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Reconceiving Legal Siblinghood

RUTH ZAFRAN[†]

How should the state treat siblings' legal relationships in cases where the relationship is based solely on genetics, such as between siblings who were born of the same sperm donor, but did not grow up together? How should it treat siblings who were born to the same family but share no genetic connection at all? These are just two formulations of the type of legal dilemmas arising ever more frequently concerning the legal recognition of siblings who are born to families created by gamete donation. In exploring "legal siblinghood" in donor-conceived families, this Article offers a contribution to the literature on two levels. First, it joins a recent strand of scholarship in family law that has brought legal siblinghood to the forefront. Second, it supplements this literature by framing some of the most fundamental questions arising from the growing phenomenon of siblings who do not conform to traditional notions of siblinghood, specifically those created through sperm donation. This Article brings to the surface legal questions—in some instances, posed here for the first time—regarding the new sibling relationships created by donor-conceived families. It also applies specific terms that pinpoint the nuanced features of such relationships to assist the scholarly and normative debate on their due recognition and protection.

After reviewing the unique aspects of the sibling relationship, its psychological significance, and in particular the different types of affinities that siblings can form in donor-conceived families, I will examine three case studies. These cases exemplify some of the legal dilemmas and difficult questions surrounding the creation of sibling relationships and the maintenance of such relationships over time. Among other insights, these cases surface the significance and implication of different sibling relationship configurations (mainly relational, purely genetic, or a combination of the two), and ask whether different rights should derive from each type, and whether they should enjoy equal levels of legal protection. Taken as a whole, the cases question whether the sibling relationship is necessarily dependent on parents, or can exist without shared parents, and ask what weight we should ascribe to the parents' say in the forming of such relationships. After addressing these questions in light of the range of sibling relationships (or potential relationships), I outline a preliminary normative approach to them. I make the case for recognizing siblinghood as a distinct legal category, and for assigning it effective protections in the particular case of non-traditional families.

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INTRODUCTION

Siblinghood has enduring emotional, psychological, and societal consequences. Siblings, for better or for worse, are important. In recent years, the law has gradually come to recognize siblings as worthy stakeholders, and this understanding has increasingly infiltrated family law doctrine and scholarship.¹ Yet, while siblings continue to solidify their standing in terms of rights, a new form of siblinghood has emerged, disrupting dated assumptions and calling for reconsideration of the notion of siblinghood generally—and in the eyes of the law in particular. Nowadays, it is not unusual for siblings to be conceived through gamete donation. Such siblings may have a direct genetic connection with someone they might not know at all; they may even be unaware of the existence of that person; or, conversely, they may share their family upbringing with a sibling who has *no* genetic connection to them. These increasingly common scenarios raise fundamental questions about the concept of siblinghood and about family genetics, function, and form.

Family law, however, is currently ill-equipped to deal with these questions. This is not surprising, as this field—which traditionally centered on the married couple, and their entry into, and exit from, the institution of marriage—has only recently grown to encompass the rights of other family stakeholders.² As shown by June Carbone, it was only relatively recently that parent-child relationships were made an important and distinct category of family law, in a gradual process of recognition that matured during the 1980s.³ This transformation happened, among other reasons, as a consequence of the growing significance of children as individuals in family and social life and a fundamental shift in societal attitudes toward children, including recognition of the need to protect them.⁴ These changes found expression in the creation of new legislation, and in amendments and adjustments to existing legislation, by which the child was positioned as a significant figure in family law.⁵

1. For an analysis of the evolution of children in law in general and in family law, see Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1451–67 (2018), and, in the context of siblings, see Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 899 (2012) (“The sibling relationship offers a striking illustration of a crucial, yet legally neglected family tie.”).

2. This was also true of the academic discipline of family law. Laura T. Kessler, *New Frontiers in Family Law*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 226 (Martha Albertson Fineman ed., 2011).

3. In this context, see the monumental volume by JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 180–194 (2000).

4. The social status of children went through a dramatic change during the 20th century. Social and legal perceptions of children changed as they gained the status of individuals entitled to both protection and, eventually, legal rights. See PETER N. STEARNS, *CHILDHOOD IN WORLD HISTORY* 72–84 (3d ed. 2016).

5. For changes in the legal status of children, even if only partial, see Dailey & Rosenbury, *supra* note 1, at 1460–67. For a call to make that transformation more complete and for suggestions on how to go about it, see generally Susan Frelich Appleton, *Restating Childhood*, 79 BROOK. L. REV. 525 (2014) (identifying problems in current legal treatment of children, advocating for the American Legal Institute’s role in addressing the problems, and arguing for the development of a new vision for child law); Barbara Bennett Woodhouse, “*Out of Children’s Needs, Children’s Rights*”: *The Child’s Voice in Defining the Family*, 8 BYU J. PUB. L. 321 (1994) (exploring the notion of reforming children’s rights discourse).

