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# TIMING LEGAL PARENTHOOD

Noy Naaman\*

## INTRODUCTION

*When does a parent become a parent?* While the literature on Assisted Reproductive Technology (“ART”) has explored the question, *who is a parent?* scholars in the field have paid less attention to the question “*when* should the parental status be formalized?”<sup>1</sup> Is it at birth? Is it when a judicial order confers that legal status on an individual? Or, has the legal status of parenthood begun to develop during the time the individual has spent initiating the parental process and consolidated at the child’s birth? Yet, these questions have critical legal and practical implications. The following scenarios illustrate how lacunae in the legal frameworks that govern the formalization of the parental relationship leave individuals, whose self-identity as parents (or parents-to-be) is established, but whose parental status is legally inchoate, vulnerable to conflicts arising in the law’s blind-spots.

Judith and Barbara, a same-sex couple, conceived through an anonymous sperm donation. While Judith, the birth mother, was legally recognized as such in the delivery room, Barbara had to apply for a post-birth judicial order. Only after a court hearing and an inspection process conducted by welfare officers, which was expected to take a few months, would the law—assuming a

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1. *Assisted Reproductive Technology (ART)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 8, 2019), [<https://perma.cc/PY7P-6HDC>] (last visited Nov. 15, 2021); *see infra* notes 37-38.

favorable outcome—recognize Barbara as the child’s mother. Shortly after the birth, however, Judith and Barbara separated. What parental rights, if any, can Barbara claim?

Ben, a single man and a senior associate at a law firm, decided to become a parent through transnational surrogacy. When Ben told his employer about his decision and the pre-birth arrangements involved in the process, including that he might need to take some time away from work, Ben’s employer told him that his promotion to a junior partner might be deferred. What legal recourse, if any, does Ben have against his employer?

Jessica and David, a different-sex couple, conceived with the assistance of Kelly, a surrogate. During week thirty-two of her pregnancy, Kelly suffered a stillbirth as a result of medical malpractice. While the hospital compensated Kelly for her loss, it denied recovery to Jessica and David for their emotional distress, simply because neither of them carried the fetus. What damages, if any, can Jessica and David seek?

A common theme that emerges from these hypothetical scenarios is uncertainty about what it means to *become* a parent. Although each of the individuals has embarked upon the journey toward parenthood, they have very different statuses in the eyes of the law.<sup>2</sup> In this Article, I examine the question of how the process of *becoming* a parent is counted by the law.

To pursue this inquiry, I theorize and problematize the tension between the *construction* of the self and legal identification.<sup>3</sup> This tension, termed here “temporal discrepancy,” refers to the gap between how a person identifies himself and how the law accounts for that identification in the context of *becoming* a parent.<sup>4</sup> I argue that this gap places certain individuals in a vulnerable position within the family and beyond. I focus on two forms of temporal discrepancy: the first concerns a scenario occurring *after* a child is born, when an individual self-identifies as a parent, but the law has yet to formalize the parental status, such as in the first hypothetical above.<sup>5</sup> The second, illustrated

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2. *Infra* Section II.A.

3. *See infra* text accompanying notes 52-64.

4. *See infra* text accompanying notes 47-48.

5. *See infra* text accompanying notes 76-86. There are circumstances in which a person may be considered a parent as a matter of law before a court has declared him as such. In

by the second and third hypotheticals above, involves a scenario occurring *before* a child's birth, when an individual self-identifies as a parent-to-be—a status of *becoming* that may be rich in meaning and laden with practical and emotional implications but that is legally overlooked.<sup>6</sup> After analyzing this gap, I consider how the law could be restructured to alleviate the effects of temporal discrepancy on parents and parents-to-be.<sup>7</sup>

This Article proceeds in three parts. Part I develops this Article's theoretical framework by looking to queer literature on time, which elucidates how time orients our embodiments in accordance with (hetero)normative logic and considers what alternatives to this operation (and understanding) of time might look or feel like.<sup>8</sup> Inspired by this literature, I develop the concept of temporal discrepancy and mobilize it for analyzing the research question of this Article.<sup>9</sup>

Part II focuses on the first form of temporal discrepancy, represented by the first gap occurring *after* birth.<sup>10</sup> I review the contingency of this tension in the context of parental identification,<sup>11</sup> mostly involving same-sex couples, in which the parental status is formalized at a remote moment in time after birth, but especially in relation to the biological parent's partner in cases of ART.<sup>12</sup> Then, I set out a taxonomy for understanding the crippling effects of that tension.<sup>13</sup> Finally, I evaluate regulatory avenues for ensuring that parental status vests as close

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this scenario, the judicial order issued after the child's birth will become effective *retroactively* from the child's birth. Such a person, nonetheless, may be placed in a vulnerable position. *See infra* note 134.

6. *See infra* text accompanying notes 214-27.

7. *See* discussion *infra* Sections II.C, III.B.

8. *See infra* Part I.

9. *See infra* text accompanying notes 41-48.

10. *See infra* Part II.

11. *See infra* text accompanying notes 71-85. The term "contingency" is used to express how certain tension becomes to be what it is. For the use of this term, see VALERIE ROHY, CHANCES ARE: CONTINGENCY, QUEER THEORY, AND AMERICAN LITERATURE 2-8 (2019).

12. *See generally* Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 76-82 (2017) (discussing marital presumption, consent to a spouse's use of ART, and adoption as options for formalizing after-birth legal parentage for nonbiological parents).

13. *See infra* Section II.B.

as possible to the child's birth and conclude with a set of considerations for lawmakers.<sup>14</sup> While this Article is not the first to advocate for at-birth parental determination, it offers a novel theoretical underpinning for the position grounded in the individual's evolving self-identification—and thus new support for the findings of other scholars. Indeed, the justifications underlying the recognition or denial of rights are significant, as “different frameworks of analysis cannot reach the ‘same result.’”<sup>15</sup>

Part III focuses on the second form of temporal discrepancy, represented by the second gap occurring *before* birth.<sup>16</sup> I assess *whether* and *how* the law should recognize the process of becoming a parent.<sup>17</sup> This part is divided into two sections to address the separate components of this inquiry. Section A discusses *whether* the law can recognize the indeterminate self-identification as a parent-to-be.<sup>18</sup> Conferring parent-to-be legal status before birth is in tension with the notion that parental status comes into existence at the moment of the child's birth.<sup>19</sup> I show that it is eminently possible for the law to recognize the fluid status of parent-to-be, and that several of the concerns that might explain its failure to do so are misguided.<sup>20</sup> Section B then explores *how* the law should recognize the process of becoming a parent.<sup>21</sup> I consider the kinds of conflicts that may arise during the process of becoming a parent and show that while the law addresses certain implications of becoming a parent, its reach is underinclusive.<sup>22</sup> Indeed, I show that by reducing the concept of becoming a parent to its purely biological (and chiefly gestational) elements, the law leaves anticipated parents in a peculiarly vulnerable position.<sup>23</sup> Accordingly, I suggest

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14. See *infra* Section II.C.

15. Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL'Y 1, 36 (2009) (citing Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1878-87 (1987)).

16. See *infra* Part III.

17. See discussion *infra* Sections III.A, III.B.

18. See *infra* Section III.A.

19. See *infra* text accompanying notes 181-94.

20. See *infra* text accompanying notes 197-213.

21. See *infra* Section III.B.

22. See *infra* text accompanying notes 228-43.

23. See *infra* Section III.B.2.

cultivating a more inclusive legal understanding that embraces the construction, rather than merely the (post-birth) existence, of the parental status and incorporates the relational elements of becoming a parent, such as social burdens, emotional involvement, and human investments.

Two notes before presenting the Article's theoretical basis. The first relates to methodology. This Article assesses the broad-scale occurrence of temporal discrepancy by engaging with three terrains: family, employment, and medical malpractice.<sup>24</sup> While articulating detailed policy proposals in each of these domains is beyond the Article's scope, I discuss how the law could be restructured and subsequently developed by policymakers in accordance with the doctrines of each.<sup>25</sup> To render my analysis more concrete, I glean support from existing laws in different jurisdictions, including U.S. states, Canadian provinces, and Israel.<sup>26</sup> While I do not purport to offer a traditional comparative legal analysis, I hope that the comparative nature of this Article can assist policymakers across the globe in making laws more attentive to the needs of various individuals in their process of becoming parents.

The second note is on terminology. I use the term "anticipated parent" in lieu of the common terms "intended parent" and "prospective parent." The term "anticipated parent" designates becoming a parent that this Article offers to elucidate. I use the term "social parent" in lieu of "non-biological parent" to avoid affirming terms derived from the bio-normative positions that I seek to de-naturalize.<sup>27</sup> Finally, I use the term "gestational party" instead of "pregnant mother" to reflect that transgender men and non-binary people also give birth.<sup>28</sup>

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24. See *infra* Section III.B.1, III.B.2.

25. See *infra* Section II.C and notes 247-54, 283-301 and accompanying text.

26. See *infra* notes 73-86, 103-14,124, 132-179, 228-9, 238-48, 258, 283-300, and accompanying text.

27. See Joanna Radbord, *Same-Sex Parents and the Law*, 33 WINDSOR REV. LEGAL & SOC. ISSUES 1, 6 (2013).

28. *Id.* at 1; *Preparing for Pregnancy as a Non-Binary Person*, FAM. EQUAL., [<https://perma.cc/5HNK-WPJ9>] (last visited Nov. 18, 2021).

## I. THE THEORETICAL FOUNDATION

This part lays down the theoretical framework of *temporal discrepancy* that will accompany us throughout the Article. After situating this Article's contribution within the legal scholarship,<sup>29</sup> I will turn specifically to queer literature on time and explain how this body of work informs my theoretical framework.<sup>30</sup> Finally, I discuss how my framework both rests on and enriches the current writing on legal identities.<sup>31</sup>

Legal scholars have ventured into the territory of time. While some scholars have considered generally how the law shapes perceptions of time as a historical, cultural, or political construct,<sup>32</sup> or how temporal logics are utilized to allocate rights,<sup>33</sup> others have considered the construction of time in specific fields, e.g., human rights,<sup>34</sup> criminal law,<sup>35</sup> and private law.<sup>36</sup> Despite these growing conversations about time and the law, the relation between time and the formation of legal identities, specifically the legal status of parenthood, remains largely unexamined.<sup>37</sup> Further, though most of the legal literature

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29. See *infra* text accompanying notes 32-39.

30. See *infra* text accompanying notes 40-48.

31. See *infra* text accompanying notes 49-64.

32. E.g., Carol J. Greenhouse, *Just in Time: Temporality and Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1631 (1989); Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663, 664-72 (2001).

33. Liaquat Ali Khan, *Temporality of Law*, 40 MCGEORGE L. REV. 55, 56-57 (2009); Frederic Bloom, *The Law's Clock*, 104 GEO. L.J. 1, 2-3 (2015).

34. See Orna Ben-Naftali et al., *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 554-55 (2005); Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POL'Y L. & ETHICS 264, 301-02 (2012); Kathryn McNeilly, *Are Rights Out of Time?: International Human Rights Law, Temporality, and Radical Social Change*, 28 SOC. & LEGAL STUD. 817, 817 (2019).

35. See Jonathan Goldberg-Hiller & David T. Johnson, *Time and Punishment*, 31 QUINNIPIAC L. REV. 621, 622 (2013).

36. See Emily Grabham, *Doing Things with Time: Flexibility, Adaptability, and Elasticity in UK Equality Cases*, 26 CAN. J.L. & SOC'Y 485, 485-86 (2011); see also Sarah Keenan, *Making Land Liquid: On Time and Title Registration*, in *LAW AND TIME* 145, 157 (Siân M. Beynon-Jones & Emily Grabham, eds., 2019).

37. See John Lawrence Hill, *What Does It Mean to Be a "Parent"?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 358 (1991) ("[T]he parental rights of the intended parents should be legally recognized from the time of conception."); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 211-12, 229-30 (2012) [hereinafter Purvis, *Intended Parents*] (discussing how parental intent is used in determining at what point in time parents are legally identified); Courtney

on ART focuses on “who is a parent?” less attention is paid to *when* the parental status should be formalized<sup>38</sup> and *how* the process of becoming a parent is influenced by a particular logic of time.<sup>39</sup> This Article aims to fill that academic gap by giving these questions much-needed theoretical attention. The value of queer theory on time to our conversation will become clear below.

Queer scholarship on time calls attention to how time is organized in accordance with the logic of (hetero)normativity, which features principles such as linearity, capitalist accumulation, and productivity, and is represented by (hetero)normative models of lives.<sup>40</sup> In so doing, this scholarship prompts us (1) to consider how non-normative embodiments that are out of social sync are marginalized and oppressed, and (2) to assess how self-identifications or embodiments that move beyond and against the normative and ostensibly objective and universal

G. Joslin, *(Not) Just Surrogacy*, 109 CAL L. REV. 401, 439-442 (2021) [hereinafter Joslin, *(Not) Just Surrogacy*] (assessing the option of establishing the parental status before the child’s birth in surrogacy arrangements).

38. *Id.* at 210, 214-5 (pointing to the gap between the legal principles of parentage determination that look backward in time and the perception of people undergoing ART who seek to “manifest their intent to become parents with a forward-looking temporal perspective, before a child is conceived and born.”). While Purvis’s analysis views the discrepancy between legal principles and self-perceptions in terms of *directions*, my analysis focuses on the discrepancy between the *construction* of self-identification and legal identification.

39. For scholarship that theorizes the significance of the period of pregnancy for women, see Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C. L. L. REV. 329, 331-32 (2010); see also Siân M. Beynon-Jones, *Timing is Everything: The Demarcation of ‘Later’ Abortions in Scotland*, 42 SOC. STUD. SCI. 53, 53 (2012). My analysis is distinct from this scholarship in that it focuses on both the gestational and relational elements of becoming a parent, while these scholars focus mostly on the former. See also Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 77, 119 (2014) (assessing why the person’s earlier commitment (the “earlier self”) does not bind the person’s will at the time of enforcement (the “later self”) in the context of agreements pertaining to affairs of surrogacy and embryos). While Matsumura’s analysis focuses on two decisive moments, the earlier and later selves, I focus on a broader period of time during which the self as a parent develops.

