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Liberty, Equality, and Parentage in the Era of Posthumous Conception

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I. INTRODUCTION

Liberty and equality have always had a complex interrelationship. Liberty protects individual choice, while equality protects individuals from discrimination based on statuses about which they have no choice. Examining liberty and equality in the context of parent-child relationships adds an additional layer of complexity. When a woman exercises her liberty to procreate by using her deceased husband's genetic material, her children may experience inequality due to their status as posthumously conceived.[1] Such children are, in some states, denied Social Security survivors benefits because their deceased genetic parent is not viewed as their legal parent.[2] This was the case with Karen Capato's twins, who were conceived using her deceased husband's sperm and subsequently denied the survivors benefits that their

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[1] These are, of course, not the only liberty and equality considerations that exist within the context of parent-child relationships. I have illustrated elsewhere that the two rights always have multiple dimensions, such that parents have equality interests and children have liberty interests. Jessica Knouse, *Reconciling Liberty and Equality in the Debate over Preimplantation Genetic Diagnosis*, 2013 UTAH L. REV. (forthcoming 2013). This essay, however, focuses on the liberty interests of parents and the equality interests of children as they operate within the context of posthumous conception.

[2] Astrue v. Capato, 132 S. Ct. 2021 (2012).

older (non-posthumously conceived) brother was able to receive because their genetic father was not viewed as their legal parent.[3] When Karen Capato's case reached the Supreme Court in 2012, her equal protection arguments were rejected and survivors benefits were withheld on the basis that the twins were not Robert Capato's "children."[4]

This essay uses *Astrue v. Capato* as a platform to examine how liberty and equality interact within parent-child relationships. It observes that as prospective parents have experienced an increase in liberty due to new reproductive technologies the children they create have not necessarily experienced a commensurate increase in equality. The law's myopic focus on parent-child relationships rather than provider-dependent relationships renders posthumously conceived children unequal along multiple dimensions. They may have not only one provider, but also only one parent.[5] This essay argues that shifting the law's focus away from identifying parents and towards identifying providers would mitigate the status inequality that posthumously conceived children currently experience without (necessarily) altering the allocation of benefits. The *Capato* case would have had a very different legacy if, instead of determining whether the twins were Robert Capato's "children,"[6] the Social Security Administration had simply determined whether they were his "dependents." This proposal fits with recent challenges to traditional notions of parentage.[7]

Part II provides background information. It describes the current law with respect to the parentage of posthumously conceived children and offers a detailed account of *Astrue v. Capato*.[8] Part III considers the liberty and equality implications of posthumous conception. It addresses the doctrinal as well as practical aspects of liberty and equality and observes that, while prospective parents have substantial liberty to elect posthumous conception, the children they create may experience inequality associated with their status as posthumously conceived—in part, because they may have only one legal parent. Part IV suggests a diminution in the law's focus on parentage. It argues that the law should focus less on parent-child relationships and more on provider-dependent relationships by, for example, eliminating the use of parental status as a proxy for provider status under the Social Security Act. Part V concludes that this shift in focus from parental status to provider status would protect the liberty of adults, promote the equality of children, and perhaps achieve a more just distribution of governmental benefits.

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[3] *Id*. at 2023, 2034.

[4] *Id*. at 2033–34.

[5] As Part III(B) will discuss, posthumously conceived children are also a subset of non-marital children. Marital status discrimination is, however—for purposes of this essay—only a secondary consideration. *See infra* Part III(B). This is, in part, because I have argued elsewhere that civil marriage should be abolished. Jessica Knouse, *Civil Marriage: Threat to Democracy*, 18 MICH. J. GENDER & L. 361 (2012). Rather than reiterating my previous arguments, I will simply note that abolishing civil marriage would be my preferred means of creating equality between marital and non-marital children.

[6] *Capato*, 132 S. Ct. at 2027–34.

[7] *See, e.g.*, Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 12 (2008).

[8] *Capato*, 132 S. Ct. at 2021.

II. UNDERSTANDING POSTHUMOUS CONCEPTION

Part II describes the current law with respect to the parentage of posthumously conceived children. It focuses on whether a deceased gamete-provider can be viewed as a legal parent. Part II(a) offers a brief overview of existing state statutes, and Part II(b) provides a detailed account of *Astrue v. Capato*.

A. Posthumous Conception and Legal Parentage

Posthumous conception can occur through at least two mechanisms. It can be accomplished using genetic material—a sperm, an egg, or an embryo—that was cryopreserved during an individual's lifetime to allow for the possibility of future parenthood,[9] or it can be accomplished using genetic material that was harvested after an individual's death at the request of a survivor.[10] The former mechanism is the more common at present,[11] and one can imagine a variety of reasons that a living individual might elect to cryopreserve his or her genetic material, including concerns about infertility resulting from medical treatment (e.g., chemotherapy), exposure to toxins or other dangers (e.g., in the course of combat), or normal aging processes.[12]

One of the primary legal issues arising from posthumous conception is parentage, yet at present less than one-third of the states have statutes addressing whether deceased gamete-providers should be viewed as the parents of posthumously conceived children.[13] Many of the states that do have statutes have embraced policies similar to Section 707 of the Uniform Parentage Act,[14] which provides:

> If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.[15]

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[9] Katheryn Katz, *Parenthood from the Grave*. 2006 U. CHI. LEGAL F. 289, 292 (2006). As Professor Judith Daar has written, "Birth after death can be accomplished by freezing sperm, eggs, or embryos when they are viable, maintaining them in a frozen state in a manner that preserves their structure and function, and thawing the material so as to restore their capacity to become a new human being." JUDITH DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 522 (2d ed. 2013).

[10] Katz, *supra* note 9 ("[I]t is possible to retrieve gametes from individuals who are deceased, brain dead, comatose, or in a persistent vegetative state ("PVS") for use in procreation by the recipient."). Professor Judith Daar writes, "[m]ore than a handful of births have been reported using sperm retrieved from a man who has been declared dead, and while there are no verified reports of postmortem egg retrieval and birth, no technophile can doubt this possibility is on the horizon." DAAR, *supra* note 9.

[11] DAAR, *supra* note 9 ("Currently the vast majority of gametes are retrieved while the progenitor is still alive . . .").

[12] Browne Lewis, *Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously*, 60 CASE W. RES. L. REV. 1159, 1170, 1173–74 (2010).

