence of this implementation in the spousal relationship, it is sorely lacking in the parent-child relationship. I have explored this possibility in several of my previous articles and a forthcoming book.[[154]](#footnote-159) Now, I would like to add another layer to the discussion of the nexus of this context and relational ethics. 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]](#footnote-160) This is a lifetime commitment and endeavor for the couple, the two progenitors, which has been illustrated by the well-known observation that [“It takes a village to raise a child](https://muse.jhu.edu/article/230449/summary),” as some scholars have put it.[[156]](#footnote-161) As has been further elaborated,

Our parenting is inherently and deeply co-operative with the caring (whether or not 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]](#footnote-162)

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 parentage is found in the relationship between every two individuals that have agreed to mutually raise a child, even if they are not officially married.[[158]](#footnote-163) 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]](#footnote-164) The obvious flip 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, 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]](#footnote-165)

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]](#footnote-166) These relational features were extensively explored in Section 3 in the pregnancy/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]](#footnote-167) and obligation[[163]](#footnote-168) have become central in the past decades also in the context of the parent-child relationship. As has been argued,

Parenthood is a good example for a human relationship that cannot be adequately grasped by resorting to rights or even duties. It is a life-long responsibility on the basis of 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 would miss the essential point.[[164]](#footnote-169)

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, we should respect any mutual agreement between them. If both are interested in bringing it 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/or 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 has claimed about its relational ontology, where the ethical self is a consequence of the relationship of caring with others, as has been concluded also in the bioethical-sociological literature, discussed above in Section 5.[[165]](#footnote-170) 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/foetus because it is not a fully individualized human being. The close bodily relationship of the woman to the foetus during pregnancy requires employing an ethics of care and responsibility.[[166]](#footnote-171)

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 it 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/moral status is not that of a person and it can be destroyed. Put differently, there is no point in bringing it into existence when both of its potential intending parents are not interested in such non-caring relationships.[[167]](#footnote-172)

Therefore, it is my opinion that such a disposition agreement should be mandatory and should not be left to the discretion of the progenitors whether or not to enter into it.[[168]](#footnote-173) 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 in light of relational ethics. The intrinsic contractual pitfalls of a change of heart and/or changed circumstances may find their appropriate answers in relational contract theory, which is also a byproduct, to some degree, of relational ethics, as was extensively discussed in the previous subchapter.

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 special circumstances, it is my opinion that 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]](#footnote-174) the ontological status of which is akin to that of a person in light of relational ethics. Since bodily integrity and social relationship are deeply realized in legal parenthood, the latter should be considered in any ethical analysis regarding the moral status of frozen embryos.[[170]](#footnote-175) This individual invests in his or her 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]](#footnote-176) 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]](#footnote-177)

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 isn’t interested in establishing present relations with the frozen embryo and, as a result, there definitely won’t 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]](#footnote-178) 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 it 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]](#footnote-179) In light of the human rights discourse, I argued that the party who is opposed to continuing the fertilization would have to accept the status of non-parenthood, without any parental rights and/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 him/her to become the legal parent of the resulting child with all the consequent parental ramifications.[[175]](#footnote-180) As I concluded elsewhere,

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]](#footnote-181)

To summarize, my 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 and/or for research, or destroyed. In any where there is no such mutual agreement or when the contract didn’t explicitly regulate such a disagreement or is unenforceable, we should prefer the party who awards them status akin to a person by allocating parental status solely to him/her. The recalcitrant progenitor, who is not interested in using them and becoming a parent, should not be determined as its legal parent.[[177]](#footnote-182)

Conclusion

The already existing hundreds of thousands of surplus frozen embryos coupled with the skyrocketing rate of divorce raise a myriad of moral, legal, 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 it is valid and enforceable. In this article, I 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, I have claimed that in any case of an explicit disposition agreement, the contract should govern. In any case of change of heart and/or changed circumstances in the de facto performance of the contract by both sides, the relational contract, which is 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 special circumstances, I have concluded 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.

1. Holly Honderich, *Baby Girl Born From Record-Setting 27-Year-Old Embryo*, BBC News 02.12.20, [Baby girl born from record-setting 27-year-old embryo - BBC News](https://www.bbc.com/news/world-us-canada-55164607). [↑](#footnote-ref-4)
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). [↑](#footnote-ref-5)
3. For the urgent need to recognize the unique relationship between genetic siblings, see recently Ayelet Blecher-Prigat, *Echoes of Nonmarriage*, 51 Ariz. St. L.J. 1213, 1245-6 (2019); Ruth Zafran, *Reconceiving Legal Siblinghood*, 71 Hastings L.J. 749 (2019-2020); Laura T. Kessler, *Family Law by the Numbers: The Story That Casebooks Tell*, 62 Ariz. L. Rev. 903, 917-8 (2020). [↑](#footnote-ref-6)
4. *See* respectively figures from the 2018 Assisted Reproductive Technology National Summary Report, Ctrs. For Disease Control and Prevention (2018), <https://www.cdc.gov/art/artdata/docs/excel/FINAL-2018-clinic-table-dataset.xlsx>; Harman, *supra* note 5, at 518. For the updated evaluation, at the end of February 2020, that there are even an estimated 800,000 frozen embryos, see WBMH Group, [*Frozen Embryos: The Law at a Crossroads*](https://www.wbmhlaw.com/2020/02/25/frozen-embryos-the-law-at-a-crossroads/), [Frozen Embryos: The Law at a Crossroads - WBMH Law](https://www.wbmhlaw.com/2020/02/25/frozen-embryos-the-law-at-a-crossroads/). [↑](#footnote-ref-7)
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 (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 (2010); [Glenn Cohen](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Cohen%2C+I+Glenn), *Artificial Wombs and Abortion Rights*, 47 Hastings Ctr. Rep. (2017), https://onlinelibrary.wiley.com/doi/full/10.1002/hast.730 [https://perma.cc/8KTE-9GR9]. [↑](#footnote-ref-8)
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 S.M.U. L. Rev. 131, 135-7 (1993). [↑](#footnote-ref-9)
7. Terrell v. Torres, No. CV-19-0106-PR, 2020 Ariz. LEXIS 25, (Jan. 23, 2020). 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 (2020). [↑](#footnote-ref-10)
8. *See* Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, 33 Wm. Mitchell L. Rev. 767 (2007) passim; [Lee R. Collins](https://www.sciencedirect.com/science/article/abs/pii/S147264831200209X#!) & [Susan L. Crockin](https://www.sciencedirect.com/science/article/abs/pii/S147264831200209X#!), *Fighting ‘Personhood’ Initiatives in the United States*, 24 [Reprod. BioMed. Online](https://www.sciencedirect.com/science/journal/14726483) 689 (2012); J. F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 Am. J. L. & Med. 573 (2013). [↑](#footnote-ref-11)
9. *See*, for example, in the context of the moral status of the fetus and the frozen embryo the following articles: Catriona Mackenzie, *Abortion and Embodiment*, 70(2) Australian Journal of Philosophy 136, 143 (1992); Oleg Artemenko, Inspirations from Potential: Does Human Embryo in vitro Possess Full Moral Status? 32 (Master’s Thesis, Centre for Applied Ethics, Linköpings universitet, 2010), [Microsoft Word - Master Thesis revised 2.doc (diva-portal.org)](https://www.diva-portal.org/smash/get/diva2%3A326440/FULLTEXT01.pdf); Kate Greasley, *[Abortion, Feminism, and 'Traditional' Moral Philosophy](https://www.google.com/books?hl=iw&lr=&id=NTG-DwAAQBAJ&oi=fnd&pg=PA107&dq=%22relational+moral+status%22++&ots=VKjbBSFZpu&sig=9zcoYhCzpbWzVA5tfeIXjFoQ8JY)*[, in](https://www.google.com/books?hl=iw&lr=&id=NTG-DwAAQBAJ&oi=fnd&pg=PA107&dq=%22relational+moral+status%22++&ots=VKjbBSFZpu&sig=9zcoYhCzpbWzVA5tfeIXjFoQ8JY) Philosophical Foundations of Medical Law 120 (Thana C. de Campos et al. eds., 2019). [↑](#footnote-ref-12)
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 (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 […]”). [↑](#footnote-ref-13)
11. *See* in the meantime Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 Wake Forest L. Rev. 159 (2005); ibid, *Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 Hastings L.J. 369 (2007). *See also* Steiger, *supra* note 8, 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.”). [↑](#footnote-ref-14)