40. This logic has been articulated in similar, though not identical, manners, by theories, such as Lee Edelman in his concept of “reproductive futurism[.]” Jack Halberstam in his concept of “repro-time[.]” and Elizabeth Freeman in her concept of “chrononormativity[.]” LEE EDELMAN, NO FUTURE: QUEER THEORY AND THE DEATH DRIVE 2 (Michèle Aina Barale, et al. eds., 2004); JACK HALBERSTAM, IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES 5, 10 (José Esteban Muñoz & Ann Pellegrini eds., 2005) [hereinafter HALBERSTAM, IN A QUEER TIME]; ELIZABETH FREEMAN, TIME BINDS: QUEER TEMPORALITIES, QUEER HISTORIES 3 (2010).



logic of time offer creative possibilities for understanding and experiencing time.<sup>41</sup>

This stance is prominent in Jack Halberstam's work, which urges its readers to explore lives that *break* from heterosexual life narratives, such as "bourgeois reproduction" and family,<sup>42</sup> and instead evolve from childhood in a trajectory that Kathryn Stockton describes as "growing sideways."<sup>43</sup> Edelman also addresses that break, exhorting us to remove ourselves from political thinking about the future, which he laments as misleading, and to embrace a nihilistic sensibility that rejects investment in any future-oriented optimism.<sup>44</sup> As opposed to Edelman, José Muñoz offers a constructive view of time by presenting the internal mode of "not yet here."<sup>45</sup> This encourages the subject to think about time in an untimely manner, beyond the linear relationship between past, present, and future, thus allowing the subject to liberate himself from the disciplining effects of time and to engage with a utopian vision that embraces unpredictable possibilities.<sup>46</sup> Viewed as a whole, queer writing demonstrates how individuals can live beyond, and in spite of, the rigid boundaries of time, elucidating the concept I term "*temporal discrepancy*."<sup>47</sup>

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41. Elizabeth Freeman, *Introduction*, 13 GLQ 159, 159-160 (2007).

42. HALBERSTAM, IN A QUEER TIME, *supra* note 40, at 6; JUDITH HALBERSTAM, THE QUEER ART OF FAILURE 70 (2011).

43. KATHRYN BOND STOCKTON, THE QUEER CHILD, OR GROWING SIDeways IN THE TWENTIETH CENTURY 11 (Michèle Aina Barale, et al. eds., 2009).

44. EDELMAN, *supra* note 40, at 4, 14, 30-31. This sensibility is further echoed in the psychoanalytic writing on the practice of barebacking among gay men—which advances a perspective on the future that health is imperative, resists the desire to live longer, and expresses a disdain for the institutional rhythm of progress and breeding. See TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING 66 (2009); LEO BERSANI & ADAM PHILLIPS, INTIMACIES 45-46, 114, 122 (2008).

45. JOSÉ ESTEBAN MUÑOZ, CRUISING UTOPIA: THE THEN AND THERE OF QUEER FUTURITY 22 (José Esteban & Ann Perregini, eds., 2009).

46. *Id.* at 22-23, 194 n.7.

47. I am mindful that some of the views expressed in these writings, specifically the disdain for breeding (see generally EDELMAN, NO FUTURE, *supra* note 40), the utopian visions of an unpredictable future (MUÑOZ *supra* note 45, at 21-23) and suicidal ideology (BERSANI & PHILLIPS, *supra* note 44, at 35; DEAN, *supra* note 44, at 66), are at odds with procreative objectives and concerns for the stability and integrity of non-normative families. However, I draw on this writing as it explicitly unpacks how non-normative kinships are repressed by institutional forms of time, exemplifying what I identify as temporal discrepancy, and because of their potential to exhort us thinking differently on time.

Temporal discrepancy is the gap between how an individual identifies or perceives himself (the *internal* sphere) and how that identification or embodiment is counted by norms (the *institutional* sphere). It occurs at moments in time when an individual's lived experience is out of sync with the events that society perceives—and the law recognizes—as milestones. Mobilizing this understanding of time as governing certain embodiments into the context of legal parenthood expands the assertion that family kinship itself is an instrument of subject formation that differentiates subjects.<sup>48</sup> Careful attention to the relation between time and subjectification is thus needed to ensure the law is on track with notions of social justice.

This suggested theoretical framework builds also on the literature of legal identities. Legal identities are formed by practices that confer a legal status upon an individual who claims an identity.<sup>49</sup> Practices, such as documentary actions (e.g., signing paperwork) or ceremonial actions (e.g., weddings), effectuate what Jessica Clarke theorizes as the moment of “*formalization*.”<sup>50</sup> At that moment, the law actualizes the self-identification of the individual, representing the moment when people first experience their identities as “*real*.”<sup>51</sup> This Article concerns moments during which the legal and self-identifications are out of sync because the *construction* of the self-identification in relation to a particular status begins or completes before its formalization.<sup>52</sup> While Clarke comprehensively analyzes the risks and benefits resulting from the formalization of legal identities, she does not tackle the period of time that I am concerned with, namely, the period before the moment of formalization.<sup>53</sup> Viewing Clarke's observations through the lens of queer theories on time can enrich her analysis, as they clear space for thinking about *becoming* in non-traditional ways, which are not necessarily inherent in an institutional logic of time.<sup>54</sup>

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48. Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 FEM. CULT. STUD. 14, 31-32 (2002).

49. Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 755-56 (2015).

50. *Id.* at 753, 756 (emphasis added).

51. *Id.* at 806.

52. See *infra* Parts II-III.

53. See Clarke, *supra* note 49, at 750-54.

54. See *infra* notes 308-09 and accompanying text.

I focus on two forms of temporal discrepancy: post-birth temporal discrepancy and pre-birth temporal discrepancy. The first refers to a gap in time in which an individual's self-identification is established, but the legal identification is still "to-be."<sup>55</sup> That legal status is still "to-be" because the law has yet to confer a legal status on the individual.<sup>56</sup> In the context of parenthood, such a discrepancy appears at birth and is sustained afterward when the parental status of the anticipated social parent is yet to be formalized.<sup>57</sup> The second form of temporal discrepancy refers to the moments at which an individual's self-identification is still developing.<sup>58</sup> That period can be viewed as a trajectory of "becoming" throughout which the self-identification fluctuates, or moves on a spectrum between a certain starting point and a designated position, which is invisible from a legal perspective.<sup>59</sup> This invisibility produces a discrepancy between the development of self-identification and the stagnation of legal identification.<sup>60</sup> In the context of parenthood, such a gap occurs before birth when an individual perceives himself as a parent-to-be, but his "to-be" status—i.e., the dynamic mode of becoming a parent—does not fit neatly into any legally cognizable category.<sup>61</sup> The similarity between the two scenarios is that both produce a discrepancy between the temporality of the internal sphere (the self-identification) and that of the external sphere (the legal identification).<sup>62</sup> In the first scenario, however, the discrepancy is grounded in the difference between the "already there" self-identification and the "to-be" legal-identification, while in the second, the discrepancy lies in the gap between the "to-be" self-identification and the ambiguous legal identification.<sup>63</sup> In other words, in the first scenario, the

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55. See discussion *infra* Part II.

56. See *infra* notes 75-84 and accompanying text.

57. See *infra* notes 75-84 and accompanying text.

58. See discussion *infra* Part III.

59. See *infra* notes 181-94, 214-27 and accompanying text.

60. See *infra* notes 193-94 and accompanying text.

61. See discussion *infra* Section III.A.

62. See *infra* notes 188-94 and accompanying text.

63. See *infra* notes 78-84 and accompanying text.

legal identification is the “to-be,” while in the second, it is the self-identification itself that is “to-be.”<sup>64</sup>

## II. POST-BIRTH TEMPORAL DISCREPANCY

The birth of a child legally signifies “the birth of a parent.”<sup>65</sup> If the child is conceived by sex-based conception, the parental status of the biological parent(s) is formalized through registration, which usually occurs immediately after the child’s birth.<sup>66</sup> By contrast, in cases of ART, e.g., sperm donation or surrogacy, the status may not be formalized until several months (if not years) after the birth, resulting in a temporal discrepancy between the self and legal identifications.<sup>67</sup> This part analyzes this discrepancy in three sections: the first outlines its contours;<sup>68</sup> the second examines its implications;<sup>69</sup> and the third evaluates the regulatory avenues needed to mitigate these implications.<sup>70</sup>

### A. The Contours of Temporal Discrepancy

When, and to what degree, does a parent experience temporal discrepancy? Reviewing the laws in various jurisdictions illustrates that the answer is contingent on three

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64. The forms of temporal discrepancy I discuss here are not exhaustive of all circumstances in which temporal discrepancy between self and legal identification might exist. In relation to parenthood, there are two forms of temporal discrepancy that mirror the forms outlined here. One form occurs after birth. Take, for example, a woman who gives birth and is legally considered a mother but refuses to embrace motherhood and rejects that legal identification. The second form happens before birth, as in the example of a pregnant woman who does not regard herself as an anticipated parent but may be legally recognized as such and thus entitled to special rights by virtue of her future parental status.

65. See Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. WOMEN’S L.J. 119, 120 (2018) [hereinafter Blecher-Prigat, *Conceiving Parents*].

66. Shohreh Davoodi, *More Than a Piece of Paper: Same-Sex Parents and Their Adopted Children Are Entitled to Equal Protection in the Realm of Birth Certificates*, 90 CHI.-KENT L. REV. 703, 707 (2015) (stating that the birth certificate certifies parenthood); see also *infra* notes 72-75 and accompanying text.

67. See *infra* notes 76-86 and accompanying text.

68. See *infra* Section II.A.

69. See *infra* Section II.B.

70. See *infra* Section II.C.

factors: the method of conception, the sex of the parents, and their marital status.<sup>71</sup> I survey the operation of these factors.

When a birth results from a *sexual union*, the default rule under Anglo-American law is that the woman who bears the child is the mother.<sup>72</sup> The woman's husband will be considered as the legal parent already at the birth, either based on marital presumption,<sup>73</sup> or on his genetic relation to the child.<sup>74</sup> If the parties are not married, the parental status of the birth parent's partner may be contingent on a written form provided soon after the birth, if not already at the hospital, declaring that the partner is the legal parent.<sup>75</sup>

If the child is conceived through anonymous *sperm donation*, the formalization of parental status may depend on the parties' sexes and their marital status.<sup>76</sup> In the case of married,

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71. My purpose is not to provide a comparative analysis of parentage determination, which is beyond the scope of this Article, but instead to exemplify the various factors that may determine the occurrence of temporal discrepancy.

72. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMPAR. L. (SUPPLEMENT ISSUE) 125, 127 (2006) [hereinafter Meyer, *Parenthood*].

73. In the United States, historically, the woman's husband has been deemed the parent, regardless of whether he is the child's genetic parent, even when proof exists that the husband is not the biological father, and this presumption remains the most common way of establishing parentage of the husband. See Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1658-59 (2015) [hereinafter Baker, *Legitimate Families*]; Douglas NeJaime, *The Nature of Parenthood*, 123 YALE L.J. 2260, 2266 (2017) [hereinafter NeJaime, *Nature*]. That presumption is also common in Canada and England. See Wanda Wieggers, *Fatherhood and Misattributed Genetic Paternity in Family Law*, 36 QUEEN'S L.J. 623, 640 (2011); Gillian R. Chadwick, *Legitimizing the Transnational Family*, 42 HARV. J.L. & GENDER 257, 280 (2019).

74. Even in these jurisdictions (like in Israel), in practice, the law infers biological paternity through marital presumption. Noy Naaman, Ayelet Blecher-Prigat, Ruth Zafran, *Parenthood Based on Relationship: Dual Motherhood as a Case Study*, 36 TEL-AVIV U. L. REV. (Iyunei Mishpat) (forthcoming) (Hebrew), available at [<https://perma.cc/99QV-2BFC>] (last visited Feb. 21, 2022).

75. In the United States, the unmarried partner of the birth mother can become the legal father of the child through a voluntary acknowledgement of paternity ("VAP"). The VAP procedure is generally limited to identifying the man alleged to be the child's genetic father (though some states' VAP forms are silent as to the genetic relationship between the male signatory and the child), and the mother needs to declare that she was not married to anyone when the child was born or at any time during the 300 days prior to the birth. See Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 70, 72 (2010); *Paternity/Parentage Establishment*, DEL. HEALTH & SOC. SERVS., [<https://perma.cc/776S-KJRR>] (last visited Nov. 20, 2021).

76. NeJaime, *Nature*, *supra* note 73, at 2296-97.

*different-sex* couples, when the wife gives birth to a child conceived through artificial insemination by an anonymous sperm donor, in many jurisdictions, the husband is automatically registered as the father by virtue of the marital presumption.<sup>77</sup> If the parents are unmarried, however, the formalization process varies; in certain jurisdictions, parentage may be attributed to the male partner through automatic registration by virtue of his quasi-marital relationship with the birth mother<sup>78</sup> or consent to raise the child with the biological mother,<sup>79</sup> while in others, the partner must invoke post-birth judicial procedures to be legally recognized as the father,<sup>80</sup> or live with the newborn for some amount of time, resulting in temporal discrepancy between the establishment of the self as a parent and the law's recognition of the parent as such.<sup>81</sup> In the case of *same-sex couples*, while in

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77. Meyer, *Parenthood*, *supra* note 72, at 134.

78. The laws in British Columbia, Ontario, Saskatchewan adopted this scheme. See Family Law Act, S.B.C. 2011, c 25, § 27 (Can.); All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), S.O. 2016, c 23, § 8 (Can.); The Children's Law Act, S.S. 2020, c 2, § 60 (Can.). In these jurisdictions, the statutes apply equally to all couples regardless of their sexual orientation.

79. In British Columbia, for example, see Family Law Act, S.B.C. 2011, c 25, § 30(b) (Can.). In Ontario for example, see All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment) S.O. 2016, c 23, § 9 (Can.). In Saskatchewan, see The Children's Law Act, S.S. 2020, c 2, § 61 (4)(b) (Can.). In the United States, as a matter of law, only "[i]n a few states, nonbiological intended parents are authorized to establish parentage through a voluntary acknowledgment of parentage." See Douglas NeJaime, *Who Is a Parent?*, 43 FAM. ADVOC. 6, 8-9 (2021). In *practice*, however, the couple can easily bypass this procedure. Specifically, though the paternity form requires the birth mother and the putative father to attest that the male partner is the genetic father, and though in certain jurisdictions they do so under penalty of perjury, the form is not scrutinized, and there is no practical means for inquiring into the use of sperm donation. For further reading on the place of biology in establishing legal parenthood through the execution of a VAP, see Baker, *Legitimate Families*, *supra* note 73, at 1686-87; Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws*, 70 MERCER L. REV. 325, 345 (2019).