[13] DAAR, *supra* note 9. Another legal issue that often arises is inheritance rights. Lewis, *supra* note 12, at 1179–81.

[14] DAAR, *supra* note 9, at 562.

[15] Unif. Parentage Act § 707 (2000) (amended 2002).

Under such statutes, whether a deceased gamete-provider will be viewed as a parent depends upon whether he or she specifically consented to be the parent of a child who was conceived and born after his or her death.

Some state statutes, rather than speaking directly to parentage, speak to inheritance rights—i.e., to whether a child can inherit from a gamete-provider whose death preceded his or her conception. In Florida, for example, where the *Capato* case occurred, a posthumously conceived child is statutorily barred from inheriting from a deceased gamete-provider unless he or she was expressly provided for by will.[16] Florida's intestacy statute provides, in relevant part, "[a] child conceived from the . . . sperm of a person . . . who died before the transfer of their . . . sperm . . . to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."[17] While this language does not speak directly to parentage, it influences parentage when read in conjunction with the Social Security Act. As Part II(b) will explain, since the Social Security Administration looks to state intestacy law to determine whether an applicant for survivors benefits is the "child" of a deceased insured wage earner, state intestacy statutes effectively determine parentage. The fact that so few states have statutes addressing the parentage of posthumously conceived children has left governmental entities with little guidance. This essay, acknowledging the lack of legislative guidance, asks whether and to what extent governmental entities ought to be using parent-child relationships as proxies for provider-dependent relationships.

B. Astrue v. Capato

This subsection describes the facts and analysis of *Astrue v. Capato* in order to illustrate how an adult's exercise of procreative liberty—i.e., the decision to engage in posthumous conception—could cause the resulting children to experience inequality. Karen Capato's posthumously conceived twins experienced inequality, in part, because they had only one legal parent, while their non-posthumously conceived genetic sibling had two legal parents.[18] It should be noted at the outset that this subsection merely describes the Court's reasoning, while Part III(b) provides a more in-depth analysis of the equal protection issues raised by posthumous conception.

Shortly after Karen and Robert Capato were married, Robert was diagnosed with esophageal cancer.[19] Because he was advised that the treatment (chemotherapy) might render him sterile, Robert had some of his sperm frozen and banked.[20] The Capatos, however, conceived naturally and had a son whom they hoped would one

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[16] FLA. STAT. ANN. § 742.17(4) (West 2013) ("A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.").

[17] *Id*.

[18] Although the Social Security Act focuses on whether someone is a deceased insured wage earner's "child" rather than whether the deceased insured wage earner is a "parent," the inquiry is substantially the same since one generally cannot be the "child" of someone without that person being their "parent." Astrue v. Capato, 132 S. Ct. 2021, 2027 (2012).

[19] *Id.* at 2026.

[20] *Id*.

day have a sibling.[21] Robert's will provided for his and Karen's son as well as for two children from a prior marriage.[22] Although Robert and Karen told their attorney that they wanted any future children to be treated the same as any existing children, Robert's will did not make any provision for future children.[23] When Robert's and Karen's son was about seven months old, Robert passed away.[24] Robert's banked sperm, however, remained viable and was used by Karen to conceive twins who were born eighteen months after Robert's death.[25]

When Karen applied for Social Security survivor's benefits for the twins the Social Security Administration ("SSA") denied her application on the basis that the twins were not Robert's "children."[26] The Social Security Act, which generally speaking is designed to provide "dependent members of [a wage earner's] family with protection against . . . the loss of [the insured's] earnings,"[27] defines the term "child" in two relevant sections.[28] Section 416(e), which provided the basis for Karen's argument, states, "'[C]hild means (1) the child or legally adopted child of an individual[.]"[29] Section 416(h)(2)(A), which provided the basis for the SSA's argument, states, "In determining whether an applicant is the child . . . of [an] insured wage earner[,] the Commissioner of Social Security shall apply [the intestacy law of the insured individual's domiciliary State]."[30] Robert had been domiciled in the State of Florida, which, as discussed in Part II(a), does not allow posthumously conceived children to take through intestacy.[31]

The district court accepted the SSA's argument, but the Third Circuit accepted Karen's argument and reversed, observing that the twins were "'the undisputed biological children of a deceased wage earner and his widow.'"[32] The Supreme Court granted *certiorari*, likely because the four courts of appeal that had spoken were

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[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*. at 2032 ("The aim was not to create a program 'generally benefiting needy persons'; it was, more particularly, to 'provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings.'") (quoting Califano v. Jobst, 434 U.S. 47, 52 (1977)).

[28] *Id.* at 2027–28; 42 U.S.C. § 416(e), (h)(2)(A) (2004).

[29] *Capato*, 132 S. Ct. at 2027; 42 U.S.C. § 416(e) (2004).

[30] *Capato*, 132 S. Ct. at 2028; 42 U.S.C. § 416(h)(2)(A) (2004). While other sub-sections within §416(h) provide alternative definitions, they were not invoked in this litigation. *Capato*, 132 S. Ct. at 2028, n.5.

[31] *Capato*, 132 S. Ct. at 2026. Florida's intestacy statute is discussed in greater detail above in Part II(A). *See infra* Part II(A).

[32] *Capato*, 132 S. Ct. at 2027 (citing Capato v. Comm'r of Soc. Sec., 31 F. 3d 626, 631 (2011)).

evenly split in their interpretations of the Social Security Act.[33] The Third and Ninth Circuits, applying §416(e), had both granted benefits because the children's biological parentage was undisputed, whereas the Fourth and Eighth Circuits, applying §416(h)(2)(A), had both denied benefits because the children could not take under state intestacy law.[34] The Supreme Court, in a unanimous opinion authored by Justice Ginsburg, agreed with the Fourth and Eighth Circuits that §416(h)(2)(A) controlled, and held that, because the twins were not Robert's "children" under Florida's intestacy law, the SSA had properly denied them survivors benefits.[35]

Although Karen raised an equal protection argument, claiming that using §416(h)(2)(A) in such a manner unlawfully discriminated against posthumously conceived children—not least, in the sense that Karen's non-posthumously conceived son was able to receive survivors benefits while her posthumously conceived twins were not[36]—the Supreme Court rejected her argument without much discussion.[37] The Court acknowledged that laws targeting non-marital children have traditionally received intermediate scrutiny, in part, because of the unfairness of punishing children for the acts of their parents.[38] But it found there had been no showing that laws targeting posthumously conceived children merit similarly heightened scrutiny.[39] It thus applied rational basis review and upheld the use of §416(h)(2)(A), even in cases where biological parentage is undisputed.[40] The Court held that looking to state intestacy law to determine parentage was rationally related to two legitimate governmental interests: first, conserving benefits for children who have actually lost a parent's support, and second, avoiding the need for individualized inquiries into dependency.[41] As previously mentioned, the equal protection issues raised by posthumous conception will be discussed further in Part III(B).