12. *See* Jean Chagnon, *Relational Ethics - A Framework for Ethical Practice in Rural Settings*, [Relational Ethics - A Framework for Ethical Practice in Rural Settings (mnpsych.org)](https://www.mnpsych.org/relational-ethics) and the various references that I will enumerate in the next chapter of the article. [↑](#footnote-ref-15)
13. *See* the following possible caveat – “While abortion doctrine is a useful analogy, abortion and pre-embryo disposition are not the same thing,” Wheatleym *supra* note 10, at 324. [↑](#footnote-ref-16)
14. For the mutual influence of these two issues, see, e.g., Hyun Jee Son, *Artificial Wombs, Frozen Embryos, and Abortion: Reconciling Viability's Doctrinal Ambiguity*, 14 UCLA Women's L.J. 213 (2005); Alyssa Yoshida, *The Modern Legal Status of Frozen Embryos*, 68 Hastings L.J. 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.”). [↑](#footnote-ref-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 (2003); Karin A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, 1 U. St. Thomas J.L. & Pub. Pol'y 100, 101-19 (2007). [↑](#footnote-ref-18)
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 Law and Bioethics 175, 179 (2010) (Heb.); Sheryl de Lacey, *Parent identity and ‘virtual’ children: Why patients discard rather than donate unused embryos*, 20(6) Human Reproduction 1661 (2005); Abigail Maguire, *An Examination into the Embryo Disposal Practices of Human Fertilization and Embryology Authority Licenced Fertility Centers in the United Kingdom*, 30(1) Cambridge Q. Healthcare Ethics 161, 168 (2021). [↑](#footnote-ref-19)
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 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."). [↑](#footnote-ref-20)
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 (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, 596-7 (2000); [Gerard Letterie](https://www.sciencedirect.com/science/article/pii/S2666334120300398%22%20%5Cl%20%22%21) & [Dov Fox](https://www.sciencedirect.com/science/article/pii/S2666334120300398#!), *Lawsuit frequency and claims basis over lost, damaged, and destroyed frozen embryos over a 10-year period*, 1(2) [F&S Reports](https://www.sciencedirect.com/science/journal/26663341) 78 (2020). [↑](#footnote-ref-21)
19. For this option, 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 (2008); Redman & Fielder Redman, *supra* note 21; [Bruce P. Blackshaw](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Blackshaw%2C+Bruce+P) & [Nicholas Colgrove](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Colgrove%2C+Nicholas), *Frozen embryos and the obligation to adopt*, 34(8) Bioethics 857 (2020). *See also* the various references enumerated at *infra* note 116. A recent survey conducted in Australia found that most women who have frozen their eggs won’t be using them, which make them available for adoption, see Alex Polyakov & Genia Rozen, *Social egg freezing and donation: waste not, want not*, Journal of Medical Ethics (2021), [Social egg freezing and donation: waste not, want not | Journal of Medical Ethics (bmj.com)](https://jme.bmj.com/content/early/2021/01/04/medethics-2020-106607) (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%). [↑](#footnote-ref-22)
20. *See*, among others, [Peter J Burton](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Burton%2C+Peter+J) & [Katherine Sanders](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Sanders%2C+Katherine), *Patient attitudes to donation of embryos for research in Western Australia*, 180(11) Medical journal of Australia 559 (2004), <https://onlinelibrary.wiley.com/toc/13265377/2004/180/11>; Catarina Samorinha & Susana Silva, *A Patient-Centred Approach to Embryo Donation for Research*, 5 Isr J Health Policy Res 44 (2016); Catarina [Samorinha](https://scholar.google.co.il/citations?user=nyZTwf4AAAAJ&hl=iw&oi=sra) et al., [*Factors Associated With the Donation and Non-Donation of Embryos for Research:*](https://academic.oup.com/humupd/article-abstract/20/5/641/2952663)[*A Systematic Review*](https://academic.oup.com/humupd/article-abstract/20/5/641/2952663), 20(5) Human Reproduction Update 641 (2014). [↑](#footnote-ref-23)
21. *See, e.g.*, Daniel I. Steinberg, *Divergent Conceptions: Procreational Rights and Disputes over the Fate of Frozen Embryos*, 7 B.U. Pub. Int. L.J. 315 (1998); Jennifer M. Stolier, *Disputing Frozen Embryos: Using International Perspectives to Formulate Uniform U.S. Policy*, 9 Tul. J. Int'l & Comp. L. 459 (2001); Shelly R. Petralia, *Resolving Disputes over Excess Frozen Embryos through the Confines of Property and Contract Law*, 17 J.L. & Health 103 (2002). [↑](#footnote-ref-24)
22. For this notion, see Paula Walter, *His, Hers, or Theirs - Custody, Control, and Contracts: Allocating Decisional Authority over Frozen Embryos*, 29 Seton Hall L. Rev. 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 (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 (2019). [↑](#footnote-ref-25)
23. *See*, for example, Mark C. Haut, *Divorce and the Disposition of Frozen Embryos*, 28 Hofstra L. Rev. 493, 510-6 (1999); I. Glenn Cohen, *The Right Not to be a Genetic Parent?* 81 S. Cal. L. Rev. 1115 (2008); ibid, *The Constitution and the Rights Not to Procreate*, 60 Stan. L. Rev. 1135 (2008). [↑](#footnote-ref-26)
24. *See* the following seminal articles: John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, [51 Ohio St. L.J. 407 (1990);](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=268&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b51%20Ohio%20St.%20L.J.%20407%2cat%20411%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=9abda29f001e0d44d49edb0853f9d754) John A. Robertson, *Precommitment Stategies for Disposition of Frozen Embryos*, 50 Emory L.J. 989 (2001); Lambert, *supra* note 22 , at 542-5, 558-63. [↑](#footnote-ref-27)
25. *See* Haut, *supra* note 26, at 519-22; Jennifer Marigliano 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, 73-4, 99, 114 (1999).](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=295&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b84%20Minn.%20L.%20Rev.%2055%2cat%2056%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=9c8961e59ce13dcdc7dd78667b103cbd) [↑](#footnote-ref-28)
26. For this substantial contractual challenge, see Coleman, ibid, at 90-5, 110-11; Robertson, Prior, *supra* note 27 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 (2002)](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=173&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b12%20Duke%20J.%20Comp.%20%26%20Int%27l%20L.%2075%2cat%2076%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=c5cc931bbb13901961c42d27ea6f231a). [↑](#footnote-ref-29)
27. For the supporters, see, for example, Mario J. Trespalacios, *Frozen Embryos: Towards an Equitable Solution*, 46 U. Miami L. Rev. 803 (1992); Melanie M. Lupsa, *Avoiding forced parenthood: a practical legal framework to resolve disputes involving the disposition of embryos*. 49 Seton Hall L. Rev. 951 (2019), and the articles of Robertson enumerated in *supra* note 27. [↑](#footnote-ref-30)
28. For some of the bitterest opponents, see Lambert, *supra* note 22; Donna M. Sheinbach, *Examining Disputes over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles*, 48 Cath. U. L. Rev. 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 (2020), <https://digitalcommons.law.wne.edu/lawreview/vol42/iss2/6>. [↑](#footnote-ref-31)
29. For the close connection between the moral status and the appropriateness of the contractual usage, see Davidoff, *supra* note 9, 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 24, at 103 (“The dominion of property law suggests that the enforcement of contracts is eminent to communal survival.”); Harman, *supra* note 5, 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.”). [↑](#footnote-ref-32)
30. La. Rev. Stat. §§ 9:121-33 (1999), discussed by Berg, Elephants, *supra* note 14, at 369, 392; Berg, Owning, *supra* note 14, at 161; Thomas, *supra* note 21, at 286-7. For a discussion of this state’s stringent approach towards abortion, see recently Yehezkel Margalit & Pnina Lifshitz-Aviram, *Towards A New Archimedean Point of Maternal vs. Fetal Rights*? 81 Louisiana Law Review 447 (2021). [↑](#footnote-ref-33)
31. N.M. Stat. Ann. § 24-9A-1(D) (2006), discussed by Harman, *supra* note 5, at 526-8; Shirley Darby Howell, *The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation*, 14 Depaul J. Health Care L. 407, 412-4 (2013). [↑](#footnote-ref-34)
32. For an overview of this dominant attitude, see Berg, Owning, *supra* note 14; Tracy J. Frazier, *Of Property and Procreation: Oregon's Place in the National Debate over Frozen Embryo Disputes*, 88 Or. L. Rev. 931 (2009); Herrera, *supra* note 10, at 125-8. [↑](#footnote-ref-35)
33. For such a comprise category,see Thomas, *supra* note 21, at 288-95; Harman, *supra* note 5, at 535-41; Provencher, *supra* note 31, at 298. [↑](#footnote-ref-36)
34. *See* the following landmark rulings: [York v. Jones, 717 F. Supp. 421, 425-7 (E.D.Va. 1989);](https://scholar.google.com/scholar_case?case=9091694349373236181&q=Davis+v.+Davis&hl=en&as_sdt=806&scilh=0) [Kass v. Kass, 235 A.D.2d 150 (N.Y. App. Div. 1997),](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=336&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b235%20A.D.2d%20150%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=ed3813048aaf26ba5cbcad3d16f7ed73) aff'd, [696 N.E.2d 174 (1998);](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=337&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b696%20N.E.2d%20174%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=0f28930f8872c9855d60628b2090f0c8) Litowitz v. Litowitz, 102 Wash.App. 934 (Wash.App. Div. 2 2000); In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003); Roman v. Roman, 193 S.W.3d 40 (Tex.App.-Houston [1 Dist.] 2006); In re Marriage of Dahl and Angle, 194 P.3d 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 286 (Apr. 17, 2017) (balancing-interests test). [↑](#footnote-ref-37)
35. *See* Davis v. Davis, 842 S.W.2d 588 (Tenn., 1992); Jeter v. Mayo Clinic Arizona, 121 P.3d 1256 (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 10 (“interim category that entitles them to special respect because of their potential for human life.”). Provencher, *supra* note 31, at 298, mentions also the following verdict and quotation – Bilbao v. Goodwin, 65 Conn. L. Rptr. 357, 2017 WL 5642280 at \*2 (Conn. Super. Ct. 2017) (“The embryos are not purely property, nor are they persons, but they are deserving of respect.”) – but unfortunately, I could not find this statement. [↑](#footnote-ref-38)