80. As for states in the United States which adopted this scheme, see NeJaime, *Nature*, *supra* note 73, at 2296-97, 2297 n.182, 2370-72. This is also the case in Israel. See Noy Naaman, *Israel: Judicial Parental Order as a Means of Recognizing Same-Sex Parenthood*, in 2021 INTERNATIONAL SURVEY OF FAMILY LAW 273 (Margaret Brinig ed., 2021) [hereinafter Naaman, *Parental Order*]; PROFESSIONAL COMMITTEE TO REVIEW CRITERIA FOR THE ISSUANCE OF THE JUDICIAL PARENTAL ORDER (INTER-MINISTERIAL COMMITTEE), [https://perma.cc/QRW6-Z7R3] (last visited Nov. 21, 2021) [hereinafter INTER-MINISTERIAL COMMITTEE GUIDELINES]. In *practice*, however, different-sex couple can easily bypass this procedure. See *supra* note 79; cf. Noy Naaman, *The Paradox of same-sex Parentage Equality*, 100(1) WASH. U.L. REV. (forthcoming 2022).

81. Under the Uniform Parentage Act ("UPA"), for example, a parental status may vest in the biological parent's partner after two years of cohabitation, but it also furthers the goal

some jurisdictions, the marital (or quasi-marital) presumption is applied to formalize the parental status of the same-sex partner immediately upon the birth,<sup>82</sup> in other jurisdictions, the parentage is established through post-birth judicial procedures, resulting in a formalization of the status that occurs remotely in time from the birth.<sup>83</sup>

Temporal discrepancy can also occur in the context of *surrogacy*. The duration of that discrepancy depends on the governing legal framework. In some jurisdictions, the parental status of the anticipated parents is formalized only after the issuance of a post-birth parental order that may be granted remotely in time after birth.<sup>84</sup> In others, by contrast, the anticipated parents are already registered as such by the time of the birth, either through pre-birth (judicial or administrative) procedure,<sup>85</sup> or by marital presumption applied at the birth,<sup>86</sup> preventing any temporal discrepancy.

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of establishing parentage quickly and with certainty. *See* UNIF. PARENTAGE ACT § 204(a)(2) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017).

82. In the United States, see COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW, § 3:5, at 173 (2021); Nejaime, *Nature*, *supra* note 73, at 2294, 2339, 2363-66. In the United States, the UPA revised the VAP process so that it can be used to establish the parental status of a “presumed parent” other than the “genetic father” or “intended parent[.]” UNIF. PARENTAGE ACT § 301 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017). Similarly, some states include a gender-neutral VAP system in cases of ART. Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE J.L. & FEMINISM 589, 604 (2018). While the establishment of the parental status in such cases *does not* occur automatically on the moment the child is born, it allows establishing parentage immediately after the birth without the need to undergo a court proceeding, a process that could render the discrepancy between the construction of the self and of legal identification more perceptible. *Id.* at 605.

83. The law as it exists in Israel is an illustrative example for this scheme. Naaman, *Parental Order*, *supra* note 80, at 273.

84. In Israel, for example, same-sex couples, are subject to post-birth procedures, which may take several months. If the couple fails to fulfill the criteria for parental orders, they may be navigated to a second-parent adoption, which can take several years. *Id.* at 272-75.

85. *See infra* notes 135-146 and accompanying text.

86. The New York appellate court recently applied the marital presumption to the biological father's same-sex spouse where the child was born via surrogacy during the marriage. *See In re Maria-Irene D.*, 153 A.D.3d 1203, 1205 (N.Y. App. Div. 2017).

## B. The Implications of Temporal Discrepancy

In this section, I explore three types of temporal discrepancies that are created when the formalization of the parental status occurs remotely in time after the birth. The first, *inner* sphere, implicates the self-continuity of the parent;<sup>87</sup> the second, *interpersonal* sphere, involves the familial dynamic;<sup>88</sup> and the third, *collective* sphere, refers to the relationship among families.<sup>89</sup> By highlighting the crippling effects in each sphere caused by delays in the formalization of the parental relationship, I illustrate how the law deploys time to police and oppress the becoming of non-normative families.

### 1. The Inner Sphere

The inner sphere refers to the *construction* of an individual's self-identification. Temporal discrepancy affects the inner sphere by disrupting the development of an individual's self-identification as an anticipated parent—that is, the state of a constant self-continuity beginning at the moment of a mutual decision to conceive, continuing through fertilization and impregnation, and becoming complete at the birth.<sup>90</sup> The discontinuity between the self and legal-identifications adversely affects the individual's self-determination in a manner that may be particularly significant given the importance of parental status in shaping our personhood.<sup>91</sup>

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87. See *infra* Section II.B.1.

88. See *infra* Section II.B.2.

89. See *infra* Section II.B.3.

90. This account does not apply to unplanned or unwanted pregnancies, which are outside the scope of this Article. This account does not ignore the presumption that *after* the birth, the self-identification of a person as a parent constantly shapes throughout his life.

91. John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233, 236 (1995); Harry Brighouse & Adam Swift, *Parents' Rights and the Value of the Family*, 117 ETHICS 80, 91-95 (2006). For further reading on identity formation of same-sex families, Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 L. & SOC'Y REV. 285, 286-87 (2002); Irene Padavic & Jonniann Butterfield, *Mothers, Fathers, and "Mathers": Negotiating a Lesbian Co-parental Identity*, 25 GENDER & SOC'Y 176, 181-82 (2011). Abbie E. Goldberg et al., *Why Parenthood, and Why Now? Gay Men's Motivations for Pursuing Parenthood*, 61 FAM. RELS. 157, 160 (2012).



The theory of narrative identity illuminates my argument regarding the effects of temporal discrepancy. This theory regards the formation of an individual's identity as occurring through narrative: a story about oneself that one tells oneself and others.<sup>92</sup> That story allows the individual to develop a self-perception as a "well-defined character[,]""<sup>93</sup> creating a "sense of meaning[] that unfold[s] in and through time."<sup>94</sup> That is, the formation of an individual's identity is suffused with the life-narrative he builds.

The theory of narrative identity is relevant for its emphasis on the role of *continuity* in the process of forming the self-narrative. Continuity allows an individual to anticipate and control his narrative<sup>95</sup> and facilitates the capability to pursue his goals and become the person he wishes to be,<sup>96</sup> enabling him to "function as [an] intentional agent[]." <sup>97</sup> Psychological scholars maintain that self-continuity is intertwined with cultural contingencies, namely that the realization of the self is informed by how temporality is "represented within the symbolic web of . . . culture."<sup>98</sup> From that point of view, one can perceive how delaying the legal recognition of parental status until well after birth, the moment that culturally signifies the birth of parenthood, interferes with the organic dynamic of self-continuity and impedes an individual's ability to experience his self-identification as "real[.]"<sup>99</sup>

Studies of same-sex families offer additional insights into how temporal discrepancy can interfere with individual narrative formation. Studies on lesbian couples, for example, reveal that

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92. Paul Ricoeur, *Narrative Identity*, 35 PHIL. TODAY 73, 77 (1991); MARYA SCHECHTMAN, *THE CONSTITUTION OF SELVES* 93-95 (1996).

93. *Id.*; SCHECHTMAN, *supra* note 92, at 97.

94. Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 14 (Peter Brooks & Paul Gewirtz, eds., 1996).

95. See Martha Minow, *Stories in Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, *supra* note 94, at 33.

96. See DAVID DEGRAZIA, *HUMAN IDENTITY AND BIOETHICS* 80 (2005).

97. Russell Spears, *Commenting on Continuity: A View from Social Psychology*, in *SELF CONTINUITY: INDIVIDUAL AND COLLECTIVE PERSPECTIVES* 251, 254 (Fabio Sani ed., 2008).

98. Romin W. Tafarodi, *Toward a Cultural Phenomenology of Personal Identity*, in *SELF CONTINUITY: INDIVIDUAL AND COLLECTIVE PERSPECTIVES*, *supra* note 97, at 33.

99. Clarke, *supra* note 49, at 753.

the lack of official recognition may lead the social mother to experience high levels of stress and uncertainty while negotiating her maternal identity with herself.<sup>100</sup> This perceived limitation on self-determination is reinforced in everyday interactions with third parties in which the social mother is deprived of the right to operate on behalf of her child.<sup>101</sup> Other recent studies illustrate how impeding the recognition of the social parent forces the family to operate in an environment marked by “confusion and social apprehension” and to adopt strategies to anticipate and defuse potential conflicts.<sup>102</sup>

## 2. *The Interpersonal Sphere*

The interpersonal sphere refers to the dynamic within the family, namely the relationship between the parents and the child (the *vertical* relationship) and the relationship between the parents (the *horizontal* relationship). Scholars over the past two decades have demonstrated that legal recognition allows parents to fulfill their parental responsibilities without obstruction and ensure the stability, security, and continuity of the parent-child relationship,<sup>103</sup> which is important for the child’s ability to achieve self-fulfillment and form other meaningful relationships

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100. See, e.g., Michele M. McKelvey, *The Other Mother: A Narrative Analysis of the Postpartum Experiences of Nonbirth Lesbian Mothers*, 37 *ADVANCES NURSING SCI.* 101, 101-02 (2014); Danuta M. Wojnar & Amy Katzenmeyer, *Experiences of Preconception, Pregnancy, and New Motherhood for Lesbian Nonbiological Mothers*, 43 *J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING* 50, 59 (2014); ALONA PELEG, *LESBIAN MOTHERHOOD IN ISRAEL* 132-34 (Stavit Sinai ed., 2020) (Isr.).

101. See McKelvey, *supra* note 100, at 112-13; Wojnar & Katzenmeyer, *supra* note 100, at 53-55, 58-59; PELEG, *supra* note 100, at 132-34.

102. Alison Gash & Judith Raikin, *Parenting Without Protection: How Legal Status Ambiguity Affects Lesbian and Gay Parenthood*, 43 *L. & SOC. INQUIRY* 82, 84, 112 (2018). These strategies include carrying documented proof of parentage or creating a narrative that children can use when their familial status is questioned. *Id.*; Emily Kazyak et al., *Law and Family Formation Among LGBQ-Parent Families*, 56 *FAM. CT. REV.* 364, 368 (2018).

103. JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 111–119 (2000) (discussing the benefits of stability in child-parent relationships); ANNE L. ALSTOTT, *NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS* 15-20, 45-47 (2004) (discussing benefits of continuity of care for children and society); Wanda Wieggers, *Assisted Conception and Equality of Familial Status in Parentage Law*, 28 *CANADIAN J. FAM. L.* 147, 149 (2012).

in life.<sup>104</sup> Legal recognition also allows both parent and child to benefit from an array of financial safeguards, such as employment benefits, insurance, and inheritance.<sup>105</sup> Delaying or impeding parental recognition, therefore, disadvantages parents and children both emotionally and financially.<sup>106</sup>

Furthermore, by not recognizing the social parent upon birth, the law carves out a hierarchy between the biological parent and the social parent in relation to the child.<sup>107</sup> The social parent experiences the tangible effects of this hierarchy when he or she is subjected to an inspection process by a multitude of institutional actors including judges, state attorneys, and, sometimes, welfare officers.<sup>108</sup> The judicial process, especially when it operates after the birth, inherently treats the social parental bond as an artificial or inauthentic kinship that is subject to intrusive scrutiny.<sup>109</sup>

Some jurisdictions perpetuate that hierarchy even after official recognition by refusing to correct the birth certificate so that it lists the social parent's name.<sup>110</sup> As a public record of facts

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104. Ya'ir Ronen, *Redefining the Child's Right to Identity*, 18 INT'L J. L., POL'Y & FAM. 147, 154 (2004) (discussing the importance of these relationships to the child's sense of belonging); see also Angela Campbell, *Conceiving Parents Through Law*, 21 INT'L J. L. POL'Y & FAM. 242, 265 (2007) (emphasizing that the legal recognition of the social parent fosters the child's self-awareness, dignity and belonging within his community); Alison Bird, *Legal Parenthood and the Recognition of Alternative Family Forms in Canada*, 60 U.N.B. L. J. 264, 285 (2010) (criticizing Canadian courts for ignoring "the symbolic importance of legal recognition to a child's sense of identity").

105. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 346-47 (2002); Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 32 (2010) [hereinafter Joslin, *Travel Insurance*].

106. See Jacobs, *supra* note 105, at 346-47; Joslin, *Travel Insurance*, *supra* note 105, at 32.

107. See also *infra* text accompanying notes 115-18.

108. See also *infra* text accompanying notes 115-18.

109. See also *infra* text accompanying notes 115-18.

110. In Israel, for example, when a same-sex female couple conceives through anonymous sperm donation, only the biological parent's name is listed on the birth certificate. See Ilan Lior, *Israel Defies Ruling to Register Same-Sex Parents on Children's Birth Certificates*, HAARETZ (Apr. 10, 2018), [<https://perma.cc/U8V6-XGY6>] (last visited Nov. 22, 2021). By contrast, numerous jurisdictions in the United States and Canada allow both parents in same-sex families to be listed on the birth certificate. See Elizabeth J. Samuels, *An Immodest Proposal for Birth Registration in Donor-Assisted Reproduction, in the Interest of Science and Human Rights*, 48 N.M. L. REV. 416, 428-29 (2018); Fiona Kelly,

that define how we present ourselves to the world, the certificate of birth registration begins the life story of who we are; in that sense, it is constitutive of our identities and of our family life narratives, especially insofar as it identifies our parents.<sup>111</sup> From a practical standpoint, the birth certificate is also what most people rely on to provide evidence of parental status when dealing with schools, health-care providers, state-provided services, border crossings, and other third parties.<sup>112</sup> The fact that this document is required for a wide range of activities and services underscores its importance.<sup>113</sup> Therefore, the absence of the social parent's name from that public, yet very personal, document routinely erases that parent in day-to-day interactions. The omission of a parent from the birth certificate could have substantial adverse effects. In cases of medical emergencies, for example, the social parent may be deprived of the right to make any decision or to be involved in a child's medical care.<sup>114</sup>

The derogatory effect of this hierarchy is especially salient when viewed alongside social research concerning same-sex families. Studies have reported on maternal jealousy within lesbian families in which only one parent has a biological link to the child,<sup>115</sup> as well as a power imbalance between the mothers concerning the ability to make decisions regarding their children.<sup>116</sup> By delaying or impeding the legal recognition of the social parent, and by creating, through the birth certificate, a hierarchy with legal and practical significance based on biological

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*(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families*, 40 OTTAWA L. REV. 185, 192 (2008).