III. IMPLICATIONS OF POSTHUMOUS CONCEPTION

Part III illustrates that as prospective parents have experienced an increase in liberty due to new reproductive technologies their children have not necessarily experienced a commensurate increase in equality. Karen Capato's exercise of liberty—i.e., her decision to use her late husband's sperm to conceive—impacted her children's equality under existing legal parentage regimes. There was even inequality among Karen's own three children. The oldest, born before his father's death, had two legal parents and was thus entitled to survivors benefits; while the

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[33] *Id.* at 2007.

[34] *Id*. (citing Capato v. Comm'r of Soc. Sec., 631 F.3d 626, 631 (2011); Gillett-Netting v. Barnhart, 371 F.3d 593, 596–97 (Cal. Ct. App. 2004); Beeler v. Astrue, 651 F.3d 954, 960–64 (Cal. Ct. App. 2011); Schafer v. Astrue, 641 F.3d 49, 54–63 (Cal. Ct. App. 2011)).

[35] *See generally Capato*, 132 S. Ct. at 2021.

[36] *Id.* at 2021, 2032–33.

[37] *Id*. at 2033.

[38] *Id*. (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)).

[39] *Id.* at 2033.

[40] *Id*.

[41] *Id*.

twins, conceived and born after their father's death, had only one legal parent (their mother) and were therefore denied survivors benefits.[42] Part III(a) addresses the liberty of adults who wish to engage in posthumous conception, and Part III(b) addresses the equality of children born through posthumous conception.

A. Liberty Rights of Prospective Posthumous Conceivers

Liberty has both doctrinal and practical definitions, and this section begins by focusing on its doctrinal definitions. To that end, it provides a brief overview of Supreme Court cases involving the right to procreate and considers whether that right extends to procreation by means of posthumous conception. Assuming that the right could extend to procreation by means of posthumous conception, this section then considers who might be able to invoke the right—e.g., a surviving prospective parent or deceased gamete-provider (through his or her legal representative). This section concludes with a brief discussion of liberty's more practical definitions and observes that—whatever its formal doctrinal dimensions—the paucity of legal regulations surrounding reproductive technologies has conferred substantial practical liberty on those who wish to engage in posthumous conception.

The Due Process Clauses of the 5th and 14th Amendments have historically protected the liberty to make decisions about procreation.[43] While the Supreme Court has never in the context of a due process decision directly recognized the right *to* procreate, it has on numerous occasions recognized the right *not* to procreate—often framing it as a right to decide "whether to bear or beget a child."[44] Furthermore, in a 1942 opinion focusing on equal protection the Court described procreation as "fundamental to the very existence and survival of the race" and as a "basic civil right."[45] While recent cases have called into question whether procreative liberty remains a "fundamental" liberty,[46] this essay proceeds from the premise that it continues to exist in at least some limited form.[47]

Assuming that procreative liberty continues to exist, it is not at all clear whether it extends to encompass non-coital—much less posthumous—conception. Historically, the test of whether a given liberty was "fundamental" and thus triggered "strict scrutiny" involved framing the liberty "careful[ly],"[48] and asking whether it

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[42] Capato ex rel. B.N.C. v. Comm'r Soc. Sec., No. 10-2027, 2013 WL 3814947 *1 (3d Cir. July 24, 2013).

[43] U.S. CONST. amends. V, XIV (preventing the government from depriving "any person of . . . liberty . . . without due process of law"); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Roe v. Wade, 410 U.S. 179, 212–13 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[44] *Eisenstadt*, 405 U.S. at 453; *Roe v. Wade*, 410 U.S. at 170; *Casey*, 505 U.S. at 851.

[45] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[46] Gonzales v. Carhart, 550 U.S. 124 (2007).

[47] As recently as 2003, the Supreme Court referred to the existence of a right to decide "whether to bear or beget a child." Lawrence v. Texas, 539 U.S. 558, 565 (2003). *Gonzales v. Carhart*, in 2007, did not directly repudiate this statement, though it (as mentioned) did call it into question. *Carhart*, 550 U.S. 124.

[48] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) ("[W]e have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."). By "carefully," the Court appears to mean "narrowly."

was "deeply rooted in our nation's history and tradition" and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it was] sacrificed.'"[49] Under such a test, posthumous conception would most likely not be viewed as a "fundamental" liberty, since it was not technologically possible for most of our nation's history. In a 2003 case, however, rather than asking whether the liberty at issue was consistent with existing traditions, the Court observed that it was consistent with "emerging" traditions and proceeded to apply what might be described as "a more searching form of rational basis review."[50] Under such a standard, laws burdening posthumous conception could potentially receive something more than regular rational basis review.

Regardless of the specific status of the liberty or the specific level of scrutiny, it is unclear who might invoke a right to posthumous conception if it were protected by the Due Process Clauses. There are least two possible scenarios. First, a decedent's representative might argue that the decedent retains a constitutional liberty right to decide whether his or her gametes should be used for posthumous conception.[51] Second, a surviving spouse, partner, parent, or other interested individual might argue that they have a constitutional liberty right to use the decedent's gametes to engage in posthumous conception.

With respect to the first scenario, a decedent most likely does not have a constitutional liberty right to decide whether his or her gametes will be used for posthumous conception.[52] While some might argue otherwise[53]—reasoning, in part,

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[49] *Id.* at 720–21. If the liberty was "fundamental," laws that burdened it received strict scrutiny; if not, they received rational basis review.

