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Conditional Parentage is the New Eugenics

*Dr. Yael Efron & Dr. Pnina Lifshitz-Aviram**

I. INTRODUCTION

Should states allow people to condition their parentage upon the traits of their prospective child? Is it legitimate for parents to aspire to an improved offspring, or should eugenic practices be restrained? Despite its reputation and the negative moral value attributed to eugenics,¹ we argue in this paper that parental selection practices are growing in scope and abundance² and are eugenics *de facto*. We further claim that, in considering this reality, the practices of genetic selection should be evaluated just as other forms of parental and reproductive autonomy are discussed: based on their reasons and justifications, rather than on terminology.

We examine the growing practice of eugenics as a fast-developing aspect of a legal phenomenon we call ‘conditional parentage’.³ We use this term to describe the choice given to, or desired by, prospective parents to decide whether they wish to parent a specific child or fetus. In this paper we claim that, unlike eugenics, conditional parentage is well-accepted in modern societies, as well as in several legal systems, such as France, England, and Israel. We wish to contribute to the existing literature on parental selection a new conceptualization for eugenics. We claim that when considered as a form of conditional parentage, eugenics has gained popularity in the obstetrics field and serve justifiable ends. We urge policymakers to embrace this new concept

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¹Stephen Wilkinson, *Eugenics, Embryo Selection and the Equal Value Principle* 1 CLINICAL ETHICS 46, 50 (2006).

²Rosamund Scott, *Choosing Between Possible Lives: Law and Ethics of Prenatal and Preimplantation Genetic Diagnosis* 1 (2007).

³The term *conditional parentage* differs from the psychological term ‘conditional parenting’, as explained hereafter.

when considering whether and how to restrict the parental choice of parentage, rather than reject it altogether based on a dated concept of eugenics. We call on them to acknowledge and regulate conditional parentage.

To demonstrate our claim, we compare three practices of parental selection, which we consider falling under the umbrella of ‘conditional parentage’. All three are examples of states’ policies for approval, endorsement, and even encouragement for prospective parents to condition their parentage upon the traits of a specific child or fetus. We show this in adoption, abortion and preimplantation genetic diagnosis (PGD). We focus on three jurisdictions that share a common history of resentment towards eugenics: England, where the term was first introduced; Europe, where less than a century ago, horrific acts were performed under a misconceived notion of eugenics; and Israel, whose inhabitants are still haunted by Nazi eugenic practices.

The term “eugenics,” coined by Sir Francis Galton,⁴ combines two Greek words: GEN (source or root) and EUS (good or fitting). Thus, suggesting the improvement of offspring. Galton was devoted to propagating the idea of improving the physical and mental makeup of the human species via selective parenthood.⁵ The term eugenics refers to both positive and negative eugenics.⁶ Positive eugenics encourage the birth of newborns with what are considered positive character traits with the aim to “promote” successful populations.⁷ Negative eugenics aims at preventing the increase of problematic populations, *inter alia*, by minimizing procreation of people considered to have negative characteristics, and in extreme cases by killing the sick and disabled. It was based on these theories, that horrific interventions in human reproduction were carried out throughout history, some of which will be reviewed hereafter.

⁴Francis Galton, *Inquiries into Human Faculty and Its Development* 24 (1883).

⁵Editors of *Encyclopaedia Britannica*, *Sir Francis Galton*, *Encyclopedia Britannica*. <https://www.britannica.com/biography/Francis-Galton> (last visited July 12, 2019).

⁶Some distinguish therapeutic goods of genetic engineering, aimed at curing diseases (what we refer to as *negative* eugenics) from eugenic goods of genetic engineering, aimed at enhancing capabilities (what we refer to as *positive* eugenics). See Nicholas Agar, *Liberal Eugenics*, 12(2) PUBLIC AFFAIRS QUARTERLY 137, 141 (1998).

⁷An experiment designed to fertilize upper-class women with sperm from Nobel prize winners ended with disappointing results and is described in DAVID PLOTZ, *THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK* (2005).

Having established the prominence of parental selection practices, this paper admits that even states that allow for various forms of eugenics, although not named as such, make a strong argument for regulating them. The use of eugenics as conditional parentage could be justified both on a personal-interest level, as well as on a state-interest level. State regulation, however, has two facets. On the one hand, it is necessary to prevent the dangerous use of such medical and social practices. On the other, state intervention in reproduction had been the root of historical abuse of science, and should therefore be limited. The contribution of this paper to existing literature is the comparison between the interests that governed eugenic in the past to those that inform regulation today. Today, paternalistic regulation binds parent's autonomous choice to opt for selection. Whereas past regulation was coercive and paternalistic in its attempt to force eugenic practices on prospective parents. In this regard, we oppose the notion that the distinguishing mark of the new liberal eugenics is state neutrality.⁸

The shift in state concerns requires a new perception of eugenics. Respecting parents' autonomy calls for a different perspective on the regulation of eugenic practices. In this paper, we call for the acknowledgement of modern eugenics as a form of conditional parentage, and that it should, therefore, be regulated in a cautious manner, rather than banned altogether. We suggest that current regulation of such practices, previously considered paternalistic, are in fact a recognition of parents' autonomy to choose their prospective offspring. In this paper, we offer suggestions for regulatory guidelines that might be adopted.

In the next section of this paper, we describe eugenics as a socio-medical phenomenon, evolving over time and yielding to regulatory frameworks. We then introduce conditional parentage as a legal phenomenon, demonstrated by several practices of selective parentage. In the last chapter we provide suggested guidelines for regulating eugenics in attempt to balance respect of parental choice with other paternalistic considerations.

II. EUGENICS AS A SOCIO-MEDICAL PHENOMENON

In this section, we define and describe eugenics, and discuss its socio-medical development. We also recognize the need for

⁸Agar, *Supra* note 6, at 137.

regulating eugenics and detail some forms of its regulation. Eugenics are described as “the science of improving human stock.”⁹ The medical definition has long evolved into a philosophy, which is widely condemned today. The philosophy justifies the prevention of procreation of certain populations. We argue that the horrific turn of events skewed the legitimate aim of eugenics, which is to minimize pain and hardships to individuals and communities. We argue that justifiable aims, regulated and monitored, do not necessarily lead to evil deeds. We do, however, recognize that scientific developments may be the catalyst for amendments in eugenic regulation.

A. ORIGINS AND DEVELOPMENTS OF EUGENICS

The concept of improving a population by controlled breeding, in order to increase the occurrence of socially desirable characteristics thought to be hereditary originated from Francis Galton’s idea on marriage. Galton believed a system of arranged marriages between men of distinction and women of wealth that would eventually produce a gifted race.¹⁰ Galton’s ideas of positive selection were embraced by a eugenics movement, founded in 1904. At the heart of the eugenics movement lay certain social and scientific assumptions. One such assumption was that certain characteristics and traits were thought to be hereditary. The characteristics viewed as almost exclusively hereditary were mental retardation, mental illness, criminality, prostitution, sexual perversion and other types of immoral behavior.¹¹ These assumptions led the movement to advocate for negative eugenics (discouraging and decreasing procreation by individuals and groups who were viewed as having inferior or undesirable traits), even more than for positive eugenics (encouragement of procreation by individuals and groups who were viewed as possessing desirable characteristics and genes).¹²

⁹*Id.*

¹⁰Francis Galton, *Hereditary Genius* (1869).

¹¹Science today renounces this notion, of course. Investigators who thought to trace the gene for idleness or criminality that they found in the same family for generations concluded that such traits result from complex interactions of genes and environment. Kim Sterelny & Philip Kitcher, *The Return of the Gene*, 85(7) *JOURNAL OF PHILOSOPHY* 339 (1988).

¹²An example for such regulatory initiative, outside the scope of our studied jurisdictions, can be found in the LAW REFORM COMMISSION OF CANADA (1979).

The movement was also concerned that families with “defective” offspring were a financial burden on the state and estimated that the “civilized world” spends about five billion dollars caring for mental defectives in public institutions.¹³ However, the economic argument was secondary to the primary concern of preventing the social delinquency and crime which was attributed to mental retardation and other assumed inherited conditions. Henry Goddard, a leading specialist in delinquency in the United States at the beginning of the 20th century, emphasized the correlation between mental retardation and crime. He coined the term “moron” and viewed the mentally weak as a menace to society and civilization and as playing a large role for most social problems.¹⁴

Under these eugenic ‘scientific’ assumptions, horrific deeds were performed worldwide under the auspices of the law. It was based on eugenics that the Nazi concept of “a pure race” emerged too. In 1933, shortly after Hitler’s rise to power, legislation was passed that made it compulsory to undergo sterilization and termination of pregnancy based on eugenics.¹⁵ Sterilization was forced upon people with mental illness, learning disabilities, physical deformities, epilepsy, blindness, deafness and alcoholism. Initiated by Heinrich Himmler, the Nazi state forced motherhood on Aryan women under the eugenics plan known as Lebensborn. According to this plan, women of upper-class status were imprisoned in a mating farm and forced to copulate with SS officers to produce a special “titanic” generation.¹⁶

The Nazi abuse of eugenics brought about harsh criticism and these “scientific” assumptions were finally discredited. Sterilization laws influenced by this distorted theory, were enacted in many states outside of Europe and held firm for many decades to follow. In fact, instances of involuntary sterilization under the auspices of the law continued worldwide well into the 1970’s. For example, by 1965, about one-third of all Puerto Rican women of child-bearing age

¹³Ezra Seymour Gosney & Paul Popenoe, *Sterilization for Human Betterment* viii (1929).

