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The Law's Duty to Promote the Kinship System: Implications for Assisted Reproductive Techniques and for Proposed Redefinitions of Familial Relations

Scott FitzGibbon¹

[W]herever you go I will go, wherever you lodge I will lodge, your people shall be my people, and your God, my God.

Ruth 1:16²

[H]uman beings . . . look separate because you see them walking about separately. But then, we are so made that we can see only the present moment. If we could see the past, then of course it would look different. For there was a time when every man was part of his mother, and (earlier still) part of his father as well: and when they were part of his grandparents. If you could see humanity spread out in time, as God sees it, . . . [i]t would look like one single growing thing—rather like a very complicated tree. Every individual would appear connected with every other.

C. S. Lewis³

1. Professor, Boston College Law School. J.D., Harvard. B.C.L., Oxford. Member of the Massachusetts Bar. This article is copyrighted © 2014 by Scott FitzGibbon. All rights reserved. Warm thanks are extended to Professor Carlos Martinez de Aguirre of the Universidad de Zaragoza, Professor Ursula Basset of the Pontificia Universidad Católica Argentina and the Universidad Abierta Interamericana; James Gordley, W.R. Irby Chair in Law, Tulane University; Professor Margaret Somerville of McGill University; and Professor Lynn Wardle of Brigham Young University. Their insights are reflected and their articles are cited at many points in the present essay. Most recently, Professor Jorge Nicolás Lafferiere's article, *The Challenges that Developments in Genetics and Artificial Reproduction Present to Intergenerational Solidarity* (cited *infra*) has been the inspiration and source of several of the insights set forth herein. Further thanks are extended to Gordana Kovač-Stanić of the University of Novi Sad, Serbia, Professor of Family, Inheritance and European Law at the Singidunum University Belgrade, Faculty of European Legal and Political Studies, Department of Private Law in Novi Sad and member of the Serbian Commission for a Draft Civil Code, whose article, *State Regulation of Surrogate Motherhood: Liberal or Restrictive Approach* (cited *infra*) has been most helpful on issues relating to surrogacy.

2. Ruth 1:16 (New American Bible).

3. C. S. LEWIS, *MERE CHRISTIANITY* (1952), reprinted in *THE C.S. LEWIS SIGNATURE CLASSICS*, 146–47 (13th ed. 2001).

I. INTRODUCTION

Kinship relations, in our society and in most, are organized systematically. That is to say, each kinship connection is constructed, conducted, and considered, not in isolation but by reference to the others. Your uncle is your father's brother, in just about the same way as your own sibling is your brother and your children are one another's brothers and sisters. Your spouse is the mother or father of your children, in just about the same way as your mother and father are your parents and the parents of your siblings. One's beliefs and expectations about what each kinship relationship entails are roughly the same as the beliefs and expectations of the other participants. Something similar can be said about brothers and parents not of one's own family: the same sorts of relationships exist among them and, though they are not one's relatives, one understands—without having to investigate—the commitment each of them has to the others, and especially to their young and to their elderly. The rearing of the next generation of the family, and the care for its elderly, are to some extent the concern of all.⁴

If humankind as a whole—or at least extended parts of it—really can be, as C.S. Lewis proposes in the text quoted above, likened to one large, complicated organism—an enormous tree stretched out across the millennia—kinship connections are the analogue of the connections among the roots and the branches, the trunk and the leaves. This illustrates the systematic character of kinship.

This article develops the concept of the kinship system, proposing a definition. It contrasts a nonsystematic arrangement—one which may indeed be emerging at present—which is based on contract. It maintains that the systematic arrangement better serves fundamental goods.

All of this has important traction upon the circumstances of our own era. Kinship is at the center of the epic crisis which has, with increasing turbulence, swept over the Western world for the past several generations. Assisted reproductive techniques (“ARTs”) and proposed new definitions of marriage and parenthood have recently raised the most basic of questions.⁵ Wise answers have been scarce, as

4. Contrast motorists or pedestrians, who, though they are all conducting more or less the same activity, have no commonality of purpose.

5. See generally NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES* (2013); Roberto Andorno, *International Policy and a Universal Conception of Human Dignity*, in *HUMAN DIGNITY IN BIOETHICS: FROM WORLDVIEWS TO THE*

might be expected in an era which tends towards skepticism about ethics.⁶ Constructive answers—ones which conduce to the promotion of familial coherence—have, similarly, been of diminished prominence, as could have been predicted of a culture which makes the exercise of individual rights, the satisfaction of choice, or the promotion of pleasure the fundamental guide to action. The result has been the delegitimization, discrediting, or decomposition of many of the elements which bind families together and of the relationships which direct and further the procreation and rearing of the next generations.⁷ The long-term result may be what might be called the “desystematization” of kinship relations. At stake is not only the strength of specific kinship connections, but also their conjunction and coordination. At risk is the possibility of mutual recognition and support. Each new initiative batters the hold of a flimsy ship.

This Article proposes that the law should promote and protect the kinship system. It applies this thesis to propose a legal response to certain assisted reproductive techniques, and to certain proposals for the redefinition and reconstruction of the family.

PUBLIC SQUARE 127, 127 (Stephen Dilley & Nathan J. Palpant eds., 2013). The vast dimensions into which ARTs may lead mankind can be surmised by reading recent proposals from two of Oxford University's most prominent thinkers in this area, who propose research into techniques of “moral bioenhancement.” See Ingmar Persson & Julian Savulescu, *Getting Moral Enhancement Right: The Desirability of Moral Bioenhancement*, 27 *BIOETHICS* 124 (2013).

6. Authorities evidencing and criticizing the positivist (viz. skeptical) account of kinship in academic anthropology are set forth in *infra* note 16.

7. See Misa Izuhara, *Introduction to AGEING AND INTERGENERATIONAL RELATIONS: FAMILY RECIPROCITY FROM A GLOBAL PERSPECTIVE* 1, 6–7 (2010) (“[T]he notion of ‘family’ has changed dramatically, particularly over the past three decades in many contemporary societies. There is no longer such a thing as ‘the family’. . . . Instead, there is now a range of ways in which people live their lives which might be considered as families, such as cohabitation, single parenthood and stepparenthood, same-sex relationships and so on With the blurring of such boundaries, it is indeed increasingly difficult to articulate what is or what is not a ‘family.’”).

II. KINSHIP SYSTEM: ITS NATURE AND BASIC GOODS

This section of this essay, drawing on anthropological scholarship, presents a definition of “kinship system” and related terms. Departing from anthropological orthodoxy, this section adduces important normative elements. It identifies the goods of kinship and of kinship systems. It proposes that it is a good thing for kinship arrangements to be systematically ordered.

A. The Meaning of “Kinship System” and Related Terms

1. Affiliations

The term “affiliation,” herein, encompasses close, intimate connections such as those between best friends and also extends to worthwhile connections of a somewhat chillier character. For example, law partners may be affiliates.

Central elements of an affiliation are beneficence, knowledge, and trust.⁸ This can be seen most vividly in instances of close friends. They wish one another well in all things, and act on their good intentions by seeking to benefit one another; and of course they know one another well, sharing, as Aristotle puts it, “in discussion and thought.”⁹ Knowing one another’s good intentions, they trust one another. The same three attributes, in more limited degree, can be found in affiliations which are not so close, such as between cordial acquaintances and perhaps even political allies. Thus affiliations are rooted in basic goods—virtues which are a universal *telos* for us humans to develop and to exercise.

The same three attributes can be identified as, so to speak, “formally” present in associations whose rules, principles, and traditions require these attributes of their members. An attorney, for example, is in a position of trust, and is obliged by law and professional ethics to act for the good of her client and to know the law and facts pertinent to the client’s situation. Thus, an attorney is an affiliate of the client: formally an affiliate, required by the rules of her profession to exercise trust and benevolence and to possess and exercise knowledge

8. See ARISTOTLE, NICOMACHEAN ETHICS 1156a 3-4, in *THE COMPLETE WORKS OF ARISTOTLE* vol. II 1729, 1826 (Jonathan Barnes ed., W.D. Ross *et al.* trans., 1984) (“[T]o be friends . . . [people] must be mutually recognized as bearing goodwill and wishing well to each other.”) [hereinafter NICOMACHEAN ETHICS].

9. *Id.* at 1170b 12; page 1850 in the volume 2 of Barnes edition (giving the precise phrase as “sharing in discussion and thought”).

in regard to the legal affairs of the client. She is an affiliate in this formal way even if she falls short of what is required. If she does not fall short, but is and does what professional responsibility requires, she is an affiliate not just formally but in substance as well.

A member of a family is a formal affiliate (and often a substantive affiliate as well). Membership in a family entails requirements of beneficence by each member towards the others, mutual knowledge, and trust.

2. Networks of affiliates

A network is an arrangement which connects many elements.¹⁰ Owing to membership in a network, it is possible for people who have never met and who have no direct experience of one another's attitudes and activities to be well disposed towards one another (i.e., benevolent) and to do well for one another, in that each can aim at the goods of one another's participation in the network, by assisting the network to flourish. For similar reasons, such strangers can, in an important way, know one another, in that each knows the others' "locations" and functions within the network and understands what might be called their network "offices."¹¹

For these reasons, networks sometimes instantiate affiliations (formal or substantive) among their members. A network of affiliates is one in which the connections are affiliational. In many instances the partners in a law firm constitute a network of affiliates, as may members of a fraternal society (such as the Lions or the Elks), members of an athletic team, and members of a religious order. By way of contrast, it seems unlikely that members of the New York Stock Exchange constitute an affiliational network, nor in many cases do the employees of a large corporation.

3. Systems

A network constitutes a system, as that term is used here, when it

10. See generally Alexandra Marin & Barry Wellman, *Social Network Analysis: An Introduction*, in THE SAGE HANDBOOK OF SOCIAL NETWORK ANALYSIS 11, 13 (John Scott and Peter J. Carrington eds., 2011) ("[A] social network is a set of socially relevant nodes [S]ocial relations include kinship . . . or other types of commonly defined role relations (e.g., friend, student); affective ties, which are based on network members' feelings for one another (e.g., liking or disliking); or cognitive awareness (e.g., knowing).").

11. See generally Scott FitzGibbon, *Marriage and the Ethics of Office*, 18 NOTRE DAME J. L., ETHICS & PUB POLICY 89 (2004).

is firmly and lastingly dedicated to the fulfillment of common purpose. A tangle of rigging may be a network but it is not a system. The lotus eaters, though they may have amounted to a network (and perhaps even an affiliational network), were probably not a system because they lacked, owing to their passivity, steady dedication to any service or common good.¹²

The purpose may be extrinsic. For example, the production of some commercial product or service may be directed towards the poor and the sick. Or it may be inward-directed, aimed mainly at enhancing the well-being of some or all of its members. The Apple computer company is a system, as is the Red Cross and just about any business or charitable institution. The key to this requirement is that there must be some coherent purpose endorsed or pursued by the members of the network.