36. *See* Davis v. Davis, *supra* note 36, at 593. *See also* the following verdicts, where I couldn't find any explicit determination regarding the status of the frozen embryos: [A.Z. v. B.Z., 431 Mass. 150 (Mass. 2000)](https://www.bloomberglaw.com/product/blaw/document/X3JNC7?utm_source=casebriefs); J.B. v. M.B, 783 A.2d 707 (N.J. 2001); Szafranski v. Dunston, 34 N.E.3d 1132 (Ill App. Ct. 2015). Therefore, I disagree with the claim that “Overall, most courts treat embryos as a special category of property—one that is not truly property,” Provencher, *supra* note 31, at 298. [↑](#footnote-ref-39)
37. *See*, for example, the argument that the person/property dichotomy is illusory at Kathleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. Davis L. Rev. 193, 208-11 (1997). For the inadequacy of this dichotomy, 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) and more generally Margaret J. Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 986-8 (1982). [↑](#footnote-ref-40)
38. Berg, Owning, *supra* note 14, at 162 and ibid, at 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, Elephants, *supra* note 14, at 369, 392. [↑](#footnote-ref-41)
39. Berg, Owning, *supra* note 14, at 211-2, 217-9. The scholarly writing concerning rights is enormous, see, among others, the following seminal writings: Alan Gewirth, Human rights: Essays on Justification and Applications (1982); Theories of Rights ([Jeremy Waldron](https://philpapers.org/s/Jeremy%20Waldron) ed., 1985); Ronald Dworkin, Taking Rights Seriously (2013); [Jack Donnelly](https://scholar.google.co.il/citations?user=2X0DLYwAAAAJ&hl=iw&oi=sra), [Universal Human Rights in Theory and Practice‏](https://www.google.com/books?hl=iw&lr=&id=Y7liDwAAQBAJ&oi=fnd&pg=PR5&dq=%22Human+rights%22&ots=NTntyAtniJ&sig=sxnq9YTlDqReZdTnSdDpeQDjRJQ) (2013). [↑](#footnote-ref-42)
40. For this notion in the context of abortion, see, for example, Leonard W. Sumner, Abortion and Moral Theory 57 (1981); Kristin Luker, [Abortion and the Politics of Motherhood](https://www.google.com/books?hl=iw&lr=&id=S6IwDwAAQBAJ&oi=fnd&pg=PR9&dq=abortion&ots=KjUhOOvRzm&sig=9oA6-HNLWIKwDtP2mcCtoSZEzxM) 3 (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). [↑](#footnote-ref-43)
41. Berg, Elephants, *supra* note 14, 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, see the following seminal articles: Jenny Teichman, *The Definition of Person*, 60(232) Philosophy 175, 177-82 (1985); Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39(4) American Journal of Law & Medicine 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). [↑](#footnote-ref-44)
42. Berg, Elephants, *supra* note 14, at 371. For a further discussion of these natural/juridical persons, see Margalit & Lifshitz-Aviram, *infra* note 77, passim. [↑](#footnote-ref-45)
43. Berg, Elephants, *supra* note 14, at 400. *See also* the discussion of fetuses and embryos ibid, at 388-402. [↑](#footnote-ref-46)
44. Charles Foster & Jonathan Herring, Identify, Personhood and the Law 35 (2017). For the importance of the relational aspect to the definition of personhood, see [Harriet A. Harris](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Harriet%20A.%20Harris%20&eventCode=SE-AU), *Should we say that personhood is relational?*, 51(2) Scott J Theol 214 (1998); Kenneth J. Gergen, R[elational Being: Beyond Self and Community (2009); Jennifer Nedelsky, [Law's relations: A relational theory of self, autonomy, and la](https://www.google.com/books?hl=iw&lr=&id=KGqhZX-rG18C&oi=fnd&pg=PP2&dq=%22Law%E2%80%99s+Relations%22+Nedelsky&ots=y0ERh_Gl8w&sig=l9vzqnmgGp_7XUEChXokR4vTpks)w (2011).](https://www.google.com/books?hl=iw&lr=&id=SweMLEe6TpgC&oi=fnd&pg=PP1&dq=%22Relational+being%22&ots=_oDx4L5kZn&sig=Tx1pkfOr-lMBPn2KodfwrIu26VI) [↑](#footnote-ref-47)
45. Jonathan Herring, *Relational Personhood*, 1 Keele Law Journal 24 (2020). For additional articles regarding relational personhood, see Annette Baier, *Cartesian Persons*, in Postures of the Mind: Essays on Mind and Morals74(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 Medical Morality 296 (2010); Chris Fowler, *Relational Personhood Revisited*, 26(3) [Cambridge Archaeological Journal](https://search.proquest.com/pubidlinkhandler/sng/pubtitle/Cambridge%2BArchaeological%2BJournal/%24N/13203/OpenView/1799940216/%24B/3F07F20B2CAD4783PQ/1;jsessionid=C6350709BDC257BE9907F7AC4D3CFBF8.i-0c9f0e77fe44e3d0b) 397 (2016). [↑](#footnote-ref-48)
46. *See* Carol Gilligan, i[n a different voice: Psychological theory and women's development‏](https://www.google.com/books?hl=iw&lr=&id=XItMnL7ho2gC&oi=fnd&pg=PR9&dq=%22In+a+Different+Voice%22&ots=6WeBRKKm-0&sig=9oyagWFzxcuuwnTDY42wDwGLZhE) (1993). *See also* Making connections: The relational worlds of adolescent girls at Emma Willard School (Carol Gilligan et al. eds., 1990); Carol Gilligan, *Moral Orientation and Moral Development*, in The Feminist Philosophy Reader 467(Alison Bailey & Chris Cuomo eds., 2008). For the consequent variants of Gilligan’s work, including Noddings’, see[*Feminist Ethics*](https://plato.stanford.edu/search/r?entry=/entries/feminism-ethics/&page=1&total_hits=1377&pagesize=10&archive=None&rank=0&query=relational%20ethics), [Stanford Encyclopedia of Philosophy](https://plato.stanford.edu/index.html) (2019), [Feminist Ethics (Stanford Encyclopedia of Philosophy)](https://plato.stanford.edu/entries/feminism-ethics/). [↑](#footnote-ref-49)
47. *See*, for example, Carole Pateman, The Sexual Contract (1988); Martha Albertson Fineman, The Autonomy Myth: A Theory of Dependency (2004). [↑](#footnote-ref-50)
48. *See, e.g.*, [Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Sel](https://www.google.com/books?hl=iw&lr=&id=-2i02mZNwCMC&oi=fnd&pg=IA1&dq=%22Relational+autonomy%22&ots=uKBBbnuNXe&sig=6S377K64Iknap-61u0UkKZ48FDs)f (Catriona Mackenzie‏ & Natalie Stoljar eds., 2000); John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117(1/2) Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition 143 (2004); [Andrea C. Westlund](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=WESTLUND%2C+ANDREA+C), *Rethinking Relational Autonomy*, 24(4) Hypatia 26 (2009). [↑](#footnote-ref-51)
49. The academic literature regarding this autonomy and its critique is enormous, so I will mention only the following landmark researches: Isaiah Berlin, F[our essays on liberty‏](https://philpapers.org/rec/BERFEO) 131 (1969); Marilyn Friedman, A[utonomy, gender, politics‏](https://www.google.com/books?hl=iw&lr=&id=nm49z8LIqDcC&oi=fnd&pg=PR13&dq=%22Marilyn+Friedman%22+2003&ots=jeXYcijqIG&sig=A1gjYDKcmceScuzK60Y0gM4dOyg) (2003); John Christman, *A*[*utonomy* *in moral and political philosophy*, Stanford encyclopedia of philosophy (2008), [Autonomy in Moral and Political Philosophy (Stanford Encyclopedia of Philosophy)](https://plato.stanford.edu/entries/autonomy-moral/).](https://stanford.library.sydney.edu.au/archives/spr2008/entries/autonomy-moral/) [↑](#footnote-ref-52)
50. *See* especially Daniel Bell, C[ommunitarianism and Its Critics (1993);](https://philpapers.org/rec/BELCAI) 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 (2001). [↑](#footnote-ref-53)
51. *See, e.g.*, Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 Yale J.L. & Feminism 7 (1989); Charles Taylor, T[he ethics of authenticity‏](https://www.google.com/books?hl=iw&lr=&id=f11Q-RNvmSEC&oi=fnd&pg=PA1&dq=%22Charles+Taylor%22+Authenticity&ots=e76X0Y391F&sig=FsdRQWC21oeezV1bE3eceE81Iow) (1992); [Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Sel](https://www.google.com/books?hl=iw&lr=&id=-2i02mZNwCMC&oi=fnd&pg=IA1&dq=%22Relational+autonomy%22&ots=uKBBbnuNXe&sig=6S377K64Iknap-61u0UkKZ48FDs)f 236 (Catriona Mackenzie‏ & Natalie Stoljar eds., 2000). [↑](#footnote-ref-54)
52. *See*, for example, 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 (second edition, updated, 2013) and more extensively Nel Noddings, The Maternal Factor: Two Paths to Morality 111-2, 198, 242 (2010). [↑](#footnote-ref-56)
53. *See* Marilyn Friedman, *Autonomy, social disruption and women*, in [Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Sel](https://www.google.com/books?hl=iw&lr=&id=-2i02mZNwCMC&oi=fnd&pg=IA1&dq=%22Relational+autonomy%22&ots=uKBBbnuNXe&sig=6S377K64Iknap-61u0UkKZ48FDs)f 35, 40-1 (Catriona Mackenzie‏ & Natalie Stoljar eds., 2000); Virginia Held, [The Ethics of Care: Personal, Political, And Global‏](https://www.google.com/books?hl=iw&lr=&id=zd0CboPGFNUC&oi=fnd&pg=PR9&dq=%22+The+Ethics+of+Care+%22+held&ots=DjnGbXxIio&sig=eUOGMHBu_QeSBHcNin7_XPQBKU4) 46 (2006); Peter Ikechukwu Osuji, *Relational autonomy in informed consent (RAIC) as an ethics of care approach to the concept of informed consent*, 21(6) [Medicine Health Care and Philosophy](https://www.researchgate.net/journal/Medicine-Health-Care-and-Philosophy-1572-8633?_sg=xzP2hI2vI9bHD9PWZBf7ySCdIkQoZGZYwlinju4kbxDGGEEHPU9ouF3kJEs012JImsXu68Ci73bORJlZ7h9mF3XkoZAhhdM.vgkghFdizPiP8kIKIh_wsftQm2ShlJrYjdjed9jdIXcA-Fs1CRiqzIsHQXrJmCj3isEXGXOOoxhlUtcVj8OKwA) 101, 107-8 (2018). [↑](#footnote-ref-57)
54. For the seminal researches regarding this nexus, 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 Sel](https://www.google.com/books?hl=iw&lr=&id=-2i02mZNwCMC&oi=fnd&pg=IA1&dq=%22Relational+autonomy%22&ots=uKBBbnuNXe&sig=6S377K64Iknap-61u0UkKZ48FDs)f 259 (Catriona Mackenzie‏ & Natalie Stoljar eds., 2000); Anita Ho, *Relational Autonomy or Undue Pressure? Family's Role in Medical Decision‐Making*, 22 Scandinavian Journal of Caring Sciences 128 (2008); Roy Gilbar, *Family Involvement, Independence, and Patient Autonomy in Practice*, 19(2) Medical Law Review 192 (2011). [↑](#footnote-ref-58)
55. *See* the following seminal bioethics articles: Anne Donchin, [*Autonomy and interdependence: quandaries in genetic decision-makin*](https://philarchive.org/rec/DONAAI)*g*, in [Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Sel](https://www.google.com/books?hl=iw&lr=&id=-2i02mZNwCMC&oi=fnd&pg=IA1&dq=%22Relational+autonomy%22&ots=uKBBbnuNXe&sig=6S377K64Iknap-61u0UkKZ48FDs)f 236 (Catriona Mackenzie‏ & Natalie Stoljar eds., 2000); Leigh Turner, *Bioethics in a Multicultural World: Medicine and Morality in Pluralistic Settings*, 11 [Health Care Analysis](https://link.springer.com/journal/10728) 99 (2003); James Lindemann Nelson & Hilde Lindemann Nelson, [The patient in the family: An ethics of medicine and familie](https://www.google.com/books?hl=iw&lr=&id=q-WhAwAAQBAJ&oi=fnd&pg=PP1&dq=Nelson+Lindemann+James+%26+Nelson+Lindemann+Hilde&ots=751-VNiL7N&sig=VG_xKL6PxrV5euMJI-frXc7eUa0)s 114-7 (2014). [↑](#footnote-ref-59)