This Article draws attention to a third category of family relationships that forms a triad along with parent-parent and parent-child dynamics: sibling relations. Although the sibling relationship has progressively gained (partial) legal recognition, and despite its enduring significance, it is not on a par legally to the parent-child or the spousal relationship. Yet, as scholars such as Jill Hasday,⁶ William Patton,⁷ and others assert,⁸ these relations *should* be recognized and provided with their own legal protections.⁹

The scholarship to date, then, has explored the role of the law in regulating sibling relationships solely in families conforming to the heteronormative model. Topics covered by this literature include the role of sibling relationships in formulating parental care arrangements following divorce (such as via physical custody arrangements and visitation rights),¹⁰ as well as the maintaining of sibling bonds in instances of adoption.¹¹ This Article takes the innovative step of broadening the scope of legal treatment of siblinghood beyond the traditional family¹² structure. This intervention is long overdue and has significant

6. Hasday, *supra* note 1, at 919.

7. William Wesley Patton, *The Status of Siblings' Rights: A View into the New Millennium*, 51 DEPAUL L. REV. 1, 2 (2001); William Wesley Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U. MIAMI L. REV. 745, 746 (1994).

8. See, e.g., Angela Ferraris, Comment, *Sibling Visitation as a Fundamental Right in Herbst v. Swan*, 39 NEW ENG. L. REV. 715, 716 (2005) (“[S]iblings possess a fundamental constitutional right to maintain relationships with each other.”); Kevin Heimler, *Dependency Hearings: California's Current Inability to Preserve the Bond Between Siblings*, 12 WHITTIER J. CHILD & FAM. ADVOC. 129, 129–30 (2012) (“This bond [between siblings] should be more important in a dependency court's analysis.”); Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1188 (1993) (“[C]ourts should recognize that the right of siblings to associate with each other is equal to the right of parents to rear their children.”); Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. REV. 1, 8 (2011) (“By proposing that statutory changes are necessary and making suggestions as to what those reforms should be, this Article attempts to further the dialogue concerning the rights of siblings in the foster care system to maintain their relationship.”); Ellen Marrus, *Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships*, 2004 U. CHI. LEGAL F. 319, 324 (arguing for benefits of continued sibling relationships); Ellen Marrus, “Where Have You Been, Fran?” *The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 TENN. L. REV. 977, 977–78 (1999) (“[S]iblings should have standing to sue.”); Dawn J. Post et al., *Are You Still My Family? Post-Adoption Sibling Visitation*, 43 CAP. U. L. REV. 307, 312 (2015) (“[T]his Article explores an issue that consistently harms our clients by overlooking their needs and calls for lasting relationships with their siblings.”); Joel V. Williams, *Sibling Rights to Visitation: A Relationship Too Valuable to be Denied*, 27 U. TOL. L. REV. 259, 259 (1995) (“One negative repercussion of the parents' divorce which has largely been ignored is arbitrary sibling separation.”).

9. Hasday, *supra* note 1, at 902.

10. *Id.* at 912–19.

11. *Id.* at 903–12; Mandelbaum, *supra* note 8; Post et al., *supra* note 8.

12. I have decided to use the terms “traditional” and “non-traditional” families only after considerable deliberation. The term “traditional,” which commonly refers to the nuclear heteronormative family comprising husband, wife, and their biological (or adopted) children, is not traditional at all, but relatively “modern.” Using the term “traditional,” which is a contingent concept, is problematic. Tradition is a time-dependent and culture-dependent concept. It also subject to subjective (positive/negative) value, which adds certain attributions to it, either as a “good” or “bad.” In the absence of a better term, I follow the conventional dichotomy and use the terms “traditional” and “non-traditional” families in this Article to differentiate the heteronormative (mostly genetic) family from other kinds of families, including same-sex parents' families, single parent by choice

application, considering the current scale of sibling relationships conceived via gamete donation.

Notably, the legal literature to date has yet to deal with the many questions relating to siblinghood beyond the narrow scope of this heteronormative worldview. Assisted reproductive technologies and DNA testing are opening up virtually endless possibilities to society in our era, creating new family structures and new dilemmas about rights, responsibilities, and protections.¹³ This Article provides a much-needed first approach to identifying these dilemmas, by examining siblinghood in donor-conceived families—mostly same-sex female families (and specifically those created through sperm donation), which are growing in number.¹⁴ In such families, we may find: siblings growing up in the same household who do not share any genetic link, whom I refer to as “relational (non-genetic) siblings”;¹⁵ siblings growing up in the same household who are only partially linked genetically;¹⁶ and, at the other extreme, siblings who share a genetic link, but were born to different families and do not reside in the same household, and may not even know of each other’s existence until later in life, if at all. The offspring experiencing this last scenario are widely termed “donor siblings”¹⁷ (a relationship type discussed at length in the work of Naomi Cahn),¹⁸ but for purposes of clarity I nuance this term to “unknown donor-siblings.” These situations raise complex legal questions regarding the creation of sibling relationships, some of the most fundamental of which are set out in this paper. These questions are concerned with: the maintenance of such bonds over time and amid changes in the parent-parent relationship; the rights of the children to

families, and others. At the heart of this Article stand donor-conceived families, just one example of a “non-traditional” family.