Systems, whenever their purposes are extensive and complex, involve differentiation and structure. Biological systems, for example, comprise many organs and tissues, functioning in concert so as to achieve a purpose (respiration, for example, or the flow of blood). Systems apply criteria of inclusion or exclusion—eligibility for a unit's being added to the system or grounds for its exclusion—based on whether a proposed member conduces to the fulfillment of the system's purpose. Systems are characterized by a coordination of function, arranging system members and deploying them towards their duties according to ability and skill.

4. *Affiliational systems*

An affiliational system is a system whose rules and principles mandate or encourage affiliation among its members. It is, in other words, a system which links its members to one another by bonds involving benevolence, trust, and knowledge,¹³ and which is devoted (as

12. This account departs from much of the social science and anthropology literature, which often accounts for systems by reference to very general and decidedly nonpurposive elements such as the aggregate or whole, the component or member, and the interaction. See, e.g., Andrea Jones-Rooy & Scott E. Page, *The Complexity of System Effects*, 24 CRITICAL REVIEW 313 (2012) ("complex systems consist of diverse, interdependent, interacting entities whose aggregate behavior can often transcend the characteristics of the parts."). Exclude common purpose, and also exclude of course any reference to common good, and the definition becomes broad enough to include even hostile or antipathetical congeries of elements as part of a system. International relations in general are treated as interactions within a system by writers in this tradition. Sexual and intergenerational practices which no reasonable person would wish to foster would count as kinship systems, by an extension of this definitional idiom.

13. Thus, a subcognitive set of bonds, as in a biological system, for example, could not

it must be if it is a system of any sort) to a common purpose. Thus, an organization whose members were organized towards and worked to achieve a common end—the manufacture of a product and its profitable sale, for example—but who cared not at all for one another's well-being and were content to be ignorant of one another (and whose indifference was not in violation of the standards and traditions of the organization), would constitute a system but not an affiliational system. The dog-eat-dog type of business corporation—Enron, before its demise, for example—is not an affiliational system.¹⁴ Mother Theresa's Sisters of Charity, however, is an affiliational system. Even a business company may be an affiliational system, if, as was the case for example with Craigslist before 2004, its participants are closely bonded with one another.¹⁵ The American judiciary may be an affiliational system (or part of a larger one: the legal system).

One indication that a system is affiliational is afforded by its approach to admitting new members: an affiliational system will usually act deliberately in such matters. It will usually limit entry to parties who can contribute to the achievement of the purposes of the system. It will seek members who will participate in its affiliational dimension by achieving integration into the system and by reflecting trust, benevolence, and knowledge.

Another indication that a system is affiliational is solidarity: those who are members specially recognize and cooperate with one another. A related indication may be called "differentiation": it stands as an indication that a system is affiliational and that it seeks to maintain clear distinctions between those who belong and those who do not. It endorses differentiating indicators (family surnames, for example). A third indication that a system is affiliational is afforded by the way a system reacts to substandard performance on the part of one of its members. Owing to the attributes of trust and benevolence, it will

establish an affiliational system since the virtues of benevolence, knowledge, and trust involve deliberation and choice.

14. See generally FRANK EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 8 (1991) (describing the marketplace as an "extended conflict among selfish people"). This is probably the depiction of business firms generally presented in Chicago School writings. This work also identifies the business company as a nexus of contracts, and so likely brings intra-corporate relationships within the extended conflict.

15. See *EBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010) (presenting a gripping narrative by a Delaware Chancellor of the original community-service culture of craigslist, Inc. and its challenge by eBay, which acquired a block of craigslist stock in 2004 and pressed craigslist to emphasize the maximization of profits).

hesitate to extrude a member, seeking instead to remedy the situation, if possible, in other ways. In all of these matters—admission, operation, and expulsion—it will seek criteria which are “systemic”: that is, understood and endorsed by (and evenly applied among) the membership as a whole.

Owing to membership in an affiliational system, strangers may participate mutually in the goods involved. Their knowledge and beneficence obtain special dimensions. Each knows the other, if not directly, then indirectly as a member of the system; each knows the system itself. Each aims at the other’s good and at the good of the system as a whole.

5. *Kinship systems*

A kinship system, as that term is here used, is an affiliational system whose purpose and intended goods include those of begetting and rearing the next generations and the integration of the generations into an affiliational order.¹⁶

a. Family as a kinship system.

An extended family is often a kinship system or a part of one. By way of contrast, a hippie commune that raised children might constitute a kinship network, but would probably not be a kinship system because of its lack of structure. Oliver Twist’s orphanage might have constituted a system, as it was of course concerned with the raising of children, but it was not affiliational, owing to the greed and selfish-

16. Thus, the account here presented is sharply different from any value-free account, and also differs from any account which is dismissive of the effort to identify kinship systems. See, e.g., David M. Schneider, *What is Kinship all About?*, in KINSHIP STUDIES IN THE MORGAN CENTENNIAL YEAR 51 (Priscilla Reining ed., 1972) (“In my view ‘kinship’ is like totemism, patriarchy, and the ‘matrilineal complex.’ It is a non-subject. It exists in the minds of anthropologists but not in the cultures they study.”). For an entrée into anthropological literature which takes this approach, see F.K.L. Chit Hlaing, *The Place of Kinship in the Social System: A Formal-and-Functional Consideration with an Appendix on Descent and Alliance*, 6 STRUCTURE & DYNAMICS: E-J. ANTHROPOLOGICAL & RELATED SCI. 1, 5 (2013) (noting that “the whole complicated Positivist line of research has led . . . in British Social Anthropology and in the work of Schneider, among others, to the denial of the existence of kinship as a theoretically definable domain . . .”). For criticism of Schneider’s approach, see Ward H. Goodenough, *Conclusion: Muddles in Schneider’s Model*, in THE CULTURAL ANALYSIS OF KINSHIP: THE LEGACY OF DAVID M. SCHNEIDER 205–218 (Richard Feinberg & Martin Ottenheimer eds., 2001). For further criticisms and important reflections on the philosophical roots of anthropological kinship skepticism, see Paul Galea, *Grandparenting and Extended-Family Support: The Silent Generation*, 3 INT’L J. JUR. FAM. 283, 288–91 (2012).

ness of its policies, and it was therefore not an affiliational system and therefore not a kinship system.¹⁷

In many societies—even today in our fluid age—kinship relations usually reflect affiliational commitments,¹⁸ and extend themselves in ways characteristic of a system. Their members are expected to be trustworthy, to know one another, and to wish one another well. This makes them formal affiliates; and if they fulfill the expectations it makes them substantive affiliates. Sociologists of the family make approximately this point when they endorse “intergenerational solidarity” as a key to understanding kinship, as they have widely done in recent decades,¹⁹ and when they observe the beneficial consequences of such solidarity, not only as regards economic support,²⁰ but also in

17. A government agency might constitute a system but not a kinship system because it lacks an affiliational character and a comprehensive kinship mission. Even the Department of Education is not a kinship system as that term is used here, because, though education is one dimension of kinship service, the department does not undertake the comprehensive care and raising of the young.

18. See also MARSHALL SAHLINS, WHAT KINSHIP IS—AND IS NOT ix (2013) (“The specific quality of kinship, I argue, is ‘mutuality of being’: kinfolk are persons who participate intrinsically in each other’s existence; they are members of one another. ‘Mutuality of being’ . . . accounts for . . . how it is that relatives emotionally and symbolically live each other’s lives and die each other’s deaths. Involving such transpersonal relations of being and experience, kinship takes place in the same ontological regime as magic, gift exchange, sorcery, and witchcraft.”). Indeed, kinship does often involve the vicariousness which is a characteristic of close friendship. One cannot, however, make this the sole (or perhaps even the central element) of kinship, for two reasons. First, manifestly many people who are interdependent and identify vicariously with one another are impossible to identify as kin. This point, or something like it, is made by Professor Maurice Bloch, who observes that “mutuality of being is not limited to the cases which have been labeled kinship,” noting that humans generally have a tendency towards empathy with one another and also noting “the feelings of bodily involvement and unity of military units in combat, of religious groups in ritual activities, or even of members of a choir . . .”) Maurice Bloch, *What Kind of “Is” Is Sahlin’s “Is”?*, 3 HAU: J. ETHNOGRAPHIC THEORY 253, 254 (2013). The second reason for doubting the use of Sahlin’s criterion as a central element is that some kinfolk are not so close to one another as to be vicarious.

19. See generally THE FAMILY, THE MARKET OR THE STATE?: INTERGENERATIONAL SUPPORT UNDER PRESSURE IN AGEING SOCIETIES (INT’L STUDIES IN POPULATION, Gustavo De Santis ed., 2012); Pierpaolo Donati, “*Inter-Generational Solidarity*”: A Sociological and Social Policy Issue, in INTERGENERATIONAL SOLIDARITY: THE PROCEEDINGS OF THE EIGHTH PLENARY SESSION OF THE PONTIFICAL ACADEMY OF SOCIAL SCIENCES 57 (Edmond Malinvaud ed., April 8–13, 2002), available at <http://www.pass.va/content/dam/scienze-sociali/pdf/actapass8.pdf>; Jorge Nicolás Lafferriere, *The Challenges that Developments in Genetics and Artificial Reproduction Present to Intergenerational Solidarity*, 4 INT’L J. JUR. FAM. 11 (2013). The promotion of intergenerational solidarity is embraced as a goal of the European Union in Article 3 of the Treaty on European Union. See Consolidated Version of the Treaty on European Union, Sept. 5, 2008, 2008 O.J. (C 115) 47, available at <http://register.consilium.europa.eu/pdf/en/08/st06/st06655-re07.en08.pdf>.

20. As to support of children, see *infra* subsection 1 of this section of this article; as to support of the elderly, see subsection 2. As to economic support generally, note that “what is less frequently considered is that the connection works in both directions: adult children (sons, especially) support their needy elderly parents, but rich elderly parents (or parents in law) may

promoting “successful coping and social integration in old age,” “self-esteem,” “the giving and receiving of help and support,” “the psychological well-being of the individual throughout his/her lifecourse,” and “better adjustment in crisis like widowhood or immigration.”²¹

Family membership entails aiming at common purposes which directly or indirectly promote the rearing of the young, and seeking consistency and coherence in pursuing that end.²² A husband regards his wife’s mother as his mother-in-law, and she regards him as her son-in-law. People regard their mothers’ fathers as their grandfathers and their grandfathers regard them, in turn, as grandchildren. Neighbors, townsmen, and other members of the society concur, as does the judiciary and government. They recognize the boundaries of a family just as do the family members. Nor is their concurrence a matter solely of nomenclature. All substantially concur on what it means to be a parent-in-law or a grandparent. Those positions are offices—they might be called “social offices”—with commonly recognized duties and responsibilities. They carry with them recognized idioms of thought and conduct.

The systemic indicia identified above are often markedly present in kinship systems. Entry criteria are usually sharp and discernible: marriage, the marriage ceremony, registrations of marriage, registrations of births and deaths. Family solidarity, at least in many cultures, is very strong, and indicia of recognition prominently featured by the use of family surnames. Extrusion and exclusion are frequently eschewed or imposed only in extreme instances of disloyalty.