56. Grace Clement, Care, autonomy, and justice: Feminism and the ethic of care 2 (1996); Nirmala Erevelles, *The “Other” Side of the Dialectic: Toward a Materialist Ethic of Care*, in Disability and Difference in Global Contexts: Enabling a Transformative Body Politic 173, 175-7 (2011) and more generally [Lawrence J. Walker, *Sex differences in moral reasoning*, in](https://www.google.com/books?hl=iw&lr=&id=25vKAgAAQBAJ&oi=fnd&pg=PA333&dq=%22Sex+differences+in+moral+reasoning.%22+&ots=NT0w3wReZt&sig=48a6UNqsNO2V02V2pH8BELdkRUw) Handbook of Moral Behavior and Development: Volume 2: Research 333 ([William M. Kurtines](https://www.routledge.com/search?author=William%20M.%20Kurtines) et al. eds., 2014). [↑](#footnote-ref-60)
57. Nel Noddings, *An Ethic of Caring and Its Implications for Instructional Arrangements*, 96(2) American Journal of Education 215, 219-20 (1988), discussed by 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 40-1 (2009). [↑](#footnote-ref-61)
58. Compare Nel Noddings, Caring: A Feminine Approach to Ethics and Moral Education (1984) with Noddings, Caring, *supra* note 55. [↑](#footnote-ref-62)
59. Noddings, Caring, *supra* note 55. *See also* Nel Noddings, *A response*, 5(1) Hypatia: A Journal of Feminist Philosophy 120 (1990). For the centrality of her research, see, among others, Sarah L. Hoagland, *Review: Some Concerns about Nel Noddings' ‘Caring’*, 5(1) Hypatia 109 (1990); Rosemarie Tong, *Nel Noddings's relational ethics*, in Feminine and Feminist Ethics 108 (1993); Kathleen O'Toole, *Noddings: To know what matters to you, observe your actions*, Stanford Online Report (1998), [What matters to Nel Noddings and why: 2/4/98 (stanford.edu)](https://news.stanford.edu/news/1998/february4/noddings.html). [↑](#footnote-ref-63)
60. Noddings, Caring, *supra* note 55, at 2. For this branch of the ethics of care, see the following seminal articles: [Helga Kuhse](https://ezproxy.ono.ac.il:2161/action/doBasicSearch?si=1&Query=au%3A%22Helga+KUHSE%22), [*Against The Stream : Why Nurses Should Say “No” To A Female Ethics Of Care*, 49(193) Revue internationals de Philosophy 285, 301 (1995);](https://ezproxy.ono.ac.il:2161/stable/23954797?Search=yes&resultItemClick=true&searchText=%22Relational+Ethics+of+Care%22&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3D%2522Relational%2BEthics%2Bof%2BCare%2522&ab_segments=0%2Fbasic_search%2Fcontrol&refreqid=search%3A106a6ba1d5862323fd2094503422fffd) Fiona Robinson, *Globalizing Care: Ethics, Feminist Theory, and International Relations*, 22(1) Alternatives: Global, Local, Political 113, 118, 130 (1997); [Carolyn Ellis](https://scholar.google.co.il/citations?user=ZTuBij4AAAAJ&hl=iw&oi=sra), *Interviewing and Storytelling From a Relational Ethics of Care*, in The Routledge International Handbook on Narrative and Life History 431 (Ivor Goodson et al. eds., 2016). [↑](#footnote-ref-64)
61. *See*, for example, [Sara T. Fry](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=FRY%2C+SARA+T), *The Role of Caring in a Theory of Nursing Ethics*, 4(2) Hypatia 87, 93-8 (1989); Randy Spreen Parker, *Nurses' stories: The search for a relational ethics of care*, 13(1) Advances in Nursing Science 31 (1990);  John Duffy‏, Provocations of Virtue: Rhetoric, Ethics, and the Teaching of Writing (2019) passim; [Per Nortvedt](https://journals.sagepub.com/action/doSearch?target=default&ContribAuthorStored=Nortvedt%2C+Per) et al., *The ethics of care: Role obligations and moderate partiality in health care*, [18(2)](https://journals.sagepub.com/toc/nej/18/2) [Nursing Ethics](https://journals.sagepub.com/home/nej) 192 (2011). [↑](#footnote-ref-65)
62. Carolyn Ellis, *Manifesting Compassionate* *Autoethnographic Research: Focusing on Others*, 10(1) International Review of Qualitative Research 54 (2017); Arthur P. Bochner, *Heart of the Matter A Mini-Manifesto for Autoethnography*, 10(1) International Review of Qualitative Research 67, 77 (2017). [↑](#footnote-ref-66)
63. Karl E. Peters et al., [*Reflections of a Naturalistic-Evolutionary-Practical Theologian in Conversation with Gallagher and Pangerl*](https://ezproxy.ono.ac.il:2161/stable/27944355?Search=yes&resultItemClick=true&searchText=%22relational%20ethics%20of%20care%22&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3D%2522relational%2Bethics%2Bof%2Bcare%2522&ab_segments=0%2Fbasic_SYC-5187_SYC-5188%2Ftest&refreqid=fastly-default%3A1cfb6bc778784930d9d773e64b0309cd), 26(3)American Journal of Theology & Philosophy 224, 234 (2005); Anna F. Bialek, Vulnerability and Its Power: Recognition, Response, and the Problem of Valorization 28 (dissertation, Department of Religious Studies, Brown University, 2016), [Vulnerability and Its Power: Recognition, Response, and the Problem of Valorization (brown.edu)](https://repository.library.brown.edu/studio/item/bdr%3A674126/PDF/). [↑](#footnote-ref-67)
64. *See* respectively Mel Gray, *Moral Sources and Emergent Ethical Theories in* *Social Work*, 40(6) The British Journal of Social Work 1794, 1806 (2010); Sarah Wright et al., *Working with and learning from Country: decentring 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, 2012. 208 pp. E55 (hbk). ISBN 9781137016379*, 33 Critical Soc. Pol'y 575, 584 (2013); Daniel Kreiss, *An Ethics of Care for Infrastructural Repair: Creating and Maintaining Democratic Capabilities*, [Kreiss\_EthicsCareandRepair (wordpress.com)](https://danielkreiss.files.wordpress.com/2010/05/kreiss_ethicscareandrepair1.pdf); [Vera Caine](https://journals.sagepub.com/action/doSearch?target=default&ContribAuthorStored=Caine%2C+Vera) et al., *The necessity of a relational ethics alongside Noddings’ ethics of care in narrative inquiry*, 20(3) [Qualitative Research](https://journals.sagepub.com/home/qrj) 265 (2020), [The necessity of a relational ethics alongside Noddings’ ethics of care in narrative inquiry - Vera Caine, Simmee Chung, Pamela Steeves, D. Jean Clandinin, 2020 (sagepub.com)](https://journals.sagepub.com/doi/abs/10.1177/1468794119851336); 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) Journal of Social and Political Psychology 556 (2018); [Orit Schwarz-Franco](https://www.tandfonline.com/author/Schwarz-Franco%2C%2BOrit), *Touching the challenge: Embodied solutions enabling humanistic moral education*, 45(4) Journal of Moral Education 449 (2016); [Janneke Adema](https://pureportal.coventry.ac.uk/en/persons/janneke-adema), [*The Ethics of* *Emergent Creativity: Can We Move Beyond Writing as Human Enterprise, Commodity and Innovation?*‏](https://library.oapen.org/bitstream/handle/20.500.12657/25324/9781783746507.pdf?sequence=1#page=81), Whose Book is it Anyway? A View from Elsewhere on Publishing, Copyright and Creativity 65, 75 (Janis Jefferies & Sarah Kember eds., 2019). [↑](#footnote-ref-68)
65. *See* the following landmark articles: Diana Fritz Cates, *Caring for Girls and Women Who Are Considering Abortion: Rethinking Informed Consent*, in Medicine and the Ethics of Care 162 (Diana Fritz Cates‏ & Paul Lauritzen eds., 2001); Michael Slot, The Ethics of Care and Empathy 16 (2007); Tove Pettersen‏, Comprehending Care: Problems and Possibilities in the Ethics of Care 12, 19, 144 (2008). [↑](#footnote-ref-69)
66. For an academic discussion of the latter substantive right, see, among others, Robert F. Drinan, *The Inviolability of the Right to Be Born*, 17 W. Res. L. Rev. 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) Journal of Legal Medicine 356 (1986); [Shiva M. Singh](http://frontiersin.org/people/u/109264) et al., *Fetal Alcohol and the Right to Be Born Healthy…*, 5 Frontiers in Genetics 356 (2014). [↑](#footnote-ref-70)
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. UL Rev. 858 (1993). For the prolife movement, see[Carol](https://www.google.co.il/search?hl=iw&biw=972&bih=483&sxsrf=ACYBGNQYFQHoaGZKxP4uc52T9eNpeKOKcA:1570178103726&q=killing+for+life:+the+apocalyptic+narrative+of+pro-life+politics+carol+mason&stick=H4sIAAAAAAAAAB3KPQoCMRBA4UqwEAtri8FSkBDt9gzeQSYx2QzJZsJk3EWP40n9KR_fW293GzMae3b1Ve-pHf5lL2pdn-bjPvvBOOZsFiHVUG8LSx7woYnlvbpmKoXqCJEFCsUwgKYA2NhjeTYlDxVFUGkOwBGa8Om3QeNCX-3gUbjAhJ3rB3T3OoaLAAAA&sa=X&ved=2ahUKEwiu7OygmYLlAhXHOcAKHXdMBCsQmxMoATAPegQIDxAH) Mason, [Killing For Life: The Apocalyptic Narrative of Pro-Life Politics (2002)‏](https://www.google.com/books?hl=iw&lr=&id=UZDxyVcLKh4C&oi=fnd&pg=PP9&dq=%22pro-life%22&ots=_24XBMbPVf&sig=CCGeVgUogu-SnQzJktYUA6dL8EI); Ziad W. Munson, The Making of Pro-life Activists: How Social Movement Mobilization Works (2010); [Joona Räsänen](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=R%C3%A4s%C3%A4nen%2C+Joona), *Why pro-life arguments still are not convincing: A reply to my critics*, 32 [Bioethics](https://onlinelibrary.wiley.com/journal/14678519) 628 (2018). [↑](#footnote-ref-71)
68. Jonathan Herring, *The Termination of Pregnancy and the Criminal Law*, in Homicide in Criminal Law: A Research Companion 136, 145 (Alan Reed et al. eds., 2018). *See also* Held, *supra* note 57, at 1; Jonathan Herring, *Caring*, 159 Law & 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 34, passim and more extensively at Margalit & Lifshitz-Aviram, *infra* note 77. [↑](#footnote-ref-72)
69. *See* Herring, The Termination, ibid;Jonathan Herring, [*Ethics of Care and the Public Good of Abortion*](http://ohrh.law.ox.ac.uk/publications/jonathan-herring-ethics-of-care-and-the-public-good-of-abortion-2019-u-of-oxhrh-j-1/), 2 University of Oxford Human Rights Hub Journal 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.”). But compare with Eugenie Gatens-Robinson, [*A Defense of Women's Choice: Abortion and the Ethics of Care*](http://web.a.ebscohost.com/ehost/viewarticle/render?data=dGJyMPPp44rp2%2fdV0%2bnjisfk5Ie46bNRrqmzTK6k63nn5Kx95uXxjL6urUq3pbBIr6%2beSriqr1Kwq55Zy5zyit%2fk8Xnh6ueH7N%2fiVaunr0qurrJPsKe2PurX7H%2b72%2bw%2b4ti7iObipIzf3btZzJzfhrvGxmSvqLFKrqavPuTl8IXf6rt%2b8%2bLqjOPu8gAA&vid=19&sid=26088f55-b87a-4e1d-8c69-55a61f1992ac@sessionmgr4008), 30(3) Southern Journal of Philosophy 39 (1992). [↑](#footnote-ref-73)