¹⁴HENRY GODDARD, *FEEBLE-MINDEDNESS: AN INQUIRY INTO ITS NATURE AND CONSEQUENCES* (1914).

¹⁵Gisela Bock, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State*, *When Biology became Destiny: Women in Weimar and Nazi Germany* 400, 407 (1984).

¹⁶PATRIZIA ALBANESE, *MOTHERS OF THE NATION: WOMEN, FAMILIES AND NATIONALISM IN TWENTIETH-CENTURY EUROPE* 37 (2006).

underwent sterilization under the local legal regime.¹⁷ Between 1975 and 1977, India had approximately seven million people sterilized in a nineteen-month period, under a governmental sterilization program led by Prime Minister Indira Gandhi.¹⁸ Even in Canada, the Sexual Sterilization Act, allowing involuntary sterilization under certain conditions, was only repealed in 1972.¹⁹

B. REGULATION OF EUGENICS

Whether socially and legally accepted, or criticized and condemned, practices of eugenics have always been regulated. When regulating the different forms of eugenics, three sets of concerns could be regarded. The first and most prominent concern in the historic eugenic movement was the concern for the community. The desire for a homogenic group, the fear of unsettling a balance that would inflict discomfort to the dominant group and the concern for the economic burden entailed in resorting this balance were the drivers for the legal framework regulating eugenics.²⁰ The second set of concerns involves the prospective parents. These include their desire for autonomous decision-making about their lives, their emotional well-being and their financial burden. The last set of concerns has to do with the unborn child. These concerns involve the medical, religious, legal and ethical viewpoint regarding the “life” of a fetus. But, since the last set of concerns goes beyond the scope of this argument, we wish to focus on concerns of the future care and well-being of the offspring once it is born.

The concern for the community had been the main driver of the eugenic movement in the past.²¹ Sterilization of the mentally or

¹⁷A law regulating “eugenic sterilization” was enacted in Puerto Rico (Act number 116 of May 13, 1937) and was not repealed until June 8, 1960. See Bonnie Mass, *Puerto Rico: A Case Study of Population Control*, 4(4) *LAT. AM. PERSPECT.* 66 (1977).

¹⁸IAN ROBERT DOWBIGGIN, *THE STERILIZATION MOVEMENT AND GLOBAL FERTILITY IN THE TWENTIETH CENTURY* 121-122 (2008).

¹⁹Sexual Sterilization Repeal Act c. 87 (1972).

²⁰Describes how politicians and scientists portrayed society as an organic body that had to be guided by biological laws: “Eugenics promoted a biologizing vision of society in which the reproductive rights of individuals were subordinated to the rights of an abstract organic collectivity” Frank Dikötter, *Race culture: Recent Perspectives on the History of Eugenics*, 103(2) *AM. HIST. REV.* 467, 468 (1998).

²¹Daniel Wikler, *Can We Learn From Eugenics?* 25 *J. MED. ETHICS* 183, 193 (1999).

physically impaired was considered to be akin to vaccination. Justice Holmes of the United States Supreme Court explained this rationale in 1927:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.²²

The laws that regulated eugenics, in many places in the world, followed the same reasoning. It was considered a public good to have a homogenic society, and the law was a justifiable means of creating one. As Holmes concluded, “The law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow.”²³

What differentiates past regulation of eugenic practices from what we suggest in this paper is the fact that historic regulation was government-led and coercive.²⁴ The societal good is not an illegitimate goal, rather the general consensus in liberal societies today, as in many of their legal systems, is that the well-being of the group cannot champion individual rights without proper consideration. The question of moral importance is whether it can be done fairly and justly. As Wikler puts it: “[i]t wasn’t, the last time it was tried.”²⁵

One possible model for a state to promote communal considerations in a non-coercive way is by generously funding prenatal examinations to detect genetic disorders.²⁶ In Israel, for

²²*Buck v. Bell*, 274 U.S. 200, 207 (1927).

²³*Id.* at 208.

²⁴Jonathan Glover Et. Al., *Eugenics: Some Lessons from the Nazi Experience* THE FUTURE OF HUMAN REPRODUCTION: ETHICS, CHOICE AND REGULATION 55 (1998).

²⁵Wikler, *Supra* note 21 at 193.

²⁶*E.g.*, Avishalom Westreich ET. AL. Brill Research Perspectives in Family Law in a Global Society *Assisted Reproduction in Israel: Law, Religion and Culture*, 12 (2018); Yehezkel Margalit, *Determining Legal Parentage: Between Family Law and Contract Law - On Challenges Determination of Legal Parenthood in the Modern Era*, 6 HAIFA L. REV. 553 (2012).

instance, there are no state-required procedures to ensure the birth of a healthy baby, but an extraordinary state budget is allocated to prenatal screening tests. As a result, most Israeli parents opt for these examinations. If a genetic defect is recognized, it is entirely up to the parents to decide how to act; there is no state intervention in the decision. However, societal pressure, created by the scarcity of impairment in the public sphere, leads many parents to terminate pregnancies of genetically impaired offspring.²⁷

The concern for the prospective parents is the second set of concerns we wish to address when considering regulating eugenics. Under these, we can find parental autonomy, which will be further discussed hereafter; emotional concerns; and the financial burden involved in raising a child with special needs. In the past, it was these concerns that allowed state paternalism to justify negative eugenics. Today, courts and legislators are weighing parents' rights and wishes against other interests.²⁸ We argue that parental-interests have replaced the past community-interest driven eugenics. It is not the state that coerces parents to eliminate unwanted embryos or to avoid disabled offspring, rather it is the choice of many to parent a child with what they perceive to be the best genetic profile. Although not coerced anymore, such choice is endorsed by many states, by what King calls "laissez-faire eugenics."²⁹

We turn now to the last set of concerns – that of the prospective offspring. We wish to distinguish this discussion on the well-being of the prospective child from the question of whether a fetus holds any rights or privileges before it is born. For the purpose of our argument, we wish to concede that for whatever reason the child was born, its conception was subject to eugenics. What we are interested in exploring, in this regard, is whether the prospective child's well-being was considered when the eugenic practice took place.

²⁷Edem E. Ekwo, Jae-On Kim, Carol A. Gosselink, John M. Opitz, James F. Reynolds, *Parental Perceptions of the Burden of Genetic Disease*, 28(4) AM. J. MED. GENET. 955 (1987).

²⁸See, e.g., *Lifchez v. Hartigan*, 914 F.2d 260 (7th Cir. 1990) (noting that if the right to privacy includes the right to avoid reproduction, it should also include "the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy"); *Carey v. Population Services International*, 431 U.S. 678 (1992) (concurring many previous rulings that "the right of privacy includes the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters that so fundamentally affect a person as does the decision whether to bear or beget a child").

²⁹David S. King, "Preimplantation Genetic diagnosis and the 'New' Eugenic" 25 J. MED. ETHICS 176, 176 (1999).

When considering eugenic practices, courts and legislators examine the effect of the decision to birth the offspring on the quality of life the child would have. The debate over sibling savior selection, which will be discussed hereafter, is an example of such deliberation. Should parents have the right to choose an embryo that would carry specific genetic traits for the purpose of using these traits as a means for treating another child? Different legal systems would decide the dilemma differently, but nowadays, all would consider that prospective child's well-being.

To conclude this section, we wish to emphasize the difference between the role of eugenics in the first half of the twentieth century from what it is today. In the past, eugenic practices were utilized to "better society" and abused science to justify paternalistic rules that had overridden parental autonomy while ignoring considerations for the well-being of the prospective child. Today, eugenic practices make use of science to fulfil parental wishes and to improve the quality of life of their offspring. Current eugenics serve as a means for conditioning parentage, in the service of parents and their offspring as well as in the service of society as a whole.

III. CONDITIONAL PARENTAGE AS A LEGAL PHENOMENON

The term 'conditional parentage' refers to the choice given to, or desired by, prospective parents to decide whether they wish to parent a specific child or fetus. It is distinct from the term 'conditional parenting' used in the realm of family psychology. The psychologist Carl Rogers was the first to argue that parents should love their children unconditionally, for who they are and not for what they do.³⁰ Therapists have argued that conditional parenting can harm the child's sense of self-worth and social development.³¹ Despite the obvious linkage of the two terms, this paper does not deal with the psychological ramifications of loving children with or without conditions. We focus our argument on the legal frameworks that allow prospective parents' preempted decision to *become* the

³⁰CARL ROGERS, CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS AND THEORY (1953).