13. See MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 40 (2001). See generally NAOMI CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES (2013) (discussing how reproductive technology makes families and forms familial bonds); JANET L. DOLGIN DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE (1997) (explaining that the scope and meaning of traditional conceptions of family are changing due to technology); MARY ANN MASON & TOM EKMAN, BABIES OF TECHNOLOGY: ASSISTED REPRODUCTION AND THE RIGHT OF THE CHILD (2017) (investigating reproductive technology and identifies issues facing non-traditional offspring).

14. I have chosen to discuss families created thanks to sperm donation, which is more common than egg or embryo donation, and is used regularly in creating non-traditional families, mostly for female same-sex couples and single mothers by choice. Most of the discussion in this Article (with the necessary changes) may also fit families created via egg or embryo donations.

15. These siblings may be born to different mothers and to different sperm donors.

16. If the mutual genetic connection originates from one of the parents, they are usually called “half-siblings.” If the genetic connection originates from the same sperm donor, I call them “same-donor siblings.”

17. The term “donor sibling” was used academically for the first time by Eric Blyth, who writes extensively on the subject of gamete donations. Eric Blyth, *Information on Genetic Origins in Donor-Assisted Conception: Is Knowing Who You Are a Human Rights Issue?*, 5 HUM. FERTILITY 185, 191 (2002). In order to distinguish between these and donor siblings who are born to the same family and establish a relational bond, I term them “unknown donor-siblings.”

18. CAHN, *supra* note 13, at 74–76. Naomi Cahn dealt extensively with offspring that were born via sperm donations to different families and their interest to seek one another and to establish contact.

have their siblinghood acknowledged and protected or to search for biological siblings outside the family unit; and how the siblinghood status is even defined.

Part I deals with the unique aspects of the sibling relationship. It briefly reviews the emotional and psychological significance of such relationships in the context of the human lifecycle and presents some of their key expressions in sociological and psychological literature. Part II presents a legal overview of sibling relationships in Western legal systems (mostly common law systems). It discusses trends in the legal treatment of siblings and the changes currently taking place, and uncovers the reasons underlying the legal approach that was taken in the past, and that of the present. In Part III, this Article turns to sibling relationships in non-traditional families, particularly those formed with the aid of sperm donation. In such families, I argue, the need for sibling relationships to be recognized by the law is acute, as they are currently at greater risk of being damaged or irretrievably severed by authorities and courts when there is a breakdown somewhere in the chain of adult relationships on which they depend. Following a general discussion of non-traditional families, this Article examines three case studies, all of which deal with sibling relations created through sperm donation. In two of the cases, sibling relations are created *de facto* in families headed by two women, based on a relational bond (with or without genetic connection). In the third case, I discuss a donor sibling relationship in which the siblings are raised in separate families and do not know one another (“unknown donor-siblings”), but one of them wishes to make contact with the other. The differences between these cases help to uncover and discuss some of the challenging issues they have in common.

Finally, Part IV analyzes these issues and suggests preliminary avenues for debate in the legal context and, just as important, in scholarly and professional thinking. Among others, it uncovers the significance and implication of different sibling relationships, whether different rights should derive from each type, in the eyes of the law, and whether they should enjoy equal levels of protection. Is the sibling relationship necessarily dependent on parents, or can there be a sibling relationship without shared parents? And what weight should we ascribe to the parents’ say in the developing of such relationships? In other words, can parents object to the formation of such a relationship, and to what extent should their objection count? Here, I will make the case for recognizing siblinghood as a separate legal category and assigning that category its own protections.

This Article does not purport to provide a fully developed normative framework for determining the solution to each scenario involving sibling relations. As a preliminary study dealing with siblinghood in donor-conceived families, its aim is to map out the various questions that might arise in certain real-life situations, outlining the distinctions between different types of situations and the fundamental dilemmas associated with them, to demonstrate the limitations of the existing law and propose a general direction for thinking among scholars, regulators, and courts.