70. Celia Wolfe-Devine, *Abortion and the "Feminine Voice"*, 3(3) Public Affairs Quarterly 81 (1989). *See also* Robin West, *Liberalism and Abortion*, 87 Geo. L.J. 2117 (1999); Eileen Mcdonagh, Breaking the Abortion Deadlock: From Choice to Consent (1996). [↑](#footnote-ref-74)
71. Herring, *supra* note 73, passim. In this vein, see also [Karen Smith Conway](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Conway%2C+Karen+Smith) & [Michael R. Butler](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Butler%2C+Michael+R), *State Abortion Legislation as a Public Good—Before and After Roe V. Wade*, 30(4) Economic Inquiry 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 (1992). For the close contention that abortion is a moral good, see [Katie](https://dl.uswr.ac.ir/browse?type=author&value=Watson%2C+Katie) Watson, [The Art Of Medicine Abortion as a Moral Good‏](https://dl.uswr.ac.ir/bitstream/Hannan/79962/1/2019%20Lancet%20Volume%20393%20Issue%2010177%20March%20%2826%29.pdf) (2017). [↑](#footnote-ref-75)
72. *See* Suzanne Staggenborg, *Coalition Work in the Pro-Choice Movement: Organizational and Environmental Opportunities and Obstacles*, 33 Soc. Problems 374 (1986); Suzanne Staggenborg*, The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 Am. Socio. Rev. 585 (1988); [Suzanne Staggenborg, The Pro-Choice Movement: Organization and Activism in the Abortion Conflict‏](https://www.google.com/books?hl=iw&lr=&id=087qxOKxvHoC&oi=fnd&pg=PA3&dq=abortion&ots=KGXsT1MsIh&sig=TjASj3yLJYtDCsif85Yt_8beUA4) (1991). [↑](#footnote-ref-76)
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 (1990-1991);  Ruth A. Miller‏, The Limits of Bodily Integrity: Abortion, Adultery, and Rape Legislation in Comparative Perspective (2007); Yehezkel Margalit & Pnina Lifshitz-Aviram, *Abortion and Coronavirus – Between Women's Rights Discourse and Obligations Discourse* (under evaluation)passim. [↑](#footnote-ref-77)
74. For the dominancy of this discourse also in the context of abortion, see [Rebecca J. Cook](https://scholar.google.co.il/citations?user=qE9R8iIAAAAJ&hl=iw&oi=sra) &  [Bernard M. Dickens](https://scholar.google.co.il/citations?user=mFQ3CM0AAAAJ&hl=iw&oi=sra), [*Human Rights Dynamics of Abortion Law Reform‏*](https://www.jstor.org/stable/20069652), 25 Human Rights Quarterly 1 (2003); Christina Zampas & Jaime M. Gher, [*Abortion as a Human Right—International and Regional Standards*,](https://academic.oup.com/hrlr/article-abstract/8/2/249/677800) 8(2) Human Rights Law Review 249 (2008); [Johanna B. Fine](https://www.semanticscholar.org/author/Johanna-B.-Fine/38490850) et al., [*The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*,](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473039/) 19(1) Health and Human Rights 69 (2017). [↑](#footnote-ref-78)
75. *See* more extensively my discussion in the previous chapter of this article and 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 (2013); Sarudzayi Matambanadzo, *Reconstructing Pregnancy*, 69 S.M.U. L. Rev. 187 (2016).](https://www.google.com/books?hl=iw&lr=&id=RorbBAAAQBAJ&oi=fnd&pg=PR1&dq=%22Caring+and+the+Law%22&ots=J9qJrUdQKv&sig=E7OoIXn_WsTWy9cehspWgTA9ouQ) [↑](#footnote-ref-79)
76. Herring, The Termination, *supra* note 72, at 148. *See also* Herring, [Ethics of Care](http://ohrh.law.ox.ac.uk/publications/jonathan-herring-ethics-of-care-and-the-public-good-of-abortion-2019-u-of-oxhrh-j-1/), *supra* note 73, 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.”); Herring, ibid, at 15 (“[…] it is inconceivable that the law could require a woman to go through pregnancy and birth for a foetus in order to promote a caring relationship.”) and more extensively at Foster & Herring, *supra* note 47. [↑](#footnote-ref-80)
77. *See* the statutes he enumerated in I. Glenn Cohen, [*Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*‏](https://journals.sagepub.com/doi/abs/10.1111/jlme.12198?casa_token=7CYuw7J05qAAAAAA:xsUDWRVdt0Bm9mKkan1QjNGxavjVLRn8DOcCxo_AF5fhyEVs0NI-PGObDkNt5_gskcfwyOPiPCHs), 43(1) [J Law Med Ethics](https://www.ncbi.nlm.nih.gov/pubmed/25846041) 87, 87 n.4-5 (2015). For the Hyde Amendment and the rape and incest exceptions, see Heather Boonstra & Adam Sonfield, *Rights Without Access: Revisiting Public Funding of Abortion for Poor Women*, The Guttmacher Institute 8 (2000), [Rights Without Access: Revisiting Public Funding of Abortion for Poor Women | Guttmacher Institute](https://www.guttmacher.org/gpr/2000/04/rights-without-access-revisiting-public-funding-abortion-poor-women); Stanley K. Henshaw et al., *Restrictions on Medicaid Funding for Abortions: A Literature Review*, The Guttmacher Institute (2009), [Restrictions on Medicaid Funding for Abortions: A Literature Review | Guttmacher Institute](https://www.guttmacher.org/report/restrictions-medicaid-funding-abortions-literature-review); 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. Mason U. C.R. L.J. 77 (2016). [↑](#footnote-ref-81)
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. Affairs 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). [↑](#footnote-ref-82)
79. For this latter notion, which may be interpreted at the least 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. & Human. 195 (1995); Richard Stith, *On Death and Dworkin: A Critique of His Theory of Inviolability*, 56 Md. L. Rev. 289 (1997); [Raanan Gillon](https://scholar.google.co.il/citations?user=1jaXZkwAAAAJ&hl=iw&oi=sra), [*Is There A 'New Ethics Of Abortion'?*‏](https://jme.bmj.com/content/27/suppl_2/ii5?int_source=trendmd&int_medium=trendmd&int_campaign=trendmd), 27 Journal of Medical Ethics ii5 (2001). [↑](#footnote-ref-83)
80. Cohen, *supra* note 81, at 96. For the “Hohfeldian way,” see Wesley Newcomb Hohfeld*, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913-1914). For the extent to which this genuine conception of rights has massively influenced legal thinking, see, among others, Max Radin, *A Restatement, of Hohfeld*, 51 Harv. L. Rev. 1141 (1938); Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975 (1982); Pierre Schlag, *How to Do Things with Hohfeld*, 78 Law & Contemp. Probs. 185 (2015). [↑](#footnote-ref-84)
81. *See* the following landmark articles regarding obligations: Diane Jeske, *Families, Friends, and Special Obligations*, 28 Canadian Journal of Philosophy 527 (1998); The Law of Obligations: Connections and Boundaries (Andrew Robertson ed., 2004); Sarah Clark Miller, *Need, Care and Obligation*, 57 Royal Institute of Philosophy Supplement 137 (2005). [↑](#footnote-ref-85)
82. *See, e.g.,* regarding the family law angle: Barbara D. Whitehead, The Divorce Culture: Rethinking Our Commitments to Marriage and Family (1997); Gillian Douglas, Obligation and Commitment in Family Law (2018); Helen Hall, *Obligation and Commitment in Family Law*, 180 Law & Just. - Christian L. Rev. 103 (2018). [↑](#footnote-ref-86)
83. *See* the following landmark books: Erik H. Erikson, Insight and Responsibility (1994); John Martin Fischer‏ & Mark Ravizza, Responsibility and Control: A Theory of Moral Responsibility (2000); Hannah Arendt, [Responsibility and Judgment‏](https://www.google.com/books?hl=iw&lr=&id=vp7W56sVUeUC&oi=fnd&pg=PR30&dq=responsibility&ots=z8tO6HotfV&sig=J1hJNdwl5Thsvf47QCgSdiDrRpU) (2009). [↑](#footnote-ref-87)
84. *See* Moshe Silberg’s seminal article, *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 (1984); David Novak, Covenantal Rights: A Study in Jewish Political Theory 27 (2009). [↑](#footnote-ref-88)
85. Margalit & Lifshitz-Aviram, *supra* note 77. *See also* briefly Margalit & Lifshitz-Aviram, *supra* note 72 (“[…] 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.”). [↑](#footnote-ref-89)
86. For the right not to gestate, see the articles of Cohen enumerated in *supra* note 26. *See also* Julia Dalzell, *The Impact of Artificial Womb Technology on Abortion Jurisprudence*, 25 Wm. & Mary J. Race Gender & Soc. Just. 327, 347 (2019). [↑](#footnote-ref-90)
87. For a contentious view, see Herring, Caring, *supra* note 79; Herring, [Ethics of Care](http://ohrh.law.ox.ac.uk/publications/jonathan-herring-ethics-of-care-and-the-public-good-of-abortion-2019-u-of-oxhrh-j-1/), *supra* note 73; Herring, The Termination, *supra* note 72. [↑](#footnote-ref-91)
88. *See* the ancient African notion of “*Ubuntu*,” discussed by Peter Paris, The Spirituality of African Peoples: The Search for a Common Moral Discourse (1995); Gessler Muxe Nkondo, *Ubuntu as a Public Policy in South Africa: A Conceptual Framework*, 2 International Journal of African Renaissance Studies 88 (2007); Thaddeus Metz, *An African Theory of Moral Status: A Relational Alternative to Individualism and Holism*, 15 Ethical Theory and Moral Practice 387 (2012). [↑](#footnote-ref-92)
89. *See*, for example, the following representative instance of relationalism in Asian Confucianism, discussed by Chenyang Li, *The Confucian Concept of Jen and the Feminist Ethics of Care: A Comparative Study*, 9 Hypatia 70 (1994); Ruiping Fan, Reconstructionist Confucianism: Rethinking Morality after the West (2010); Chenyang Li, The Confucian Philosophy of Harmony (2013). [↑](#footnote-ref-93)
90. *See* Wendy Austin, *Relational Ethics*, in The SAGE Encyclopedia of Qualitative Research Methods 749 (Lisa Given ed., 2008). [↑](#footnote-ref-94)
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](https://www.amazon.com/-/he/s/ref%3Ddp_byline_sr_book_1?ie=UTF8&field-author=Vangie+Bergum+and+John+Dossetor&text=Vangie+Bergum+and+John+Dossetor&sort=relevancerank&search-alias=books), Relational Ethics: The Full Meaning of Respect (2005); Wendy Austin, [*Ethics in a Time of Contagion: A Relational Perspective‏*](http://cjnr.archive.mcgill.ca/article/view/2151), 40(4) Canadian Journal of Nursing Research Archive 10 (2008). [↑](#footnote-ref-95)
92. *See* respectively Slot, *supra* note 69; Raja Halwani, *Care Ethics and Virtue Ethics*, 18 Hypatia 161 (2003); Sarah Clark Miller, The Ethics of Need: Agency, Dignity, and Obligation (2012). [↑](#footnote-ref-96)
93. *See* text accompanying *supra* n.62. [↑](#footnote-ref-97)
94. *See, e.g.*, Stephen Mumford, Dispositions (2003); Barbara Vetter‏, Potentiality: From Dispositions to Modality (2015) and more broadly Giorgio Agamben & Daniel Heller-Roazen‏, Potentialities: Collected Essays in Philosophy (1999) [↑](#footnote-ref-98)