111. Anna Marie D'Ginto, Comment, *The Birth Certificate Solution: Ensuring the Interstate Recognition of Same-Sex Parentage*, 167 U. PA. L. REV. 975, 1001-02 (2019).

112. Davoodi, *supra* note 66, at 708; D'Ginto, *supra* note 111, at 1002.

113. D'Ginto, *supra* note 111, at 1002.

114. *Id.* For further reading on other harms inflicted on families who lack birth certificates accurately reflecting their child's legal parentage, see Motion for Leave to File Brief of Amicus Curiae Family Law Professors in Support of Petitioners and Brief of Amici Curiae in Support of Petitioners at 9-17, *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (No. 16-992).

115. Suzanne Pelka, *Sharing Motherhood: Maternal Jealousy Among Lesbian Co-Mothers*, 56 J. HOMOSEXUALITY 195, 196 (2009); Claudia Ciano-Boyce & Lynn Shelley-Sireci, *Who Is Mommy Tonight? Lesbian Parenting Issues*, 43 J. HOMOSEXUALITY 1, 10-11 (2002).

116. See McKelvey, *supra* note 100 at 108; Wojnar & Katzenmeyer, *supra* note 100, at 58-59.

differences, the law entrenches or even exacerbates these internal conflicts within families. This outcome produces a paradox: precisely in those families that depart from the heteronormative model premised on biological kinship, and that rely on alternative procreative arrangements due to the biological constraints of same-sex reproduction,<sup>117</sup> biology becomes the key factor shaping their dynamic.<sup>118</sup> Rather than perpetuate this negative dynamic, the law should facilitate familial stability for the benefit of all family members.

Such a hierarchy between biological and social parenthood becomes all the more apparent in cases of dissolution that occur before the social parent's parental status is formalized. In such scenarios, temporal discrepancy may situate the social parent in a vulnerable position by providing an unjust advantage to the biological parent, who might seek to deny him custodial, visitation, or other rights with respect to the child.<sup>119</sup> In the absence of a legally recognized parent-child relationship, the social parent may find himself barred from making decisions relating to the child.<sup>120</sup> Conversely, a social parent may disclaim responsibility for the child more easily than the biological parent, leaving the child with the support of only the latter.<sup>121</sup> Instead of facilitating these imbalances, we should expect the law to place both parents on equal footing as soon as possible after birth.

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117. Scholars have long discussed how intent—rather than biology—has a meaningful role in the family arrangements of same-sex kinship. See, e.g., Tarsh Bates, *The Queer Temporality of Candida/Homo Biotechnocultures*, 34 AUSTRALIAN FEMINIST STUDS. 25, 33 (2019). This is not to say that biology plays no role at all in same-sex families, but for same-sex couples, biological kinship may be less significant than for different-sex couples. For the opposite view, see Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1083 (2016) (discussing the importance for gay people of a genetic parental bond). This is also the case in Israel, see Noy Naaman, *Bordering Legal Parenthood*, 33(2) YALE J.L. & HUMAN. SECTION (forthcoming 2022).

118. See, e.g., Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L. J. 459, 475-76 (1990).

119. As Nancy Polikoff wrote more than three decades ago, without formalizing the child-parent relationship, a person “may even be found without standing to challenge parental custody.” *Id.* at 471-73; Kelly, *supra* note 110, at 191 nn.17, 20 (referring to Canadian cases in which, during this waiting period, the biological mother refused to consent to the social mother adopting her child).

120. See Polikoff, *supra* note 118, at 471.

121. See *id.*

Challenges to the social parent's relationship to the child may also arise in the event the biological parent dies before the social parent's parental status is formalized. In such circumstances, there is no guarantee that the social parent would be allowed to continue to raise the child.<sup>122</sup> "One can . . . readily envision the potential conflict[s] between" the social parent and the parents or other kin of the deceased biological parent, who may feel entitled to take over the parental role and either adopt the child or become the child's legal guardians.<sup>123</sup>

### 3. *The Collective Sphere*

The third sphere, the collective, refers to relationships among different families. Temporal discrepancy in this context produces systematic differences between different-sex couples who conceive via sexual intercourse and whose parental status is characterized by "natural" temporal congruence and same-sex couples for whom the status of one or both parents is established remotely in time from the birth.<sup>124</sup> Recognizing only biological parents at the child's birth puts same-sex couples at a disadvantage relative to different-sex couples.<sup>125</sup> That difference "countenance[s] a second-class status" for the children of same-sex couples whose familial stability, and emotional and financial

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122. Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 468 (2012).

123. 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, 137 n.117 (2008). If the biological parent sets up a guardianship clause in his will naming his partner as caregiver in the event of his death, this may address these concerns.

124. In certain jurisdictions, the conferral of the nonmarital genetic father's parentage does not occur automatically. *See supra* note 82; *see also* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1187 (2010) [hereinafter Joslin, *Protecting Children(?)*]. However, in these cases, the parental recognition occurs via a simple procedure of signing a form at the hospital, immediately after the child's birth, and without the need to undergo a court proceeding, a process that could render the discrepancy between the construction of the self and of legal identification more perceptible. Parness & Townsend, *supra* note 75, at 57.

125. *See* D'Ginto, *supra* note 111, at 1001-02.

security are impaired as compared to the children of “traditional families.”<sup>126</sup>

As noted above, temporal discrepancy in the context of procreation through ART does not affect same-sex couples exclusively.<sup>127</sup> Nevertheless, this group is disproportionately impacted given that most same-sex couples cannot conceive a child genetically related to both parents.<sup>128</sup> In jurisdictions that limit the marital presumption or VAPs (available for unmarried couples) to different-sex couples, the law creates systematic differences between different-sex couples and lesbian couples who conceive through sperm donation.<sup>129</sup> The disadvantageous treatment of lesbian couples comes sharply into focus by comparison with either unmarried male partners of biological mothers, who may be designated as the child’s father without evidence that he is in fact the biological father,<sup>130</sup> or male spouses of biological mothers who may be designated as the child’s father through the marital presumption, even in the face of evidence that he is not in fact the child’s biological father.<sup>131</sup>

Viewing these three spheres together illustrates that the moment of formalization affects a parent’s self-authorship as well as familial stability, emotional bonds, and financial safeguards. These elements set forth the very conditions under which family arrangements can be formed, be sustained, and flourish. Impeding parental recognition, therefore, is particularly harmful to the *becoming* of families.

### C. Bridging the Gap

Equipped with the foregoing observations about the adverse implications of temporal discrepancy, we now turn to evaluate the

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126. Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 225-26 (2009).

127. See *supra* Section II.A.

128. Indeed, in some circumstances, the parties in same-sex couples are both biologically related to the offspring. Take, for example, female same-sex couples who conceive a child via reciprocal in-vitro fertilization, in which one woman gestates the embryo and the other provides the ovum.

129. See Parness & Townsend, *supra* note 75, at 64, 72, 80.

130. See *supra* note 79.

131. See *supra* note 73.

avenues that can prevent or mitigate them. This section discusses both judicial<sup>132</sup> and non-judicial procedures.<sup>133</sup>

### *1. Judicial Involvement*<sup>134</sup>

The first solution is *pre-birth legal preparation*, which is to say, to initiate a pre-birth procedure so that the judicial order can be granted as close as possible to the birth to file the form of VAP prior to birth.<sup>135</sup> This procedure can be invoked starting as early as the moment of conception, or at a later point, which may be relevant in situations where the intent is constructed during pregnancy.<sup>136</sup> This process does not confer that status during pregnancy, nor does it provide authority over the fetus or the pregnant party's body.<sup>137</sup> Far from doing so, it ensures that the establishment of legal identification occurs at the same time as, or as close as possible to, the child's birth.<sup>138</sup>

This procedure has several advantages. It ensures clarity and stability in the childcare relationship that will begin immediately at birth and acknowledges the emotional involvement of both parents. It may also be helpful in cases of dissolutions that occur before the post-birth order is granted by foreclosing disputes

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132. See *infra* Section II.C.1.

133. See *infra* Section II.C.2.

134. Another avenue for addressing the implications discussed above is to apply the parental order so that it becomes effective retroactively from the moment the child is born. The benefit of this avenue is that from the moment the order is applied, the parental status, and all the benefits and responsibilities derived from that status, is vested on the anticipated parent. See Naaman, *Parental Order*, *supra* note 80, at 281. That solution, however, is by nature an ex-post facto remedy, and thus does not prevent the occurrence of temporal discrepancy and its effects, among them the disruption of self-continuity (especially in cases when the birth certificate is not revised to list the social parent's name), the impediment of financial safeguards, and the peculiar vulnerability of the family in the event of tragedy (e.g., dissolutions or the death of one of the parents) occurring before the judicial issuance.

135. See Katherine Farese, *The Bun's in the Oven, Now What?: How Pre-Birth Orders Promote Clarity in Surrogacy Law*, 23 U.C. DAVIS J. JUV. L. & POL'Y 25, 59 (2019).

136. Israeli law, for example, recently allows parties conceiving via sperm donation to submit an application for a parental order sixty days prior to the birth. See FamA 9182/18 John Does v. The General Attorney, Nevo Legal Database (June 6, 2020) (Isr.). In other jurisdictions, e.g., Florida and Minnesota, the anticipated parents can prepare the paperwork ahead of time and even file the case before the birth, and the court will grant the actual order after the birth. See Michelle Keeyes, *ART in the Courts: Establishing Parentage of ART Conceived Children (Part 2)*, 15 WHITTIER J. CHILD & FAM. ADVOC. 189, 192 (2016).

137. Purvis, *Intended Parents*, *supra* note 37, at 250.

138. *Id.* at 248.



around the existence or validity of the former couple's mutual consent to conceive the child.<sup>139</sup> Such a procedure can offer protections for both the parents and the child. For example, pre-birth procedures can offset efforts by a biological parent to deny her former partner custodial or visitation rights despite their mutual intent to have a child and their mutual responsibility for the child's future.<sup>140</sup> Similarly, pre-birth procedures can foreclose efforts by a social parent to disclaim responsibility for the child and leave the child with the support of only the biological parent, contrary to the former couple's agreement.<sup>141</sup> That process can also be used as a proxy for consent to raise the child together.<sup>142</sup> Finally, assigning future parental status to the anticipated parent in cases of same-sex couples undergoing ART matches the legal implications applied to sex-based reproduction, in which after the conception the genetic parent cannot deny responsibilities in relation to the child.<sup>143</sup>

The second solution is a *pre-birth legal determination* of the parental status, i.e., pre-birth orders, that will be effective at birth.<sup>144</sup> Under this possibility, the parties sign a parenthood agreement and, after reviewing it, a court issues an order confirming the anticipated parents as the eventual child's legal parents.<sup>145</sup> This model, in addition to the advantages of pre-birth

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139. The reason for concern is that intent can be imprecise and difficult to express, and even when there is a written agreement, there may still be disputes concerning the scope or validity of the agreement. *See id.* at 249; Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 274-75 & nn.145-46 (2019) [hereinafter Feinberg, *Restructuring Rebuttal*].

140. *See Purvis, Intended Parents*, *supra* note 37, at 251.

141. *See id.*

142. *See id.* at 249.

143. *See id.* at 250.

144. In the United States, several jurisdictions have adopted this model. *See, e.g.*, CAL. FAM. CODE § 7962(f)(2) (West 2019); 750 ILL. COMP. STAT. 47/35(a) (2016); ME. STAT. tit. 19-a, § 1934(1)(B) (2016); NEV. REV. STAT. ANN. § 126.720(4) (2017); N.H. REV. STAT. ANN. § 168-B:12(I) (2015); N.J. STAT. ANN. § 9:17-67(a), (f)-(g) (2018); N.Y. FAM. LAW § 581-203(b), (d) (McKinney 2020); 15 R.I. GEN. LAWS § 15-8.1-804(a) (2020); VT. STAT. ANN. tit. 15C, § 804(a)(1) (2019); WASH. REV. CODE § 26.26A.750(1)(a) (2018); D.C. CODE § 16-408(a), (e) (2017); *see also* UNIF. PARENTAGE ACT § 811(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017). For further reading on this model—that is, the date upon which the order becomes effective, *see* Joslin, (*Not*) *Just Surrogacy*, *supra* note 37, at 439-40.

145. Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 633-34 & n.3 (2005).

preparation discussed above, allows the parents to be listed on the child's birth certificate immediately after birth and resolves insurance coverage affairs.<sup>146</sup>

A pre-birth order, however, raises tangible concerns in surrogacy because that order may divest the surrogate of parental rights to the eventual child before the birth.<sup>147</sup> This outcome raises a concern that the surrogate may not be able to truly consent to relinquish her future parental status before birth.<sup>148</sup> However, this concern can be mitigated by simply subjecting the parental determination to a waiting period, thereby balancing the certainty of the anticipated parents and ensuring autonomy for the surrogate.<sup>149</sup> Moreover, a pre-birth order should not interfere with the gestational party's autonomy over her body during the period of pregnancy.<sup>150</sup> For example, if the anticipated parents have second thoughts regarding the pregnancy, they could not force the surrogate to have an abortion, nor would they have any right to withdraw their status as parents.<sup>151</sup> Conversely, if the surrogate has second thoughts regarding the pregnancy and decides to have an abortion, the anticipated parents would be unable to prevent her from doing so.<sup>152</sup> This method can also benefit the surrogate as it assures her that the anticipated parents, provided that they comply with the statutory requirements, will take responsibility for the child after his birth.<sup>153</sup>

Another potential concern is that the fetus would be legally understood as a person if parentage is assigned before the child's birth.<sup>154</sup> However, if the order becomes effective only *after* the

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146. *Id.* at 634-35; Farese, *supra* note 135, at 59.

147. Purvis, *Intended Parents*, *supra* note 37, at 235-37.

148. Conor Cory, Note, *Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy?*, 23 GEO. J. ON POVERTY L. & POL'Y 133, 136, 146-47 (2015).