³¹ALFIE KOHN, UNCONDITIONAL PARENTING: MOVING FROM REWARDS AND PUNISHMENTS TO LOVE AND REASON (2005).

parents of a specific child or fetus, and not on *how* they choose to raise and educate them if they do become their parents.³²

Many legal systems deem the right to parent a fundamental human right, thus protecting it against state intervention³³ or the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.³⁴ The scope and limitations of these types of interventions are beyond the aim of this paper. We wish to focus on the legal questions that arise when discussing the symmetric right *not* to parent³⁵ and the right (if this desire is indeed protected as such) to parent a child with or without specific traits.

The narrow point of view of the *positive* right to be a parent, which suggests that the right to parent includes the right to choose offspring of certain characteristics, is morally debated. The moral

³²A similar differentiation is developed in STEPHEN WILKINSON, CHOOSING TOMORROW'S CHILDREN: THE ETHICS OF SELECTIVE REPRODUCTION (2010), chapter 2. Wilkinson argues that even if parents should love whatever attributes their child would have, it does not follow that it is wrong to select a child with specific attributes. Moreover, parents could aim at having a certain type of child and still love whichever child they have.

³³*Troxel v. Granville*, 530 U.S. 57 (2000); In *P. & S. v. Poland*, 2012 Eur. Ct. H.R., the Court reiterated that the notion of private life within the meaning of Article 8 applies both to decisions to become and not to become a parent.

³⁴Article 8 (2) of the European Convention on Human Rights. In App. 16899/13 *Kocherov and Sergeeva v. Russia* (29/3/2106) the European Court of Human Rights held that despite the legitimacy of the aims of the state laws under Article 8 (2) of the Convention, the reasons had been insufficient to justify the interference with family life, which had been disproportionate to the legitimate aim pursued.

³⁵An argument from symmetry suggests that human rights are equally protected both in their 'positive' form (the right to do or to obtain something) and their 'negative' form (the right to refrain from doing or obtaining something). In the context of this paper, the right to parent is a 'positive' right and the right not to parent is a 'negative' right. Barak-Erez & Shapira argue that merely presenting the positive right as symmetric to the negative right does not entail any normative conclusion and may result in maneuvering by other moral arguments. They demonstrate this point by discussing the seemingly symmetric rights to parent and not to parent. Daphne Barak-Erez & Ron Shapira, *The Delusion of Symmetric Rights*, 19 OXFORD J. OF LEGAL STUD. 297 (1999). Such substitution of moral arguments with legal arguments was discussed in European Court of Human Rights Chamber judgment *Mizzi v. Malta* (12.01.06). There, a Maltese court denied a request to repudiate a man's paternity of a child that was born to his wife, despite DNA evidence. The ECHR held that there had been a violation of Article 8 (right to respect for private and family life) of the Convention of Human Rights, considering that a fair balance had not been struck between the general interest of the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of the biological evidence.

discomfort is clear when parents wish to choose a child with blonde hair and blue eyes. Screening for a physical trait is less controversial when both parents are carriers of Cystic Fibrosis and wish to diagnostically screen for embryos who lack their defective gene. Both blonde hair and the Cystic Fibrosis gene are physical traits that can be biologically traced and controlled. Morally, these parental choices may be viewed differently, but is there a difference when considering them legally?

The desire for a healthy, intelligent offspring, preferably with physical resemblance, is understandable and usually expected by many adults,³⁶ but is also encouraged by many states.³⁷ Legal systems allow for medical practices that ensure that prospective parents fulfill their wishes for desired parenthood and avoids the difficulties of raising a child with mental or physical disabilities. States provide legal instruments that enable this *negative* aspect of the parentage right. These legal instruments include the prerogative of prospective parents to choose their child by process of adoption; selective abortion, both negative (choosing not to parent impaired embryos) and positive (choosing a specific desired trait); and prenatal and preimplantation genetic diagnosis (PGD), both negative (as in screening out undesired embryos) and positive (choosing embryos with specific traits for implantation).

A. ADOPTION

The legal manifestation of ‘conditional parentage’ could easily be demonstrated in adoption laws. Adoption is defined in the New York Consolidated Laws and Domestic Relations Law as a legal process by which “a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person.”³⁸ While in some jurisdictions authorities may choose the prospective adopters,³⁹ in all jurisdictions allow prospective adopters opt into this process with

³⁶Barak-Erez & Shapira, *Id.* at 302, deem this to be an existential choice, yet admit that for others, *not* becoming a parent may be an existential choice as well.

³⁷Yehezkel Margalit, *Scarce Medical Resources – Parenthood at Every Age, In Every Case, and Subsidized by the State?* 9 *Netanya Academic College Law Review* 191 (2014) (Heb.).

³⁸N.Y. Dom. Rel. Law § 110 (2010). Interestingly, in all three jurisdictions studied in this paper there is no explicit definition of adoption in the legislature.

³⁹Such is the case in England and Wales under Section 21(1) of Adoption and Children Act, 2002.

no coercion, and exercising full autonomy.⁴⁰ This autonomy is granted to them under the right to parent. We argue that the adoption processes are a form of conditional parenting, both in the *negative* aspect and in the *positive* aspect.

Most children are born to parents who did not retain any medical or administrative intervention or assistance in conception or pregnancy.⁴¹ The traits of these offspring are not chosen in advance and indeed, some are born to their parents' dismay, with undesired traits. Some of these children, as well as those born to mothers and fathers that are unable to attend to their needs, are put up by the state for adoption. Under legal systems in which adopting parents can choose the adopted child, these parents may exercise their right *not* to parent.

In this section, we argue that when refusal to adopt a specific child does not revoke the eligibility to adopt a different child, conditional parentage is practiced. We do acknowledge that perhaps some jurisdictions may bar prospective adopters from enrolling in the system if they restrict the choice of adopted children. However, in the three jurisdictions that we compare this is not the case. In England, France, and Israel adoption laws do not specify such sanction. Research also supports our claim that prospective adopters do in fact base their decision to adopt on characteristics of the prospective adoptee.⁴² Furthermore, the adoption policies in many

⁴⁰In France an explicit request by adopters must be made to the Tribunal de Grande Instance to grant an adoption order. See Art. 353 of the French Civil Code. Such is the requirement in Israel as well. See Sec. 1(a) to the Children Adoption Law, 1981.

⁴¹In 2015, artificial reproductive technology contributed to only 1.7% of all infants born in the United States. See Saswati Sunderam, Dmitry M. Kissin, Sara B. Crawford, Suzanne G. Folger, Sheree L. Boulet, Lee Warner and Wanda D. Barfield, *Assisted Reproductive Technology Surveillance – United States, 2015*, 67(No. SS-3) MMWR SURVEILL. SUMM. 1 (2018). Available at: <http://dx.doi.org/10.15585/mmwr.ss6703a1>. By comparison, in France, one in 35 births (2.9%) in 2012 was a result of assisted reproductive technology. See AGENCE DE LA BIOMÉDECINE, ACTIVITÉ D'ASSISTANCE MÉDICALE À LA PROCRÉATION 2012 (2013), available at: <https://www.agence-biomedecine.fr/annexes/bilan2013/donnees/procreation/01-amp/pdf/amp.pdf/>.

⁴²Matthew D. Bramlett & Laura F. Radel, *Factors Associated with Adoption and Adoption Intentions of Nonparental Caregivers* 19(1) ADOPTION QUARTERLY (2016); Sarah Carnochan, Megan Moore & Michael J Austin, *Achieving Timely Adoption*, 10(3) J EVID BASED SOC WORK 210 (2013); Jessica Snowden, Scott Leon & Jeffrey Sieracki, *Predictors of children in foster care being adopted: A classification tree analysis*, 30(11) CHILDREN AND YOUTH SERVICES REVIEW 1318 (2008); Tom McDonald, Alan Press, Peggy Billings & Terry Moore, *Partitioning the adoption process to better predict permanency*, 86(3) CHILD WELFARE 5 (2007); Christian Connell, Karol H. Katz, Leon Saunders & Jacob

jurisdictions are based on the growing need for permanent placement of children in need and active encouragement and support of prospective adopters,⁴³ thus, it seems unlikely to ban interested adopters from adopting because of their preferences.