The definition of “kinship system” proposed above does not restrict the term to networks where all the connections are biological,

transfer resources downwards to the next generation and, occasionally, make their adult descendants better off.” De Santis, *Introduction* to THE FAMILY, THE MARKET OR THE STATE: INTERNATIONAL SUPPORT UNDER PRESSURE IN AGEING SOCIETIES ix, xiii (Gustavo de Santis, ed., 2012).

21. Ruth Katz & Ariela Lowenstein, *Theoretical Perspectives on Intergenerational Solidarity, Conflict, and Ambivalence*, in AGEING AND INTERGENERATIONAL RELATIONS: FAMILY RECIPROCITY FROM A GLOBAL PERSPECTIVE 29, 36 (Misa Izuhara ed., 2010).

22. This thesis might be extended by commending *direct* intention over indirect, proposing that a “full system” involves *directly* aiming at the achievement of the purpose of the network rather than accepting the achievement only as a side effect. This is an attractive extension of the thesis. Where the achievement of the purpose is not a directly intended effect the system stands to be impoverished. Where kinship goods, (for example, rearing the young and caring for the old and the other goods of kinship) were undertaken only as unwelcome consequences of the pursuit of some other, primary end (for example, sexual pleasure, or the avoidance of social disgrace) the arrangement would be a sorry excuse for a kinship system. Those who reared children with only those aims directly in mind would poorly model the affiliational virtues and thus poorly conduce to the transmission of those virtues to the next generation.

though in most instances they are.²³ It leaves plenty of room for adoption, foster parenting, and the like.

b. Beyond the individual family: a society's kinship system.

When a society recognizes and supports kinship-system characteristics in families, it is reasonable to extend the term "kinship system" to the relevant aspects of the society as a whole, and to speak of the families in that society as members of that society's kinship system. This is the practice in academic anthropology.

This article leaves aside the complex problems arising where a country is comprised of populations that differ considerably in the way they structure their families: minority ethnic or religious groups, for example. Plainly, each extended family may constitute a kinship system, and so also may each social subgroup (each religious or ethnic group, for example). When the pluralistic society as a whole accomplishes the difficult feat of endorsing criteria which recognize and acknowledge each subgroup's kinship system, it may make sense to consider the pluralistic society as an entirety to have a single kinship system, notwithstanding its flexibility in encompassing several divergent approaches.²⁴

B. Goods of Kinship

This section adumbrates several of the ways in which kinship relationships aim at and achieve important goods. This lays the groundwork for the central thesis of Part IV of this essay, which proposes that these goods are served with special success when kinship relationships are arranged as a system.

Important kinship goods are emphasized in a recent article by Leon Kass:

Human love is not merely possessive and self-serving, a lack seeking to be filled; it is also generous and generative, a fullness seeking to give birth. Indeed, it is the common project of procreation that holds together what sexual difference sometimes threatens to drive apart. Flesh of their flesh, a child is the parents' own commingled

23. This is likely for good reason: many of the goods of kinship described below flourish best among the biologically related. See Scott FitzGibbon, *The Biological Basis for the Recognition of the Family*, 3 INT'L. J. FAM. 1 (2012).

24. The thesis developed further along in this article suggests a duty of the State to support each extended family. Whether it should seek to meld the systems into a consistent whole is a matter left for some other essay.

being externalized, and their unification is even more powerfully enhanced by the shared work of rearing.

Providing an opening to the future beyond the grave, carrying not only our seed but also our names, our ways, and our hopes that they will surpass us in goodness and happiness, children are a testament to the opportunity for transcendence. A hope-filled repayment forward of the debt we owe backward for our own lives and rearing, our children represent also our share in the perpetual renewal of human possibility. In this way, sexual eros, which first drew our love upward and outside of ourselves, finally provides for the partial overcoming of the limitation of perishable embodiment altogether.

It is for these deeper reasons that marriage, procreation, and especially child-rearing are at the heart of a serious and flourishing human life, if not for everyone then at least for the great majority. Most of us know from our own experience that life becomes truly serious when we become responsible for the lives of others for whose being in the world we have said "We do." It is fatherhood and motherhood that teach most of us what it took to bring us into our own adulthood, engaged in practices that are most fully rewarded when we live to see our children caring for children of their own. And it is the desire to give not only life but a good way of life to our children that opens us toward a serious concern for the true, the good, and even the holy. Parental love of children leads once-wayward sheep back into the fold of church and synagogue. In the best case, it can even be the beginning of the sanctification of life—yes, even in modern times."²⁵

1. *Childrearing*

The most obvious kinship goods relate to the rearing of the young. Extensive findings from the social sciences confirm, what common sense and the implications of several international instruments suggest: in rearing a child and bringing him along to successful maturity, there is nothing as salubrious as committed parents.²⁶

25. Leon R. Kass, *The Other War on Poverty*, 12 NAT'L AFF. 3, 8–9 (2012), available at <http://www.nationalaffairs.com/publications/detail/the-other-war-on-poverty>.

26. See Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILD TRENDS 1, 6 (June, 2002), available at <http://www.childtrends.org/?publications=marriage-from-a-childs-perspective-how-does-family-structure-affect-children-and-what-can-we-do-about-it> ("[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes

Grandparents and other members of the extended family are important as well. The following subsections explore three dimensions of this set of goods.

a. Kinship and childrearing: the practical side

The practical requirements of childrearing are mainly fulfilled by members of the extended family. As Professor Lynn Wardle observes:

[The] extended family provides more persons and more resources, and therefore more physical protection for dependent and other needy family members. The extended family provides a larger network of family members to facilitate opportunities, including acquisition of education and employment. It affords richer resources for strengthening marriage and for assisting with the rearing of children.²⁷

Thus, grandparents play an important role.²⁸ In the United States, more than 2.5 million of them have responsibility (full or partial) for a grandchild's care.²⁹ Increasingly, grandparents care for grandchildren in households without parents,³⁰ in many instances because a parent is incarcerated or has been abused or is suffering the effects of illegal substances.³¹ European statistics also reflect extensive grandparental involvement.³² Paul Galea of the University of Malta observes

than do children in intact families headed by two biological parents. Parental divorce is also linked to a range of poorer academic and behavioral outcomes among children.”)

27. Lynn Wardle, *Intergenerational Justice, Extended and Redefined Families, and the Challenge of the Statist Paradigm*, 3 INTL J. JUR. FAM. 167, 174 (2012).

28. Galea, *supra* note 16, at 291–97.

29. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 2012, POPULATION: HOUSEHOLDS, FAMILIES, GROUP QUARTERS 59, (Table 70), available at <http://www.census.gov/compendia/statab/2012/tables/12s0070.pdf>. These statistics relate to 2009, and may comprise only those grandparents who lived with grandchildren.

30. Bert Hayslip & Patricia Kaminsky, *Grandparents Raising Their Grandchildren: A Review of the Literature and Suggestions for Practice*, 37 MARRIAGE & FAMILY REV. 147, 151 (2005). See Ross D. Parke, Foreword, in PARENTING THE CUSTODIAL GRANDCHILD: IMPLICATIONS FOR CLINICAL PRACTICE xv (Bert Hayslip & Patricia Kaminsky eds., 2008).

31. See Andrew Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403 (2010).

32. See Karsten Hank & Isabella Buber, *Grandparents Caring for Their Grandchildren: Findings from the 2004 Survey of Health, Ageing, and Retirement in Europe*, 30 J. FAM. ISSUES 53, (2009). See generally Marta Choroszewicz & Pascal Wolff, *51 Million Young EU Adults Lived With Their Parent(s) in 2008*, EUROSTAT, available at <http://eurostat.ec.europa.eu/>

portal/page/portal/income_social_inclusion_living_conditions/publications/statistics_in_focus (reporting that in 2008, about 46% of persons aged 18–34 in EU countries lived with at least one of their parents); Christine Chambaz, *Lone-parent Families in Europe: A Variety of Economic and Social Circumstances*, 35 SOC. POL'Y & ADMIN. 658 (2001).

that such “vertical kinship ties” are of growing importance owing to enhanced longevity, predicting that “[i]t will become increasingly common for people to live for part of their lives as members of three- and four-generation families as the number of grandparents increases.”³³

2. Kinship and childrearing: the development of the moral person

The moral, religious,³⁴ and personal development of the young is furthered by kin.³⁵ Children develop morally through a process of modeling:

A young child is able to latch onto the moral kind, bravery, or lying, by grasping central paradigms of that kind . . . Moral development is . . . enlarging the stock of paradigms . . . ; developing better and better definitions of whatever it is that these paradigms exemplify; appreciating better the relation between straightforward instances of the kind and close relatives; and learning to adjudicate competing claims from different moral kinds . . .³⁶

Good modeling requires good models. Kin are bound together by important virtues and thus comprise persons worthy of emulation.

33. Galea, *supra* note 16, at 285. See generally Izuhara, *supra* note 7; Linda J. Waite, *The Changing Family and Aging Populations*, 35 POP. & DEV. REV. 341 (2009). Predictions similar to those of Galea are advanced in Vern Bengtson, *Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds*, 63 J. MARRIAGE & FAM. 1 (2001) (emphasizing “the strength and resilience of intergenerational solidarity over time”).

34. See Lynn Wardle, *The Jurisprudence of Parenting and the Influence of Religion on Effective Parenting*, 2 INT’L J. JUR. FAM. 437, 468–77 (2011) [hereinafter *Jurisprudence of Parenting*].

35. See DECLARATION OF THE RIGHTS OF THE CHILD, G.A. Res. 1386 (XIV), U.N. Doc. A/4345 (Nov. 20, 1959), Article 6.:

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of *tender years* shall not, save in exceptional circumstances, be separated from his mother. (*emphasis added*)

See also Moore, Jekielek & Emig *supra* note 26.

36. Gareth B. Matthews, *Concept Formation and Moral Development*, in PHILOSOPHICAL PERSPECTIVES ON DEVELOPMENTAL PSYCHOLOGY 175, 185 (James Russell ed., 1987). See generally A. Bandura, *Social Cognitive Theory: An Agentic Perspective*, 52 ANN. REV. PSYCHOL. 1 (2001); Lawrence J. Walker, Karl H. Hennig & Tobias Krettenauer, *Parent and Peer Contexts for Children’s Moral Reasoning Development*, 71 CHILD DEVELOPMENT 1033 (2000):

Psychoanalytic theory emphasizes early parent/child relationships in the development of conscience through the mechanism of identification and consequent internalization of values. Social-learning theory . . . emphasizes the power of models and so has also focused on parents’ role in displaying and reinforcing appropriate behaviors. Cognitive development theory . . . holds that interactions with peers are more potent . . .

Id. at 1033. This study finds that both parents and peers “have a role to play.” *Id.* at 1046.

Professor Wardle observes:

Extended families generally . . . enlarge and deepen kinship identity, providing children, youth, and adults with relational groundings: with what can be called 'root paradigms.' They foster trust in others and in the future. Nurturing of trust by natural extended families undergirds the well-being of rising generations by creating social capital, enhancing trust-based strong economies, and increasing trust-based liberty.³⁷

Unless it has become dysfunctional, family members trust one another and thus model trust to the young. By steadfastness in childrearing, they justify this trust.