149. *See id.* at 148-49. This could be applicable only if the order becomes effective after the child's birth. Note that currently there are jurisdictions, such as Illinois, in which the order is effective immediately even if issued prior the child's birth. *See* 750 ILL. COMP. STAT. 47/35(a) (2016). The author does not advocate for establishing a status of parentage before the child's birth. *See*, in this regard, *infra* notes 201-04 and accompanying text.

150. *See* Joslin, (*Not*) *Just Surrogacy*, *supra* note 37, at 441.

151. Purvis, *Intended Parents*, *supra* note 37, at 250.

152. *Id.*

153. Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1120-21 (2014).

154. Joslin, (*Not*) *Just Surrogacy*, *supra* note 37, at 459.

child's birth, such a concern, to some extent, is alleviated, because parentage has yet to be established.<sup>155</sup> The problem is not with the option for a pre-birth order per se, but with “what those orders say and do[.]”<sup>156</sup>

Pre-birth procedures, either pre-birth preparation or determination, while laudable, are still inadequate resolutions. From a procedural aspect, court adjudications can easily become an invasive and frustrating process involving multiple state actors such as welfare agencies, state attorneys, and judges.<sup>157</sup> These procedures may also be subject to delays both on behalf of the administrative agencies reviewing the application for the order and the courts authorized to issue the order.<sup>158</sup> In emergency scenarios, such as those occurring in the era of COVID-19, this concern becomes more tangible, as we may anticipate further delays—either on behalf of the parties who cannot attend hearings or on behalf of judges—impeding the issuance of the order.<sup>159</sup> From a substantive aspect, individuals who are unaware of the possibility of initiating the process before birth (or who do not have sufficient resources for attaining this knowledge) may not take advantage of this resolution.<sup>160</sup> Hence, judicial procedure as a condition for assigning parentage produces a gap between disadvantaged and wealthy individuals, impeding substantial equality between the formation of families on the grounds of socio-economic status. This gap should encourage us to consider more efficient and simpler methods for formalizing parentage status, which do not involve court adjudication. The ensuing part surveys such methods.

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155. *See id.* at 38.

156. *Id.* at 442.

157. *See* Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2063-64 (2014).

158. *See, e.g.*, Purvis, *Intended Parents*, *supra* note 37, at 244-45.

159. *See Court Operations During COVID-19: 50-State Resources*, JUSTIA, [<https://perma.cc/VYM5-FQSV>] (last visited Nov. 23, 2021).

160. This concern is pronounced in cases of females conceiving via sperm donation and less in surrogacy. In surrogacy, the anticipated parents are accompanied by an attorney. Snyder & Byrn, *supra* note 145, at 633-34.

## 2. Non-Judicial Involvement

One possibility for attributing parentage without judicial intervention is based on pre-birth agreement which is taken into effect at the child's birth.<sup>161</sup> In jurisdictions that have adopted this model, such as Illinois,<sup>162</sup> British Columbia,<sup>163</sup> and Ontario,<sup>164</sup> if the statutory requirements—such as conducting a written contract and using independent legal representation—are fulfilled, the anticipated parents are registered as parents with the relevant authorities immediately or soon after the birth.<sup>165</sup> Under such laws, judicial intervention is not required as a matter of course but may be invoked in the event of a later dispute.<sup>166</sup>

Another possibility is a presumption of joint parenthood based on couplehood. It has long been considered appropriate to infer paternity from a couple's relationship—as evidenced by laws incorporating a marital presumption—laws that have recently extended beyond the traditional heteronormative model of marriage.<sup>167</sup> Certain scholars, then, offer to move forward and include couplehood as a basis for the presumption of joint parenthood.<sup>168</sup> This model frees the law from heteronormative notions that are grounded exclusively in marriage,<sup>169</sup> and

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161. This possibility has been advocated by various scholars. See Joslin, *Protecting Children(?)*, *supra* note 124, at 1221; Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 *BUFF. L. REV.* 465, 466-67 (2016). For further reading on the advantages of establishing parenthood based on pre-birth agreement, see Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 *WHITTIER J. CHILD & FAM. ADVOC.* 39, 58-60 (2013).

162. 410 *ILL. COMP. STAT.* 535/12 (2017); *Surrogacy*, *ILL. DEP'T OF PUB. HEALTH*, [<https://perma.cc/RK4E-USJH>] (last visited Nov. 23, 2021).

163. Family Law Act, S.B.C. 2011, c. 25, § 29 (Can.).

164. All Families Are Equal Act, S.O. 2016, c. 23, § 10(3) (Can.).

165. See 410 *ILL. COMP. STAT.* 535/12; All Families Are Equal Act, S.O. 2016, c. 23, §§ 10–11 (Can.).

166. See 410 *ILL. COMP. STAT.* 535/12(7); Family Law Act, S.B.C. 2011, c. 25, § 31(1) (Can.); All Families Are Equal Act, S.O. 2016, c. 23, §§ 10(6), 11, 13 (Can.).

167. See *supra* notes 72-79 and accompanying text.

168. See Blecher-Prigat, *Conceiving Parents*, *supra* note 65, at 155. To date, this model has been implemented in three Canadian provinces. See *supra* note 78.

169. Blecher-Prigat, *Conceiving Parents*, *supra* note 65, at 121. That presumption, therefore, circumvents legal limitations related to law that might have unwanted side-effects on the parentage regime. Take, for example, a jurisdiction like Israel that is dominated by religious law, and that does not authorize same-sex marriage (but that registers such marriages conducted in other jurisdictions by virtue of private international law). Ayelet Blecher-Prigat & Noy Naaman, *The Abolition of Legal Marriage in Israel as a Potential*

promotes stability and predictability at a low cost, as it does not involve judicial discretion.<sup>170</sup>

While developing a particular implementation strategy is beyond the scope of this Article, I conclude this section by synthesizing three sets of questions that policymakers should consider in relation to the suggested presumption. The *first* relates to the meaning of the relationship on which the presumption is grounded: what factors will determine couplehood?<sup>171</sup> Must the couple be sharing a household?<sup>172</sup> If so, for how long?<sup>173</sup> Must the couple maintain a sexual commitment?<sup>174</sup> What moment in time will determine whether the parties are in a relationship: the moment of birth or of conception?<sup>175</sup> The *second* concerns the rights of third parties. How should the presumption be applied when there are multiple potential parents?<sup>176</sup> Who will receive priority among these potential parents in jurisdictions that do not recognize more than two parents?<sup>177</sup> The *third* concerns scenarios involving a lack of

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*Queer-Religious Project*, in QUEER AND RELIGIOUS ALLIANCES: FRIENDSHIP IN FAMILY LAW AND BEYOND (Nausica Palazzo & Jeff Redding eds., forthcoming 2022) (manuscript at 2-4).

170. See Aviel, *supra* note 157, at 2009 n.9.

171. See, e.g., *infra* note 173.

172. See, e.g., *infra* note 173.

173. In Ontario, e.g., the All Families Are Equal Act requires a conjugal relationship without specifying a minimum duration. See All Families Are Equal Act, S.O. 2016, c. 23, §§ 1, 8 (Can.) (defining spouse as “the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage”). In Saskatchewan, by contrast, the Children’s Law Act requires a conjugal relationship of at least two years before the moment of conception. See Children’s Law Act, S.S. 2020, c. 2, §§ 55, 60, (defining spouse as “legally married spouse of a person or a person with whom that person has cohabited as spouses continuously for a period of not less than 2 years”).

174. One could assert that a commitment is not contingent on monogamy. See Edward Stein, *Adultery, Infidelity, and Consensual Non-Monogamy*, 55 WAKE FOREST L. REV. 147, 168-69 (2020). This seems to be highly relevant in cases of gay men undergoing surrogacy, as they disproportionately choose to maintain sexually non-exclusive relationships while still committed to one another. See, e.g., Colleen H. Hoff & Sean C. Beougher, *Sexual Agreements Among Gay Male Couples*, 39 ARCHIVES OF SEXUAL BEHAV. 774, 774 (2010).

175. For example, in Ontario, British Columbia, and Saskatchewan, the focus of the presumption in cases of sperm donation is the moment of conception. See All Families Are Equal Act, S.O. 2016, c. 23, § 8(3) (Can.); Family Law Act, S.B.C. 2011, c. 25, § 27(3) (Can.); Children’s Law Act, S.S. 2020, c. 2, § 60 (Can.).

176. See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U.L. REV. 227, 230-31 (2006).

177. In surrogacy, recognizing the parental status of the anticipated parents at birth requires either ignoring the parental status of the surrogate or recognizing more than two

consent to raise the child. Can the couple decide in advance that the presumption will not be applied?<sup>178</sup> Under what circumstances, if any, can one party change his mind?<sup>179</sup>

### III. PRE-BIRTH TEMPORAL DISCREPANCY

The birth of a child legally signifies the birth of parenthood.<sup>180</sup> Self-identification as a parent, however, may develop much earlier, as an ongoing process, producing an indeterminate identity as a “parent-to-be” whose legal implications are unclear.<sup>181</sup> The tension between how an individual perceives the process of becoming a parent and grows into that identification, and how that process is viewed by the law, was classified as the second form of temporal discrepancy.<sup>182</sup> This part focuses on this doctrinal tension, examining *whether* and *how* the law could moderate its implications.

#### A. The Contours of Temporal Discrepancy

*Can the law acknowledge the process of becoming a parent?*

I argue that it is eminently possible to recognize this fluid process and that of the numerous considerations that might explain its current failure to do so, several are misguided.

Legal scholars have long investigated how time systematically infuses the law.<sup>183</sup> Among them is Liaquat Ali Khan, who offers the distinction between two elements, “points in time” and “durations” of time.<sup>184</sup> Khan builds on these

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parents (assuming that the law grants parental status to women based on the act of giving birth). One way to approach this tension is to craft a rule requiring a post-birth waiting period before that presumption becomes effective. *Cf.* NeJaime, *Nature*, *supra* note 73, at 2340; Feinberg, *Restructuring Rebuttal*, *supra* note 139, at 244 n.8.

178. *See* All Families Are Equal Act, S.O. 2016, c. 23, § 8(3) (Can.); Family Law Act, S.B.C. 2011, c. 25, § 27(3) (Can.); Children’s Law Act, S.S. 2020, c. 2, § 60(3) (Can.).

179. One can readily envision scenarios in which the presumption should not apply due to lack of mutual consent to raise the child together. *See* All Families Are Equal Act, S.O. 2016, c. 23, § 8(3) (Can.); Family Law Act, S.B.C. 2011, c. 25, § 27(3) (Can.); Children’s Law Act, S.S. 2020, c. 2, § 60(3) (Can.).

180. Blecher-Prigat, *Conceiving Parents*, *supra* note 65, at 120.

181. *See id.* at 151; *see also* discussion *supra* Section II.B.1.

182. *See supra* notes 58-61 and accompanying text.

183. *See supra* notes 32-36 and accompanying text.

184. Khan, *supra* note 33, at 63.

elements to develop two other principles that are relevant to my analysis.<sup>185</sup> The first, “time trigger[,]” elaborates on the first element, a point in time, and refers to the moment that activates or ends rights and obligations.<sup>186</sup> The second principle features the second element, duration of time, and shows that this element can be either definite or indefinite.<sup>187</sup>

I argue that the distinction between these principles can explain the occurrence of temporal discrepancy. While the construction of the *legal identification* as a parent is captured by the principle of time-trigger, the construction of *self-identification* may occur over a duration of time. Specifically, the time-trigger of the *legal identification* is the moment a child is born, as that is the moment at which the legal responsibilities and entitlements inherent in the parental status initiate.<sup>188</sup> Self-identification, by contrast, like other human dynamics, is not always confined to a specific point in time but develops organically and gradually. The temporality of the human dynamic can be expressed as a duration of time that can be either definite or indefinite.<sup>189</sup> The *construction* of self-identification is definite when that process has a starting point and an ending point.<sup>190</sup> For example, it may begin at the moment of the decision to conceive and end at the moment of the birth.<sup>191</sup> Together, both points describe a definite timeframe. But the duration of the development of self-identification can also be indefinite; this is when self-identification commences somewhere after or prior to the moment of conception and emerges gradually, along a spectrum.<sup>192</sup> That

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185. *Id.* at 58.

186. *Id.* at 87.

187. *Id.* at 65-68 (noting that a provision that ceases to exist at a specified date is an example of a legal principle characterized by a definite duration of time, and the concept of “reasonable time” is an example of a legal principle characterized by an indefinite duration of time).

188. See Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 421, 435-36, 463 (2013).

189. See Khan, *supra* note 33, at 65-69.

190. See *id.* at 65.

191. See *id.*

192. See *id.* at 67. Compare this with the critique of the requirement for pre-conception *intention* as a condition for parental determination. That intention, as Ayelet Blecher-Prigat highlights, “does not emerge as a momentary event, but rather is a process that evolves and develops over time.” See Blecher-Prigat, *Conceiving Parents*, *supra* note 65, at 151; see

spectrum, however, remains ignored from a legal perspective.<sup>193</sup> The disparity between the development of the legal identification, on the one hand, and the construction of self-identification, on the other, constitutes the second form of temporal discrepancy.<sup>194</sup>

Indeed, the doctrinal analysis of temporality provides a plausible explanation for the occurrence of temporal discrepancy;<sup>195</sup> however, I believe that this explanation wrongly describes temporal discrepancy as an inevitable phenomenon. To better understand that temporal tension, I offer to shift the gaze toward the political considerations that shape its occurrence.

As a new infant depends on others for his survival, there is a clear public interest in assigning responsibility for the infant to an adult who can take care of his needs immediately upon his birth.<sup>196</sup> Would this interest not be better served if the anticipated parents were legally recognized as such *before* the birth? Why, then, do so many legal regimes use birth as the triggering event for creating the legal status of parenthood?<sup>197</sup> I outline two explanations below, each grounded in political-cultural considerations.

The first explanation reflects an interest in protecting the self-determination of the party who carries the fetus.<sup>198</sup> This consideration can be divided into two interrelated concerns. The first is that recognizing the legal status of the parent-to-be might equate prenatal life with actual life.<sup>199</sup> Once the law formalizes the legal status of the anticipated parent as such, the argument

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also Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 661 (2012) (stating that “[w]hether that intent existed, and whether it was demonstrated through particular understandings and conduct, would seem to be more important than its precise timing (i.e., whether it was manifested before or after conception).”). My analysis extends beyond that critique and encompasses other relational elements underlying the process of becoming a parent that slip under the radar of the law. See *infra* notes 220-24 and accompanying text.