I. THE MEANING AND IMPORTANCE OF SIBLING RELATIONS

A. SOCIOLOGICAL PERSPECTIVES

Of all of one's relationships in life, the sibling relationship is typically the longest-lasting. In most cases, it is longer than the parent-child relationship (which ends, usually, with the death of the parent first) or the spousal relationship, which begins at a much later age. In most cases (though by no means all), the sibling relationship includes cohabitation for a significant period of time, shared parental care, and shared life experiences. It extends beyond childhood and adolescence and transforms significantly over the span of decades, as the result of various external circumstances and life-changing events.¹⁹

The relationship may include significant elements of sharing and caring. First, the siblings share the care provided by their parents. Sometimes, they also assume caregiving roles toward one another, both during their childhood and later, during their adult life and even in old age, in accordance with differences in age, gender,²⁰ and personality, dependent on the culture and society in question.²¹ Further, in many cases, siblings share the responsibility of caring for their elderly parents,²² which is only increasing in view of the present increase in life expectancy.²³ In addition to caring, siblings may also act as agents of socialization for their younger siblings, and, as such, serve as positive and sometimes also negative role models.²⁴

19. On the characteristics of this relationship, see VICTOR G. CICIRELLI, *SIBLING RELATIONSHIPS ACROSS THE LIFE SPAN* 1–3 (1995).

20. Particularly among sisters. See Jerrie L. McGhee, *The Effects of Siblings on the Life Satisfaction of the Rural Elderly*, 47 J. MARRIAGE & FAMILY 85, 86 (1985) (“The bonds between sisters were the closest.”).

21. On the effects of culture, see e.g., CICIRELLI, *supra* note 19, at 69–85 (comparing industrialized and non-industrialized cultures). In non-industrial agricultural societies, siblings fill a caregiving role that is similar in essence to the parental role. Thomas S. Weisner & Ronald Gallimore, *My Brother's Keeper: Child and Sibling Caretaking*, 18 CURRENT ANTHROPOLOGY 169, 174 (1977). The caregiving role often comes at the expense of the sibling's personal needs, but they nonetheless perform it in recognition of its social significance. Patricia Zukow-Goldring, *Sibling Caregiving*, in 3 HANDBOOK OF PARENTING: BEING AND BECOMING A PARENT 253, 258, 266 (Marc H. Bornstein ed., 2d ed. 2002).

22. Bonnie Lashewicz, *Sibling Resentments and Alliances During the Parent Care Years: Implications for Social Work Practice*, 11 J. EVIDENCE-BASED SOC. WORK 460, 460 (2014). However, research shows that, in many cases, one of the siblings is chosen to be the exclusive or leading caregiver. See Tennille J. Checkovich & Steven Stern, *Shared Caregiving Responsibilities of Adult Siblings with Elderly Parents*, 37 J. HUM. RESOURCES 441, 442 (2002). For a broader perspective on the role of siblings in the care of older parents, see INGRID ARNET CONNIDIS, *FAMILY TIES AND AGING* 241–47 (2d ed. 2010).

23. For an overview of the changes in life expectancy in affluent Western countries see Yves Decady & Lawson Greenberg, STATISTICS CAN., *Health at a Glance: Ninety Years of Change in Life Expectancy* (2014), <https://www150.statcan.gc.ca/n1/en/pub/82-624-x/2014001/article/14009-eng.pdf>; Public Health: England, *Chapter 1: Population Change and Trends in Life Expectancy*, GOV.UK (Sept. 11, 2018), <https://www.gov.uk/government/publications/health-profile-for-england-2018/chapter-1-population-change-and-trends-in-life-expectancy>.

24. See Robert S. Stewart, *Sibling Attachment Relationships: Child-Infant Interactions in the Strange Situation*, 19 DEVELOPMENTAL PSYCHOL. 192, 198 (1983) (finding that older siblings can act as attachment figures for infant siblings).

In contrast with other relationships, which, in most cases, combine elements of choice (such as choosing whether to marry and whom, or deciding to have a child),²⁵ siblinghood, by definition, *never* entails a choice. The decision to bring a child into the world is most commonly an autonomous decision made by the parents, thereby unilaterally placing siblinghood on their children, even if it is often seen as being in their best interests. There is no formal possibility of release from the sibling “status,” in contrast to marriage (which can be ended through divorce) or the caregiving parental role (which can be severed by giving a child up for adoption). Siblinghood is an involuntary relationship, and siblings cannot free themselves from it in the formal, legal sense.

Nonetheless, over time, siblings *can* shape their relationship through choice, as a close bond that includes elements of sharing and/or caring, or as more distant, to the point of complete emotional detachment. In some cases, sibling relations involve love, intimacy, and a sense of belonging and mutual responsibility or caring, but in other cases (or during different times) they can involve enmity, competition, and jealousy.²⁶ Often, emotions are mixed.²⁷ Various external factors can affect the nature of the relationship. For example, a correlation has been found between the quality of the relationship and the gender of the siblings (females tend to maintain closer relationships with both brothers and sisters), while geographical distance and the familial status of the siblings (whether they are single, whether they have families of their own, and so on) can also predict the degree of closeness and intensity of the bond.²⁸ The quality and the nature of the sibling relationship, it has been argued, have an effect on personal welfare and on individual behavior in other realms of life.²⁹ These findings will be presented in more detail in the following section, which deals with insights into siblinghood from the psychology literature.