A well-formed arrangement of kinship is constructed of stable relationships among the modeling adults. It establishes them in social roles which all can understand and most will accept. It facilitates harmony. It may effectively allocate the duties of childrearing. It will model, to the observant child, the exercise of social roles and the nature of kinship. As Professor Ursula Basset observes:

In the traditional view of the family, the child's identity was formed through a continuum starting with the marriage of the mother and the father and continuing through birth by the mother and the legal presumption establishing the paternity of the father, all coherent with the normal course of development. Genetic ties, blood ties, the actual state of affairs and the autonomous choices of the people involved: All came together to create in a continuous movement a common identity.³⁸

3. *Kinship and childrearing: the formation of the affiliative person*

The *affiliational* capacity and disposition of the young—the ones they carry forward into later life—are strongly influenced by the models of association with which they are presented. "Research clearly demonstrates" what common sense would in any case suggest: that "family structure matters for children."³⁹

Affiliational character is formed by the affiliations of early life. The offsprings' own marriages and friendships in later life will be intensely affected by the affiliational order of their upbringing.⁴⁰ Judith

37. Lynn Wardle, *Intergenerational Justice, Extended and Redefined Families, and the Challenge of the Statist Paradigm*, 3 INT'L. J. JUR. FAM. 171 (2012) (footnotes omitted).

38. Ursula Basset, *What is a Family? Exploring the Juridical Ground of Familism Today*, 3 INT'L J. JUR. FAM. 301, 315–16 (2012) (footnote omitted).

39. Moore, Jekielek & Emig, *supra* note 26, at 6.

40. See Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and*

Wallerstein reports: "A central finding of my research is that children identify not only with their mother and father as separate individuals but with the relationship between them. They carry the template of this relationship into adulthood and use it to seek the image of their new family."⁴¹ The same point can be made about affiliation with the civic order generally. An extensive Irish study recently concluded that "[t]he family has the first and most enduring effect on children's development as healthy and socially competent members of society."⁴²

Emotional Well-Being of the Next Generation, 15 MARRIAGE & CHILD WELLBEING 75, 85 (2005) ("Another benefit of a positive co-parental relationship is the modelling of interpersonal skills, such as showing respect, communicating clearly, and resolving disputes through negotiation and compromise. Children who learn these skills by observing their parents have positive relationships with peers and, later, with intimate partners."); Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAMILY 191 (2005) ("Presumably, children with maritally distressed parents are less likely than other children to observe and learn positive behaviors that facilitate long-term bonds with others. These children may reach adulthood with poorly developed relationship skills and a repertoire of interpersonal behaviors that undermine marital satisfaction and stability."); STEPHANIE STAAL, *THE LOVE THEY LOST: LIVING WITH THE LEGACY OF OUR PARENTS' DIVORCE* 28 (2000) (reporting, based on personal experience and interviews with 120 adult offspring of divorce, that "[o]ur parents' marriages provide us with the primary model of intimacy that we internalize and refer to for comparison when we get older. When parents divorce . . . we are left to invent intimacy on our own terms . . ."); Mario Mikulincer, Phillip R. Shaver & Keren Slav, *Attachment, Mental Representations of Others, and Gratitude and Forgiveness in Romantic Relationships*, in DYNAMICS OF ROMANTIC LOVE: ATTACHMENT, CAREGIVING, AND SEX 190, 195 (Mario Mikulincer & Gail S. Goodman eds., 2006) ("There is extensive evidence that attachment anxiety and avoidance in adulthood are associated with negative appraisals of parents.").

41. JUDITH WALLERSTEIN, JULIA LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY* xxix (2002). See JOHN SNAREY, *HOW FATHERS CARE FOR THE NEXT GENERATION: A FOUR-DECADE STUDY* 297 (1993) (findings suggest that men who were "highly and positively involved in promoting their children's social-emotional development during adolescence" based their approach to fathering on "a mixture of modeling and of rectifying their own experience of being fathered."). See *id.* at 27680 (reviewing the studies which demonstrate the impact of fathering—including the father's sharing of parenting with the mother—on the offspring's own parenting practices); ANDREW J. CHERLIN, *PUBLIC AND PRIVATE FAMILIES: AN INTRODUCTION* 309 (4th ed., 2005) (concluding, after a review of the literature, that "it is better for children to be raised by two parents than one."); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 MARRIAGE & CHILD WELLBEING 75, 89 (2005) ("Research clearly demonstrates that children growing up with two continuously married parents are less likely to experience a wide range of cognitive, emotional, and social problems, not only during childhood, but also during adulthood. Although it is not possible to demonstrate that family structure is the cause of these differences, studies that have used a variety of sophisticated statistical methods . . . suggest that this is the case."); Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 288 (2005) (reviewing several studies and stating that "[o]n average, children of married parents are physically and mentally healthier, better educated, and later in life, enjoy more career success than children in other family settings.") (quoting LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* 124 (2000)).

42. *Key Findings: 13-Year-Olds, No.3: The Family and Financial Circumstances of 13-Year-Olds*, in DEPARTMENT OF CHILDREN AND YOUTH AFFAIRS, REPUBLIC OF IRELAND,

Professor Bénédicte Sage-Fuller of the University of Cork (Ireland) observes: “Children grow to be good members of society acquire human qualities such as free will, responsibility and autonomy when growing up in their family environment. This is where they learn to live sociably, and are preserved from solitude as individuals.”⁴³

a. Care and support of the elderly

Care and support for the elderly falls largely to kin. Governments may supply economic needs but only affiliates can adequately supply an elderly person’s social and emotional requirements. “The world population is old and, by all historical standards, is ageing further. . . .”⁴⁴ “The median age . . . currently close to 29 years for the world as a whole, is on the rise and could reach 38 years by 2050.”⁴⁵ The well-being of the numerous aged persons will depend in part on “the strength of the social and relational networks that we will set up and be able to maintain.”⁴⁶ Professor De Santis observes:

At least in the developed world, the economic resources of the old should suffice, all in all, but the lack of kin, of a solid family structure, of children living nearby – this could constitute a major personal and social problem, especially in the final phases of one’s life, when physical and cognitive limitations of various kinds are more likely to emerge.⁴⁷

b. Limitation of the State

A well-formed kinship arrangement performs many functions

GROWING UP IN IRELAND: NATIONAL LONGITUDINAL STUDY OF CHILDREN 1 (2012), available at http://www.growingup.ie/fileadmin/user_upload/Conference_2012/GUI_KF_A4_3_Family.pdf.

43. Bénédicte Sage-Fuller, *Income Taxation of the Family in Ireland*, 4 INT’L J. JUR. FAM. 205, 206 (2013).

44. De Santis, *Introduction*, *supra* note 20, at ix. Note, however, that this statement—that the population is old—is proposed as resting on the number or percentage of elderly person, as measured by time since birth. The author identifies another line of analysis, as described in the next footnote.

45. *Id.* This introduction notes, however, that ageing is in part a social construct and that factors such as health and education affect the consequences of chronological age; it reports the ingenious idea that the best measure of a person’s age may be the time remaining until likely death, by which measure the world has actually grown younger. Further statistics are presented in Chris Phillipson, *Globalisation, Global Ageing, and Intergenerational Change*, in AGEING AND INTERGENERATIONAL RELATIONS: FAMILY RECIPROCITY FROM A GLOBAL PERSPECTIVE 13, 1415 (Misa Izuhara, ed., 2010).

46. De Santis, *Introduction*, *supra* note 20, at xi.

47. *Id.*

which would otherwise be supplied by the state, and which would fall under the jurisdictions of governmental agencies were kinship to wither or fail. A recent European study notes, emphasizing the economic care of the elderly, that “results are consistent with the possibility that state intervention crowds out relatives in intergenerational relationships, but the causal chain might also work in the opposite direction; where adult children feel fewer obligations towards elderly parents, the state must step in and fill the void.”⁴⁸

Absent a kinship arrangement, character formation would devolve upon chance associations and upon the schools. Exemplification of the affiliational would increasingly be presented by models of state-citizen connections, decreasingly by familial ones. The “lifeworld,” to use terms from the writings of Jürgen Habermas, would in this way be colonized by the “systems world.”⁴⁹

“Colonization” may be too moderate a word. Colonies, after all, usually continue to enjoy an acknowledged status, albeit a subordinate one, and are recognized as having origins and histories distinct from those of the colonizers. Compare a fairly recent statement from Supreme Judicial Court of the Commonwealth of Massachusetts, which depicts the State as the *creator* of kinship or at least of a central kinship connection. “[T]he government,” stated the court, “creates civil marriage.”⁵⁰

Professor Wardle observes:

[a]s family bonds are weakened, an important bastion against creeping statism and tyranny is eroded, since unwarranted or unjust interference with a family member is likely to be deeply resented and long remembered by the entire family (more vehemently and longer

48. Valeria Bordone, *Social Norms and Intergenerational Relationships*, in *THE FAMILY, THE MARKET OR THE STATE?: INTERGENERATIONAL SUPPORT UNDER PRESSURE IN AGEING SOCIETIES* 159, 172 (Gustavo De Santis, ed., 2012). A brief discussion is contained in Izuhara, *supra* note 7, at 45. The “crowding out” thesis is contested, with reference to the UK experience, in Phillipson, *supra* note 45, at 17.

49. See *THE THEORY OF COMMUNICATIVE ACTION* *passim*, e.g. at page 154 of Volume II: *LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* (Thomas McCarthy, trans., 1987) (“In modern societies, economic and bureaucratic spheres merge in which social relations are regulated only via money and power. Norm-conformative attitudes and identity-forming social memberships are neither necessary nor possible in these spheres; they are made peripheral instead.”).

50. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 954 (2003) (“We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. . . . In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.”)

than would be the case where the victim is a stranger).⁵¹

III. NONSYSTEMATIC KINSHIP ARRANGEMENTS: A CONTRACTARIAN EXAMPLE

Contrast a social order in which kinship arrangements are understood and practiced nonsystematically. An example can be generated by imagining a purely contract system: one, that is, in which all kinship connections were established and conducted based on the rules and principles, as well as the philosophy and anthropology, which underlie modern American contract adjudication and practice. A kinship network, under such an approach, would be a “nexus of contracts” in much the same sense as is a corporation according to Chicago-School thinking.⁵² This section depicts a kinship network organized on that basis.⁵³

Imagine a world in which kinship connections are established entirely by contract and are governed entirely by contract law in something like its modern form. In this world, no claim for recognition as husband, wife, father, mother, child, uncle, aunt, ancestor or descendant has traction except and to the extent that it can be founded on choice, agreement, and consent, and no duties, rights or other normative content is thought to apply to any such relationship except insofar as it might trace its pedigree to such a bargain. What would the family—as a matter of law and of social life—be like in such a situation? Of course, we cannot predict with confidence, because the proposed criterion yields indeterminate results. If, for example, someone advances a claim, based on an agreement that he should be recognized as the father, instead of or in addition to other candidates, whose agreement counts? Between which parties should such an agreement count? The obvious possibilities are the biological parents and the offspring. But what about other biological relatives, other caregivers, or other loved ones?⁵⁴ As these questions suggest, the contractual account is incapable of generating a reliable account of fami-

51. Wardle, *supra* note 2, at 196.

52. See, e.g., FRANK EASTERBROOK & DAN IEL FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1990).

53. An important article on related matters is George Dent, *Families We Choose? Visions of a World without Blood Ties*, 2 INT'L. J. JUR. FAM. 13 (2011).