193. See *supra* notes 58-61 and accompanying text.

194. See *supra* notes 58-61 and accompanying text.

195. See *supra* notes 188-94 and accompanying text.

196. Laufer-Ukeles & Blecher-Prigat, *supra* note 188, at 463-64.

197. *Id.* at 421, 435-36, 463.

198. Joslin, (*Not*) *Just Surrogacy*, *supra* note 37, at 457, 459; see *supra* notes 150-52 and accompanying text.

199. Joslin, (*Not*) *Just Surrogacy*, *supra* note 37, at 408.



goes, it equally accords legal status to the fetus as a child-to-be.<sup>200</sup> Granting legal existence to the fetus, however, plays into anti-abortion rhetoric at odds with women's right to self-determination.<sup>201</sup> For that reason, it comes as no surprise that pro-choice advocates focus on the moment of birth as the outset of a woman's relational status to the fetus.<sup>202</sup> The second concern involves the relationship between the gestational party and the anticipated parents, which becomes apparent in the context of surrogacy and pre-birth orders.<sup>203</sup> This line of concern focuses on the possibility that recognizing a legal status of "parent-to-be" might be construed as granting such parties abortion-related rights that would limit the self-determination of pregnant women.<sup>204</sup>

However, recognizing the period at which a parent is anticipating parenthood is not the same as recognizing parental status, nor does it endow this status with the same rights to which a parent is entitled.<sup>205</sup> As I will illustrate in the next section, the implications of becoming a parent are separate from questions regarding when a fetus is deemed to become a person and do not inherently grant legal rights to the fetus.<sup>206</sup> Understanding that the process of becoming a parent can be legally recognized without acknowledging the personhood of the fetus and without infringing on the gestational party's self-determination diminishes these concerns.<sup>207</sup>

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200. *Id.* at 408, 441-42.

201. This concern has been evident within the debate around the Missing Angel Act in the United States, which authorizes grieving parents to request from the state a birth certificate for a stillborn child. With this in mind, Carol Sanger posits that the stakes of recognizing that emotional suffering of the grieving parents, the (lost) to-be-parents, "may take on a life of its own" by granting benefits to the grieving parent in the year of the birth. Carol Sanger, "The Birth of Death": *Stillborn Birth Certificates and the Problem for Law*, 100 CAL. L. REV. 269, 306-08 (2012). Doing so, Sanger cautions, equates prenatal life with life of a born baby, playing into the trap of those who advocate for criminalizing abortions. *Id.* This concern has been raised in relation to pre-birth orders that establish the parental status of the intended parents in surrogacy prior to the birth. See Joslin, (*Not*) *Just Surrogacy*, *supra* note 37, at 441.

202. Pamela Laufer-Ukeles, *The Disembodied Womb: Pregnancy, Informed Consent, and Surrogate Motherhood*, 43 N.C. J. INT'L L. 96, 102 (2018).

203. Cory, *supra* note 148, at 144-45.

204. Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 522-24 (2017).

205. See *infra* Sections III.B.1, III.B.2.

206. See *infra* Section III.B.

207. Cory, *supra* note 148, at 144-45.

A second explanation for why the creation of the legal status of parenthood is tethered to the moment of the child's birth is grounded in cultural beliefs surrounding childbearing.<sup>208</sup> According to the Jewish tradition, for instance, taking certain actions before a birth, including having baby showers, revealing a baby's intended name, and buying clothes or preparing a room for the baby, should be postponed until the birth to avoid "bad luck."<sup>209</sup> This belief reflects the broader idea rooted in the Jewish tradition that celebrating something we anticipate before it happens might cause the "evil eye" (*ayin hara*).<sup>210</sup> This line of thought runs through the regulation of parental orders in Israel, specifically in the Attorney General's approach when opposing petitions to provide pre-birth orders,<sup>211</sup> and in a recent report issued by a government-appointed task force that assesses the circumstances under which a parental order can be issued.<sup>212</sup>

However, ignoring the process of becoming a parent in the name of such cultural beliefs is problematic in the context of today's technologically sophisticated environment.<sup>213</sup> As I explain below, the law can recognize that an individual is anticipating parenthood without taking any direct action concerning the eventual child or granting legal rights to the fetus as a separate entity.

## B. Bridging the Gap

*How, and for what purpose, can the law recognize the process of becoming a parent?* To pursue this inquiry, I focus on

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208. See, e.g., Yael Hashiloni-Dolev, *The Effect of Jewish-Israeli Family Ideology on Policy Regarding Reproductive Technologies*, in *BIOETHICS AND BIOPOLITICS IN ISRAEL: SOCIO-LEGAL, POLITICAL, AND EMPIRICAL ANALYSIS* (Hagai Boas, et., eds., 2018).

209. See Jennifer Saranow Schultz, *Miscarriage, Superstition and the Jewish Baby Shower*, N.Y. TIMES (Feb. 21, 2014, 11:01 AM), [<https://perma.cc/W545-2QBY>] (last visited Nov. 24, 2021). The Jewish belief is in contrast with the Christian notion of conferring early status as a person. Hashiloni-Dolev, *supra* note 208, at 124-25.

210. Rabbi Philip Sherman, *Why Don't Many Jewish Couples Have Baby Showers or Buy Things for Their Baby Ahead of Time?* JEWISHBOSTON (Aug. 20, 2013), [<https://perma.cc/H3KN-LJY3>] (last visited Nov. 24, 2021).

211. That opposition was represented in their response to the appeal submitted to the Supreme Court in *Fama 9182/18 John Does v. The General Attorney* (June 6, 2020), Nevo Legal Database (Isr.).

212. INTER-MINISTERIAL COMMITTEE GUIDELINES, *supra* note 80, at 30-31.

213. Sherman, *supra* note 210.

two terrains in which temporal discrepancy occurring before birth emerges; in each, I identify various ways in which questions of parentage arise *prior* to the moment of the birth, assess how the failure to recognize the process of becoming a parent inflicts harm on that person, and consider how an inclusive vision of becoming a parent might look. Far from offering a full prescription, I hope that my analysis can be used as a stepping stone for thinking more seriously about the law in a way that promotes accountability for such harms.

Let's begin with the two elements of the suggested vision. The first concerns the *timeframe* of becoming a parent. The process of becoming a parent is oriented by several events transpiring during the process of conceiving and carrying a child to term; the birth is only one constitutive, though crucial, event in that process.<sup>214</sup> Such understanding may become more apparent in cases of ART, where the trajectory to parenthood could take years, especially if that process involves experience of conception-related difficulties and can be challenging and time-consuming.<sup>215</sup> The way individuals perceive themselves as becoming parents, therefore, may not be forged abruptly at their child's birth, but may instead develop gradually and become complete at the birth.<sup>216</sup> That is, the birth completes, rather than establishes, this process.<sup>217</sup> Accordingly, I propose that this period of time should be considered in disputes relating to parenthood.<sup>218</sup>

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214. See *supra* Section III.A.

215. Gash & Raikin, *supra* note 102, at 97, 99.

216. See Blecher-Prigat, *Conceiving Parents*, *supra* note 65, at 151; see also *supra* Section III.A.

217. See *supra* Section III.A.

218. One question, which will accompany us throughout the ensued discussion and should be considered further, is *when* exactly this process initiates. There are several possibilities—the moment of a mutual consent to conceive, the moment of initial conception (sperm meets egg), the moment of fertilization (an embryo forms), the moment of implantation (the embryo successfully implants in the wall of the uterus), or somewhere after that point during pregnancy. It seems that the significance of determining the moment at which this process initiates varies in accordance with specific legal aspects. For assisted reproduction purposes, questions such as the following arise: if one consented to the assisted reproduction after the pregnancy occurred, might one be able to change one's mind? And, if this happens, does the withdrawal depend on the approval of the other party? Also, what if one consents, but then later seeks to withdraw consent and does so *prior* to transfer and conception? Is it then possible that one might still be held to be a parent of the resulting

The second element concerns the *content* of that timeframe. The process of becoming a parent is not confined to events with biological elements, such as sexual intercourse, conception, or the delivery of the child.<sup>219</sup> The process also encompasses relational elements, such as the mutual decision to conceive and raise a child, multiple forms of work associated with the process of becoming a parent—like adopting behavioral patterns needed to prepare for the parental role and developing a social network to facilitate the adjustment to the new role of a parent<sup>220</sup>—and special arrangements involved in ART procedure,<sup>221</sup> such as aspects of the decision-making processes, e.g., whom of the two women would carry and bear the child,<sup>222</sup> or whom of the two men would supply the sperm to impregnate the egg donor,<sup>223</sup> researching medical options and legal constraints, finding a clinic for the reproductive procedure, meeting an egg or sperm donor, meeting physicians or surrogacy agency staff for in-vitro fertilization, selecting a surrogacy agency, choosing a prospective surrogate and establishing meaningful relationship with her,<sup>224</sup> and undertaking legal actions involved in that process, such as negotiating the agreements involved.<sup>225</sup> All such elements, in the eyes of the anticipated parent, contribute to the child's birth and shape his selfhood as a parent, which he experiences as an ongoing process rather than as something fixed or static.<sup>226</sup>

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child? In the United States, for example, the 2017 UPA allows the intended party in surrogacy to change its mind before an embryo transfer. UNIF. PARENTAGE ACT § 808(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017); see also Dara E. Purvis, *Expectant Fathers, Abortion, and Embryos*, 43 J.L. MED. & ETHICS 330, 330, 335 (2015).

219. David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 325-30 (2019).

220. *Id.* at 327-30.

221. Gash & Raiskin, *supra* note 102, at 104; Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207, 208-17 (2010).

222. For the complexity of this aspect, see Abbie E. Goldberg, *The Transition to Parenthood for Lesbian Couples*, 2 J. GLBT FAM. STUD. 13, 24-25 (2006).

223. Dana Berkowitz, *Gay Men and Surrogacy*, in LGBT-PARENT FAMILIES: INNOVATIONS IN RESEARCH & IMPLICATIONS FOR PRACTICE 76 (Abbie E. Goldberg & Katherine R. Allen eds., 2013).

224. Elly Teman & Zsuzsa Berend, *Surrogate Non-Motherhood: Israeli and US Surrogates Speak about Kinship and Parenthood*, 25 ANTHROPOLOGY & MED. 296, 300, 308 (2018).

225. *Id.* at 299.

226. Compare with the literature of legal embodiment. See, e.g., Ruth Fletcher et al., *Legal Embodiment: Analysing the Body of Healthcare Law* 16 MED. L. REV. 321, 335-44

Accordingly, one may view both the biological and relational elements as constituting the parental status.<sup>227</sup> That understanding, in turn, produces a need to consider how the law could be more responsive to the experience of becoming a parent.

I should clarify that I do not suggest that the anticipated parent should be legally recognized as a parent before the child's birth or that anticipated parents should have parental rights before the birth. Instead, I propose that the law should acknowledge the process of *becoming* both through the body and the self and should reflect both the physical implications of that process and its relational elements, though without neglecting the gestational-related concerns discussed above. In the following sections, I examine two terrains that exemplify pre-birth temporal discrepancy and consider how the implementation of my vision might look.

### *1. Work-Family Conflicts*

In various jurisdictions, the law provides employment entitlements based on parental status, such as paternity leave and protections against discrimination based on parental status, regardless of who carried the fetus or has a genetic relationship to the child.<sup>228</sup> When it comes to the period of pregnancy, however, the law generally provides special rights only to the pregnant woman.<sup>229</sup> This is out of the recognition that pregnancy, a condition unique to women, entails peculiar physical and social implications.<sup>230</sup> Pregnant women, for example, are more likely to face employment discrimination based on the assumption that

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(2008) (stressing the subjective, intersubjective, material, and symbolic dimensions of embodiment, and how these dimensions do, and should, inform the law).

227. Some scholars argue that the embodiments of becoming a parent extend beyond identity-constituting and involve also relationship-constituting. Alison Reiheld, "The Event That Was Nothing": *Miscarriage as a Liminal Event*, 46 J. SOC. PHIL. 9, 11 (2015).

228. See 29 C.F.R. § 825.120 (2018).

229. When the law does provide the anticipated father with benefits relating to pregnancy, though, it is mostly when it is necessary for him to care for his pregnant partner. See, e.g., the Family and Medical Leave Act in the United States which provides benefits relating to pregnancy to an anticipated father only when necessary "to care for a pregnant spouse . . ." See 29 C.F.R. § 825.120(a)(5) (2018).

230. Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 848-49 (2016).

they will soon be missing work due to their caregiving responsibilities.<sup>231</sup>

The process of becoming a parent, nonetheless, involves human investments that do not flow directly from its gestational elements, such as attending prenatal appointments and learning how to care for an infant.<sup>232</sup> Additionally, the process may provoke physiological or psychological effects unrelated to carrying the fetus, such as antenatal depression among anticipated fathers due to worries about being a parent.<sup>233</sup> These investments and implications are overlooked by the law, however, exemplifying what I theorize as one type of temporal discrepancy.<sup>234</sup>

The implications of this oversight are palpable in two categories of employment conflicts, both of which are peculiar to couples in which neither party is pregnant, e.g., couples (same- or different-sex), or single individuals who have children through surrogacy. The *first category* involves adverse employment actions based on the parent-to-be *status*.<sup>235</sup> In a scenario in which an employer's decision not to hire a (non-pregnant) prospective employee or not to promote a current (non-pregnant) employee based on that employee's status as an anticipated parent, the employee may find himself without a cause of action under anti-discrimination laws.<sup>236</sup> For example, when a single man is anticipating becoming a parent by surrogacy, the employer might assume that he is not a dependable employee because of potential future obligations reducing his investment in work, especially after the birth.<sup>237</sup> Because, in the classic scenario, this assumption

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231. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty*, 112 AM. J. SOCIO. 1297, 1297 (2007); Caroline Gatrell, *Managing the Maternal Body: A Comprehensive Review and Transdisciplinary Analysis*, 13 INT'L J. MGMT. REVS. 97, 98-100 (2011).