95. Jennifer McKitrick, *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 (unpublished Dissertation, Georgetown University, 2017) and more broadly Jennifer McKitrick, [Dispositional Pluralism‏](https://www.google.com/books?hl=iw&lr=&id=aftdDwAAQBAJ&oi=fnd&pg=PT6&ots=l5XM2oI3lI&sig=2KlY6AvljQ4lWV9kwZj_V2TnkNE) (2018). [↑](#footnote-ref-99)
96. For a contentious philosophical argument, see Nicolas Delon, *Moral Status, Final Value, and Extrinsic Properties*, 114(3) Proceedings of the Aristotelian Society 371, 377 (2014) (“To conclude, then, moral status can depend on extrinsic properties on which EFV (extrinsic final value – YM) 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 – YM).”). For a further discussion of the nexus of relational ethics and the ethical disposition, see Gray, *supra* note 68. [↑](#footnote-ref-100)
97. Yael Hashiloni-Dolev & Noga Weiner, *Reproductive Technologies and the Moral Status of the Embryo: A View from Israel and Germany*, 30(7) Sociology of Health and Illness 1055, 1055 (2008); R. J. Gerber, *Abortion: Parameters for Decision*, 82(2) Ethics 137, 147 (1972); Susan Bordo, Unbearable Weight: Feminism, Western Culture, and the Body 85 (2004). [↑](#footnote-ref-101)
98. Thus, the history of the conceptualization of the fetus mainly reflects the history of the medical authority, see Luker, *supra* note 43; 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). [↑](#footnote-ref-102)
99. *See* Lawrence J. Kaplan & Rosemarie Tong, Controlling our Reproductive Destiny: A Technological and Philosophical Perspective 150-2 (1996). [↑](#footnote-ref-103)
100. For such a scientific approach, see Joseph Fletcher, [Humanhood: Essays in Biomedical Ethics](https://journals.lww.com/ajnonline/Citation/1980/04000/Humanhood__Essays_in_Biomedical_Ethics.54.aspx) 15 (1979); Sarah Franklin, *Fetal Fascinations: New Dimensions to the Medical-Scientific Construction of Fetal Personhood*, in [Off-Centre: Feminism and Cultural Studies](https://philpapers.org/rec/FRAOFA) 190 (Sarah Franklin et al. eds., 1991); Christopher Kaczor, The Edge of Life: Human Dignity and Contemporary Bioethics (2005). [↑](#footnote-ref-104)
101. *See* Hashiloni-Dolev & Weiner, *supra* note 101, at 1064. [↑](#footnote-ref-105)
102. For this notion in the bioethical-sociological literatures, see, e.g., Lynn M. Morgan, *Fetal Relationality in Feminist Philosophy: An Anthropological Critique*, 11(3) Hypatia 47 (1996); [Tanja](https://www.sciencedirect.com/science/article/abs/pii/S0277953605007033%22%20%5Cl%20%22%21) Krones et al., *What is the Preimplantation Embryo?* 63 Social Science and Medicine 1 (2006). [↑](#footnote-ref-106)
103. *See, e.g.*, Ronald Dworkin, [Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom](https://www.google.com/books?hl=iw&lr=&id=7c6Zd3XP5CcC&oi=fnd&pg=PR10&dq=abortion+%22human+rights%22+fetus&ots=XqKQO73qlh&sig=-Nuxn5Gg_vZUxuQ_pARKGBtJTck) (2011). *See also* Jacquelyn Ann K. Kegley, *Using Genetic Information: The Individual and the Community*, 15 Med. & L. 377, 377-386 (1996); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 Yale L. J. 1394 (2009). [↑](#footnote-ref-107)
104. [Tanja Krones](https://pubmed.ncbi.nlm.nih.gov/?term=Krones+T&cauthor_id=15545119) & [Gerd Richter](https://pubmed.ncbi.nlm.nih.gov/?term=Richter+G&cauthor_id=15545119), *Preimplantation Genetic Diagnosis (PGD): European Perspectives and the German Situation*, 29(5) J Med Phil 623, 635 (2004), was discussed by 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). [↑](#footnote-ref-108)
105. Wiesemann, ibid, at 122-3 (“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.”). [↑](#footnote-ref-109)
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)](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=252&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b81%20Va.%20L.%20Rev.%202377%2cat%202381%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=e6be8507b8a59710fc53f9e02476591c) and more generally [Marshall H. Klaus](https://www.amazon.com/-/he/s/ref%3Ddp_byline_sr_book_1?ie=UTF8&field-author=Marshall+H.+Klaus&text=Marshall+H.+Klaus&sort=relevancerank&search-alias=books) & [John H. Kennell](https://www.amazon.com/-/he/s/ref%3Ddp_byline_sr_book_2?ie=UTF8&field-author=John+H.+Kennell&text=John+H.+Kennell&sort=relevancerank&search-alias=books), Maternal-infant bonding: The Impact of Early Separation or Loss on Family Development (1976). Also discussed by Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective,*20 Wm. & Mary J. Women & L. 423, 435 (2014); ibid, Determining Legal Parentage – Between Family Law and Contract Law 51 (2019). [↑](#footnote-ref-110)
107. *See* Herring, [Ethics of Care](http://ohrh.law.ox.ac.uk/publications/jonathan-herring-ethics-of-care-and-the-public-good-of-abortion-2019-u-of-oxhrh-j-1/), *supra* note 73, at 21; Herring, The Termination, *supra* note 72, at 144; Jonathan Herring & P.-L. Chau, [*My Body, Your Body, Our Bodies*, 15(1)](https://academic.oup.com/medlaw/article-abstract/15/1/34/942862) Medical Law Review 34 (2007). [↑](#footnote-ref-111)
108. Iris M. Young, On Female Body Experience: “Throwing Like a Girl” and Other Essays 49 (2005). Was mentioned at Feminism and Philosophy Essential Readings in Theory, Reinterpretation, and Application 409 (Nancy Tuana & [Rosemarie Putnam Tong](https://www.routledge.com/search?author=Rosemarie%20Putnam%20Tong) eds., 1995); [Virginia Schmied](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Schmied%2C+Virginia) & [Deborah Lupton](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Lupton%2C+Deborah), [*The Externality of the Inside: Body Images of Pregnancy*](https://onlinelibrary.wiley.com/doi/abs/10.1046/j.1440-1800.2001.00088.x), 8(1) Nursing Inquiry 32, 38 (2001). [↑](#footnote-ref-112)
109. Margaret O. Little, *Abortion, Intimacy and the Duty to Gestate*, 2 Ethical Theory and Moral Practice 295, 301 (1999). *See also* Barbara Katz Rothman, [Recreating motherhood](https://www.google.com/books?hl=en&lr=&id=VfpPDQnwNdgC&oi=fnd&pg=PR7&dq=%22Barbara+Katz+Rothman%22&ots=qOfJs9mPYO&sig=0XfGsQWKrokw_P_K32SMz-Q44oE) 89 (1989); Anne Elvey*, The Material Given: Bodies, Pregnant Bodies and Earth*, 18(41) Australian Feminist Studies 199, 208 (2003). [↑](#footnote-ref-113)
110. Wiesemann, *supra* note 108. *See also* Lynn M. Morgan & Beth A. Conklin, *Babies, Bodies, and the Production of Personhood in North America and a Native Amazonian Society*, 24(4) Ethos 657 (1996). [↑](#footnote-ref-114)
111. *See*, for example, Avraham Steinberg, Encyclopedia of Jewish Medical Ethics: A Compilation of Jewish Medical Law on All Topics of Medical Interest vol. 1, 1, s.v. ‘abortion and miscarriage’ (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). [↑](#footnote-ref-115)
112. *See* the various references enumerated at *supra* note 18. [↑](#footnote-ref-116)
113. *See*, for example, Avraham Steinberg, *Jewish Perspectives*, in The Embryo Scientific Discovery and Medical Ethic 21 ([Shraga](https://www.amazon.com/-/he/s/ref%3Ddp_byline_sr_book_1?ie=UTF8&field-author=Ed.+Blazer%2C+Shraga&text=Ed.+Blazer%2C+Shraga&sort=relevancerank&search-alias=books)  Blazer & Etan Z. Zimmer eds., 2005) and more generally Daniel B Sinclair, Jewish Biomedical Law: Legal and Extra-Legal Dimensions 60-61 (2003); Barilan, *supra* note 115. [↑](#footnote-ref-117)
114. *See* his following Hebrew sources: 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 (2000); Yossi Green, Procreation in the Modern Era: Legal and Halachic Perspectives (2008). [↑](#footnote-ref-118)
115. Aharon Lichtenstein*, Abortion: A Halakhic Perspective*, in Leaves of Faith: The World of Jewish Learning vol. 2, 242, 251 (2004) [=25(4) Tradition 3, 11 (1991)], was discussed by Alan Jotkowitz, *Abortion and Maternal Need: A Response to Ronit Irshai*, 21 Nashim: A Journal of Jewish Women's Studies & Gender Issues 97, 103 (2011); [Benjamin Gesundheit](https://www.researchgate.net/scientific-contributions/Benjamin-Gesundheit-39493599?_sg%5B0%5D=dJKgfawsnW_fo3IVi7y9nPhrQPYvOBqZCNA3NvCO6mQ_ro77JhUSyxgmp0MdEn_B9sdXUQo.7WLeBrdX16ky3gYOOMudX_TMde5M2Je4dC5_5MfZO7a9jQWO8Yr_-10NUVQNiEnksZdGHTCPMiJ_sifzUASbsQ&_sg%5B1%5D=xcTjVQLnrFGCnkesmTGXqTJifxY6ccFJ6-C2n7UbA15QoxrJSAJwd6CkokDGFQ6yYPrRUOM.NKXFhIKBuHO88VYm0I1NlYFHb5KgUJF9btq5iJA0FDS5IRPnabT8QErQqn8CXa_ghOwdvIt7xMfGLoNzZN_VMw), *F*[*ate and Judaism–Philosophical and Clinical Aspects‏*](https://www.karger.com/Article/PDF/331691), in Knowing One's Medical Fate in Advance: Challenges for Diagnosis and Treatment, Philosophy, Ethics and Religion 80 (Manuel Battegay et al. eds., 2012). [↑](#footnote-ref-119)
116. *See* more extensively at Alan Jotkowitz, *"Halakhah Loved Not the Parents Less, But the Child More”: R. Aharon Lichtenstein On Abortion*, 47(4) Tradition 137, 150-6 (2015); ibid, *On the Methodology of Jewish Medical Ethics*, 43(1) Tradition: A Journal of Orthodox Jewish Thought 38, 50 (2010); Alan Jotkowitz et al., *Abnormalities Mild with Fetuses for Abortions*, 12 IMAJ 5, 7-8 (2010). [↑](#footnote-ref-120)
117. For the *halakhic* jurisprudence of other decisors 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). [↑](#footnote-ref-121)
118. For this substantial character of Judaism, see, e.g., [Aaron Kirschenbaum,](https://ixtheo.de/Author/Home?author=Kirschenbaum%2C+Aaron) 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 (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.). [↑](#footnote-ref-122)
119. *See* Ben Zion Schereschewsky, “*Mamzer*” in The Principles of Jewish Law 435-8 (Menachem Elon ed., 1975); [Pamela Laufer-Ukeles](http://international.westlaw.com/find/default.wl?mt=LawReview&db=PROFILER-WLD&rs=WLIN14.10&docname=0334969101&rp=%2ffind%2fdefault.wl&sp=intmalmad-000&findtype=h&ordoc=0418439982&tc=-1&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=9AB609D8&utid=30), *The Lost Children: When the Right to Children Conflicts with the Rights of Children*, 8 Law & Ethics Hum. Rts. 219, 242-5 (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, 413-6 (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). [↑](#footnote-ref-123)
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(2) Am. U.J. Gender Soc. Pol’y& L. 647, 653-4 (2018). [↑](#footnote-ref-124)