Before turning to what we can learn from psychology about sibling relations, however, it should be reiterated that the focus of this Article is on non-traditional families. Thus, we must first understand who these siblings are. In traditional families, the question of “who counts as siblings” seldom arises, since

25. Clearly, however, not every marriage guarantees a choice, and certainly not every pregnancy; every choice, even one that does not entail direct coercion, is affected by socio-cultural forces.

26. For an example of scholarship on love and intimacy between siblings, see Kory Floyd, *Brotherly Love II: A Developmental Perspective on Liking, Love, and Closeness in the Fraternal Dyad*, 11 J. FAM. PSYCHOL. 196 (1997). For an example on competition and jealousy, see Jennifer L. Bevan & Kristen A. Stetzenbach, *Jealousy Expression and Communication Satisfaction in Adult Sibling Relationships*, 24 COMM. RES. REPS. 71 (2007).

27. For a comprehensive study of sibling relations, their significance, importance and variety, see generally JEFFREY KLUGER, *THE SIBLING EFFECT: WHAT THE BONDS AMONG BROTHERS AND SISTERS REVEAL ABOUT US* (2012).

28. Lynn K. White & Agnes Riedmann, *Ties Among Adult Siblings*, 71 SOC. FORCES 85, 97–99 (1992); see also McGhee, *supra* note 20 at 86 (finding that gender, geographic distance, and personality traits greatly influence nature of adult sibling relationships).

29. Laurie Kramer & Lew Bank, *Sibling Relationship Contributions to Individual and Family Well-Being: Introduction to the Special Issue*, 19 J. FAM. PSYCHOL. 483, 483 (2005) (“Yet a growing body of research is emerging that illustrates the many ways in which human development and the quality of life is impacted by relationships with siblings.”).

children born to, and raised by, the same parents are unquestioningly recognized as siblings; in non-traditional families, by contrast, identifying siblings is less intuitive and more complex.

Same-sex families and single-parent families can opt to bring children into the world via assisted reproductive technologies, using sperm, egg, or embryo donors, or surrogacy. Even in heteronormative two-parent families, procreation can be similarly aided by third parties, namely gamete donors and surrogates. And in blended families, children are born to a parent and his or her new partner (who might also have children from a previous relationship). All of these scenarios challenge any simplistic, narrow definition of siblinghood, regardless of whether the family form itself might be considered “traditional” or “non-traditional.” There may be “relational (non-genetic) siblings,” children who are raised together in the same household and share care by the same parental figures but have no genetic affinity. At the other end of the spectrum are children who grow up in separate homes, without any emotional or care-based bond (sometimes without even knowing each other or knowing of one another’s existence), in spite of their genetic affinity. This can arise when offspring from the same gamete donor are born to separate families. Here, my preferred term is “unknown donor-siblings.”³⁰ And we may find siblings whose relationship combines these traits. That is, an emotional affinity may exist alongside a genetic affinity to a common parent (as in second-marriage families, into which further children are born) or a genetic affinity to a party external to the family unit (for example, when two children are conceived with the aid of the same sperm donor—children I term “same-donor siblings”).³¹ In this Article, I have chosen to analyze the growing phenomenon of sibling relationships born of families created via sperm donation. While some of the more challenging situations outlined here are specific to this context, others may also be experienced by (and/or relevant to) families with a more traditional configuration.³²

B. PSYCHOLOGICAL PERSPECTIVES

A review of the psychology research literature reveals two important facts. First, sibling relations (in general) have received limited scholarly attention until recently,³³ relevant scholarship having begun to flourish only in the past two

30. See *supra* note 17.

31. See *supra* note 16.

32. Including blended families, hetero-normative families assisted by sperm donation, and other families that were assisted by egg or embryo donation.