232. Fontana & Schoenbaum, *supra* note 219, at 327-30.

233. *Id.* at 337.

234. *See supra* Section III.A.

235. *See infra* text accompanying notes 253-54.

236. *See infra* text accompanying notes 253-54.

237. There is a presumption that employers prefer anticipated fathers as compared to men who do not expect children out of the assumption that anticipated fathers increase their breadwinning efforts. *See* Fontana & Schoenbaum, *supra* note 219, at 348 & n.241 (citing Shelly Lundberg & Elaina Rose, *Parenthood and the Earnings of Married Men and Women*, 7 LAB. ECON. 689, 705-06 (2000)). However, that may not be true in cases of a gay couple

typically disadvantages pregnant women, anti-discrimination statutes contemplate recourse for adverse actions taken against pregnant employees.<sup>238</sup> Single men, gay couples, and other non-gestational parents, however, may be considered outside the scope of such statutes' protections.<sup>239</sup>

The *second* category involves adverse employment actions based on the *conduct* of the anticipated parent, such as disciplining an employee for being absent from work to attend a prenatal appointment or ultrasound test of the surrogate or any other pre-birth caregiving responsibilities.<sup>240</sup> Such actions may not give rise to an actionable claim of discrimination, since the law generally does not consider non-gestational anticipated parents to be within the scope of individuals entitled to invoke statutory protections.<sup>241</sup> By contrast, an anticipated gestational mother may have a cause of action in the same scenario.<sup>242</sup> Giving legal rights only to the prebirth care-work of a pregnant person is normatively problematic, especially once we realize that people undergoing ART have particular prebirth arrangements that may require their absence from work.<sup>243</sup>

These two categories of conflicts illustrate that during the period of pregnancy—or even earlier, while conducting fertility treatments—certain employees may be subject to adverse employment actions based on their status or efforts as parents-to-be, but lack legal remedies to redress them.<sup>244</sup> Scholars argue that

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conceiving through surrogacy given the assumption that the employee will be more likely to be absent to fulfill his parental responsibilities.

238. Courts in the United States have held that Title VII and the Pregnancy Discrimination Act (“PDA”) “prohibit[] an employer from discriminating against a woman ‘because of her capacity to become pregnant.’” *See, e.g.,* Kocak v. Cmty. Health Partners, 400 F.3d 466, 469 (6th Cir. 2005) (quoting Int’l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991)).

239. *See* Fontana & Shoenbaum, *supra* note 219, at 338.

240. For a discussion of the antagonism directed toward male caregiving embedded in the workplace, see Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 257, 265-69 (2013).

241. *See, e.g.,* 42 U.S.C. § 2000e(k).

242. For example, the United States PDA, which amended Title VII to protect against pregnancy discrimination, covers only women. *See* 42 U.S.C. § 2000e(k).

243. *See In Vitro Fertilization (IVF)*, MAYO CLINIC (Sept. 10, 2021), [<https://perma.cc/8934-X52G>] (last visited Nov. 24, 2021).

244. *See, e.g.,* 42 U.S.C. § 2000e(k).

this vulnerability lies in the fact that pregnancy is sexualized—i.e., that issues arising during pregnancy are framed as issues pertaining exclusively to women—and, therefore, the implications of pregnancy that are independent of the pregnant body are invisible to the law.<sup>245</sup> Following this line of thought, I suggest thinking about these conflicts through the lens of *becoming* a parent. That is, rather than focusing on pregnancy per se, we should consider how the period of gestation incorporates both biological and relational elements.<sup>246</sup> By disentangling the implications of becoming a parent from those that relate to the physician condition of pregnancy, I do not aim to trivialize the risks of pregnancy for the gestational party, nor to obscure how pregnancy has been used to justify the oppression of women. Rather to clear space for thinking how the law could be responsive to the nuanced needs of all anticipated parents, including those of the non-gestational anticipated parents.

Two ways emerge for implementing such a vision in practice. The first, as David Fontana and Naomi Schoenbaum offer, is to provide to non-gestational anticipated parents the same entitlements that pregnant women receive when the entitlements are designed to address non-biological prebirth care and commitments.<sup>247</sup> These may include, for example, the right to be absent from work to attend prenatal obstetrician appointments.<sup>248</sup> While employers cannot ask for evidence of the appointment, employers may ask for a declaration of the time and date of the appointment and of the employee's relationship with the person undergoing treatment.<sup>249</sup> This avenue would ensure that the non-gestational parents could engage in pre-birth work without the risk of adverse employment consequences.<sup>250</sup> It would also

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245. Fontana & Schoenbaum, *supra* note 219, 311-13.

246. *See supra* text accompanying notes 217-27.

247. *See supra* text accompanying notes 217-27; Fontana & Schoenbaum, *supra* note 219, at 324, 336, 338, 354.

248. For example, the UK created a sex-neutral paid prenatal leave program allowing the non-gestational party to be absent from work to attend a number of prenatal appointments. *See* Department for Business, Innovation & Skills & Jo Swinson, *Press Release: New Right for Fathers and Partners to Attend Antenatal Appointments*, GOV.UK (Oct. 2, 2014), [<https://perma.cc/8ZCP-DKVQ>] (last visited Nov. 24, 2021).

249. *Id.*

250. *See* Fontana & Schoenbaum, *supra* note 219, at 339-40, 366.



encourage early development of the emotional bond between parent and child, which may be weaker when the anticipated parent does not carry the fetus, by facilitating the involvement of the anticipated parents in the process of becoming a parent.<sup>251</sup> Finally, fostering the non-gestational party's involvement can strengthen the relationship between parents so that they can effectively co-parent the child.<sup>252</sup>

Another avenue to further consider is providing protection against employment discrimination based on the employee's status of parent-to-be. Just as employment laws prohibit *discrimination* against an employee based on parental status after the child's birth (regardless of the employee's gestational or genetic tie to the child), the law could extend those protections to the pre-birth period.<sup>253</sup> Specifically, the law could recognize "anticipated parents" as a protected class under current regimes or enact separate restrictions to prevent employers from terminating employees based on their status of becoming parents. These protections could be triggered, for example, by the employee's initiation of fertility treatments, at the moment the employee shares his intention to do so with the employer, or when the employee informs the employer about the pregnancy of their future child—namely, when the employee becomes vulnerable to biases concerning his future commitment to the workplace. This avenue, however, requires careful consideration of who falls within the class of anticipated parents,<sup>254</sup> and necessitates a determination of how it could operate in such a manner which does not unduly burden employers.

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251. *Id.* at 345.

252. This outcome is vital for marriage-like relationships that lack the institutional support for the commitment that marriage enjoys. See Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 562-64 (2007).

253. The Human Rights Code, RSO 1990, c H-19, s 5 (provincial statute prohibiting employment discrimination in Ontario) is an illustrative scheme that could implement these protections. This statute provides protections against discrimination on the ground of family status. It might be worth observing that nothing necessarily prevents a tribunal from interpreting this protected ground under the Ontario Human Rights Code in a way that extends protection back in time to cover the context of pregnancy. I am indebted to Kerry Rittich for this observation.

254. One way could be those who are or who might be determined to be parents at the moment of the child's birth.

## 2. Reproductive Malpractice

Reproductive malpractice resulting in pregnancy loss provides another manifestation of temporal discrepancy. As these disputes arise at the moment tortious conduct suddenly disrupts the process of becoming a parent, they exemplify the relationship between the “to-be” self—specifically its liminal character<sup>255</sup>—and the law’s (ex-post) acknowledgment of that status or liminal event.<sup>256</sup> This section examines how a broader vision of becoming a parent can be implemented to address such disputes. To pursue my inquiry, I consider compensation-based schemes for intangible harms, under the laws of the United States and Israel, though my analysis could be applicable to other jurisdictions as well, given that the inquiry under consideration transcends jurisdictional boundaries.<sup>257</sup>

Jurisdictions in the United States vary in terms of the scope of the right to recovery they recognize for intangible harms arising out of tortious pregnancy loss.<sup>258</sup> Most jurisdictions provide legal recourse for such harms only if the plaintiff suffers a physical injury.<sup>259</sup> Accordingly, non-gestational parties typically have no legal claim for malpractice resulting in a miscarriage or stillbirth.<sup>260</sup> Courts in the United States that have permitted legal recovery for a non-gestational parent have limited

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255. Reiheld, *supra* note 227, at 9-12.

256. *Id.* at 17.

257. I do not purport to offer a doctrinal analysis. For a comprehensive overview of the statutes and judicial cases in the United States, see, e.g., Jill Wieber Lens, *Tort Law’s Devaluation of Stillbirth*, 19 NEV. L.J. 955, 987-92 (2019).

258. It was only in 2004, for example, in the case of *Broadnax v. Gonzalez*, that the New York Court of Appeals permitted the gestational plaintiff, the grieving anticipated mother, to recover for emotional anguish resulting from miscarriage (or stillbirth) caused by medical malpractice even though she did not suffer any physical injuries. See, 809 N.E.2d 645, 648-49 (N.Y. 2004). The court clarified that this recourse is not applicable to the father, and commentators have argued that this view is grounded “on the inseparable and completely intertwined relationship between the mother and the fetus.” Alicia A. Ellis, Note, *Better Late Than Never: New York Finally Closes the “Gap” in Recovery Permitted for Negligent Infliction of Emotional Distress in Prenatal Medical Malpractice Cases*, 80 ST. JOHN’S L. REV. 725, 750 (2006).

259. For a critique of this legal principle, see generally DOV FOX, *BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW* (2019).

260. Jill Lens shows that only a few courts have recognized a claim by the father. See Lens, *supra* note 257, at 987.

liability to circumstances in which that parent witnessed the conduct causing the physical injury or the plaintiff's own physical safety was at risk.<sup>261</sup> The reluctance to compensate a non-gestational party for other intangible harms incident to pregnancy loss reinforces the notion that becoming a parent is essentially a gestational process.

This reductionist understanding of parenthood-to-be is normatively problematic. Research has shown that both gestational and non-gestational parents experience emotional suffering in the event of pregnancy loss due to psychological factors involved in pregnancy.<sup>262</sup> The psychologist Anna Brandon, for example, demonstrated that developing a prenatal attachment during pregnancy can transpire *regardless* of the anticipated parent's sex.<sup>263</sup> The research of Nathaniel Wagner on anticipated parents who lost their fetus showed that "men suffer loss in much the same way as women and that culture is the primary factor leading to the demonstrated difference in response . . . ."<sup>264</sup> Likewise, an Irish study that examined the emotional impact of miscarriage on men found that men are inclined to hide their emotions so that they would be perceived as strong for their partners.<sup>265</sup> Overall, this research demonstrates that there is a need to approach this experience from a perspective that denaturalizes the link between the psychological and gestational experiences of becoming a parent.

One could envision intangible injuries in this context as those involving the disruption of the self-authorship,<sup>266</sup> the loss of

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261. *Id.* at 988.

262. See, e.g., Nathaniel J. Wagner et al., *Fathers' Lived Experiences of Miscarriage*, 26 FAM. J.: COUNSELING & THERAPY FOR COUPLES & FAMS. 193, 193, 195-96, 198 (2018); Anna R. Brandon et al., *A History of the Theory of Prenatal Attachment*, J. PERINATAL & PSYCH. & HEALTH 201, 213 (2009).

263. Brandon et al., *supra* note 262, at 210-11.

264. Nathaniel J. Wagner et al., *supra* note 262, at 193.

265. McDonald, *Men's Feelings Ignored Over Miscarriages*, SUNDAY TIMES (Aug. 15, 2004, 1:00 AM), [<https://perma.cc/5RQX-V9K5>] (last visited Nov. 25, 2021).

266. Such an argument can be supported by studies highlighting how the prenatal period becomes a driving force that leads to the development of the paternal identity. See Catarina Silva et al., *Transition to Fatherhood in the Prenatal Period: A Qualitative Study*, 26 CIÊNCIA & SAÚDE COLETIVA 465, 466-70 (2021); Hongjian Cao et al., *Identity Transformation During the Transition to Parenthood Among Same-Sex Couples: An Ecological, Stress-Strategy-Adaptation Perspective*, 8 J. FAM. THEORY & REV. 30, 30 (2016). In this regard, Dov Fox offers to think about the intangible harm caused to the

possibility,<sup>267</sup> the expectations for becoming a parent,<sup>268</sup> or the linear process of “relationship-constituting[.]”<sup>269</sup> all of which resonate with the notion of being invested in “physical . . . human . . . and social capital . . . .”<sup>270</sup> This investment includes various elements, such as accumulating goods needed to care for the eventual child, forming social networks necessary for the pregnancy or the eventual child, or other activities involved in developing the identity of a future parent.<sup>271</sup> Focusing on these elements—all of which are shared by the gestational *and* the non-gestational anticipated parents—highlights the shortcomings of regimes that limit the scope of non-gestational parties’ recourse for intangible losses.<sup>272</sup>

That limitation, furthermore, raises a paradox in surrogacy. Though the surrogate is likely to be compensated for her emotional distress, the *actual* anticipated parents’ distress over the loss of the eventual child may remain uncompensated.<sup>273</sup> Certainly, pregnancy loss entails a penetrating emotional loss.<sup>274</sup> This has been shown to be true even for surrogates who disclaim any attachment to the fetus, and regardless of the level of fetal development or whether the surrogate suffers a physical injury.<sup>275</sup> Yet the anticipated parents are at least as susceptible as the

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anticipated parent in similar events of reproductive malpractice, e.g., the loss of frozen embryos caused by the fertility clinic, as “[t]he disruption of family planning” because the tortfeasor’s actions invade “the control individuals have over their reproductive lives[.]” and cause the loss of “people’s legitimate expectations to exercise a reasonable measure of control over decisions about having children.” See Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 159, 172, 210-11 (2017).

267. Julia Frost et al., *The Loss of Possibility: Scientisation of Death and the Special Case of Early Miscarriage*, 29 SOCIO. HEALTH & ILLNESS 1003, 1013 (2007).

268. See Erica Richards, Note, *Loss of Potential Parenthood as a Statutory Solution to the Conflict Between Wrongful Death Remedies and Roe v. Wade*, 63 WASH. & LEE L. REV. 809, 812-13 (2006).

269. See Reiheld, *supra* note 227, at 11.

270. Fontana & Schoenbaum, *supra* note 219, at 327.

271. *Id.* at 327-30.