[50] *Lawrence*, 539 U.S. at 571–72 (analyzing Texas's same-sex sodomy ban and stating the following: "[W]e think that our laws and traditions in the past half century are of most relevance here. [They] show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'") (internal citations omitted). The description of the level of scrutiny as "a more searching form of rational basis review" derives in part from Justice O'Connor's concurrence in *Lawrence*. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). While Justice O'Connor was writing about the Equal Protection rather than Due Process Clause, one could argue that the majority's due-process-based decision applied a similarly heightened form of rational basis review.

[51] While some have explored the debate over what should occur when the decedent was silent with respect to his or her wishes, this essay sets that scenario aside and focuses on cases in which the decedent clearly expressed his or her wishes. This is most common in situations where the decedent cryopreserved his or her genetic material during his or her lifetime and was directly asked to contemplate the possibility of posthumous conception.

[52] *See* John Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1041–42 (1994) ("Even if the Court found that noncoital reproduction was protected [as a fundamental constitutional right], decisions about posthumous reproduction are so far removed from [the] interests [motivating non-posthumous reproduction] that it is highly unlikely that a fundamental constitutional right would be found.").

[53] Professor Anne Reichman Schiff, for example, has written, "the right to avoid becoming a biological parent should generally be respected after death as it is in life, and . . . infringing upon this interest constitutes a serious violation of an individual's procreative liberty." Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 908 (1997). Professor Kathryn Katz has similarly written, "The dead are not usually

that one's liberty to make decisions about procreation should endure so long as his or her genetic material remains viable—such arguments ignore the close connection between procreative rights and parental rights.[54] The liberty to make procreative decisions is closely tied to the liberty to make parenting decisions, and the dead can neither enjoy the rights nor carry out the responsibilities of parenthood. As Professor John Robertson wrote in his seminal article titled *Posthumous Reproduction*, "The interest in controlling reproductive events that will not occur until after one is dead is simply too attenuated a version of the important interests that one has in controlling reproduction while alive to warrant constitutional protection."[55] The decedent, therefore, most likely does not have a constitutional liberty right to make decisions about posthumous conception.[56]

It should, as an aside, be noted that the decedent may potentially assert a property right created by state law that would afford him or her some control over the disposition of his or her gametes. Decedents are generally able to exercise control over the disposition of their organs and tissue[57] and, while gametes may be viewed as quite different from organs and tissue,[58] decedents have in some cases been allowed to transfer vials of sperm by will.[59] Further discussion of the decedent's potential property right is beyond the scope of this essay.

With respect to the second scenario, a surviving spouse, partner, parent, or other interested individual might argue that they have a constitutional liberty right to use the decedent's gametes to engage in posthumous conception.[60] Although living persons clearly have procreative liberty, that liberty does not encompass the use of another person's gametes.[61] As Professor Katheryn Katz observed in her 2006 article titled *Parenthood from the Grave*, the right "to procreate with a partner of one's

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thought of as having rights that survive death, but . . . procreative rights are exceptional." Katz, *supra* note 9.

[54] The Due Process Clauses of the Fifth and Fourteenth Amendments protect not only procreative rights but also parental rights. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925), Troxel v. Granville, 530 U.S. 57 (2000).

[55] Robertson, *supra* note 52, at 1042. Professor Robertson continues, "This is true both for engaging in posthumous reproduction and for avoiding posthumous reproduction." Robertson, *supra* note 52, at 1042.

[56] It should be noted that states may give deference to decedent's wishes, and that this article is only addressing the issue of whether the decedent has a constitutional liberty right.

[57] *See, e.g.*, UNIF. ANATOMICAL GIFT ACT § 8 (amended 2008) (providing that, if the decedent's wishes with respect to organ and tissue donation are known they should be honored, even if the next-of-kin disagrees).

[58] Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (holding that frozen embryos were different from other human tissue because of their potential to become persons).

[59] Hecht v. Superior Court, 20 Cal.Rptr.2d 275 (Cal. Ct. App. 1993) (holding that Kane had a property interest in, and could therefore bequeath, his stored sperm to his partner, Hecht).

[60] The parties are listed in order of the probability with which their requests will be granted, all things being equal.

[61] Ethics Comm. of the Am. Soc'y for Reprod. Med., *Posthumous Reprod.*, 82 FERTILITY & STERILITY S260, S261 (2004).

choice . . . is limited by the requirement that the partner must consent."[62] She thus reached the conclusion that survivors do not have a constitutional liberty right to make unilateral decisions about posthumous conception.[63] Indeed, as evidenced by divorce-related disputes, even where two parties consented to the use of their gametes to create embryos, it is not at all clear that one of them could later make a unilateral decision to use those embryos.[64]

It should, again as merely an aside, be noted that the survivor may potentially assert a property right created by state law that would afford him or her some control over the decedent's gametes. States, for example, grant survivors who are next-of-kin the right to possess the decedent's body for purposes of burial, donation, and the prevention of mutilation.[65] It is unlikely, however, that this would translate into a right to order an invasive procedure such as posthumous gamete retrieval, or to utilize previously frozen gametes without the decedent's express consent. The decedent might, however, pass previously frozen gametes to a survivor by will and convey his or her consent to their use for conception.[66] Further discussion of the survivor's potential property rights is beyond the scope of this essay.

Moving from the doctrinal to the practical, the technology enabling posthumous conception has indisputably and irrevocably expanded individual liberty. Whether or not there is any constitutional liberty right under existing due process doctrine, the paucity of legal regulation surrounding reproductive technologies has conferred substantial practical liberty on surviving spouses (and, in some cases, other individuals) who wish to engage in posthumous conception—especially where the decedent has clearly expressed his or her consent. Guidelines issued by the Ethics Committee of the American Society for Reproductive Medicine provide that if the decedent has consented to posthumous reproduction it is generally permissible for doctors to enable posthumous conception.[67]

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[62] Katz, *supra* note 9, at 313.

[63] Katz, *supra* note 9, at 313.

[64] *Davis*, 842 S.W.2d at 588 (preventing an ex-wife from donating embryos against an ex-husband's wishes, but observing that "[t]he case would be closer if [the ex-wife] were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means"). For further discussion of these issues, see Kass v. Kass, 91 N.Y.2d 554 (1998) and A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).

[65] *See* Brotherton v. Cleveland, 923F.2d 477 (6th Cir. 1991).

[66] Hecht v. Sup. Ct., 20 Cal.Rptr.2d 275 (Cal. Ct. App. 1993).