33. Thus, for example, Cicirelli notes in his 1995 book that research on the topic of siblings was lagging behind research on couples or parents’ relationships. CICIRELLI, *supra* note 19, at 1. Subsequent scholarship similarly notes that relatively little attention has been given to siblings in research, compared to studies of other familial ties, such as parenthood and coupledom. Kramer & Bank, *supra* note 29, at 483; Avidan Milevsky & Mary J. Levitt, *Sibling Support in Early Adolescence: Buffering and Compensation Across Relationships*, 2 EUR. J. DEVELOPMENTAL PSYCHOL. 299, 300 (2005); see also White & Riedmann, *supra* note 28, at 85. The reigning assumption was that the sibling bond has a limited influence on the development and behavior of individuals, compared to parental influence.

decades.³⁴ Second, again until more recently, the research tended to focus on the negative influences siblings have on each other, rather than on the beneficial and supportive effects of such relationships.³⁵ This narrow perspective and the limited scope of existing research were highlighted in the introduction to a groundbreaking volume devoted to sibling relations in the therapeutic context from 2010,³⁶ as well as in a 2013 review published in the multidisciplinary journal *Adolescent Health*.³⁷ Both essays note the transformation taking place in both the scope and orientation of the scholarship. In addition to receiving much more scholarly attention,³⁸ the focus of the attention on siblinghood has changed as well: alongside an extensive discussion on the pathological effects siblings have on one another,³⁹ the positive aspects of the sibling relationship are also being studied and highlighted.

For example, studies have looked at the role of older siblings in the lives of their younger siblings as caregivers, role models, mentors, teachers, and playmates.⁴⁰ Such studies have found that, in certain circumstances, siblings can compensate for the physical absence or emotional distance of parents.⁴¹ Positive

34. It is interesting to note that a similar lacuna in research is characteristic also of historical research. See generally Giulia Calvi & Carolina Blutrach-Jelín, *Sibling Relations in Family History: Conflicts, Co-Operation and Gender Roles in the Sixteenth to Nineteenth Centuries. An Introduction*, 17 EUR. REV. HISTORY 695 (2010) (discussing the atmospheric migration from sibling rivalry to sibling support).

35. Katherine Jewsbury Conger, *Beyond Tattling: What Can Siblings Tell Us About Adolescent Behavior?*, 53 J. ADOLESCENT HEALTH 151, 151 (2013).

36. Jonathan Caspi, *Preface to SIBLING DEVELOPMENT: IMPLICATIONS FOR MENTAL HEALTH PRACTITIONERS*, xiii-xvi (Jonathan Caspi ed., 2011).

37. Conger, *supra* note 35.

38. I estimated the scope of these studies by means of a general survey. Using the ProQuest psychology database, I mapped the number of articles published over the past two decades in peer-reviewed journals that included the words “sibling,” “sister,” or “brother” in their title. I found the number of articles on siblinghood during the period 2008–2018 to be 1.6 times greater than the period from 1998–2008.

39. Many studies have shown that negative behaviors externalized by older siblings (antisocial behavior, violence, use of drugs and alcohol, early sexual activity, and more) predict similar negative behaviors among their younger sibling. See Ivy N. Defoe et al., *Siblings Versus Parents and Friends: Longitudinal Linkages to Adolescent Externalizing Problems*, 54 J. CHILD PSYCHOL. & PSYCHIATRY 881, 882 (2013) (“Numerous cross-sectional studies demonstrate significant associations between siblings’ externalizing problems.”); Abigail A. Fagan & Jake M. Najman, *Sibling Influences on Adolescent Delinquent Behaviour: An Australian Longitudinal Study*, 26 J. ADOLESCENCE 546, 546 (2003) (examining sibling similarities in offensive behaviors during adolescence); Jim Snyder et al., *The Consequences of Antisocial Behavior in Older Male Siblings for Younger Brothers and Sisters*, 19 J. FAM. PSYCHOL. 643, 651 (2005) (finding that early sibling conflict and exposure to deviant behavior increases risk to younger siblings for a variety of serious behavior problems in adolescence); Shawn D. Whiteman et al., *Similarities and Differences in Adolescent Siblings’ Alcohol-Related Attitudes, Use, and Delinquency: Evidence for Convergent and Divergent Influence Processes*, 43 J. YOUTH ADOLESCENCE 687, 687 (2014) (investigating social influence processes in explaining siblings’ participation in risky behaviors); Shawn D. Whiteman et al., *Similarities in Adolescent Siblings’ Substance Use: Testing Competing Pathways of Influence*, 74 J. STUD. ALCOHOL & DRUGS 104, 104 (2013) (“[S]iblings (particularly older siblings) have a marked influence on adolescents’ alcohol and other substance use.”).

40. See, e.g., Zukow-Goldring, *supra* note 21 (examining sibling caretakers in multi-cultural study); Stewart, *supra* note 24, at 198; see also Robert B. Stewart & Robert S. Marvin, *Sibling Relations: The Role of Conceptual Perspective-Taking in the Ontogeny of Sibling Caregiving*, 55 CHILD DEV. 1322, 1330 (1984).