272. See *id.* at 327-28, 330.

273. Lens, *supra* note 257, at 976 n.154.

274. Zsuzsa Berend, *Surrogate Losses: Understandings of Pregnancy Loss and Assisted Reproduction Among Surrogate Mothers*, 24 MED. ANTHROPOLOGY Q. 240, 242 (2010).

275. See *id.* at 242-44, 253 (framing the surrogate’s harm as a failure to deliver the promised “gift of life” and a loss of both “the . . . ‘journey’ and the dream of fully belonging to the surrogate community” and “the [anticipated parents’] trust and appreciation”).

surrogate to mental anguish in the event of pregnancy loss, though they may experience their grief differently.<sup>276</sup>

Tort law is one means by which private parties pursue reparation for their injuries.<sup>277</sup> Grounding legal recovery for intangible harms associated with tortious pregnancy loss exclusively on the gestational bond is at odds with modern family structures and technological innovations that disentangle biology from the responsibility of raising a child.<sup>278</sup> Moreover, its gestational focus produces a systematic distinction between couples who conceive with the assistance of a surrogate and other couples.<sup>279</sup> These observations underscore the need for tort law to evolve to reflect modern realities, compensate all anticipated parents who suffer emotional injuries as a result of tortious conduct, and redress systematic inequalities.

Critics of this view will undoubtedly argue that once we begin to consider according non-gestational parties legal rights and remedies in relation to pregnancy loss, we open the door to claims by such parties that would restrict women's reproductive right to abortion.<sup>280</sup> Certainly, that is a tangible concern. Nevertheless, there are at least two reasons to believe that abortion rights and my vision could coexist.<sup>281</sup> First, while my suggested view contemplates compensation for *tortious* conduct resulting in the loss of pregnancy, "[a]bortion is a voluntary termination of pregnancy."<sup>282</sup> Second, my suggested view does not create any rights for the unborn child, but instead, it aims to provide recovery to the grieving individuals for their emotional pain stemming from the loss of pregnancy and of the relationship with their desired (unborn) child.

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276. See generally Christa Craven and Elizabeth Peel, *Stories of Grief and Hope: Queer Experiences of Reproductive Loss*, in QUEERING MOTHERHOOD: NARRATIVE AND THEORETICAL PERSPECTIVES (Margaret F. Gibson, ed., 2014).

277. RESTATEMENT (SECOND) OF TORTS § 901 (AM. L. INST. 1979).

278. See Lens, *supra* note 257, at 987.

279. See *id.* at 976 n.154.

280. See Sanger, *supra* note 201, at 305; Rita M. Dunaway, *The Personhood Strategy: A State's Prerogative to Take Back Abortion Law*, 47 WILLAMETTE L. REV. 327, 327 (2011).

281. Cf. Lens, *supra* note 257, at 1009-12 (positing that a tort recognition of stillbirth is consistent with abortion rights).

282. *Id.* at 1006.

The Israeli regulatory regime illustrates how challenges to gestation-based distinctions can channel a more inclusive vision of becoming a parent. The Israeli Supreme Court in *Levy v. Shaare Zedek Medical Center* (“*Levi*”) paved the way for a regulatory scheme that allows anticipated non-gestational parents to recover for intangible harms associated with tortious pregnancy-related injuries.<sup>283</sup> *Levi* involved a prenatal injury when a fetus “died” in utero as a result of the hospital’s negligence.<sup>284</sup> The court ruled that both the anticipated mother and the anticipated father could be compensated for their emotional harm.<sup>285</sup> All three judges held that the anticipated mother was a *direct* victim due to her role in the act of giving birth, during which the damage was caused.<sup>286</sup> But the judges were split as to whether the anticipated father, who was exposed to the anticipated mother’s injury, should be classified as a *direct* victim or a *secondary* victim.<sup>287</sup>

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283. See CivA 754/05 *Levy v. Shaare Zedek Med. Ctr.*, 218(2) PD 218, 255 (2007) (Isr.).

284. *Id.* at 218, 234, 249.

285. *Id.* at 251, 258. It should be emphasized that this recovery is separate from the legal recourse available to the gestational parent in relation to the physical experience of her pregnancy loss. See *id.* at 246-49 (noting that direct victims who suffer *tangible* injuries may recover damages notwithstanding the restrictions Israeli courts apply to indirect victims seeking reparations for *intangible* injuries). Under earlier Israeli Supreme Court precedent, a person who suffers emotional harm as a consequence of severe bodily injury negligently caused to a close relative can recover only if the emotional harm is severe and provokes substantial mental consequences. See LCivA 444/87 *Alsoucha v. Estate of Dehan*, 44(3) PD 397, 433-36 (1990) (Isr.). Specifically, that emotional harm must amount “to a mental disease (psychosis) or a mental disturbance (neurosis) involving a considerable amount of disability . . . .” *Levi*, 218(2) PD at 244. However, that decision left room for flexibility in applying the criteria. *Alsoucha*, 44(3) PD at 432. The Court in *Levi* decided that the circumstances under consideration justified flexibility and thus ruled that the anticipated father was entitled to compensation for his emotional harm, notwithstanding the absence of a serious emotional disability. *Levi*, 218(2) PD at 252-53, 255.

286. *Levi*, 218(2) PD at 246, 249, 262, 265. It is worth noting that while the majority agreed with the trial court’s classification of the anticipated mother as a direct victim, it remarked that the anticipated mother was not harmed “in the usual sense[.]” as the emotional distress she suffered resulted from “the death of another—the [fetus] that was in her womb.” *Id.* at 246, 249. Indeed, the court opined that the obvious connection between the anticipated mother and the fetus created a layer of complexity that placed her “on both sides of the dividing line between a secondary victim and a [direct] victim, with one foot on each side.” *Id.* at 249. The court ultimately determined that the anticipated mother could recover damages regardless of her classification. *Id.* at 270 (Joubran J., concurring).

287. *Id.* at 250, 262 (Hayut, J., concurring in part and dissenting in part), 266 (Joubran, J., concurring).

The majority opinion held that the anticipated father was a *secondary* victim, reasoning that the injury he suffered derived solely from his exposure to the tortious conduct that directly injured the anticipated mother.<sup>288</sup> The majority acknowledged the emotional involvement of the father in the process of conceiving the fetus, emphasizing, for example, his “torment involved in the lengthy and exhausting fertility treatments, the keen anticipation of the child that was about to be born[,] and the bitter pain . . . .”<sup>289</sup> In the majority’s view, however, that involvement did not make the anticipated father a direct victim, but it nevertheless justified compensating him for his emotional harm, although he did not suffer the severe mental consequences required by previous legal precedents.<sup>290</sup>

By contrast, the minority opinion of Justice Hayut concluded that the anticipated father should be regarded as a *direct* victim, reasoning that he experienced a direct loss as the anticipated parent of the eventual child.<sup>291</sup> Hayut stressed that the process of conceiving a child is “the result of a partnership and a joint physical and emotional effort of the spouses as parents . . . .”<sup>292</sup> That substantive involvement, in Hayut’s view, justifies treating an anticipated father as a primary victim.<sup>293</sup> That approach embraces a both/and view of parenthood, which incorporates *both* biological *and* relational elements, while acknowledging the central and crucial role of the pregnancy experienced by women

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288. *Levi*, 218(2) PD at 250 (majority opinion), 267 (Joubran J., concurring) (“[T]he emotional damage that he suffered derived from his identification with the suffering that the mother experienced and from his being a full partner on an emotional level in the birth process.”).

289. *Id.* at 266-67 (Joubran, J., concurring).

290. *Id.* at 255 (majority opinion), 267 (Joubran J., concurring).

291. *Id.* at 263 (Hayut, J., concurring in part and dissenting in part) (“Admittedly, from a purely physical viewpoint, the mother naturally has a major role in the process as the person carrying the [fetus] in her womb and as the person from whose womb the [fetus] emerges into the world. But this does not, in my opinion, detract from the extent of the father’s emotional and psychological involvement in the process (except in cases where such involvement does not exist for one reason or another).”).

292. *Id.*

293. *Levi*, 218(2) PD at 263 (Hayut J., concurring in part and dissenting in part).

in procreation.<sup>294</sup> That understanding is reflected in the outcome, which awarded higher compensation to the anticipated mother.<sup>295</sup>

By shifting the gaze from the gestational elements of becoming a parent toward its relational elements, Hayut's rhetoric embraces an inclusive vision of becoming a parent of the kind I encourage throughout this Article.<sup>296</sup> It conveys a clear message that pregnancy is a joint experience that involves the mutual responsibility of both (or sometimes multiple) anticipated parents and values emotional investment by both men and women in becoming parents.<sup>297</sup> Scholars have long discussed how the legal discourse of parenthood is constructed by such a narrow definition of masculinity.<sup>298</sup> Recently, more feminist scholarship has emerged that considers how the post-birth, traditional gender division of labor is shaped by the period before the birth,<sup>299</sup> illustrating the potential of valuing the emotional involvement of both parents already before birth, as represented by Justice Hayut's opinion in the *Levi* decision.<sup>300</sup> This is not to say that judicial rhetoric alone can undo traditional norms or reshape family arrangements.<sup>301</sup> Nevertheless, incremental changes consistent with that rhetoric would be important steps toward a legal framework that acknowledges and supports the full range of experiences involved in the journey toward parenthood.

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294. *Id.*

295. Justice Hayut awarded NIS 500,000 to the anticipated mother and NIS 350,000 to the anticipated father. That difference is grounded on the presumption that the emotional harm of the anticipated mother is shaped *also* by the physical elements of carrying the fetus. *Id.* at 264.

296. *See supra* Section III.B.

297. *See Levi*, 218(2) PD at 262-63 (Hayut J., concurring in part and dissenting in part).

298. *See, e.g.*, Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1048-50 (2012); Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 MICH. ST. L. REV. 983, 984-85 (2013). Karin Carmit Yefet, *Feminism and Hyper-Masculinity in Israel: A Case Study in Deconstructing Legal Fatherhood*, 27 YALE J.L. & FEMINISM 47, 49-50 (2015).

299. *See, e.g.*, Fontana & Schoenbaum, *supra* note 219, at 311-13, 315.

300. *Levi*, 218(2) PD at 263 (Hayut J., concurring in part and dissenting in part).

301. *See also* Daphna Hacker, *Single and Married Women in the Law of Israel—A Feminist Perspective*, 9 FEMINIST LEGAL STUDS. 29, 52 (2001).



## CONCLUSION

The time has come to think more seriously about the *becoming* of legal parental status. The concept of temporal discrepancy reveals how traditional understandings of becoming a parent, embedded in different bodies of the law, marginalizes certain modalities of life and renders them vulnerable.<sup>302</sup> This concept clears space for considering an alternative framework for breaking with this understanding and mitigating its crippling outcomes.

I offer to implement this framework both at the time of the child's birth by conferring the parental status as close as possible to the birth,<sup>303</sup> and in the period preceding the child's birth by proposing a legal understanding that syncs with the experience of becoming a parent.<sup>304</sup> This understanding acknowledges the relational elements of becoming a parent, such as the social burdens involved in the process, emotional involvement, and other precious human investments that often remain invisible.<sup>305</sup> This understanding could be implemented by providing legal protections to the anticipated parents *ex-ante*, when they are *anticipating* parenthood—as exemplified in the discussion of work-family conflicts<sup>306</sup>—and/or *ex-post*, when the process of becoming parents is disrupted by a tortious act—as in conflicts arising from instances of reproductive malpractice.<sup>307</sup>

My hope is that this analysis can be used as a starting point for further scholarly and legislative conversations about how the law could embrace the process of becoming a parent. Instead of asking only *when* does a parent become a parent, we should also ask: *how* does a parent become a parent? Framing the question broadly to incorporate the process illuminates the need to consider its richness and to examine more seriously its implications.

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302. *See supra* Section II.B.

303. *See supra* Part II.

304. *See supra* Part III.

305. *See supra* Section III.B.

306. *See supra* Section III.B.1

307. *See supra* Section III.B.2

While articulating a detailed blueprint for this understanding as it applies in various legal contexts is beyond the scope of this Article, my analysis offers several considerations for future conversations. These include: who falls within the class of anticipated parents? What timeframe applies to the process of becoming? Which moments in time are most relevant in each legal context? This conversation should be framed through the lens of a gender-neutral understanding of parenthood that resists a reductionist, biology- and gestation-centric view of procreation, while remaining attentive to the bodily autonomy of gestational parents.<sup>308</sup>

Finally, though the Article's focus is parental identification, queer theories of time could fuel us to consider other internal processes that may be marginalized or simply slip under the radar of institutional rhythms.<sup>309</sup> We should take these theories one step further and ask whether the law can—or should—embrace these *becomings*? Thinking about these questions uncovers a space in which queer and legal studies have yet to intersect but should.<sup>310</sup>

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308. I acknowledge that a framework recognizing the richness of becoming a parent has the potential to interfere with a gestational parent's self-determination or to minimize the role of pregnancy. Indeed, this is a concern that policymakers must consider seriously. And, certainly, it is vital to approach this task with caution, as feminists have been long warning us about the undesired outcomes for mothers of de-gendering family laws. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 70-100 (1995). But as the suggestions I offer herein reflect, such concerns need not stand in the way of a more inclusive approach to legal parenthood.

309. Consider the experience of the transgender person whose assigned sex is incompatible with his or her subjective experience of gender. That incompatibility produces a similar separation and contradiction between the internal/self and the external/societal spheres. That separation may commence at birth, when there is discrepancy between the assigned sex on the legal documents, e.g., the birth certificate, and the expressed or felt gender of the individual, and continue until the formalization process required to bridge that gap is completed. The moment of temporal harmony will occur only after the transgender individual complies with the requirements needed to execute the formalization process. *Cf.* Ido Katri, *Scamming Reforms- Sex Reclassification from the Body to the Self*, in *OXFORD ENCYCLOPEDIA OF LGBT POLITICS AND POLICY* (Don Merkel ed., 2019).

310. Scholars have urged us to extend the scope of queer legal theory to objects of research beyond sex into other areas such as theories of time. *See, e.g.*, Brenda Cossman, *Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)*, 6 *CRITICAL ANALYSIS* L. 23, 37-38 (2019). Informed by their call to action, I hope this Article could lay the foundation for this much-needed intersection in the context of parenthood.