[67] Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 61, at S260–61. The Ethics Committee stated:

> If an individual designates the use of stored frozen gametes or embryos that can be used for posthumous pregnancy, either for the use of a spouse or as a donation to others, it would seem to be totally appropriate to honor this designation after their death in the absence of any adverse consequences to the living participants in the pregnancy or any expected children. The gestating woman and the rearing parent(s) must be fully informed and in agreement with the process.

Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 61, at S261. If, however, the decedent was silent or wished not to procreate posthumously, the ASRM prohibits doctors from proceeding. The Ethics Committee stated:

B. Equality Rights of Posthumously Conceived Children

Equality, like liberty, has both doctrinal and practical definitions, and this section begins by focusing on its doctrinal definitions. To that end, it offers a brief overview of cases involving discrimination against non-martial children and follows other scholarship in arguing that the same principles applying in those cases ought to apply in cases involving discrimination against posthumously conceived children.[68] Turning to equality's more practical definitions, this section concludes by observing that when the legal system pronounces a posthumously conceived child a single-parent child it imposes dignitary harms and interferes with decisions that should be reserved for the child and his or her family. The legal system, in sum, renders the posthumously conceived child unequal.

The Equal Protection Clause, which prevents the government from "deny[ing] to any person within its jurisdiction the equal protection of the laws," has been interpreted as protecting children from discrimination based on the marital status of their parents.[69] Laws targeting non-marital children have historically received a form of intermediate scrutiny[70] and have been invalidated unless they were substantially related to legitimate governmental interests.[71] Such laws have raised suspicion among the justices for a variety of reasons.[72] First, non-marital status is never volitional, since "no child is responsible for his birth and penalizing the illegitimate child is ineffectual—as well as an unjust—way of deterring the parent."[73] Second, non-marital status "bears no relation to the individual's ability to participate in and contribute to society."[74] And third, non-martial children have endured a long history

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> Programs are urged to insist that donors make their wishes known. If no decision on disposition after death has been made, one would expect that in most instances this would preclude any posthumous use. A request by a husband or wife for use of stored gametes or embryos to override a prior denial of posthumous reproduction by the deceased spouse should not be honored.

Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 61, at S261.

[68] *See* Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234, 235 (2005) ("assert[ing] that state classifications that restrict the rights of posthumously conceived children to inherit must satisfy intermediate scrutiny").

[69] U.S. CONST. amend. XIV, § 1.

[70] Mathews v. Lucas, 427 U.S. 495, 505–06 (1976). Although Mathews does not expressly apply intermediate scrutiny, later cases reference it as having applied intermediate scrutiny. Clark v. Jeter, 486 U.S. 456, 461 (1988) (citing *Mathews* after stating that discriminatory classifications based on illegitimacy receive intermediate scrutiny).

[71] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985) ("[O]fficial discriminations resting on [illegitimacy] are . . . subject to somewhat heightened review [and] 'will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest.'") (citing Mills v. Habluetzel, 456 U.S. 91, 99 (1982)).

[72] A concise and very useful overview of the law as it relates to non-martial children is available in ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 933–34 (3d. ed. 2009).

[73] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

[74] *Mathews*, 427 U.S. at 505.

of discrimination that continues, albeit in less harsh forms, to the present.[75] Their long history of discrimination is evident from the fact that they were, at common law, "filius nullius, or children of no one" and thus unable to inherit from either parent through intestate succession.[76] Continued discrimination is evident from the fact that non-marital children must still take special steps to be able to inherit from their fathers through intestate succession.[77]

Although these attributes of non-marital children have raised suspicion about laws that target marital status, the Court has not been willing to apply strict scrutiny to such laws—in part, because marital status is invisible and being a non-marital child "does not carry an obvious badge."[78] In applying intermediate scrutiny, the Court has been relatively consistent in invalidating laws that disadvantage all non-martial children, but has varied in its view of laws that disadvantage only some subset of non-martial children.[79] This variance is illustrated by two cases decided in the 1970s, both of which relate to the Social Security Act.

Jiminez v. Weinberger, decided in 1974, involved a claim by non-marital children for disability benefits under the Social Security Act.[80] Jiminez had three children and, while the oldest was approved for benefits based on the fact that she had been dependent on Jiminez prior to the onset of his disability, the younger two were denied benefits because they had not been born until after the onset of his disability.[81] Even though all three children had lived with and been supported by Jiminez their entire lives, only one was eligible for benefits as a dependent.[82] Although other children born after the onset of a parent's disability—i.e., all marital children and those non-marital children who could inherit under state law, had been legitimated under state law, or were "illegitimate only because of some formal defect in their parents' ceremonial marriage"[83]—were presumed dependent, Jiminez's

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[75] *Weber*, 406 U.S. at 175("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage.").

[76] Goodwin, *supra* note 68, at 241. By the 1700s, non-marital children were able to inherit through intestate succession from their mothers, but it was not until recently (and with proof of paternity) that they were able to inherit through intestate succession from their fathers. Goodwin, *supra* note 68, at 241.

[77] Lewis, *supra* note 10, at 36 ("Marital children only have to be born to have the right to inherit. Whereas, in most states, non-marital children have to jump through legal hoops in order to gain the right to inherit from their fathers."); Richard F. Storrow, *The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 561, 577 (2012) ("Most states have passed laws allowing nonmarital children to inherit from their mothers, but, by and large, nonmarital children still face legal obstacles to inheriting from their fathers.").

[78] *Mathews*, 427 U.S. at 506.

[79] CHEMERINSKY, *supra* note 72, at 934.

[80] Jiminez v. Weinberger, 417 U.S. 628 (1974).

[81] *Id.* at 630–31.