41. Wyndol Furman & Duane Buhrmester, *Children’s Perceptions of the Qualities of Sibling Relationships*, 56 CHILD DEV. 448, 448 (1985); Grania Sheehan et al., *Children’s Perceptions of Their Sibling*

sibling bonds have been found to be predictive of greater emotional and social understanding, cognitive abilities, moral sensitivity, and psychological ability to adapt socially.⁴² Nurturing the sibling bond has been found to lead to positive behavioral outcomes (such as self-control and social skills), as well as exerting a positive effect on academic accomplishments.⁴³ Other research has shown that sibling support can even mitigate various risk factors such as poverty,⁴⁴ and that it has a cushioning effect during family crises and stressful life events.⁴⁵ It should be emphasized that, because of the enduring nature of the sibling relationship, it can play an important role not just in childhood, but also throughout adulthood and old age.⁴⁶ As shown by research, adult-sibling bonds have the potential to provide substantial emotional support.⁴⁷ In sum, siblinghood has a significant impact on individuals' and families' lives.⁴⁸

A specific sub-field of psychological research focuses on placement in foster care and adoptive families. This sub-field has produced data demonstrating the positive effects of joint placement of siblings, both in terms of behavior in the foster home and behavior in outside contexts such as school (reduced behavioral problems and improved academic achievements).⁴⁹ Joint placement of siblings can lead to better relationships with peers, greater

Relationships During Parental Separation and Divorce, 41 J. DIVORCE & REMARRIAGE 69, 70–71 (2004) (finding siblings to be protective figures during parental divorce).

42. See, e.g., Mary D. Salter Ainsworth, *Attachments and Other Affectional Bonds Across the Life Cycle*, in ATTACHMENT ACROSS THE LIFE CYCLE 33, 46 (Colin Murray Parkes et al. eds., 1991); Milevsky & Levitt, *supra* note 33, at 300.

43. Mark E. Feinberg et al., *Siblings Are Special: Initial Test of a New Approach for Preventing Youth Behavior Problems*, 53 J. ADOLESCENT HEALTH 166, 171 (2013) (finding that sibling-focused afterschool programming enhanced sibling relationships and children's social competencies).

44. See Susan J.T. Branje et al., *Perceived Support in Sibling Relationships and Adolescent Adjustment*, 45 J. CHILD PSYCHOL. & PSYCHIATRY 1385, 1393 (2004); Milevsky & Levitt, *supra* note 33, at 317 ("Support from siblings . . . serve[s] as a protective factor, or buffer, against negative academic adjustment associated with ecological risk and to compensate somewhat for low mother support.").

45. Krista Gass et al., *Are Sibling Relationships Protective? A Longitudinal Study*, 48 J. CHILD PSYCHOL. & PSYCHIATRY 167, 172 (2007) ("After having experienced stressful life events, children who had affectionate relationships with their siblings were less likely to experience a change in internalizing when compared to those children without affectionate sibling relationships.").

46. Glenna Spitze & Katherine Trent, *Gender Differences in Adult Sibling Relations in Two-Child Families*, 68 J. MARRIAGE & FAM. 977, 977 (2006).

47. A study by White and Riedmann found that about half of the participants in a survey of about 8000 adults with siblings were in contact with their siblings on a monthly basis, and nearly two thirds counted at least on sibling as a close friend. White & Riedmann, *supra* note 28, at 91.

48. For a survey of the range of effects and implications, some positive and others negative, see Shawn D. Whiteman et al., *Sibling Influence in Human Development*, in SIBLING DEVELOPMENT: IMPLICATIONS FOR MENTAL HEALTH PRACTITIONERS, *supra* note 36, at 1.

49. Rebecca L. Hegar & James A. Rosenthal, *Foster Children Placed with or Separated from Siblings: Outcomes Based on a National Sample*, 33 CHILD. & YOUTH SERVS. REV. 1245, 1250 (2011); Devi Miron et al., *Considering the Best Interests of Infants in Foster Care Placed Separately from Their Siblings*, 35 CHILD. & YOUTH SERVS. REV. 1385, 1389 (2013). It is interesting to note that joint placement of siblings, in foster homes and other settings, increases the chances that effective relations with the birth parents be maintained. Split placement makes it objectively more difficult for parents who must travel to different places and devote more time and money to managing these relationships. Considering the difficulties parents experience, this task sometimes seems insurmountable. *Id.*

emotional wellbeing,⁵⁰ and resilience.⁵¹ On the other hand, a conflictual relationship between siblings, together with certain pathologies, particularly those derived from shared traumatic experiences and crises, can be a risk factor.⁵² Thus, joint placement of siblings is neither right nor beneficial in all cases. But as far as it is appropriate, it does apparently hold the potential to contribute to the siblings' welfare.⁵³