54. Or, if his claim is based on caregiving, what care? Care for what needs? Past care only or prospects of future care as well? Or, if the claim is based on sentiments, how strongly felt? How long-lived? And whose? Should only the sentiments of the claimant count, or those of the child as well? What about other children, biological relatives, and caregivers?

ly, yielding a stable identification of family membership or generating a sound family structure. Here follows a depiction of one way to run such a railroad.

Amy, Algernon, and Agatha are “married” to one another. That is to say, they have entered into three two-person contracts, each of which recognizes the other two people as “spouses” and each of which specifies a range of rights and duties, related for example to financial and labor contributions, place of residence, and childcare.⁵⁵ (These agreements differ as to term: Amy’s and Algernon’s is for 25 years whereas Algernon’s and Agatha’s is for three and Agatha’s and Amy’s is “at will.”).

Algernon’s and Agatha’s contract specifies that each shall recognize the parents of the other as parents-in-law, and similarly provides for recognition of uncles and aunts and cousins. Of course, in this world, parenthood itself is a matter of contract, as are all other familial relationships. Here is a sample of how it works as to parenthood:

Algernon, Agatha, and Baxter have entered into a “prospective parenting contract,” which contemplates that they will seek to acquire and raise a child jointly. This agreement provides that the parties will parent two children starting with infancy and continuing not less than twelve years, with some clauses specifying the parties’ respective duties as to child support and child care.⁵⁶ Accordingly, they propose a parenting agreement relating to a two-day-old baby called Beata, then a resident in a hospital maternity ward. Beata’s attorney represents her in this matter and this attorney receives instructions from a guardian. Fiduciary standards demand that her attorney and the guardian agree only to a parenting contract that will maximize Beata’s well-being.⁵⁷ They may seek a better deal elsewhere.

Beata’s biological mother, who has given birth to Beata and has been nursing her, has submitted a bid herself. However, Algernon,

55. See Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 307 (2010) (“Unlike current marriage, minimal marriage does not require that individuals exchange marital rights reciprocally and in complete bundles: it allows their disaggregation to support the numerous relationships, or adult care networks, which people may have. Minimal marriage would allow a person to exchange all her marital rights reciprocally with one other person or distribute them through her adult care network.”).

56. The contract allows for assignment of any or all duties to third parties. Thus even nursing and feeding and changing diapers may be delegated.

57. In this world, fiduciary law is an extension of contract principles. The duties of the attorney are taken to be those which the attorney and Beata would have agreed upon had Beata been competent to enter into a contract, and it takes a similar approach to the guardian’s duties. Contract law in this world assumes that a party entering into a contract does so in order to maximize her “self-interest,” and it understands self-interest as based on utility maximization.

Agatha, and Baxter persuade Beata's attorney that they offer the better deal, as they have the financial wherewithal, professional credentials, and careers that will assure her a fine upbringing, whereas Beata's biological mother has no college degree and lives in a modest apartment. The infant's attorney therefore reaches agreement with Algernon, Agatha, and Baxter instead of with the biological mother. They, not she, gain legal recognition as the parents of Beata.

The contract contains a set of representations and warranties as to Beata's health and heredity, and as to Algernon's, Agatha's, and Baxter's health and financial condition. It provides for fifteen years of financial support, educational opportunities, and health insurance. Algernon, Agatha, and Baxter agree to use their best efforts to secure recognition of Beata as the "granddaughter" of their parents and the "cousin" of their cousins, while disavowing any warranty that these "relatives" will actually recognize any responsibilities for Beata's welfare. Bear in mind that these "parents" of Algernon, Agatha, and Baxter have of course obtained that status through a contracting process similar to that which applied to Beata; and the "cousins" were recognized as such through agreement as well.

The salient point here, of course, is that the goods of kinship system are in major part neglected, and the structure of each relationship is identified in isolation, not in a way firmly connected with those of other familial connections. None of the "mothers" of Algernon, Agatha, Amy or Baxter gave them birth, nor does anyone in the story have any affinity for anyone else beyond what might be found between any two strangers or what is identified above as part of their agreements.

Suppose that Algernon has been having an affair with Candida and that she has given birth to a baby as result. The fact is that Algernon, and some of the others involved in the episodes described above, have enjoyed a number of temporary flings. As this illustrates, people in this world are made of flesh and blood, and experience the pull of biological tendencies at least as much as do people in the real world. In this imaginary world, no one prohibits, nor does its social morality condemn, the indulgence of these tendencies; indeed it supports and encourages them so long as they are the products of mutual consent.

Some of these flings have resulted in births. However, Algernon and his friends acknowledge no lasting duties to support or rear or care for any of their hapless offspring. Nor does anyone expect that they should. Their liaisons are decidedly extra-familial, as family is

understood in this world, and not based on contracts that provide for any obligations.

Some efforts to induce contractual connections have been made by way of establishing voluntary registries through which biological offspring can identify and contact biological parents. In addition, a “registry of one-night stands” has been proposed.⁵⁸ As these initiatives have, predictably, resulted in but a slight augmentation of parental support, extensive responsibilities have instead been shouldered by the government’s welfare agencies and foster-care systems.

IV. THE SUPERIORITY OF THE AFFILIATIONAL SYSTEM

The goods of kinship are better served by a kinship system rather than by the contractual approach described in Section III;⁵⁹ better than by any other nonaffiliational, nonsystematic arrangement that can readily be imagined. Section IV identifies several reasons why this is the case. It adduces several characteristics that are especially present in a system, as that term is defined above, and especially in a kinship system. It contrasts the nonsystematic instance of a thoroughly contractualized system.

A. Aspects of the Affiliational System which Conduce to the Service of Kinship Goods

1. Commonality of intention

Members of a kinship system jointly intend its goods,⁶⁰ whereas participants in a nonsystematic arrangement need not do so. Obviously, commonality of intention conduces to the successful achieve-

58. See generally Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431 (2012).

59. Remember that the contractual approach there described is based on the rules, principles, and theories about contract that prevail today. Alternative contracting idioms can profitably be imagined: ones that are friendlier to affiliational networks. It is not a thesis of this Article that kinship connections ought not to be formed by agreement, or that formation by tradition or assignment by social morality is the superior approach.

60. This is so because intentionality is implicit in affiliation, and affiliation is an element of the term “kinship system” as defined above. To be sure, an exception must be recognized for affiliations which are formal but lack substance; that is, for connections such as between a client and a lawyer who disrespects the requirements of professional ethics, in which the elements of affiliation are present as requirements but not honored by one of the parties. The definitions developed above would identify such a connection as an affiliation (a “formal affiliation”) and thus a participant of that delictual sort might be a formal member of a kinship system, though lacking actual affiliative intention.

ment of the purposes of a system: here, the kinship goods.

Less obviously, commonality of intention establishes a sort of vicariousness which makes the achievement of one member of the system constitute, to some extent, the achievement of the others. As Aristotle states, the actions of a friend are in a way the actions of one's self.⁶¹ Vicariousness is a recurrent feature of kinship relations: one is proud of the achievements of one's relatives and ancestors.

2. Roots in basic goods

As set forth above, kinship systems are affiliational in nature, and thus rooted in the goods of benevolence, knowledge, and trust. These virtues and their exercise, being perennial objects of human aspiration, constitute a foundation for kinship networks more solid and perdurant than might be found at the base of other kinship structures—ones founded, for example, on illusory, transient or instrumental goods such as the protection of wealth or the exercise of power; ones founded only on negotiated agreement.

To be sure, the affiliational virtues might be instantiated in isolated dyads, or they might be found among participants in networks lacking coherent purpose and therefore not qualifying as systems. It seems likely, however, that these virtues are in a sense “network-seeking.” Benevolence, notably, presses people to reach out beyond the dyadic to bring in others. Devotion to the good of offspring has a similar effect. Kinship networks fulfill the affiliational goods in a way more fulsome than other kinship connections.

Rooted as it is in basic virtues, a kinship system is likely to be endorsed and supported by its participants in a more lasting and devoted way than other kinship arrangements might be. A kinship system is for that reason especially well-suited to fulfill the arduous and lengthy projects of childrearing and care of the elderly, and to sustain the demanding conditions for resistance to state oppression.

3. Roots in social morality

In our society and many others, kinship systems are established and defined primarily by social morality rather than through the fiat

61. “[T]hings that might be brought about by our own efforts . . . in a sense include things that can be brought about by the effort of our friends . . .” NICOMACHEAN ETHICS, *supra* note 8, at 1112b 27–28, page 757. Another translation: “what our friends achieve is, in a way, achieved through our agency.” *Id.*, page 36 of the translation by Terrence Irwin (2d ed., 1999).

of the State⁶² or the negotiations of the parties. Similarly, kinship systems are recognized as affording goods to society; their serviceability to the State is seldom emphasized. This state of affairs strengthens the position of the kinship network as a bulwark against State oppression.

To be sure, the definition of “kinship system” developed above does not require an element of social recognition. Kinship systems can exist prior to or outside of society, and may perdure in hostile social environments. Nevertheless, several of their fundamental elements make kinship systems especially eligible for social recognition and explain why they usually receive it. For one thing, the basic purposes of a kinship system—rearing the young and caring for the old—are congruent with the purposes of most societies, which of course care about babies and the elderly. Further, the affiliational roots of kinship system—their foundation in the virtues of benevolence and knowledge and trust—being perennial objects of appreciation and respect in many contests, make kinship ties recognizable and appealing to society generally. Society itself, when it is well ordered, is a sort of affiliational system.⁶³

4. Perdurance of membership; stability of role

Members of many systems, and certainly most members of kinship systems, occupy their places within the system for long periods of time, in many instances for life. You will always be a son or daughter of your parents. Aspirationally, and in many instances actually, your father will always be the husband of your mother. Your grandparents and cousins and so on will be such so long as you and they live. From most such roles, no one can resign. The duties and responsibilities of such roles cannot be abjured without a hit to reputation and even to self-esteem. These roles last even beyond the grave; they will be mentioned in your obituary and on your gravestone.

Furthermore, note the socially settled and stable character of kinship roles. They are not bargained out anew in each iteration. Your belief as to who is your sister is the same as that of your parents, and

62. *But cf.* Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941, 954 (2003) (“We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage.”).

63. *See generally* Scott FitzGibbon, *The Seduction of Lydia Bennet: Toward a General Theory of Society, Marriage, and the Family*, 4 AVE MARIA L. REV. 581 (2006).

of all your relatives, on that point.⁶⁴ The roles are slow to change. The meaning and moral content of parenthood, grandparenthood, and other kinship offices alter little from generation to generation.