In England, the adoption process is governed by the Adoption and Children Act, 2002. Under this law, state-recognized services are entailed with the task of matching approved adopters with children waiting for a family.⁴⁴ In a guide provided for prospective adopters, the matching process is described: “If there is a potential match... your details would be sent to the child’s social worker and the child’s social worker would send the child’s details to your social worker *for you to think about*: [emphasis added].⁴⁵ We read this statement as an invitation to practice conditional parentage since prospective parents are encouraged to choose their adopted child and allowed to refrain from choosing a child they do not desire. This popular website, although not of any legal merit, is indicative of adoption policies in England.⁴⁶

The Adoption and Children Act itself does not prescribe such a process in the detail provided in the guide. However, when detailing conditions for making adoption orders⁴⁷ and the restrictions on making adoption orders,⁴⁸ the Act is silent regarding the question of whether the match was the first to be made, or whether adopters refused the previous matching. The legislature does state that in determining the suitability of a couple to adopt a child, proper regard should be given to the need for stability and permanence in their relationship.⁴⁹ Since no case law linked this section with refusal to adopt a specific child, interpretation could go both ways. One might suggest that ‘picky-choosy’ parents are not as stable as demanded, while others might see their final choice as a sign of a permanent decision. Either way, if no English court had ever revoked eligibility of adopters based on the fact that they chose

K. Tebes, *Leaving foster care – The influence of child and case characteristics on exit rates*, 28(7) CHILDREN AND YOUTH SERVICES REVIEW 780 (2006).

⁴³Clair Fenton-Glynn, *Adoption without consent*, SECRETARY OF STATE FOR HEALTH, “ADOPTION: A NEW APPROACH” (DECEMBER 2000).

⁴⁴Adoption and Children Act, 2002, Section 2.

⁴⁵First4adoption, *First Steps*, <http://www.first4adoption.org.uk/first-steps-complete/>, (First4Adoption is the national information service for people interested in adopting a child in England).

⁴⁶Fenton-Glynn, *supra* note 43.

⁴⁷Adoption and Children Act, *supra* note 44, § 47.

⁴⁸*Id.* § 48.

⁴⁹*Id.* § 45(2).

their adopted child, it is fair to conclude that adoption laws in England enable a practice of conditional parentage.

When comparing the English law with the legal framework in the United States, similar conclusions may be drawn. Although in the United States there is limited federal constitutional and statutory law since adoption is controlled by state law,⁵⁰ general features of adoption law that are common across most states.⁵¹ Similarly to English law, both the general provisions of the United States federal law and the more specific regulation by the states, no restriction on the parents to actively choose their adopted child could not be found. We also found no restrictions to parental freedom of choice in Israeli, nor in French adoption legislation or case law.

Moreover, several states have recently enacted statutes that recognize and allow enforcement of “open adoption” or post-adoption contact agreements between birth and adoptive families, and some states even recognize “non-binding open adoption” agreements.⁵² By recognizing the autonomy of parents to transfer and receive parental privileges and responsibilities through contracts, the states acknowledge the autonomy of prospective adopters to choose to adopt a specific child. In our view, this is a legal recognition of the practice of conditional parentage.

⁵⁰Several uniform adoption acts have been proposed for the states, but only a few states have adopted them: NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS, UNIF. ADOPTION ACT (1969), <http://www.uniformlaws.org/shared/docs/adoption/adoption69.pdf>; NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS, UNIF. ADOPTION ACT (1994), http://www.uniformlaws.org/shared/docs/adoption/uaa_final_94.pdf. The 1969 Act has been adopted in Arkansas, Iowa, New Mexico, North Dakota, Oklahoma: *Legislative Fact Sheet – Adoption Act (1953) (1969)*, UNIF. LAW COMM'N, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Adoption%20Act%20%281953%29%281969%29> (last visited May 11, 2018). The 1994 Act has been adopted in Vermont: *Legislative Fact Sheet – Adoption Act (1994)*, UNIF. LAW COMM'N, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Adoption%20Act%20%281994%29> (last visited May 11, 2018).

⁵¹Luis Acosta, *Adoption Law: United States*, Library of Congress, <https://www.loc.gov/law/help/adoption-law/unitedstates.php#f2> (last visited May 11, 2018).

⁵²*Id.* at n. 24 (A listing and discussion of these statutes can be found in Joan Heifetz Hollinger, *Adoption Law and Practice* (2012) in sections 13-B.01 to 13-B.03. See also Yehezkel Margalit, *Towards Determining Legal Parentage by Agreement in Israel*, 42 HEB. U. L. REV. (MISHPATIM) 835, 856-57 (2012)(Heb.)).

Not only modern legal systems are not the only systems to recognize adoptive parents' choice of a child. Another form of conditional parentage can be found in the Jewish law. The Jewish status of *mamzer* (bastard), is among other reasons given to a child conceived as a result of incest. This status prevents the marriage of a *mamzer* with any other Jew that is not a *mamzer* as well. The status of *mamzer* cannot ever be erased. This status, however, does not apply to non-Jews resulting in some Jewish adoptive-parents prefer the adoption of non-Jewish children⁵³ in order to avoid the fear of creating unintentional incest in the future for their adopted child.⁵⁴ This form of selective adoption could also be considered selective parentage.

B. ABORTION

The pro-life/pro-choice debate is beyond the scope of this paper, since abortion is legal in all three jurisdictions compared.⁵⁵ For our purpose, we claim that in legal systems where abortion is legitimate, even if only under specific circumstances, it is a form of conditional parentage. The law on selective abortion in the UK is one example.⁵⁶ Under the UK Act, if there is “a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped,” the parents may terminate the pregnancy and not parent the unborn child.⁵⁷ The same condition is also required under Israeli law.⁵⁸ Comparatively, under the French Code, the pregnant woman is free to terminate her pregnancy before its twelfth week based solely on her reluctance to continue it.⁵⁹ This arrangement allows for an even wider scope of

⁵³This preference is not allowed under the Israeli Adoption Law 1981, Article 5, determining the religion of adoptive parents to be that of the adopted child. Such provision does not exist in other legal systems, such as the UK or the US.

⁵⁴However, this preference contradicts a different important principle in Jewish law, which is the preservation of Jewish bloodline. For the debate on this issue in Jewish Law, see YEHEZKEL MARGALIT, *THE JEWISH FAMILY: BETWEEN FAMILY LAW AND CONTRACT LAW* (2017), p.165 and the citations in footnote 127.

⁵⁵In England and Wales abortion is regulated in the Abortion Act 1967; in France it is regulated in the Public Health Code, 1975, last amended in 2016: Code de la Santé Publique, 1975 : articles L2212-1 à L2212-11; and in Israel it is regulated in the Penal Code 1977, Articles 312-321.

⁵⁶Abortion Act 1967 (UK).

⁵⁷*Id.* § 1(1)(d).

⁵⁸Israeli Penal Code, 5737-1977, Art. 316(a)(3).

⁵⁹French Public Health Code Art. L2212-1.

parental selection, including social reasons to abort a pregnancy, such as lack of ability to offer a happy childhood.

The selective process in England and Israel is subject to physicians' discretion, which is not often challenged in court. The judicial review on the doctors' assessment of the substantiality of the risk or of the seriousness of the potential handicap is rarely successful. Since the law requires the doctors to conclude their prognosis in 'good faith', courts tend to refrain from intervening in their medical assessment.⁶⁰ As a result, the reality is that in all three jurisdictions, a prospective parent is able to opt-out of parentage based on their will not to parent specific offspring, possibly due to physical or mental disadvantages. We regard this negative selection as conditional parentage.

The right of the pregnant woman to choose not to parent her unborn fetus is also protected under the European Convention of Human Rights, particularly under Article 8, which protects the right for private and family life. The European Court of Human Rights (ECHR) is willing to protect the decision to abort a pregnancy as an inherent part of a woman's private and family life. However, it has decided that its regulation is still consistent with section two of the article,⁶¹ allowing states to interfere with this right in the interests of protecting "morals, or the protection of the rights and freedoms of others."⁶² Furthermore, the Court considered a lack of a clear procedure to review the legitimate criteria for abortion to be in breach of Article 8 of the Convention, thus creating a positive obligation on the states to regulate abortions.⁶³

Wrongful birth claims, acknowledged by some legal systems,⁶⁴ compensate parents for the lost opportunity to abort unwanted

⁶⁰In *Jepson v The Chief Constable of West Mercia Police Constabulary*, [2003] EWHC (Ch) 3318, a reverend requested a police investigation against the doctors who approved abortion of a fetus suspected to be born with cleft lip and palate. As police concluded that the doctors' decision was in good faith the complaint was reverted. This incident is quite rare and unique, and we were not able to locate similar cases. For accounts of the developments in this case see Scott, *supra* note 2, at 72.

⁶¹*Bruggemann and Scheuten v Germany*, App. No. 6959/75, 3 Eur. Comm'n H.R. 244 (1981).

⁶²European Convention on Human Rights, Article 8(2), Nov. 4, 1950.

⁶³*Tysiack v Poland*, Eur. Ct. H.R. Appl. No. 5410/03 [2007] available at: https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Tysiack_decision.pdf

⁶⁴For a comparative account of such claims in the United States, England and France see Maria Canellopoulou Bottis, *Wrongful Birth and Wrongful Life Actions*, 11 EUROPEAN JOURNAL OF HEALTH LAW 55 (2004). In Israel this

offspring. This imposes liability on physicians to *offer* parental selection to parents suspected of having a child with a disability.⁶⁵ We learn from this that parents are entitled under the law not only to select whether to parent a fetus or not, but also to receive information about the physical traits of the prospective child as a basis for making their decision.