[82] *Id.*

[83] *Id.* at 634–36. The full list of non-marital children who could receive benefits was as follows: those "(a) who can inherit under state intestacy laws, or (b) who are legitimated under

younger two children were denied not only the presumption of dependency but also the opportunity to prove actual dependency.[84] The Court, in holding the discrimination between two subsets of non-marital children unconstitutional, observed that the Act was both over-inclusive (in allowing some non-marital children to receive benefits based on an incorrect presumption of dependency) and under-inclusive (in preventing other non-marital children from receiving benefits despite their actual dependency).[85] Ultimately, the Court promoted the primary purpose of the provision at issue, which was "to provide support for dependents of a disabled wage earner."[86]

Mathews v. Lucas involved a claim for Social Security survivors benefits by the non-marital children of a deceased insured wage earner.[87] Under the Social Security Act, all marital children and some non-marital children—those who were presumed dependent based on, for example, their ability to inherit under state intestacy law and those who could prove actual dependency at the time of death—were entitled to benefits, while others were not.[88] Robert Cuffee's two children were neither presumptively nor actually dependent on him at the time of his death, and were thus denied benefits.[89] They challenged the denial, but the Court rejected their challenge because the provision at issue was meant to provide for dependents and the presumptions of dependency were "reasonably related to the likelihood of dependency."[90] Although some children who were similarly situated—in that they were not actually dependent on their parent at the time of his death—would receive benefits based on their presumptive dependency while the Cuffee children would not, the Court found no equal protection violation.[91]

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state law, or (c) who are illegitimate only because of some formal defect in their parents' ceremonial marriage." *Id*. at 635–36.

[84] *Id.* at 634–35.

[85] *Id*. at 637.

[86] *Id*. at 634.

[87] Mathews v. Lucas, 427 U.S. 495, 495 (1976).

[88] *Id*. at 498–99, 502. While the law is slightly more complicated than the textual sentence suggests, the additional nuances do not provide much more clarity. The Court wrote, in full,

> Unless the child has been adopted by some other individual, a child who is legitimate, or a child who would be entitled to inherit personal property from the insured parent's estate under the applicable state intestacy law, is considered to have been dependent at the time of the parent's death. Even lacking this relationship under state law, a child, unless adopted by some other individual, is entitled to a presumption of dependency if the decedent, before death, (a) had gone through a marriage ceremony with the other parent, resulting in a purported marriage between them which, but for a nonobvious legal defect, would have been valid, or (b) in writing had acknowledged the child to be his, or (c) had been decreed by a court to be the child's father, or (d) had been ordered by a court to support the child because the child was his.

Id.

[89] *Id*. at 500–01.

[90] *Id*. at 509.

[91] *Id*. at 495–523.

Others, including Julie Goodwin (whose work this section draws upon), have considered how the above doctrine might apply to posthumously conceived children. One must begin the discussion by observing that posthumously conceived children are, in fact, a subset of non-marital children.[92] As the Supreme Judicial Court of Massachusetts explained, "[b]ecause death ends a marriage, posthumously conceived children are always non-marital children."[93] Conception status (i.e., posthumous or non-posthumous) also shares several of the features of marital status.[94] First, like marital status, it is never volitional, since "no child is responsible for his birth."[95] Second, like marital status, it "bears no relation to the individual's ability to participate in and contribute to society."[96] And third, while non-marital children may have endured a longer history of discrimination than posthumously conceived children this is at least in part because posthumous conception was not technologically possible for most of our nation's history.[97] Furthermore, it is clear that posthumously conceived children have experienced and continue to experience discrimination, both social and legal.[98] In some states—such as Florida, where the *Capato* case occurred—posthumously conceived children are, as previously discussed, barred from taking through intestate succession.[99]

The *Capato* Court, however, neither viewed posthumously conceived children as a subset of non-marital children nor recognized them as similar to non-marital children and thus applied only rational basis review.[100] While acknowledging that classifications disadvantaging non-marital children are quasi-suspect, in part because of the unfairness of punishing children for the acts of their parents,[101] the *Capato* Court held that "posthumously conceived children [have not been shown to] share the characteristics that prompted our skepticism of classifications disadvantaging

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[92] Goodwin, *supra* note 68 (citing Woodward v. Comm'r of Soc. Sec., 760 N.E.2d at 266–67 (Mass. 2002)).

[93] Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 266–67 (Mass. 2002)("Because death ends a marriage, see *Callow v. Thomas*, 322 Mass. 550, 55 78 N.E.2d 637 (1948); *Rawson v. Rawson*, 156 Mass. 578, 580 31 N.E. 653 (1892), posthumously conceived children are always nonmarital children.").

[94] *See also* Goodwin, *supra* note 68.

[95] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

[96] Mathews v. Lucas, 427 U.S. 495, 505 (1976).

[97] Goodwin, *supra* note 68, at 241.

[98] Goodwin, *supra* note 68, at 272–73.

[99] FLA. STAT. § 742.17(4) (2013); *see* Goodwin, *supra* note 69, at 241. While posthumously conceived children may be unable to inherit through intestate succession, most states allow children born either before or within 300 days of a parent's death to inherit through instate succession. Goodwin, *supra* note 69, at 241.

[100] Astrue v. Capato, 132 S. Ct. 2021, 2033 (2012). It should be noted that the court did not definitively decide whether heightened scrutiny would be appropriate if, in a future case, posthumously conceived children were shown to share the characteristics that render non-marital children a quasi-suspect class. *Id.*

[101] *Id.* (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)).

[non-marital] children."[102] This suggests that, at least for the moment, laws targeting posthumously conceived children are likely to receive only rational basis review. Even if the Court had applied heightened scrutiny in *Capato*, however, the provision at issue might have survived, since the Court viewed its purpose as providing "dependent members of [a wage earner's] family with protection against . . . [the] *loss* of [the insured's] earnings."[103] Although some posthumously conceived children—e.g., those entitled to inherit under state intestacy law—would receive benefits, no posthumously conceived child would be able to illustrate loss in the sense of dependency at the time of their parent's death.

Turning to equality's more practical definitions, limiting the law's reliance on parent-child relationships as a proxy for provider-dependent relationships could mitigate the inequality experienced by posthumously conceived children. When the legal system pronounces a posthumously conceived child a single-parent child it imposes dignitary harms and interferes with decisions that should be reserved for private actors. Rather than determining whether a deceased gamete-provider is a parent, the law ought to leave that decision to the child and his or her family. The term parent carries substantial symbolic weight and should not be legally imposed or withheld in this context. Instead, the law should focus on the concrete incidents of parentage, such as being a financial provider.

IV. DIMINISHING THE LAW'S FOCUS ON PARENTAGE

Part IV argues that the inequality experienced by posthumously conceived children could be at least partly mitigated by shifting the law's focus away from parent-child relationships and toward provider-dependent relationships. It specifically argues that we ought to eliminate the use of parentage as a proxy for dependency and, in turn, as a path to survivors benefits. This would, in cases like *Capato*, allow legal entities to identify provider-dependent relationships and allocate benefits without making any pronouncements about parent-child relationships. Part IV(A) discusses how we might eliminate the use of parent-child relationships from the Social Security Act, and Part IV(B) discusses how we might then allocate benefits.