These features—perdurance of membership, stability of role—are basic to the achievement of kinship goods. The young can well be reared (and the old successfully cared for) only through patient efforts across long periods of time, optimally by a stable group of caretakers. Children do not flourish best when they are passed like batons from one runner to another. Intergenerational modeling is facilitated by stability. Within a kinship system, what you see to be expected of your parents—year in and year out, through the course of your development—is identical to what will be expected of you one day, when you are a father or a mother. Support of the elderly is facilitated: it would hardly be possible to confer steady support upon grandparents in a social order in which divorce and dispersal had become endemic, or in a society in which opinions fluctuated wildly as to what is meant by the term “grandparent” or on what that position entailed.

To be sure, perdurance and stability of role are not identified as among the defining elements of “kinship system” in the account of that term constructed above. However, those elements are implicit, and they may be promoted by some of the defining elements. The elements of affiliation, for example, tend towards perdurance and stability: close affiliates (good friends, at any rate), do not readily part, nor do they plasticize their relationship. Intentionality towards a purpose, for another important example, makes for perdurance and stability whenever the purpose takes a long time to achieve. Such is manifestly the case with rearing the young and supporting the elderly.

B. A Nonsystemic, Nonaffiliational Arrangement Contrasted

Contrast the instability, inconstancy, and dis-integration introduced when family membership is based upon the slippery surface of contract. Contracts may be created at any time and with almost any person. The duties they create may be assigned to others. They may last for but short periods; they may be discharged; they may be voided by change in circumstances or mistake. They may be rescinded by

64. See Hlaing *supra* note 16, at 3 (noting “the utterly uncontroversial fact that all human communities recognize that, for any person there is necessarily a mother paired (whether understood in biological terms or not!) with a man such that he legitimizes her giving birth and it, at least *inter alia*, called whatever their word is for our word father.”).

consent. They may be—they usually are—mutually independent: the purposes of one agreement may be divergent from those of others.

A party to a contract may be excused if the other party has committed a misrepresentation. (For example, in the hypothetical situation, Algernon, Agatha, and Baxter may abandon Beata if it emerges that she is not, genetically, what she was represented to be.) A party may refuse to perform if the other party has breached. Applying this again to the hypothetical, Algernon and Baxter may refuse to carry forward their relationship with Agatha if she has not lived up to her monetary commitments. Note how different the attitudes are within the family, as traditionally understood. There, to quote the distinguished writer Marilynne Robinson, “help and kindness and loyalty are owed where they are perhaps by no means merited.”⁶⁵

The grounding of contracts, as they are generally understood today, is in the arms-length “morality of the marketplace.” The theoretical basis of contract, as now generally accepted, lies in freedom of the will and the utility or preference-maximization of the parties. These foundational bases encourage room for contractual alteration and for termination. When circumstances change so much that contractual obligations no longer correspond to what the parties had in mind, freedom can be enhanced by allowing the parties to avoid further performance. When circumstances change so much that performance has become unduly expensive, economic principles may support the excuse of efficient breach.

V. THE MORAL TRACTION OF A KINSHIP SYSTEM; ITS ENTITLEMENT TO PROTECTION BY SOCIETY AND THE STATE

So fundamental is a well-formed kinship system to the flourishing of the individual that to deprive him of membership or obstruct entirely the exercise of kinship-system office—for example by depriving a child of her relationship with her parents, by depriving parents of their children or by permanently separating husband and wife, as was sometimes done by slaveholders—constitutes a serious wrong to the victims and also, in many cases, a grave wrong to the other members

65. Marilynne Robinson, *Family*, in *THE DEATH OF ADAM: ESSAYS ON MODERN THOUGHT* 87, 88 (1998), *excerpt available at* <http://www.religion-online.org/showarticle.asp?title=258>. See generally Richard Stith, *Her Choice, Her Problem: How Having a Choice Can Diminish Family Solidarity*, 2 INT'L. J. JUR. FAM. 179 (2011) (proposing the surprising but plausible thesis that it is sometimes better not to have been chosen—better for example for a child if its mother had not had the option to abort it; and that it is better for family solidarity if some choices are unavailable).

of the kinship system. Similarly, for a government or a political community to dissolve a well-formed kinship system—or to seek to prevent one from forming up, as was proposed by Plato⁶⁶ and as may have been the policy in ancient Sparta⁶⁷—is delictual.

For a government to refrain from harm is plainly not enough. As a trustee for civil society, government must affirmatively protect and nurture it, seeking the general good of citizens at least so far as their goods touch on public affairs. Protecting and nurturing a well formed kinship system is thus a major part of a government's responsibility.⁶⁸

This conclusion, or something close to it, is endorsed by the Universal Declaration of Human Rights, which states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State,”⁶⁹ and by the International Covenant on Civil and Political Rights, which contains the same statement.⁷⁰ A similar point is made in the Preamble to the Convention on the Rights of the Child, which states that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,” and that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding” Article 8 of this convention further states that “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”⁷¹

66. IN THE REPUBLIC OF PLATO 142–44 (Allan Bloom trans., 2d ed. 1968). Plato places the thesis in the mouth of Socrates.

67. As described in Plutarch's *Lycurgus* (75 A.D.). A translation by John Dryden is available at <http://classics.mit.edu/Plutarch/lycurgus.html>.

68. See generally SIMEON TSETIM IBER, THE PRINCIPLE OF SOLIDARITY IN CATHOLIC SOCIAL THOUGHT: IMPLICATIONS FOR SOCIAL JUSTICE AND CIVIL SOCIETY IN NIGERIA (2011) (emphasizing the importance of kinship relations).

69. UNIVERSAL DECLARATION OF HUMAN RIGHTS, art.16(3), Dec. 10, 1948, G.A. res. 217A (III), U.N. Doc./ A/810 (1948), available at <http://www.un.org/en/documents/udhr/index.shtml>. See Ursula C. Basset, *Derecho del Niño a la Unidad de Todo se Identidad*, F Revista Jurídica La Ley 1005 (2011).

70. Article 23-1, March 23, 1976, 999 U.N.T.S. 1717, available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>.

71. CONVENTION ON THE RIGHTS OF THE CHILD, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 Nov. 1989, entry into force Sept. 2, 1990, in accordance with Article 49, available at <http://www2.ochr.org/english/law/crc.htm>.

The German constitution states that “[m]arriage and family are under the special protection of the state,”⁷² and similar provisions are contained in many national constitutions.⁷³ To be sure, these provisions refer to “the family,” but it involves no distortion to extend families to the kinship system. A well-formed kinship system is a mainstay of all families; to erode or abolish one hurts families while promoting it protects them.

VI. IMPLICATIONS FOR ASSISTED REPRODUCTIVE TECHNIQUES AND FOR PROPOSED REDEFINITIONS OF FAMILIAL RELATIONS

What does all of this suggest for the law when it encounters proposed alterations of the reproductive arrangements in its society? This question generates different answers according to the posture in which a matter arises and the legal body whose actions are elicited. Legislation and judge-made law are two possibilities. Constitutional adjudication is a third and will hereafter be the exemplar.

Imagine yourself the Chief Justice of a Supreme Court which operates under a judicialist constitution and has no binding precedent or statute on point. Imagine four instances of new and challenging developments relating to kinship. Statutes have been adopted in your jurisdiction which restrict or prohibit the activities in question, or which at least deny them full recognition. Cases come before you in which these statutes’ constitutionality is challenged.

Further imagine that there is no directly relevant constitutional text nor binding precedent. The constitutional tradition is broadly judicialist, giving you great leeway. A clause in the Constitution authorizes the Court to “frame and apply wise principles and doctrines directed to the good of the civil order.” How would you best adjudicate these cases?

72. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [FRG CONSTITUTION] art. 6(1), available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

73. Extensive citations and quotations are contained in Carmen Garcimartin, *Defining Family Relations Within the Law: Nuclear Family vs. Extended Family*, 3 INT’L J. JURIS. FAM. 85, 87–88 nn. 10 & 11 (2012). A table of constitutions, distinguished according to categories of provisions relating to parents, children, and parenting, is contained in Jurisprudence of Parenting *supra* note 34, at 443–49 & 468–77. An exposition of Eastern European provisions is presented in Olga Cvejić Janić, *The Definition of Family in Modern Law and Its Legal Protection*, 1 INT’L J. JUR. FAM. 77, 85–87 (2010).

*A. Some Hypothetical Cases**1. The chimera*

Scientists have developed the capacity to combine genetic material from different species. Thus, an offspring might have a lion as one of his genetic parents and inherit some of its traits: claws on his feet, perhaps, or a mane and a tail.⁷⁴ Scientists and entrepreneurs propose to open a clinic to offer such services widely. Proponents advocate a “new, genetically constructed” family order.

2. Comprehensive ARTs which do not involve other species

Scientists have developed the capacity to create a fertilized egg using genetic materials from three donors, with the effect that the offspring will have three genetic parents.⁷⁵ Further, they have developed the capacity to intervene in the genetic dimension of natural reproduction—for example by gamete selection—so as to assure that the offspring will have certain genetic traits: high intelligence, for example, and immunity from certain diseases. And of course, these scientists have the capacity to perform IVF and sperm implantation and to facilitate surrogate motherhood.⁷⁶ Scientists and entrepreneurs propose to open clinics to perform the services described above. They propose to advertise for donors and “commissioning parents,” offering a menu of genetic characteristics. They also propose to contract

74. See generally CHIMERA'S CHILDREN: ETHICAL, PHILOSOPHICAL AND RELIGIOUS PERSPECTIVES ON HUMAN-NONHUMAN EXPERIMENTATION (Callum MacKellar & David Jones, eds., 2012).

75. See generally Rowena Mason & Hannah Devlin, “MPs vote in favour of ‘three-person embryo’ law,” THE GUARDIAN, Feb. 3, 2015, *available at* <http://www.theguardian.com/science/2015/feb/03/mps-vote-favour-three-person-embryo-law>. Cf. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION ARTICLE 3, adopted December 7, 2000, 2010 O.J. C 83/02, *available at* <http://eu-rex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>, which provides:

“In the fields of medicine and biology, the following must be respected in particular:

- (a) the free and informed consent of the person concerned, according to the procedures laid down by law;
- (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
- (c) the prohibition on making the human body and its parts as such a source of financial gain;
- (d) the prohibition of the reproductive cloning of human beings.”

76. See generally NAOMI CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES (2013).

for surrogacy services⁷⁷ and, where there is a demand for them, “special parenting arrangements.”

3. *The IVF baby with married parents*

Other scientists propose, more modestly, to service infertile married couples. They would arrange for the fertilization of one of the woman’s eggs with her husband’s sperm, and for the implantation of the fertilized egg into her uterus.⁷⁸

4. *Polyamorous associations*

In a major city, a subculture has developed in which men and women practice “polyamory.” This consists of a cohabitational arrangement beyond that of just one man and one woman, where several persons live together and participate in sexual intercourse with one another. Those involved, and some who applaud them, identify these arrangements as “marriages.”⁷⁹ When children are begotten, or are brought into the group in any other way, the adult participants and their sympathizers identify the female adults in the group as the mothers and the males as the fathers of those children. They herald this as the arrival of a new way of being a family.