Another aspect of parents' legitimate practice of conditional parentage could also be observed in the claim for compensation for negligent sterilization in certain cases. It is worthy to note that it is not the mere parentage that is the damage claimed, as the birth of a healthy child does not usually constitute a tort claim.⁶⁶ The Queen Bench in the UK awarded parents compensation for financial damages only where the child was born with "severe learning difficulties."⁶⁷ We see this as support of our claim that prospective parents are entitled to place conditions – specifically physical or medical ones - on their parentage.

So far, in the discussion on abortion, we have detailed mainly aspects of negative selection where health reasons have justified conditional parentage. However, conditional parentage, is not restricted to medical reasons. In several legal systems, social reasons were also acknowledged by the ECHR as legitimate for aborting a pregnancy.⁶⁸ We learn from this that conditional parentage is a legal phenomenon that is wider than the realm of health and medicine. However, for the discussion of Eugenics, there is no significance to reasons of parental selection that are not intended to better the physical traits of their offspring.

C. PREIMPLANTATION GENETIC DIAGNOSIS (PGD)

Over the last century, the means for becoming a parent has evolved significantly. Society today benefits from having many diverse methods of conception. One method is assisted reproduction

doctrine governed for several decades but was neglected in 2012 in the ruling of C.A. 1326/07 *Hammer v. Amit* (28.5.12).

⁶⁵See for example, the UK case of *Rand v East Dorset Health Authority*, 56 BMLR 39 [2000], where the court found the health authority responsible for introducing parents to the choice of abortion.

⁶⁶*McFarlane v Tayside Health Board* [1999] 2 AC 59 (HL) (appeal taken from Scot.).

⁶⁷*Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] QB 266.

⁶⁸*RH v Norway*, App. 17004/90 Eur. Comm'n H.R. (1992), available at: <https://www.globalhealthrights.org/wp-content/uploads/2016/12/H.-v.-NORWAY.pdf>

today can be performed by in-vitro fertilization, (IVF). In this process, a zygote is created by manipulating a sperm cell into an egg, thus creating an embryo in a laboratory. Due to the risk involved in harvesting eggs, most procedures require the production and harvesting of several eggs from a woman. Therefore, it is usual to produce several embryos in one IVF treatment. The multiple embryos created in the IVF process allow the performance of PGD. During the PGD process, once the embryo develops and contains several cells, one or more of these cells are removed and examined to detect specific genes. This technique enables the detection of genetic traits, both desired and undesired, and allows parents to choose which of the embryos to implant in the woman's womb.

The process of PGD is helpful for detecting both single gene defects, such as Cystic Fibrosis, as well as other chromosomal disorders, such as Down Syndrome. Prospective parents can choose a single suitable embryo from multiple potential offspring to implant and birth. As genome mapping develops, it is possible to screen for any type of genetic traits, not only for defects or chromosomal disorders. Almost any desired or undesired gene could be diagnosed and screened, if not today, then in the foreseeable future.⁶⁹ This possibility is, of course, of great controversy.⁷⁰

In Italy, for example, a rule stating that only three embryos could be created by IVF and that all must be transferred to a woman's uterus,⁷¹ essentially banning PGD, was declared unconstitutional by the Italian Constitutional Court in 2008⁷² and later by the European Court of Human Rights.⁷³ In 2012, the right of a fertile couple to seek medically assisted reproduction was acknowledged, and Italy was condemned for banning it. The ECHR judges pointed out the inconsistency in Italian law denying the couple access to embryo screening while authorizing medically-assisted termination of pregnancy in cases where the fetus was suspected of a genetic disease.

⁶⁹James Watson, *A Personal View of the Project*, THE CODE OF THE CODES: SCIENTIFIC AND SOCIAL ISSUES IN THE HUMAN GENOME PROJECT (Daniel Kevles & Leroy Hood, eds, 1992).

⁷⁰Richard Lewontin, *BIOLOGY AS IDEOLOGY: THE DOCTRINE OF DNA* (1992).

⁷¹Norme in materia di procreazione medicalmente assistita, Legge 19 febbraio 2004, n. 40 (It.).

⁷²Giuseppe Benagiano & Luca Gianaroli, *The Italian Constitutional Court modifies Italian legislation on assisted reproduction technology*, 20 REPROD. BIOMED. ONLINE 398, 399 (2010). Available at:

[https://www.rbmojournal.com/article/S1472-6483\(09\)00280-6/pdf](https://www.rbmojournal.com/article/S1472-6483(09)00280-6/pdf)

⁷³*Costa and Pavan v. Italy*, App. No. 54270/2010, Eur. Ct. H.R., 2012. Available at: <http://hudoc.echr.coe.int/eng?i=002-6452>

To prevent misuse of PGD, some countries regulate it by law. In England, for example, the Human Fertilization and Embryology Act of 1990 (HFEA) governs the provision of IVF under a Code of Practice. Under this code, produced by the Advisory Committee of Genetic Testing, embryo selection is generally restricted by regulatory provisions.⁷⁴ PGD should only be available where there is a “significant risk of a serious genetic condition... in the embryo.”⁷⁵ The HFEA attempts to detail such risks in several provisions, which relate to the prospective well-being of the future child. The conditions of the license provided by the Human Fertilization and Embryology Authority to perform PGD, under paragraph 1 of Schedule 2 to this Act, are detailed in Schedule 13 and include risks such as “a serious physical or mental disability” or “a serious illness.”⁷⁶

In France, the law allows a specially certified fertility specialist to perform PGD, but only to select against serious, incurable diseases.⁷⁷ Under another law, an agency (Agence de la Biomédecine) was created and authorized to oversee assisted reproductive technology and PGD.⁷⁸ The Agency sends parents who wish to perform PGD for assessment at a specialized interdisciplinary center (Centre Pluridisciplinaire de Diagnostic Prénatal), that determines whether the conditions are sufficiently severe and whether the relevant genetic information is sufficiently prognostic.⁷⁹

In Israel, where reproduction and fertility play a very central role in the culture,⁸⁰ PGD is practiced intensely, putting Israeli women among the world’s biggest consumers of prenatal genetic tests, genetic profiling, and counselling.⁸¹ This practice is encouraged by generous state funding for PGD and other forms of

⁷⁴Human Fertilisation and Embryology Act 1990 [hereinafter: HEFA], § 13(9) and (10) (UK).

⁷⁵Advisory Committee of Genetic Testing, *Consultation Document on Preimplantation Genetic Diagnosis*, November 1999.

⁷⁶HEFA, *supra* note 74, paragraph 9 Schedule 13.

⁷⁷Loi relative à la bioéthique, 2011. Loi no. 2011–814 (France).

⁷⁸Loi relative à la bioéthique, 2004. Loi no. 2004–800 (France).

⁷⁹REP. AGENCE DE LA BIOMEDECINE, LE DIAGNOSTIC PREIMPLANTATOIRE ET VOUS (2012), http://www.agence-biomedecine.fr/IMG/pdf/2012_brochure_dpi_vdef.pdf.

⁸⁰Sigrid Vertommen, *Towards a political economy of egg cell donations: ‘Doing it the Israeli Way’*, CRITICAL KINSHIP STUDIES: KINSHIP (TRANS)FORMED 169, 169 (Charlotte Kroløkke, ed., 2016).

⁸¹*Id.*.

assisted reproduction.⁸² Regulation of PGD in Israel is not enforced by law but by administrative instructions to laboratories⁸³ and by scholarly discussions of its bioethical issues.⁸⁴ Under these regulatory regime, PGD is intended to prevent genetically induced mental and physical disparities, but is both comparatively broad in the scope of conditions that allow for such intervention, as well as comparatively loose in the state's enforcement of the guidelines. In this regard, Israel stands out as the most liberal in conditional parentage by means of PGD, out of the jurisdictions examined here. Both England and France are stricter in their access to PGD.⁸⁵

In the United States, PGD is not regulated by law, but is discussed in guidelines and recommendations by professional societies. The Ethics Committee of the American Society for Reproductive Medicine published an opinion that considers PGD for adult-onset conditions "ethically justifiable" when the condition is serious and there are no known, or only extremely burdensome, interventions available. This opinion also states that PGD is "ethically acceptable as a matter of reproductive liberty" for even less serious or lower penetrance conditions.⁸⁶ Also, The American College of Medical Genetics' recommendations on PGD are to leave to the parents the decision whether they want to receive and act upon information about the genetic conditions regarding their future child.⁸⁷

⁸²Westreich, *supra* note 26.

⁸³Ministry of Health, Guidelines for Preimplantation Genetic Diagnosis (PGD), instructions no. 50/2006 (20.12.2006) (Heb.).

⁸⁴There are many scholarly discussions in academic literature, but the most 'formal' report was published by the Israel National Science Academy, which was based on the guidelines *Id.*. See NATIONAL BIOETHICS COMMITTEE, "BIOETHICAL ISSUES IN PREIMPLANTATION GENETIC DIAGNOSIS (PGD)" (Michelle Rabal, ed. 2008) (Heb.).