A. From Parents and Children to Providers and Dependents

Parent-child relationships are often used as proxies for provider-dependent relationships and, thus, as one path to governmental benefits.[104] Under the Social Security Act, children are generally viewed as the dependents of their legal parents.[105] Section 402(3)(A) provides, "A child shall be deemed dependent upon his father [or mother] unless, at [the time of death, the father or mother] was not living with or contributing to the support of [the] child and [the] child is [not the father's or mother's] legitimate child."[106] While the cases discussed above speak to some of the

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[102] *Id.*

[103] *Id.* at 2032. The Court went on to discuss the Ninth Circuit's holding that the "regime is 'reasonably related to the government's twin interests in [reserving] benefits [for] those children who have lost a parent's support.'" *Id.* at 2033.

[104] *See, e.g.*, 42 U.S.C. § 402(d)(3)(A) (2013).

[105] *Id.*

[106] *Id.*

intricacies of the Social Security Act's provisions, it suffices for purposes of this Part to say that being the "child" of a deceased insured wage earner is in many cases the key to being deemed a "dependent" and, thus, to receiving benefits.

Inasmuch as the Social Security Act is designed to provide benefits for the dependents of deceased insured wage earners,[107] there is no reason other than administrative convenience to use parent-child relationships as a proxy for provider-dependent relationships. And, it should be emphasized, the administrative convenience of allowing parental status to determine provider status is outweighed by the very real costs it imposes on children. It results, for example, in some posthumously conceived children who have only one provider unnecessarily being told they also have only one parent.[108]

While "parent" may at first blush seem to be a useful category, little effort is required to illustrate that it is a highly unstable category—even outside the unique context of posthumous conception.[109] There are, as Professor Susan Appleton observes in her article titled *Parents by the Numbers*, many kinds of parents[110]—one might, for example, identify birth parents, genetic parents, intended parents, adoptive parents, de facto parents, and psychological parents.[111] And, there are at least three common ways of defining what it means to be a legal "parent." One might focus on genetics, on intent, or on actual parental conduct.[112]

As applied to posthumous conception, a deceased gamete-provider's parental status varies depending on whether one focuses on genetics, intent, or parental conduct. If one focuses on genetics, the deceased gamete-provider is always a parent; if one focuses on intent, he may in some cases be a parent; and, if one focuses on parental conduct, he will never be a parent. With respect to parental conduct, as Part III(A) discussed, deceased individuals can neither enjoy the rights nor carry out the responsibilities of parenthood. As Professor Robertson (whose

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[107] *Capato*, 132 S.Ct. at 2032, (citing Califano v. Jobst, 434 U.S. 47, 52 (1977)); *see also* 42 U.S.C. § 402(1)(C) (2013) (providing that every "child" who is "dependent" upon a deceased insured wage earner is entitled to benefits). This is not the only purpose of the Act; the Act provides others with benefits as well. 42 U.S.C. § 402(1)(C) (2013).

[108] It should be noted that, although it is not the focus of this essay, allowing parental status to determine provider status may also result in some children who had two providers being denied benefits on the grounds that only one of those providers was a parent.

[109] There is a vast body of scholarship on the law of parentage. Important recent contributions include Susan Frelich Appleton, *supra* note 7, at 25–26; Julie Shapiro, *Counting from One: Replacing the Marital Presumption with a Presumption of Sole Parentage*, 20 AM. U. J. GENDER SOC. POL'Y & L. 509 (2012); Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 655 (2008); Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 851–52 (2006); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & Pol'y 47, 49 (2007).

[110] Appleton, *supra* note 7, at 25–26.

[111] Appleton, *supra* note 7, at 25–26.

[112] Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 381 (2007) ("As our courts and legislatures grapple with [determining parentage], the primary factors they have considered are procreative intent, genetics, the marital presumption, and parental conduct.").

work on this topic is discussed in Part III(A)) explained, "[o]rdinarily, reproduction is valued because of the genetic, gestational, and rearing experiences involved."[113] Yet, individuals whose gametes are used posthumously "will not gestate [or] rear [, and a]t most, [will experience only] the present satisfaction of knowing that genetic reproduction might occur after [they have] died."[114] Conversely, they will "not experience anxiety about the welfare of their offspring or the fear that a person will knock on their door claiming to be their child."[115] He concludes, "[a]t most, they will have the certainty that no children will be born after they die and they are no longer around to see, rear, or worry about them."[116]

Many scholars have recognized the difficulty in relying exclusively on genetics, intent, or parental conduct to determine parenthood,[117] and one way of alleviating the difficulty is to avoid it altogether by eliminating the determination of parenthood wherever possible. The law could alternatively focus on identifying the individuals who fill the specific roles traditionally associated with parenthood, such as the role of financial provider. Professor Appleton has, for example, explored the idea of "decoupl[ing] parental status from [the associated] financial obligations,"[118] and has argued that the bundle of rights and responsibilities that has historically flowed from parenthood has, in some ways, already been unbound.[119] Eliminating the focus on parental status in favor of a focus on provider status would reserve the decision of whether to view a deceased gamete provider as a parent for the posthumously conceived child and his or her family. This would not only prevent the government from unnecessary intervention, but also protect the child from the confusion that could result if the family reached a different conclusion than the government.

On a practical level, one could easily determine whether a deceased gamete provider should be viewed as a financial provider who was capable of transmitting survivors benefits without determining whether he or she was the child's parent. One could conclude that deceased gamete providers are never financial providers, since even if they pass property to their posthumously conceived children they cannot make subsequent financial provisions. Or, one could conclude that deceased gamete providers may be financial providers in a narrow set of circumstances—for example, where they have passed property by will to their posthumously conceived children. While there may be other alternatives, the key point is that it is possible to sever the determination of parental status from the determination of provider status with the goal of reserving the former for the posthumously conceived child and his or her family.

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[113] Robertson, *supra* note 52, at 1031.

[114] Robertson, *supra* note 52, at 1031–32.

[115] Robertson, *supra* note 52, at 1032.

[116] Robertson, *supra* note 52, at 1032.