B. *How Best to Adjudicate*

For you as Chief Justice, here are some principles for adjudicating these matters.

1. Consider whether the procreative order of your country is

77. For general discussion of surrogate motherhood, see Gordana Kovačik-Stanić *State Regulation of Surrogate Motherhood: Liberal or Restrictive Approach*, 4 INT’L J. JUR. FAM. 35 (2013).

78. The procedure has been structured in such a way as not to produce “extra” fertilized eggs and thus not to raise issues related to abortion. For a general discussion of surrogacy, see DIRECTORATE-GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT C: CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS, *A COMPARATIVE STUDY ON THE REGIME OF SURROGACY IN EU MEMBER STATES* (2013), available at <http://www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=93673>.

79. See generally Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 303, 305 (2010) (“[I]ndividuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties, the type of relationship involved, and which rights and responsibilities to exchange with each. . . . [A] liberal state can set no principled restrictions on the sex or number of spouses and the nature and purpose of their relationships, except that they be caring relationships . . .”).

conducted through a kinship system.

A good first step is to take cognizance of the state of affairs in your country as regards kinship system. Some countries might lack one; some cultures may have descended into confusion and contradiction so severe that kinship offices hardly exist and family relations are episodic and controverted. Let us suppose that you determine that the procreative practices of your country are conducted through a kinship system, as that term is defined above.⁸⁰

2. Understand the principles of the kinship system.

Your second step is to ascertain the principles and standards by which your country's kinship system operates. Many are implicit in the account of the term "kinship system" set forth above. A network must operate according to standards which direct it to the procreational project, for example, and it should have standards which in one way or another encourage members to promote one another's good. Without such standards, a network would not be a kinship system at all.

Beyond these necessary elements, each kinship system is likely to endorse further principles and standards. In a Jewish society, for example, requirements derived from Torah and Talmud provide special criteria for the validity of marriage and the recognition of offspring. In a thoroughly liberal and secular society—but one which has not contractualized its kinship order to the point of abandoning kinship system altogether—principles and rules which aim to protect autonomy and dignity will be much to the fore.

3. Ascertain whether the kinship system is sufficiently just to deserve protection and support.

Your next step is to consider whether the kinship system of your society is ineligible for support owing to pervasive injustice.⁸¹ Kinship

80. As noted above, this Article leaves aside the complex problems presented in a social or national order that contain within it populations which—perhaps owing to religious and ethical divergence—differ considerably in the way they structure their families. It seems likely that the State, in such a situation, is obliged to support each extended family. The State may also be under a duty to seek a balance or set of accommodations, or to support the balance and accommodations endorsed by the social order over which it presides. In any event, many of the assisted reproductive techniques and other novel initiatives here discussed would raise the same difficulties and objections under most if not all of the kinship systems which history has developed.

81. To be sure, many likely unjust elements — the endorsement of malicious violence between family members, for example — would likely disqualify the arrangement from constituting an affiliational network owing to contravention of the requirement of trust, benevolence or knowledge.

relations may be founded on force and exploitation would be unworthy of nurture and support. Unjust exclusion from participation might ground a finding of disentitlement for support. This might be the case, for example, with a system which provided that no recognition was to be accorded to family relations among members of a particular race. On the other hand, a suspicion of injustice may be rebutted where it rests on a reasonable basis. For example, a system which treated ordination to a celibate clergy as an impediment to marriage would not be unjust for that reason.⁸²

In what follows, it is assumed that you determined that the kinship arrangements of your society satisfy the requirements of justice.⁸³

4. Determine the compatibility of the proposed modification.

Your next undertaking is to consider whether the proposed modification in kinship arrangements is consistent with the kinship system.

a. The chimera project

In the case of the chimera project described above, the conclusion is probably clear. The creature created by the proposed project might be so different from the rest of the population as not to be recognizably human; it would not likely be accepted as human by many; and it would certainly be vastly different in appearance—and no doubt in behavior as well—from anyone who might otherwise be identified as its brother, sister, mother, grandparent or relative of any sort. It would therefore probably be unable to find a stable place for itself within the kinship system.

If the chimera project perdured and flourished, entire generations would emerge, afflicted with impoverished familial recognition. Consensus would unravel as to who was related to whom and what relationships of a familial nature entailed. The proliferation of such beings would disrupt and destabilize the entire system, to the detriment of the goods of kinship. Law and government would on this ground be justified in disfavoring the project.

82. Problematic cases are presented by the treatment in some systems of persons born outside of wedlock.

83. This is not to suggest that they can be ignored and or might not deserve support of some sort even if they were to fail the test. Exigencies or positive statutory decrees might mandate support; alternatively, the case at hand might not implicate the unjust dimension of the system.

b. The project involving comprehensive ARTs but without the involvement of other species.

Similar concerns, in a less extreme degree, might arise as a result of other comprehensive ARTs projects, especially the one described above in which three-parent embryos are created. In many such instances, as a leading scholar observes, “chaotic outcomes that seem unfair to some of the parties are inevitable.”⁸⁴

People who might consider themselves to be parents would be uncertain as to whether they occupy that status; children would be uncertain of their parentage.⁸⁵ Candidates include gamete donors, the surrogate mother (if there is one), and the commissioning person or persons. In 2013, California adopted a law allowing for the legal recognition of more than two parents for one child.⁸⁶ Contrariwise, what about parentless children? Fairly recent decisions from Georgia

84. Brian H. Bix, *Private Ordering and Family Law*, 23 J. Am. Acad. Matrimonial Law 249, 281 (2010), available at http://www.aaml.org/sites/default/files/MAT203_2.pdf.

85. *Id.* at 249. This authority further states:

Increasingly, sperm donation is being used by unmarried couples (both same-sex and opposite sex) and also by intended single parents. Additionally, the donated sperm is frequently being obtained from friends or acquaintances rather than from an anonymous donor from a sperm bank. Sometimes the parties want the donor to have a role in the life of the resulting child; sometimes they do not; and sometimes the parties have (or claim to have) different views of what the “shared understanding” is or was. Sometimes the parties put their understandings into writing, though more often they do not. And sometimes the parties’ subsequent behavior is contrary to their original understanding.

Compare J. David Bleich, *Family Values in the Jewish Tradition*, 1 INT’L. J. JUR. FAM. 113, 128 (2010) (noting authorities “express[ing] the view that the Sages of the Talmud would have decried any act that leaves a child bereft of a halakhically recognized father, just as they legislated against relationships that might give rise to ambiguous paternity.”).

86. Section 7601 of the California Family Code was amended by Stats 2013, c. 564 (S.B. 274); it now provides:

(a) “Natural parent” as used in this code means a non-adoptive parent established under this part, whether biologically related to the child or not.

(b) “Parent and child relationship” as used in this part means the legal relationship existing between a child and the child’s natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship.

(c) This part does not preclude a finding that a child has a parent and child relationship with more than two parents.

(d) For purposes of state law, administrative regulations, court rules, government policies, common law, and any other provision or source of law governing the rights, protections, benefits, responsibilities, obligations, and duties of parents, any reference to two parents shall be interpreted to apply to every parent of a child where that child has been found to have more than two parents under this part.

See generally Ann E. Kinsey, *A Modern King Solomon’s Dilemma: Why State Legislatures Should Give Courts the Discretion to Find that a Child has More than Two Legal Parents*, 51 SAN DIEGO L. REV. 295 (2014).

and Pennsylvania allow a sperm donor to divest himself of parental responsibilities by agreement.⁸⁷ Why not the ovum donor and the surrogate mother as well?

Persons who are uncertain as to their parentage are therefore uncertain as to their entire families. Doubts arise as to who is a brother, sister, grandparent, aunt or uncle.⁸⁸ Donor-conceived children have been found to be “disproportionately likely to feel confused when it came to identifying members of their families and to feel that they could ‘depend on’ their friends more than their families.”⁸⁹ “They wonder: Do I have siblings or cousins? Who are they? What are they like? Are they ‘like me’? What could I learn about myself from them?”⁹⁰ When the child reaches maturity, further problems arise,

87. *Brown v. Gadson*, 654 S.E.2d 179 (2007), *cert. den.* (Feb. 25, 2008) (holding enforceable an agreement for a sperm donor to be relieved of parental responsibilities); *Ferguson v. McKiernan*, 940 A.2d 1236 (2007) (holding enforceable an oral agreement between “[f]ormer paramours” by which the sperm donor was relieved of parental responsibilities). Compare *Mintz v. Zoernig*, 198 P.2d 861 (C.A. 2008), *cert. den.* No. 31,320 (Nov. 6, 2008) (concluding that while agreements divesting sperm donors of obligations for child support “may be valid in some instances, where the biological father goes beyond merely donating sperm and assumes a parental role . . . he is liable for child support.”). See generally Lauren Gill, *Who’s Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1742-45 (2013).

88. Another sort of confusion or complication arises in instances of intra-family surrogacy. Mary Welstead describes a case in which a woman became a surrogate mother for her daughter, and thus “simultaneously acquired the dual status of mother and grandmother” to the offspring. In another instance, a woman agreed to become a surrogate mother for her own mother and stepfather. “She subsequently gave birth to a baby, and so became his mother and his stepsister at the same time. Her own three older children acquired a half-brother and step uncle.” Mary Welstead, *This Child is My Child; This Child is Your Child; This Child was Made for You and Me—Surrogacy in England and Wales*, in *THE INT’L. SURVEY OF FAM. LAW* 167 (Bill Atkin, ed., 2011 ed.).

89. Naomi Cahn, *The New Kinship*, 100 GEO. L. J. 367, 384-85 (2012) (citations omitted):

Donor children may experience a sense of loss for not having information about their biological pasts or being able to establish a relationship with their gamete provider, analogous to the experience of “genetic bewilderment” reported by some adopted children. In one of the first studies to compare donor-conceived offspring to adoptees to biological children, the researchers found that approximately one-third of the respondents “strongly” agreed, and another one-third “somewhat” agreed that “[m]y sperm donor is half of who I am.” Similar percentages wondered about their donor’s family. And many were interested in knowing about their ethnic or national backgrounds. Compared to adoptees and offspring biologically related to both parents, the donor-conceived were disproportionately likely to feel confused when it came to identifying members of their families and to feel that they could “depend on” their friends more than their families.