⁸⁵Restricted access to assisted reproductive technologies are discussed in SACHA REBECCA WAXMAN, *THE PRE-CONCEPTION WELFARE PRINCIPLE: A CASE AGAINST REGULATION* (A Thesis Submitted to the University of Manchester School of Law for the Degree of Doctor of Bioethics and Medical Jurisprudence, 2017).

⁸⁶Ethics Committee of the American Society for Reproductive Medicine, *Use of Preimplantation Genetic Diagnosis for Serious Adult Onset Conditions: A Committee Opinion*, 100 FERTIL. STERIL. 54 (2013).

⁸⁷Wayne W. Grody, Barry H. Thompson, Anthony R. Gregg, Lora H. Bean, Kristin G. Monaghan, Adele Schneider & Roger V. Lebo, *ACMG position statement on prenatal/preconception expanded carrier screening*, 15(5) GEN. MED. 482 (2013), <https://www.nature.com/articles/gim201347>.

These provisions relate mainly to *negative* PGD; that is, the choice *not* to implant an embryo with genetic defects.⁸⁸ Despite on-going debate regarding the scope of “significant risk”⁸⁹ and of “seriousness of genetic condition,”⁹⁰ the choice of prospective parents to prevent illness from their prospected offspring is largely accepted both by society and by law. Therefore, negative PGD is a both a medically and legally legitimate practice of parental selection.

The most significant challenge to PGD is its *positive* aspect, which is choosing to implant an embryo with specific genetic traits. One practice that was challenged under the PGD license was the practice of creating a ‘savior sibling’. Since PGD enables the selection of embryos with specific genetic traits, prospective parents are medically able to create a sibling for their child of their desired genetic form. With this practice, a genetic match could be created to enable organ transplant to the sibling.

The debate over whether the practice of positive PGD is legitimate under the HFEA arose in the *Quintavalle* case.⁹¹ The parents of a boy born with a serious genetic disorder sought IVF treatment in which any embryo would be tested for its pre-implantation genetic status. They requested that only an embryo capable of producing the stem cells necessary to cure the boy would be implanted. The HFEA refused to license such a procedure since it would not constitute treatment of the mother within the Act. It was held that the Act required only that the procedures undertaken should be in the course of treating the mother. Such treatment would include many procedures not directly affecting her. This procedure would be considered treatment in the context of the treating the mother, putting it within the scope of the Authority to consider and therefore license such procedures.

Positive PGD was also acceptable in France in 2013, on a case-by-case basis. Following recommendations from Centre Pluridisciplinaire de Diagnostic Prénatal, the director of the Agence de la Biomédecine decided to permit the use of PGD for Human Leukocyte Antigen (HLA) tissue matching, to select for siblings

⁸⁸We wish to note that the provision that allows for sex-selection under this Act, to prevent gender-related serious medical conditions in the embryo, might also be regarded as ‘negative’ PGD. This is based on the purpose of the procedure, to *prevent* a genetic trait. *Id.*, paragraph 10 Schedule 13.

⁸⁹Scott, *supra* note 2 at 207.

⁹⁰*Id.*, at 208.

⁹¹*Quintavalle v Human Fertilisation and Embryology Authority*, [2005] UKHL 28.

who can serve as tissue donors.⁹² Although the decision does not grant a general license to preform PGD for every ‘sibling savior’ practice, it is indicative of the legitimacy for parents to select their newborn based on a specific genetic trait.

Another form of positive PGD attracted fierce criticism when a lesbian couple in the United States deliberately chose to have a deaf baby.⁹³ The two women, both mental health specialists and deaf themselves, said they had wanted a child that would be like themselves, claiming they would make better parents to a deaf child. The couple was scrutinized publicly, but was autonomous to decide so legally. In the United States, choosing disability, just as choosing to prevent one, is not regulated by law and is left to parental discretion. Furthermore, selecting someone with a disability does not inevitably mean selecting a child with a lower quality of life.⁹⁴ This couple’s choice provoked a debate over the morality of their decision.⁹⁵ Nonetheless, whether one sides with or rejects the parental choice, the fact of the matter is that a choice *can* and *had* been made, making this couple’s parentage conditioned to the prospective child’s deafness.

To summarize this chapter, we can conclude that conditional parentage takes place under diverse legal frameworks, such as adoption, abortion and PGD. We can firmly argue that although these practices are refrained from being labeled as eugenics, they are in fact forms of parental selection based on physical and genetic traits. We can also conclude that these medical-legal phenomena are well accepted both by law and society.

IV. DELICATE BALANCE – GUIDELINES FOR REGULATING EUGENICS

Our claim is that eugenics are a fact of life in modern society. In contrast to the concerns that justified eugenic practices in the past, parental autonomy is the core justification for eugenics today.

⁹²Agence de la Biomedecine, *Conseil D’Orientation Modification Des Criteres D’Agrements En Genetique Concernant Le HLA*, Deliberation N. 2013-CO-45 (France, Nov. 21, 2013). Available at: http://www.agence-biomedecine.fr/IMG/pdf/deliberation_2013_co_45.pdf

⁹³David Teather, *Lesbian couple have deaf baby by choice*, THE GUARDIAN (8 April, 2002). Available at: <https://www.theguardian.com/world/2002/apr/08/davidteather>

⁹⁴Wilkinson, *supra* note 32 at 61.

⁹⁵Julian Savulescu & Robert Sparrow, *Making Better Babies: Pro and Con*, 31(1) MONASH BIOETHICS REVIEW 36, (2013).

Unlike the paternalistic laws of the past that coerced prospective parents into eugenic practices, such as prevention of intermarriage or sterilization, the laws of our time are balancing wishes of prospective parents to use eugenic practices with other important concerns. Such concerns include community diversity and the offspring's quality of life.

Although eugenics can serve justifiable means, eugenics are prone to abuse and misuse. We acknowledge that both alleviating all boundaries, on one hand, and coercing parents to parent, on the other, is undesired. As Agar argues, the use of genetic engineering should be tailored to the needs of those who wish to improve their life plans, but would also shield societies from being shaped in the form dictated by dominant values.⁹⁶ In this summative section we offer choices of methods for the regulation of eugenics, based on the forms of regulation in other conditional parentage practices.

To accomplish the balance of parental autonomy with societal morality, four forms of regulating conditional parentage are recognized in this paper. We named these types of potential methods of regulation: (1) information-based autonomy, (2) intervention only in *positive* selection, (3) legal guidelines for parental selection, and (4) case-by-case review. Outlining these methods of dealing with eugenic presence in legal and societal lives is far from evaluating them. In this section, we attempt to highlight the advantages and challenges of each method, but we refrain from trumping one over the others.

(1) Information-Based Autonomy

The most lenient method of regulation is the non-regulation of conditional parentage. Under this regime, states simply leave free choice to the parents. For this method to be morally legitimate, parental choice should be based on full and valid information. We identify this practice in the United States regarding PGD, where professional associations offer education and recommendations, but the law does not interfere with the parental choice.

Being a parent is hard enough...yet, many people parent because they choose to, not because they are coerced into it. However, not all parents think through the potential hardships of parenting when choosing to procreate. For those who do, the *information-based autonomy model* suggests that it is legitimate, as

⁹⁶Agar, *supra* note 6.

in any voluntary decision, to opt for hardship and to persevere. It is also just as legitimate to opt-out of hardship and to aim at avoiding it. Both decisions fall within the realm of personal autonomy.⁹⁷

This type of method bases conditional parentage on theories of informed consent. The expression “informed consent” relates to the legal obligation of a doctor to provide a patient with the information relevant to the decision-making and to receive consent prior to any medical procedure being carried out. Informed consent is mandatory prior to obtaining medical treatment. However, when regulating conditional parentage, it is not mandatory but voluntary. The parents have a right to be provided with information⁹⁸ and a right to choose their course of action accordingly, but their actions are not conditioned on their consent to this information. The obligatory nature of the information lies on the state to provide it, not on the parents to accept it.

The question is how much information and what type of information should be given to the parents to enable them to be truly informed. Neither legislature, court rulings, nor literature has yet provided a definitive answer.⁹⁹ Courts tend to decide based on a standard of “reasonability” when discussing the breadth and depth of the information given by a physician to a patient.¹⁰⁰ These rulings are intended to deal only with the health of the patient, and do not deal with the implications on the prospective offspring or society.

We argue that under this method of regulating conditional parentage, it is the state’s duty to inform parents of all aspects of their decision. We fear that without a legal requirement to provide the parents with information regarding a wide set of considerations, it is unclear whether this method of regulating conditional parentage

⁹⁷This ethical view was expressed in Savulescu’s remarks in Savulescu & Sparrow, *supra* note 95, at 43.

⁹⁸The French Public Health Code clearly states this in regard to abortion in Art. L2212-1. This is also the case in Israeli regulation for PDG, *supra* note 83. However, even under such requirement, any information given to parents is of course pending funding and availability.