[117] Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1258 (2013) ("[I]ntent, genetics, gestation, and functional care all matter in determining parental ties, and it is difficult and perhaps artificial to separate one out as the exclusive indicator of legal parenthood.").

[118] Appleton, *supra* note 7, at 38.

[119] Appleton, *supra* note 7, at 22–23, 26.

Inquiries into provider status rather than parental status are, thus, both possible and preferable. It should be noted that, as will be discussed in Part IV(B), such inquiries could also, if applied uniformly, result in some children receiving benefits through individuals to whom they have no legal relationship under the current system. Such a system could more accurately reflect the reality of children's lives and more justly effectuate the purpose of the Social Security Act, which is to provide for the dependents of deceased insured wage earners.[120]

While proposing to diminish the use of parentage may seem radical, it is not entirely novel. Several scholars have recently questioned the law's focus on parentage. Professor Melissa Murray has explored the possibility of "dismantling parenthood altogether as a legal category."[121] While she urges caution—in part, because the concept of the legal parent is so pervasive[122]—her work illustrates that the law's assumptions about legal parents are often not well aligned with the realities of parenting. The law, for example, assumes that parents are their children's primary caregivers, while in reality "parents routinely rely on [others] to help them discharge their caregiving responsibilities."[123] Professor Susan Appleton has relatedly challenged "parenthood's supposed indivisibility" and argued that "family law already routinely practices disaggregation of parental rights and responsibilities."[124] States, as Professor Appleton points out, already have elaborate rules for dividing the incidents of parentage upon divorce.[125] Courts regularly dictate who will receive physical custody, who will receive legal custody, and who will provide financial support.[126] Allowing legal entities to make more nuanced determinations provides a host of benefits, from promoting the just allocation of benefits to allowing families to make their own decisions about who will take on the mantle of parenthood.

B. Allocating Benefits in a Less Parent-Focused Regime

If, as Part IV(A) urges, we shifted our focus away from parent-child relationships to vitiate the status inequality that posthumously conceived children experience, the question of which children should receive survivors benefits would remain. Karen Capato said in an interview that her case was "not about the money,"[127] but one can assume that money was at least a relevant consideration—or that it would be for other litigants. There are multiple options for going forward under a less parent-focused regime, and this section will sketch the outlines of one possibility.

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[120] Astrue v. Capato, 132 S. Ct. 2021, 2028 (2012) (citing Califano v. Jobst, 434 U.S. 47, 52 (1977)); *see also* 42 U.S.C. § 402(1)(C)(ii) (2013); Webber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[121] Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 390, 453 (2008).

[122] *Id*. at 453.

[123] *Id*. at 390.

[124] Appleton, *supra* note 7, at 26.

[125] Appleton, *supra* note 7, at 11–69.

[126] Appleton, *supra* note 7, at 41.

[127] *See* Chelsea Henderson, *Dads' Donations Leave Final Gifts: Posthumously-Conceived Children Face Legal Barriers*, UNIV. PRESS, Apr. 27, 2012, http://www.lamaruniversitypress.com/dads-donations-leave-final-gifts-1.2860028#.UdcZQqwkzfU.

If the goal were to maintain the existing system largely intact, one could simply allocate survivors benefits to those children who had actually received support from a deceased insured wage earner during his or her lifetime. Such a system would not, of course, have changed the result for Karen Capato's twins. They did not receive support from Robert Capato during his lifetime and they would not receive benefits under this new system. Furthermore, such a system would change the results unfavorably for some posthumously conceived children. Those who live in states with intestacy laws allowing them to inherit from their deceased genetic parents would receive benefits under the existing system, but would not receive benefits under this new system.

There would be, however, three important benefits to this new system. First, it would treat all posthumously conceived children equally—despite the fact that equality would take the form of a blanket denial of survivors benefits. Second, it would treat posthumously conceived children and non-posthumously conceived children equally, because it would hold them all to the same standard. Under the new standard, it should be noted that benefits would be awarded to some previously ineligible children—i.e., those who had been receiving support from a non-parent.[128] Third and finally, this new system would prevent the government from making unnecessary pronouncements about parentage. Rather than dictating whether a given deceased insured wage earner was a parent, administrators would simply determine whether he or she had been a provider. While identifying actual providers rather than using parentage as a proxy would of course impose new burdens (on, for example, administrators), such burdens would be far outweighed by the benefits that would be conferred on society as a whole. While there are other more radical alternatives—such as, for example, dismantling survivors benefits in favor of a program that would benefit all children by decoupling child support entirely from previous provider support—they are beyond the scope of this essay.

V. CONCLUSION

Part V concludes that, if we focused less on parental status and more on provider status we could protect the liberty of adults, promote the equality of children, and perhaps achieve a more just distribution of governmental benefits. Removing the requirement of a parent-child relationship from the Social Security Act would have positive consequences for both adult's procreative liberty and children's equality. It would protect adult's procreative liberty in the sense that prospective parents would not have to worry that electing posthumous conception would adversely affect their children. It would promote children's equality by removing any harm that might flow from the disconnect between their mother's view of their parentage and the law's view of their parentage. It would, furthermore, be consistent with recent proposals to rethink the law's focus on parentage.

As previously mentioned, Karen Capato said in an interview that her case was "not about the money."[129] Part of what it was likely about, however, was whether her

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[128] These children would have been denied benefits under the old system because they were not "children" of a deceased insured wage earner, but they would be awarded benefits under this new system. Astrue v. Capato, 132 S. Ct. 2021, 2028 (2012). The *Capato* Court noted that the Act's purpose was to reserve benefits for "those children who have lost a parent's support." *Id.* This proposal would give benefits to any children who had lost a provider's support. *Id.*

[129] *See* Henderson, *supra* note 127.

deceased husband was the legal parent of her children. This essay would reform the law such that survivors benefits could be allocated without any determination of legal parentage. This would give prospective parents in Karen Capato's situation the liberty to make decisions about posthumous conception without fear of imposing legal inequality on their children. It would also enable the resulting children and their families to make their own decisions about whether to view the deceased gamete provider as a parent. Understood more broadly, this idea of unbinding the term "parent" from the historically associated rights and responsibilities could promote liberty as well as equality and ultimately enable courts to make more nuanced determinations about the rights and responsibilities associated with childrearing.