90. Margaret Somerville, *Children’s Human Rights to Natural Biological Origins and Family Structure*, 1 INT’L. J. JUR. FAM. 35, 42 (2010). But cf. Immaculada De Melo-Martin, *The Ethics of Anonymous Gamete Donation: Is There a Right to Know One’s Genetic Origins?* 44 HASTINGS CENTER REPORT 36 (2014), available at <http://onlinelibrary.wiley.com/doi/>

related to incest and to legal restrictions prohibiting consanguineous marriage. Issues arise as to a child's right to learn of his or her origins versus the privacy concerns of the various sorts of parent.⁹¹ The foundational good afforded by a well-functioning kinship system—the provision to the child of a stable and consistent place in the familial structure—is undermined by ARTs.⁹²

The adults are also affected. Disputes over parental rights and custody ensue. These problems may be especially acute in instances in which the ARTs projects include surrogacy, since a surrogate mother may be reluctant or unwilling to give up the child, even though she has promised to do so.⁹³ As Professor Gordana Kovaček Stanić observes, “[p]regnancy and giving birth to a child lead to the creation of emotional ties between the mother and the child, which

10.1002/hast.285/full (“knowledge about one’s genetic origins has not been shown necessary for protecting donor-conceived people’s interests in thriving family relationships, health, and the forging of an appropriate sense of self.”). Responding to Melo-Martin: Vardit Ravitsky, *Autonomous Choice and the Right to Know One’s Genetic Origin*, 44 HASTINGS CENTER REPORT 36 (2014), available at <http://onlinelibrary.wiley.com/doi/10.1002/hast.286/full> (stating, in the abstract: “Indeed, the research on the needs, preferences, and well-being of donor-conceived individuals is scant. In fact, we lack robust empirical evidence regarding all aspects of donor conception. I argue, however, that the right to know one’s genetic origins does not rest on empirical evidence. Some donor-conceived individuals who are unable to know their genetic origins may suffer great harms. Others may suffer no harm at all. But all are treated wrongly when they are deprived of the ability to access information about their genetic origins. They are deprived of an important aspect of their autonomy: the liberty to choose what meaning they assign to the genetic components of their identity.”). A brief criticism of the Melo-Martin and Ravitsky articles is presented in Kimberly Leighton, *The Right to Know Genetic Origins: A Harmful Value*, 44 HASTINGS CENTER REPORT 5 (2014), available at <http://onlinelibrary.wiley.com/doi/10.1002/hast.334/full>.

91. Somerville, *supra* note 90, at 52; RUTH DEECH & ANNA SMAJDOR, FROM IVF TO IMMORTALITY: CONTROVERSY IN THE ERA OF REPRODUCTIVE TECHNOLOGY 157–58 (2007) (noting the possibility that upon learning of his or her origins, the child may feel that he has been deceived); Olga Čvejić Janić, A Child’s Origin and Parenting, 2 INT’L. J. JUR. FAM. 335, 351–52 (2011) (discussing Serbian law).

92. See Susan Golombok, Lucy Casey, Gabriela Roman & Vasanti Jadva, *Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment*, 54 J. CHILD DEVELOPMENT & PSYCHIATRY 653 (2013), abstract available at http://onlinelibrary.wiley.com/doi/10.1111/jcpp.12015/abstract?utm_source=RTA+Italiano+Surrogacy+Bill&utm_campaign=winstorg&utm_medium=email:

Although children born through reproductive donation obtained SDQ [Strengths and Difficulties Questionnaire] scores within the normal range, surrogacy children showed higher levels of adjustment difficulties at age 7 than children conceived by gamete donation. Mothers who had kept their child’s origins secret showed elevated levels of distress. However, maternal distress had a more negative impact on children who were aware of their origins

(The quotation is from the abstract.)

93. See Welstead, *supra* note 84, at 172–76 (describing cases in the UK in which the surrogate mother was unwilling to give up the baby).

seem unnatural, even inhuman, to break.”⁹⁴ Even the right to information—knowledge of one’s “own” child—will be disputed. Inevitably, the bonds of familial commitment weaken. A sort of “anti-custody” dispute has been reported: one in which all of the adults sought to disembarass themselves of their babies:

In 2000, an English woman agreed with an Italian man and his Portuguese wife, who lived in France, to become a surrogate mother for them. Donor sperm, obtained from an American sperm bank based in Copenhagen, and donor eggs, from an English woman, were used to create the embryos which were implanted by a Greek doctor in Athens—a truly international affair. However, a problem arose, as the fetuses turned out to be twin girls and not the boys which the intended parents had hoped for. They asked the surrogate mother to have an abortion and she refused. She did not, however, want to keep the children for herself and began the search for alternative parents. A lesbian couple in California put in a bid for the children via a surrogacy agency there. The twin girls were eventually born in a hospital in California at a cost to the surrogate of \$25,000 which the couple refused to reimburse. They subsequently adopted the babies.⁹⁵

The goods of the kinship system stand to be undermined by most ARTs projects. Moral guidance, affiliational modeling, support of the elderly or the ill, intergenerational solidarity: none are securely available where roles are ambiguous and controvertible. The power of the State is, where ARTs of most sorts proliferate, almost inevitably enhanced, since government and law will be called upon to determine the most fundamental elements of the kinship order. The dictum of the Massachusetts court— “[T]he government creates civil marriage”:⁹⁶ preposterous under normal circumstances when family forms are culturally established and operate without State involvement—could then readily be extended: “the government,” it might soon be reasonably concluded, “creates all familial relationships.”

94. *State Regulation of Surrogate Motherhood: Liberal or Restrictive Approach*, 4 INT’L. J. JUR. FAM. 35, 57 (2013).

95. Welstead, *supra* note 84, at 176. See Nick Craven, “Dilemma Over the Surrogate Twins with No Parents,” DAILY MAIL (LONDON), May 8, 2000, *available in part at* <http://www.questia.com/library/1G1-109614634/dilemma-over-the-surrogate-twins-with-no-parents>.

96. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003) (Part III A) (“We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.”).

c. The project involving IVF with married donors

Here, you as Chief Justice can probably reach an optimistic conclusion so far as considerations related to the protection of the kinship system are concerned. As in all of these instances, the genetic parents and the prospective social parents are the same people, occupying the offices (husband and wife) which most kinship systems recognize as appropriate for parenthood, it can be predicted that the kinship system in the society over which you preside has ample room for recognizing the offspring, and that the goods of the kinship system will not be dis-served by it.

d. The polyamorous associations.

The polyamorous arrangements identified above are likely to conflict with the kinship system and to undermine kinship goods. The temporary character of the relationships involved, and especially the fragility of the parent-child bonds, undermine the efficacy of childrearing, the care of the elderly, and any likely resistance to State encroachment. The effervescent character of such an association diminishes the likelihood of the participants receiving the recognition and support accorded to mothers, fathers, brothers, sisters, and others who form a part of a true kinship system.

e. How the law should respond when divergences are identified

Thus, three of the four instances described above can be found to diverge from what is likely the kinship system of your country. How should the law respond? Should statutes deny them recognition or even prohibit them? If a statute does restrict them, should you uphold it as constitutional, or at least conclude that the constitutional mandate to protect the kinship system weighs strongly in favor of such a holding?

This Article proposes that in general the answer to these questions will be in the affirmative: general practices which undermine the kinship system should be disfavored, denied recognition, and often prohibited. Here, however, are some lines of thought and instances of possible circumstances which might lead the law towards a more permissive approach.

1. Countervailing concerns about the welfare of those directly involved

It might well be argued in some cases that the well-being of the

potential offspring, of his or her parents or of others directly involved is implicated in a way that demands that you, as Chief Justice, allow or perhaps even mandate procedures which undermine the kinship system. A fairly recent set of articles by Julian Savelescu proposes a “principle of procreative benevolence,” such that “couples who decide to have a child have a significant moral reason to select the child who, given his or her genetic endowment, can be expected to enjoy the most well-being.”⁹⁷ This principle supports extensive application of ARTs. Recent articles wisely point out that the well-being of others besides the individual offspring must be taken into account. Douglas and Devolder propose the additional principle of “procreative altruism,” which requires that “[i]f couples (or single reproducers) have decided to have a child, and selection is possible, they have significant moral reason to select a child whose existence can be expected to contribute more to (or detract less from) the well-being of others than any alternative child they could have.”⁹⁸

The principles of procreative benevolence and procreative altruism may lead you to depart from an unswerving policy in support of the kinship system. On the other hand, those principles will support such a policy in many cases, since the well-being of the offspring, and of all involved, is usually promoted by characteristics which facilitate her integration into a kinship system—facilitate acceptance by her family, for example.

2. *Separation of the divergent arrangement*

Some circumstances may justify the lawmaker, and you as Chief Justice, in concluding that a kinship arrangement, however divergent, is sufficiently far separated from the general kinship system that its

97. Julian Savelescu & Guy Kahane, *The Moral Obligation to Create Children with the Best Chance of the Best Life*, 23 *BIOETHICS* 274, 274 (2009), available at <http://faculty.smu.edu/jkazez/PAP/savulescu-kahane.pdf>. Here is another formulation from that article:

If couples (or single reproducers) have decided to have a child, and selection is possible, then they have a significant moral reason to select the child, of the possible children they could have, whose life can be expected, in light of the relevant available information, to go best or at least not worse than any of the others.

Id. (citation omitted). Other works proposing this general thesis or a similar one include Julian Savelescu, *In Defence of Procreative Beneficence*, 33 *J. MEDICAL ETHICS* 284 (2007); Julian Savelescu, *Procreative Beneficence: Why We Should Select the Best Children*, 15 *BIOETHICS* 413 (2001).

98. T. Douglas & K. Devolder, *Procreative Altruism: Beyond Individualism in Reproductive Selection*, 30 *J. Med. Philos.* 400(2013).

divergence is not a matter of grave concern. Such a conclusion may be precluded as to the three problematic divergent practices identified above, since in each instance the participants aspire to spread and generalize their approach to and to secure a modification to the general kinship system which accommodates them. However, such a conclusion might be reasonable in an instance in which the novel practice was not intended to metastasize and where its proponents were content to maintain a separate identity. Shaker procreative practices may afford an example.

If you as Chief Justice or if any lawmaker can, under the circumstances, reasonably conclude that this separation exists and will continue, the concerns advanced in this Article will have considerably less weight.

3. The possibility of growth and change in the kinship system.

Might you cautiously permit some divergences which are not separated out? Perhaps your country's kinship system can change and adapt, consistently with the sustenance and pursuit of the goods of kinship.

If you are a truly wise Chief Justice, you may be able to discern the deeper principles and habits of thought upon which your country's kinship system is based. You may gauge its capacity to incorporate new practices and to establish a place for divergent procreative arrangements. You might, in some countries and cultures, confidently discern a capacity for evolution, and predict that new procreational practices will be brought within the kinship fold and new familial identities reliably recognized.

Perhaps the legal and institutional system of your country can be modified so as to protect and integrate the children of novel arrangements in such a way that they will be afforded intergenerational solidarity and be well provided for, morally guided, affiliationally integrated, and in other ways supported in just the fulsome ways in which a well-functioning kinship system serves its participants. Perhaps the ambiguities of kinship relationships can find stable resolution in sufficiently defined new family forms, and relational conflicts satisfactorily resolved. Perhaps the obligational traction that traditional kinship systems exert upon the human heart can be applied consistently within systems pervaded by novel forms. Perhaps the State can, even under conditions of kinship-system alteration, be kept within its proper sphere. Perhaps you as Chief Justice can assist in framing legal doctrines that serve these ends and assure these results.

You must ask yourself whether, under the circumstances within your country and culture, these outcomes are at all likely to be achieved. Optimistic conclusions would be more easily arrived at where the moral culture was solid and widely accepted, and the government consistently restrained. Optimistic conclusions would be difficult to arrive at in a country and culture (our own, for example) where, and during a time (the present, for example) when, the kinship system was brittle and in a state of disarray.