⁹⁹Margaret A. Somerville, *Labels Versus contents: Variance Between Philosophy, Psychiatry and Law in the Concepts Governing Decision Making*, 39 MCGILL L.J. 179 (1994); EDWARDS RICHARDS & KATHARINE RATHBUN, LAW AND THE PHYSICIANS: A PRACTICAL GUIDE 145 (1993); GEORGE POZGAR, LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION 301 (1993).

¹⁰⁰See for example *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309 (1994); see also Canada’s High Court of Justice in *Arndt v. Smith*, 126 D.L.R. (4th) 705 (1995); *Arndt v. Smith*, 148, D.L.R. (4th) 48 (1997); see also Australia’s High Court in *Rogers v. Whitaker* (1992) 175 CLR 479, 490 (Austl.); see also ECHR 2013/14 *Csoma v. Romania*, 15 January 2013, no. 8759/05 (Third Section).

can lay within the framework of the doctrine of informed consent. Research suggests that manipulation of information may give prospective parents the sense that they are making a free choice, while they are actually “nudged” into a choice that is preferable for certain stakeholders.¹⁰¹ This approach does not coerce the parents’ decision, thus respecting their autonomy, but rather puts a burden on the state to provide valid information on all aspects of the decision.

Do we trust parents to make a decision that would balance both their needs and societal concerns?¹⁰² Should parental skills or abilities determine the approval or refusal to allow parental selection? Should a less capable parent be given more freedom to choose their prospective offspring? Although not all people are fit to parent, the literature on parenting admits that it is not possible to establish what makes a “good” parent.¹⁰³ With no agreed or research-based good-parenting guidelines, such limitation on parental autonomy seems arbitrary, offensive and inefficient. It does, however, infuse doubt into the information-based autonomy regulatory method.

(2) *Intervention in ‘Positive’ Selection*

The next form of regulation of parental choice is found in most adoption laws. This type of regulation differentiates between ‘negative’ and ‘positive’ selection. Despite the fact that there is no judicial intervention in negative adoption (the prospective parents’ choice *not* to adopt a certain child), there is, however, much intervention in ‘positive’ adoption (i.e. courts protect or deny prospective parents’ choice to adopt a specific child). Under this regime, the state is prohibited from intervening in peoples’ decision *not* to parent an offspring with specific traits while allowing the state to intervene in the positive choice to parent-specific offspring. In

¹⁰¹Ignnaas Devisch, *Progress in Medicine: Autonomy, Oughtonomy and Nudging*, 17 J. EVAL. CLIN. PRACT. 857, 859-60 (2011).

¹⁰²See Agar, *supra* note 6, at 144 (arguing that leaving it completely to prospective parents’ autonomy may not secure diversity, the landmark of liberal theory, as their preferences are not always based on objective facts, but rather on the prejudice of the society they are a part of. It is worrisome to place such responsibility on a social environment that challenges women, homosexuals or ethnic minorities).

¹⁰³See generally MARC. H. BORNSTEIN, HANDBOOK OF PARENTING, LAWRENCE ERLBAUM ASSOCIATES (1995); Robert Epstein, *What Makes a Good Parent?* SCIENTIFIC AMERICAN MIND 45 (2010).

several legal systems, the right not to parent overrides the right to parent,¹⁰⁴ and it is legitimate to allow parents to opt-out of parenting.

Regulating *positive* conditional parentage by state intervention is contrary to the principle of 'Procreative Beneficence'.¹⁰⁵ Under this principle, parents do not only have reason to want the best for their children, but they are also morally obligated to attempt to produce the best child possible. Restricting this obligation is also questionable in light of liberal views that do not see a moral difference between enhancing capabilities by intervention with environment (such as diet or education) and enhancing capabilities by genetic engineering.¹⁰⁶ If states refrain from restricting parents from enhancing their children's capabilities by adding extra tutoring to their education or adding vitamins to their diets, then why should states limit parents who are able to afford to design genetically enhanced babies?

There are two justifications for state intervention in such parental choice. The first justification would be that non-intervention would cause injustice by unequal distribution of eugenic goods. States have an obligation to distribute resources equally, but it is possible to justify distribution of eugenic goods by state regulation by means of Rawlsian justice. Rawls's Difference Principle justifies deviation from equal distribution of goods, such as liberty and opportunity, only if the unequal distribution betters society as a whole, especially the least privileged in society.¹⁰⁷ Therefore, a regulation model that intervenes in 'positive' conditional parentage to ensure that all prospective parents have access to positive selection, is considered legitimate. This can be achieved with generous state funding of such processes, as is the case in Israel.¹⁰⁸

The second reason for states' regulation of positive selection relies on two of the many critiques of the Procreative Beneficence Principle.¹⁰⁹ The first is concerned with the possible abuse of

¹⁰⁴Barak-Erez & Shapira, *supra* note 35.

¹⁰⁵See Julian Savulescu, *Procreative Beneficence: Why We Should Select The Best Children*, 15 *BIOETHICS* 413 (2001).

¹⁰⁶Agar, *supra* note 6 at 139-40.

¹⁰⁷See generally JOHN RAWLS, *A THEORY OF JUSTICE: REVISED EDITION* (1999).

¹⁰⁸Westreich, *supra* note 26; see also Vertommen, *supra* note 80.

¹⁰⁹See Andrew Hotke, *The Principle of Procreative Beneficence: Old Arguments and a New Challenge*, 28(5) *BIOETHICS* 255 (2014) (explaining a strong logical critique, which is beyond the scope of this paper, argues that having good reasons do something does not constitute a moral obligation to do it); see also Rebecca Bennett, *The Fallacy of the Principle of Procreative Beneficence*, 23(5) *BIOETHICS* 265 (2009).

scientific developments in parental screening, which in time will most likely enable more and more possibilities for selection, perhaps to the point of ordering an exact model of a child.¹¹⁰ King fears that parents' preference for certain types of children is "not too far removed from their experience as consumers, choosing amongst different products."¹¹¹ Genetic diagnostics and fetal selection are terms generally ascribed to sinister regimes, that turn the child into a 'commodity', so such concerns are understandable.¹¹² It should be argued, though, that the commodification argument fails to ignore a distinction between the commercial value to parental selection and the actual treatment of children as commodities.¹¹³ Thus, fear of commodification simply justifies regulation.

The second critique is the fear of diversity. Biologically speaking, diversity is a strength, and genetic mutations have an evolutionary role.¹¹⁴ It is Agar who expressed concern about diversity by allowing parents to choose genetic traits.¹¹⁵ From a liberal perspective, restricting parental choice, based on what states consider desirable, is immoral because it too might eliminate diverse life plans that are inherent to the liberal ideology.¹¹⁶ Having said that, states do intervene in the market of human improvements by allocating education and health funds. Shouldn't the same standards be applied to both types of intervention?¹¹⁷

With these perils in mind, we should also remember that there are tangible benefits to positive parental selection. Positive parental selection is not only about the moral right of autonomy nor the well-being of the family, it is also about creating future generations with fewer illnesses and better prospects for success. Conditioning

¹¹⁰See generally Wolfram Henn, *Consumerism in Prenatal Diagnosis: A Challenge for Ethical Guideline*, 26 J. MED. ETHICS 444 (2000). (noting that some reject this possibility and argue that testing for certain traits, such as intelligence or aspects of personality, demands testing a higher number of embryos than what is usually created in IVF, that it is unlikely to be done); see also Edwin Kirk, *Embryo Selection for Complex Traits is Impracticable*, 326 BRITISH MEDICAL JOURNAL 53 (2003).

¹¹¹King, *supra* note 29, at 180.

¹¹²PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEM IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *SPlicing LIFE: THE SOCIAL AND ETHICAL ISSUES OF GENETIC ENGINEERING WITH HUMAN BEINGS* (1982).

¹¹³Wilkinson, *supra* note 32 at 132.

¹¹⁴King, *supra* note 29, at 181.

¹¹⁵Agar, *supra* note 6, at 144.

¹¹⁶See Vertommen, *supra* note 80, for an explanation that such accusations are already made against the 'market' of egg cells in Israel.

¹¹⁷*Id.* at 143.

parentage on successful, healthy offspring is not all bad, despite the questionable reputation of this practice.

(3) *Legal Guidelines for Parental Selection*

The third form of regulation is providing a legal framework that outlines the conditions for parental choice. We see this type of regulation in HFEA,¹¹⁸ for example. Under this regime of regulation, conditioning parentage – both *positive and negative*— is subject to a set of legal guidelines, dictated by the legislature. The legislation is an expression of the common values of society.

The argument against this method would be the loss of parental autonomy and state intervention in private affairs. Some argue that pure autonomy does not exist in modern societies, since we willingly relinquish our freedoms for societal order,¹¹⁹ thus any legislative regulation could be considered “apparent paternalistic intervention,” since it is an intervention by the legislator that expresses the desires of people whose freedom is restricted, and these desires can be realized only within the legal limits.¹²⁰ If parents agree to relinquish their autonomy in areas where they want legislative regulation, then this is not paternalism and hence, not considered a loss of autonomy.