121. Sinclair, *supra* note 117, at 59-60. *See also* Hashiloni-Dolev & Weiner, *supra* note 101, 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,* 36Ohio State Journal on Dispute Resolution 151, 176-80 (2022) (forthcoming). For another aspect of the Jewish and consequently also the Israeli relational ethics' point of view, see Deborah [Lupton](https://scholar.google.co.il/citations?user=eUTSClMAAAAJ&hl=iw&oi=sra), T[he Social Worlds Of The Unborn 76 (2013) ‏ .](https://www.google.com/books?hl=iw&lr=&id=p2vZ07r9DGIC&oi=fnd&pg=PP1&dq=%22Relational+Ethics%22+%22frozen+embryo%22&ots=IZnSSKo6IY&sig=vsjSXkXwmAHGOfRMwpydarqrCz4) [↑](#footnote-ref-125)
122. David J. Bleich, *In Vitro Fertilization: Questions of Maternal Identity and Conversion*, 25 Tradition 82, 97 (1991), was mentioned by Aaron L. Mackler, *In Vitro Fertilization* 519 (1991), [mackler\_ivf.pdf (rabbinicalassembly.org)](https://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/mackler_ivf.pdf); ibid, *An Expanded Partnership with God? In Vitro Fertilization in Jewish Ethics*, 25(2) The Journal of Religious Ethics 277, 290 (1997); ibid, *J*[*ewish Perspectives on Embryo and Stem Cell Research‏*](https://www.google.com/books?hl=iw&lr=&id=21ZEAgAAQBAJ&oi=fnd&pg=PA147&dq=%22TEHUMIN+11,+272%22&ots=hC4-48bpv-&sig=5mrZmbw5oE2AI53R-ipiciPInjc), in Religious Perspectives on Bioethics 147, 149 (Mark Cherry ed., 2013). [↑](#footnote-ref-126)
123. Rabbinical Court (Tel Aviv) 1049932/8 **Anonymous v. Anonymous** (unpublished, 20.07.2016). For an academic discussion of this verdict, see Margalit, the Jewish, *supra* note 124, at 153 n.84. But compare with the opinion of Shlomo Dichovsky, mentioned there in pp. 28-29, 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. [↑](#footnote-ref-127)
124. Hayyim D. Halevi, *On Fetal Reduction and the Halakhic Status of In Vitro Embryos*, 47-48 Assia 14, 15 (1990) (Heb.). For a similar ruling, see Yitzhak Zilberstein, *The Evaluation of the Pre-embryo Before Implantation for Prevention of Defective Embryos and Gender Determination*, 51-2 Assia 54, 56 (1992) (Heb.). *See also* Compendium on Medical Ethics: Jewish Moral, Ethical and Religious Principles in Medical Practice 51 (David M. Feldman & Fred Rosner, 6th ed. 1984); Shalom & Hashiloni-Dolev, *supra* note 19, at 179. [↑](#footnote-ref-128)
125. Mordehai Eliyahu, *Destroying Embryos and Fetal Reduction*, 11 Tehumin 272, 272-3 (1990) (Heb.), was discussed by Mackler, An Expanded, *supra* note 126; Mackler, J[ewish ‏](https://www.google.com/books?hl=iw&lr=&id=21ZEAgAAQBAJ&oi=fnd&pg=PA147&dq=%22TEHUMIN+11,+272%22&ots=hC4-48bpv-&sig=5mrZmbw5oE2AI53R-ipiciPInjc)Perspectives, *supra* note 126; Gideon A. Weitzman et al., *Genetic Counseling for the Orthodox Jewish Couple Undergoing Preimplantation Genetic Diagnosis*, 21 Journal of Genetic Counseling 625, 626 (2012). [↑](#footnote-ref-129)
126. Barilan, *supra* note 115, at 153. 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](https://ezproxy.ono.ac.il:2161/action/doBasicSearch?si=1&Query=au:%22TANYA+ZION-WALDOKS%22), [*Politics of Devoted Resistance: Agency, Feminism, and Religion among Orthodox Agunah Activists in Israel*](https://ezproxy.ono.ac.il:2161/stable/43669943?Search=yes&resultItemClick=true&searchText=%22Politics%20of%20devoted%20resistance%3A%20Agency%2C%20feminism%2C%20and%20religion%20among%20Orthodox%22&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3D%2522Politics%2Bof%2Bdevoted%2Bresistance%253A%2BAgency%252C%2Bfeminism%252C%2Band%2Breligion%2Bamong%2BOrthodox%2522&ab_segments=0%2Fbasic_SYC-5187_SYC-5188%2Ftest&refreqid=fastly-default%3Aa6c947ca905ec04ce33389eb128ec53f), 29(1) Gender and Society73(2015). [↑](#footnote-ref-130)
127. Margalit, the Jewish, *supra* note 124, at 140-2, 157. For a broader discussion of DLPBA as the best normative model for determining legal parenthood in various scenarios, see Margalit, Determining, *supra* note 110. For its practical implementation in domestic and international surrogacy arrangements, see respectively Margalit, In Defense*, supra* note 110; Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements,* 24J. L. & Pol'y 41 (2016). [↑](#footnote-ref-131)
128. Margalit, the Jewish, *supra* note 124, at 160; Margalit, Towards, *supra* note 124, 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 (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) and the other references enumerated by 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, 104-5, 111-4 (2017). [↑](#footnote-ref-132)
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 (1999). [↑](#footnote-ref-133)
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” – YM); 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, 88-9 (MPhil Degree, Faculty of Law, Edinburgh University, 2009); Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting*, 19 Cardozo J.L. & Gender 437, 455-60, 470-5 (2013). [↑](#footnote-ref-134)
131. *See* text accompanying *supra* n. 27-29. [↑](#footnote-ref-135)
132. For a discussion of these rights, see, among others, Lambert, *supra* note 22 , at 541-8; Lupsa, *supra* note 30, at 954-61; Wheatleym *supra* note 10, at 306-11. Interestingly, Walter, *supra* note 25, at 969, enumerates 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. Furthermore, Johnson even “recount[s] the five prevailing views among academics,” Alex M. Johnson Jr., *The Legality of Contracts Governing the Disposition of Embryos: Unenforceable Intra-Family Agreements*, 43 Sw. L. Rev. 191, 213 (2013). [↑](#footnote-ref-136)
133. Margalit, Determining, *supra* note 110, at 114. *See also* Yehezkel Margalit, T*o Be or Not to Be (A Parent)? - Not Precisely the Question; the Frozen Embryo Dispute*, 18 Cardozo J. L. & Gender 355 (2012). For the dilemma 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 Columbia Law Review 1377 (2010). [↑](#footnote-ref-137)
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 cutting-edge fertility treatments, and in artificial insemination from donor, see respectively Yehezkel Margalit, *Intentional Parenthood: A* *Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 Whittier Journal of Child and Family Advocacy 39 (2013); Yehezkel Margalit & John Loike, *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 Harvard Journal of Law and Gender 107 (2014); Yehezkel Margalit, *Artificial Insemination from Donor (AID) – From Status to Contract and Back Again?*, 21(1) [Boston University Journal of Science & Technology Law](http://lawlib.wlu.edu/LJ/index.aspx?mainid=428) 69 (2015). [↑](#footnote-ref-138)
135. *See* text accompanying *supra* n. 28-29. [↑](#footnote-ref-139)
136. *See* Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, [94 Nw. U.L. Rev. 805, 812 (2000)](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=302&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b94%20Nw.%20U.L.%20Rev.%20805%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=d25af96e106cf890e63758d95d57dcee). [↑](#footnote-ref-140)
137. Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, [1985 Wis. L. Rev. 565, 570 (1985).](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=363&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1985%20Wis.%20L.%20Rev.%20565%2cat%20570%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=3aa2ef3f05f657ecf9c29f5d1eb99241) For an extensive discussion of the relational contract, see Margalit, *supra* note 110, at 452-6. [↑](#footnote-ref-141)
138. *See* Peter Linzer & Patricia A. Tidwell, *The Flesh-Colored Band Aid-Contracts, Feminism, Dialogue, and Norms*, 28 Hous. L. Rev. 791 (1991); Sharon Thompson, Prenuptial Agreements and the Presumption of Free Choice 132-3 (2015); Jonathan Herring, V[ulnerable adults and the law 226-8](https://www.google.com/books?hl=iw&lr=&id=eOBOCwAAQBAJ&oi=fnd&pg=PP1&dq=%22Contract+Law+and+Vulnerability%22&ots=mmjJkaG5ZQ&sig=QnA5-46bjCL1wbzMnoSWvyWKjYw) (2016). [↑](#footnote-ref-142)
139. *See* Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 Wis. L. Rev. 483 (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](https://oxford.universitypressscholarship.com/view/10.1093/acprof%3Aoso/9780199206551.001.0001/acprof-9780199206551) 201, 220 (Andrew Burrows & Alan Rodger eds., 2006). [↑](#footnote-ref-143)
140. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U. L. Rev. 1065 (1985); Linzer & Tidwell, *supra* note 142 ; Herring, *supra* note 142, at 257-62. [↑](#footnote-ref-144)
141. For the phrase “mirror image,” see Eisenberg, *supra* note 140, at 812. For further 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. Sociol. Rev. 55, 57 (1963). For empirical studies, see, e.g., Gordon, ibid, at 560. For a survey of sociological and psychological researches, see the prolific writings of Stewart Macaulay: as ibid, *An Empirical View of Contract*, 1985 Wis. L. Rev. 465 (1985); ibid, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 Mod. L. Rev. 44 (2003). [↑](#footnote-ref-145)
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)](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=365&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b94%20Nw.%20U.L.%20Rev.%20877%2cat%20881%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=17ae536aa77b32025a8086ce4ca7c634). [↑](#footnote-ref-146)
143. *See* Ian Macneil, *The Many Futures of Contracts*, 47 S. Cal. L. Rev. 691, 738-40 (1974); ibid, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 Nw. U.L. Rev. 854 (1978); ibid, The New Social Contract: An Inquiry into Modern Contractual Relations 28 (1980); ibid, The Relational Theory of Contract: Selected Works of Ian Macneil (David Campbell ed., 2001). [↑](#footnote-ref-147)
144. *See* the opinion of Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, [47 Stan. L. Rev. 211, 251 (1995)](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=246&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b47%20Stan.%20L.%20Rev.%20211%2cat%20232%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=61a93f5d13b22fe72fa65079e6f1b027) and Ian R. Macneil in his various articles. [↑](#footnote-ref-148)
145. *See* the opinion of McKendrick, *supra* note 145, at 332; Eisenberg, *supra* note 145, at 806; Robert E. Scott, *The Case for Formalism in Relational Contract*, [94 Nw. U.L. Rev. 847, 848 (2000).](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=367&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b94%20Nw.%20U.L.%20Rev.%20847%2cat%20848%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=0a967bbc0ee819d57f92786b9f2dd18c) [↑](#footnote-ref-149)