Another argument reiterates the one expressed above, regarding the dominance of national values over private ones. Modern liberal societies fear the perils of a regime that dictates values to individuals, especially in intimate areas of life, such as family and procreation, where enforcement is almost impossible. Such regulation is deemed obsolete and dangerous. Although values change throughout the eras and locations, some values gain traction in many societies and are expressed in their legal systems. We see this, for example, in the “welfare principle.” Under this principle, the child’s best interests is the paramount consideration in any decision concerning them.¹²¹ The European Convention of Human Right acknowledged state interference in family life could be considered a breach of human rights if not justified by the values in

¹¹⁸HEFA, *supra* note 74.

¹¹⁹Roger B. Dworkin, *Medical Law and Ethics in the Post-Autonomy Age*, 68 *IND. L. J.* 727, 728 (1993).

¹²⁰*Id.* at 735.

¹²¹See Fenton-Glynn, *supra* note 43, at 8, (expounding on this principle in English law, and Justice Dorner’s ruling in P.C.A 4755/00 *Jane Doe v. John Doe*, 55(2) 321 (8.1.2001) (ruling the welfare principle is paramount in Israeli law)).

consensus.¹²² The exception in Article 8 of the convention acknowledges conditions that justify legal intervention in family life, where societal well-being is at risk.

Further support for the legislature-based model can be based on some of the critiques to the information-based model. There are prominent voices in the bioethics community arguing for “the right to remain in ignorance.”¹²³ While testing for genetic disorders contributes to the family’s knowledge of the genetic make-up of their prospective child, it does not prevent harm to future children. Such practices serve only the interests of the parents but not that of their future child. Therefore, it is ethically wrong to base a decision regarding future children on the same standards for informed consent as any other medical treatment. Under a legislative regime, allocating eugenic goods it is not left solely to the parents’ autonomy, but rather the future children’s interests are to be regarded as well.

It is also possible to justify the state distribution of eugenic goods through state regulation by means of Rawlsian justice. As mentioned, Rawls’s Difference Principle justifies deviation from the equal distribution of goods, such as liberty and opportunity only if the unequal distribution better society as a whole, especially the ones with lesser influence in society.¹²⁴ Rawls’ approach serves the argument for *negative* selection (such as enhancing resistance to the flu) because it serves more lives than *positive* selection (such as height or musical talent). Some traits, such as the enhancement of intelligence, are not as easily categorized.¹²⁵ Should it be considered beneficial to the individual, thus, unjustified by Rawls, or can it help society as a whole, thus, justified?

To summarize the model of legislative regulation, we can argue on one hand, for a clear and balanced expression of common societal values. On the other hand, concerns for the overriding of national values over personal values are also to be reckoned with. This

¹²²Troxel, *supra* note 33.

¹²³See Rebecca Bennett, *Antenatal Genetic Testing and the Right to Remain in Ignorance*, 22(5) THEOR. MED. BIOETH. 461 (2001) (coining the term); see also Elisa García, Danielle R. M. Timmermans & Evert van Leeuwen, *Rethinking Autonomy In The Context Of Prenatal Screening*, 28 PRENAT. DIAGN. 115 (2008); see also Ainsley J. Newson, *Ethical Aspects Arising From Non-Invasive Fetal Diagnosis*, 13(2) SEMIN. FETAL NEONAT. M. 103 (2008) (citing Bennette).

¹²⁴Rawls, *supra* note 107.

¹²⁵See JEFF LYON & PETER CORNER, *ALTERED FATES: GENE THERAPY AND THE RETOOLING OF HUMAN LIFE* 543 (1995), for a discussion that science can already to attribute intelligence to a section in the genome.

delicate balance in modern legal systems is scrutinized and examined by the judiciary, to ensure legitimate use of legislative powers and sufficient attentiveness to parental choice.

(4) Case-by-Case Review

The last form of possible regulation of conditional parentage could be the case-by-case review by a multidisciplinary board of experts. Such a regulatory method is applied in France for determining the legitimacy of *positive* PDG in the case of “sibling savior” parentage. Regulating parentage on a case-by-case method has the advantage of applying specific consideration to the specific family’s needs. The board’s deliberation process can contribute to the family’s sense of justice and therefore, respects their right to due process. The use of professionals, not merely state administrators, minimizes the risk of dogmatic dictation of societal values and shifts the focus on medical and ethical concerns, rather than national concerns.

As in every regulatory procedure that is not unified and standard, legal certainty and expectations are compromised. It is nearly impossible to conduct a regulatory system where most decisions are governed on a case-by-case basis, for two possible reasons. One reason is that it puts enormous strain on public resources. As technology advances, selective parentage becomes more easily accessible by potential parents. If the professional board becomes the only obstacle for the family, it would quickly be overburdened with requests for review, creating a need to decide faster, either by shorter deliberation or with added personnel. This solution is neither good for prospective parents nor for society. Shorter deliberations risk the merits of the process, while added board members add resources and risks contradicting results for similar cases.

The second reason that a case-by-case review process is not a useful regulatory process is that in large numbers, such process eventually becomes policy-making. It is inevitable that technological advancement and societal values will allow for more and more opportunities regarding parental selection. Thus, if the whole point of a case-by-case review process is to attend to the needs of specific families, it is inevitable that families’ concerns would be categorized and regarded considering previous decisions of the board. This is not only due to efficiency concerns and the need

to process many requests in a timely manner, but also due to the sense of equal treatment that public servants are obliged to.

Despite the regulatory deficiency of such method, it has an advantage that legal regulation misses. The tendency to respect and to obey professional authority in private matters, such as doctors and other professionals, is commonly greater than legal obedience.¹²⁶ A professional advisory board, even if it applies policy based on ethical and societal values, is likely to be trusted publicly more than legislative policy dictating family values. Another advantage of professional advisory board is the updated information that may be applied to the decision. Whereas legislature is stagnant in nature, in a realm of rapid advancements, many legislative regulations become dated and even obsolete, in light of technological advancements. A board of professionals is able not only to be more flexible than a legislator but also to apply state-of-the-art knowledge in the deliberations.

V. SUMMARY

Becoming a parent is a life-changing event. It is only natural that people put extreme emphasis on decisions regarding their parentage. It is also commonly accepted that parentage is not a necessity, but a privilege for those who want it. Therefore, we view it acceptable to place conditions over this pivotal experience. Not everyone is obliged to be a parent and parenting is not mandatory under any circumstances. Indeed, both law and society allow individuals to condition the decision to parent.

It is, however, questionable what conditions are placed on parentage. All prospective parents wish for a healthy offspring with maximum potential to succeed in life. But are all preferences legitimate? When past regimes took advantage of scientific advancements to control breeding, this led to horrific acts. Eugenics became a foul concept. The justified aim of the eugenic movement—to better human life and minimize pain suffering—took a sickening turn into complete erasure of personal autonomy.

With careful avoidance of using the term eugenics, the idea of parental selection and controlled breeding advanced rapidly. This advancement was not only scientific, but also legal and societal. In this paper, we demonstrated legally and socially acceptable methods

¹²⁶See generally Eric J. Cassell, *Consent or Obedience? Power and Authority in Medicine*, 352(4) N. ENGL. J. MED. 328 (2005).

for parental selection: in adoption processes, in abortion regulation, and in PGD procedures. Eugenics, the improvement of breeding, is a modern fact of life. Conditioning parentage on the existence of specific traits of the prospective child (positive eugenics) and conditioning parentage on the absence of a specific trait of the prospective child (negative eugenics) is recognized by legal systems and by public values.

We are fully aware of the perils of this phenomenon. It is impossible to forget the detrimental results of past interventions in parentage decisions. Alas, the use of eugenic rhetoric in the past was a means by regimes to restrict personal autonomy and apply paternalistic values. Conditional parentage in current times is the exact opposite. It is a means for individuals to exercise private rights and make autonomous decisions about their parentage. States' paternalistic interventions in these conditions, where there are such interventions, are made to restrict individuals from applying eugenic practices in the private realm; they are intended to restrict parental choice rather than coerce one.

The difference between past paternalistic intervention in parental selection and current paternalistic restrictions does not make such regulation redundant. We acknowledge the need for oversight in the conditions—positive or negative—that individuals place on parentage. Although such conditions may contribute to the well-being of the family and society at large, they may also harm it. These conditions may quickly slip into a dystopian reality of tailor-made, homogenic, commodified society, with all respective horrors of the past.

We urge in this paper, to not only acknowledge and accept eugenic as a current reality of parentage, but we also argue for its regulation. In this paper we highlighted four methods of regulation that we recognize in parental selection practices. We evaluate the benefits and challenges of each method but dare not rate them. Instead, we call for an open discussion, without the pretense that eugenics are banned or outcasted, on the regulatory processes that are required to protect society and its individuals from abuse of scientific advancements.