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).](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=368&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b46%20San%20Diego%20L.%20Rev.%20553%2cat%20554%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=2bda098e906b6e8428882668158816c5) [↑](#footnote-ref-150)
147. *See* Gordon, *supra* note 141, at 566. [↑](#footnote-ref-151)
148. For a similar modern implication, see Gordon, *supra* note 141, at 556-9. [↑](#footnote-ref-152)
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, 252-3 (Rochelle Cooper Dreyfuss et al. eds., 2001). [↑](#footnote-ref-153)
150. For a related call to define a disposition agreement as a relational contract, see Johnson, *supra* note 136, 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 110, at 454-6. *See also* Flavia Berys, *Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangemen\*ts Go Sour*, [42 Cal. W. L. Rev. 321, 345-47 (2006);](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=375&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b42%20Cal.%20W.%20L.%20Rev.%20321%2cat%20346%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=d109ca704416be43c4783d0117e0df2b) Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49(1) Law & Society Review 143, 148 (2015) (“Surrogacy is a doubly relational contract”). [↑](#footnote-ref-154)
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 (2010). *See also* a more specific contention for our case at Johnson, *supra* note 136, 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.”). [↑](#footnote-ref-155)
152. *See* Macneil, *The Many*, *supra* note 147, at 720-1. *See also* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, [84 Va. L. Rev. 1225, 1230-32 (1998);](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=369&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b84%20Va.%20L.%20Rev.%201225%2cat%201230%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=7c8893d3d81abc8f861a39d2ec5ca54f) Robert Leckey, *Relational Contract and other Models of Marriage*, 40 Osgoode Hall L.J. 1 (2002); [Elizabeth S. Scott](http://international.westlaw.com/find/default.wl?mt=WorldJournals&db=PROFILER-WLD&rs=WLIN15.04&docname=0408668601&rp=%2ffind%2fdefault.wl&sp=intmalmad-000&findtype=h&ordoc=0427881384&tc=-1&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=BD66E297&utid=13) & [Robert E. Scott](http://international.westlaw.com/find/default.wl?mt=WorldJournals&db=PROFILER-WLD&rs=WLIN15.04&docname=0114854501&rp=%2ffind%2fdefault.wl&sp=intmalmad-000&findtype=h&ordoc=0427881384&tc=-1&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=BD66E297&utid=13), *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 Colum. L. Rev. 293 (2015) passim. [↑](#footnote-ref-157)
153. *See* Macneil, *Contracts*, *supra* note 147, at 857-8. For the conceptualization of relational contract theories in terms of marriage in the writings of Macneil and Macaulay, see Gordon, *supra* note 141, at 569. *See also* Margalit, *supra* note 125. [↑](#footnote-ref-158)
154. *See* the following Hebrew references:Yehezkel Margalit*, From the Tender Years Doctrine to the Approximation Rule – Between Family Law and Contract Law,* 15(1) Haifa Law Review (2021) (forthcoming); *The Freedom of Contract, the Freedom of Inheritance and Between Them* (under evaluation); Determining Legal Parentage by Agreement in Israel - Between Family Law and Contract Law (under evaluation). *See also* Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. Rev. 551 (1999). [↑](#footnote-ref-159)
155. Johnson, *supra* note 136, at 214 and n.186-187 and accompanying text. [↑](#footnote-ref-160)
156. [Jane Cowen-Fletcher, It Takes a Village (1994);](https://www.google.co.il/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiCm8S4_-juAhVOaRUIHUhDDHAQFjAAegQIAhAC&url=https%3A%2F%2Fwww.amazon.com%2FTakes-Village-Jane-Cowen-Fletcher%2Fdp%2F0590465732&usg=AOvVaw2Alzp9zcWP8oav2n4h6L98) Does It Take A Village? Community Effects on Children, Adolescents, and Families ([Alan Booth](https://www.routledge.com/search?author=Alan%20Booth) & [Ann C. Crouter](https://www.routledge.com/search?author=Ann%20C.%20Crouter) eds., 2001); Hillary Rodham Clinton, It Takes A Village and Other Lessons Children Teach Us (2006). [↑](#footnote-ref-161)
157. Foster & Herring, *supra* note 47, at 37-8. [↑](#footnote-ref-162)
158. Ayelet Blecher-Prigat, *Conceiving Parents*, 41 Harvard 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 […]”). For the relational traits of a variety of angles of the parent-child relationship, see Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 Duke J. Gender L. & Pol'y 1 (2009); Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 Am. U. J. Gender Soc. Pol'y & L. 163 (2009-2010); Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 Conn. L. Rev. 741 (2016). [↑](#footnote-ref-163)
159. For a related claim, see Berg, Owning, *supra* note 14, 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.”). [↑](#footnote-ref-164)
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 137, at 372-4; Yehezkel Margalit*, Bridging the Gap Between Intent and Status: A New Framework for Modern Parentage,* 15(1) Whittier Journal of Child and Family Advocacy 1, 26-8 (2016); Margalit, Determining, *supra* note 110, at 163-8. [↑](#footnote-ref-165)
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 77, at IIIc. [↑](#footnote-ref-166)
162. *See*, for example, the various chapters of the book: Responsible Parents and Parental Responsibility (Jonathan Herring et al. eds., 2009), such as Julie Wallbank, *Parental Responsibility and the Responsible Parent: Managing the “Problem” of Contact*, in Responsible Parents and Parental Responsibility 296 (Jonathan Herring et al. eds., 2009). *See also* John Eekelaar, *Parental Responsibility: State of Nature or Nature of the State?* 13:1 Journal of Social Welfare & Family Law 37 (1997);[Jonathan Herring, *Parental Responsibility, Hyper-Parenting and the Role of Technology*, in The Oxford Handbook of Law, Regulation and Technology 404 (](https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199680832.001.0001/oxfordhb-9780199680832)Roger Brownsword et al. eds., 2017). [↑](#footnote-ref-167)
163. *See* the following seminal researches: John Eekelaar, *Are Parents Morally Obliged to Care for their Children?* 11 Oxford Journal of Legal Studies 340 (1991); Mavis Maclean & John Eekelaar, The Parental Obligation (1997); Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 Villanova Law Review 135 (2014). [↑](#footnote-ref-168)
164. Wiesemann, *supra* note 108, at 124. But 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); ibid, *The 'Good Enough Parent' in the Age of the New Reproductive Technologies*, in The Ethics of Genetics in Human Procreation 33 ([Hille Haker](https://www.amazon.com/-/he/s/ref%3Ddp_byline_sr_book_1?ie=UTF8&field-author=Hille+Haker&text=Hille+Haker&sort=relevancerank&search-alias=books) & [Deryck Beyleveld](https://www.amazon.com/-/he/s/ref%3Ddp_byline_sr_book_2?ie=UTF8&field-author=Deryck+Beyleveld&text=Deryck+Beyleveld&sort=relevancerank&search-alias=books) eds., 2000). [↑](#footnote-ref-169)
165. *See supra* note 55, 60 and accompanying text. [↑](#footnote-ref-170)
166. Wiesemann, *supra* note 108, at 125. [↑](#footnote-ref-171)
167. For a similar argumentation, see Johnson, *supra* note 136, 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.”). [↑](#footnote-ref-172)
168. For a similar conclusion, see ESHRE Task Force on Ethics and Law, *The Cryopreservation of Human Embryos*, 16(5) Human Reproduction 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 137, at 386-8;Margalit, Determining, *supra* note 110, at 254-7. *See also* in the context of surrogacy agreements, Margalit, In Defense*, supra* note 110, at 466. For a similar call by another scholar, see Malo, *supra* note 25, at 332, 334. [↑](#footnote-ref-173)
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, *supra* note 14, at 389. [↑](#footnote-ref-174)
170. Wiesemann, *supra* note 108, at 117-8; ibid, at 123 – “Thus, in order to define the moral status of the embryo we have to analyse the moral meaning of parenthood.” *See also* [Jason Scott Robert](https://www.tandfonline.com/author/Robert%2C%2BJason%2BScott) & [Françoise Baylis](https://www.tandfonline.com/author/Baylis%2C%2BFran%C3%A7oise), *Crossing Species Boundaries*, 3(3) American Journal of 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 of the human species cannot be established through genetic or genomic means.”). [↑](#footnote-ref-175)
171. *See* Herring, The Termination, *supra* note 72, at 145; Herring, [Ethics of Care](http://ohrh.law.ox.ac.uk/publications/jonathan-herring-ethics-of-care-and-the-public-good-of-abortion-2019-u-of-oxhrh-j-1/), *supra* note 73, at 13 and more extensively Herring, Caring, *supra* note 79, at 11-45. [↑](#footnote-ref-176)
172. Ariz. Rev. Stat. Ann. § 25-318.03(A) (2018), inspired by Terrell v. Torres, *supra* note 10 and mentioned at Harman, *supra* note 5, at 539. [↑](#footnote-ref-177)
173. *See* Lois Tonkin, *Haunted by a Present Absence*, 4(1) Studies in the Maternal 1 (2012), [Tonkin\_SiM\_4(1)2012 (canterbury.ac.nz)](https://ir.canterbury.ac.nz/bitstream/handle/10092/11984/12660448_Tonkin_SiM_4%281%292012.pdf?sequence=1&isAllowed=y); Herring, [Ethics of Care](http://ohrh.law.ox.ac.uk/publications/jonathan-herring-ethics-of-care-and-the-public-good-of-abortion-2019-u-of-oxhrh-j-1/), *supra* note 73, 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.”), ibid, at 15; Herring, The Termination, *supra* note 72, 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 do so.”), ibid, at 150. [↑](#footnote-ref-178)
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 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 (1999). [↑](#footnote-ref-179)
175. Margalit, *supra* note 137, at 389. *See also* Margalit, Determining, *supra* note 110, at 242-3. [↑](#footnote-ref-180)
176. Margalit, Determining, *supra* note 110, at 242; Margalit, *supra* note 137, at 374. [↑](#footnote-ref-181)
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, *supra* note 39; “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, 2018 CO 85, 16SC906 (Oct. 29, 2018), [The Supreme Court of the State of Colorado](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2016/16SC906.pdf). For an academic discussion of it, see Petralia, *supra* note 24. 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,” Harman, *supra* note 5, at 544. [↑](#footnote-ref-182)