Another branch of psychological research focuses on the sibling relationship during and following divorce. Although most researchers agree that the relationship is affected by the fact of divorce *and* its process—that is, by the intensity and duration of the conflict⁵⁴—there is less consensus on the nature of this effect.⁵⁵ Psychological research suggests—reasonably, it would seem—that the sibling relationship should be maintained during and after the divorce, to protect the sibling support system and defend the children concerned against the negative effects of the dissolution of the family unit, parental conflicts, and, in some cases, the absence of one of the parents.⁵⁶ Kluger has argued that split-custody arrangements exacerbate the trauma children experience during a divorce: the pain of separation from the parent who did not win custody can be made worse if compounded by separation from a sibling as well. If the siblings were to stay together, they could comfort one another, and the pain of the divorce

50. See Miron et al., *supra* note 49, at 1389.

51. Sabrina M. Richardson & Tuppert M. Yates, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 CHILD. & YOUTH SERVS. REV. 378, 384 (2014).

52. Karen Rothschild & Daniel Pollack, *Revisiting the Presumption of Jointly Placing Siblings in Foster Care*, 12 SEATTLE J. FOR SOC. JUST. 527, 529–30 (2013).

53. L. Oriana Linares et al., *Placement Shift, Sibling Relationship Quality, and Child Outcomes in Foster Care: A Controlled Study*, 21 J. FAM. PSYCHOL. 736, 741–42 (2007).

54. For a survey of possible effects according to various studies, see KLUGER, *supra* note 27, at 115–27.

55. One cluster of studies indicates that children who experienced divorce maintain strong and beneficial relationships with their siblings. See Caroline Abbey & Rudi Dallos, *The Experience of the Impact of Divorce on Sibling Relationships: A Qualitative Study*, 9 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 241, 241 (2004). Another group of studies shows, on the other hand, that the relationship of siblings whose parents divorced (especially if the divorce happened when the children were older and the level of conflict between the parents during the divorce was high) can be characterized as distant and conflictual in comparison to that of siblings in families without divorce. See, e.g., Avidan Milevsky, *Perceived Parental Marital Satisfaction and Divorce: Effects on Siblings Relations in Emerging Adults*, 41 J. DIVORCE & REMARRIAGE 115, 124 (2004); Patricia Noller et al., *Conflict in Divorcing and Continuously Married Families: A Study of Marital, Parent-Child and Sibling Relationships*, 49 J. DIVORCE & REMARRIAGE 1, 20 (2008). A third group of studies shares the conclusion that divorce affects the sibling relationship but found that the effects are not necessarily exclusively positive or negative. Thus, for example, children whose parents were divorced had more intense relationships with their siblings—relations that were characterized, on the one hand, by greater closeness and warmth, and on the other hand, greater hostility and conflict. Sheehan et al., *supra* note 41, at 72. Yet, another study found that greater parental conflict may have led to greater conflict among siblings, but that this did not affect the positive aspects of the sibling bond, such as the quality of the relationship and the frequency of interaction. Anne-Rigt Poortman & Marieke Voorpostel, *Parental Divorce and Sibling Relationships: A Research Note*, 30 J. FAM. ISSUES 74, 84 (2009).

56. Sheehan et al., *supra* note 41, at 90.

would be easier to bear and possibly less traumatic.⁵⁷ Various studies reveal, among other findings, that split custody denies children important sibling support and comfort, leads to the development of unhealthy alliances between the child and the parent receiving custody, and harms the development of sibling relationships by denying the high level of physical and emotional interaction they require,⁵⁸ especially when the children concerned are young.

Although the overwhelming majority of psychological studies have investigated the sibling relationship in the context of the *traditional* family, they are far from irrelevant for our purposes: at least part of this scholarship can also be applied to non-traditional families. We can assume (albeit not without hesitation) that, as long as the siblings live in the same household and maintain a sibling relationship, particularly one that began in infancy, the relationship is likely to present similar features to those found in the sibling relationships by the studies discussed above.⁵⁹ Some insights can also be derived from the literature regarding families where step-siblings (those without genetic affinity) and half-siblings (sharing one genetic parent) live together. A survey of this research reveals a range of findings.⁶⁰ Some of the studies, for example, found no difference in the degree of mutual affection felt by full siblings in traditional families compared to the mutual affection felt by siblings in blended families.⁶¹ Even a study focusing on families combining both adopted and biological children identified no differences in their sibling relationships.⁶² One study,

57. See KLUGER, *supra* note 27, at 116–17. One study found that splitting custody of the siblings did not necessarily have a negative effect on their relationship and that it may have even had a beneficial element to it. See Bruce Hawthorne, *Split Custody as a Viable Post-Divorce Option*, 33 J. DIVORCE & REMARRIAGE 1 (2000).

58. Thus, for example, one study found that siblings separated as the consequence of a divorce were in less frequent contact and their relationship was less stable and harmonious than that of siblings who were not separated by a divorce. Sylvie Drapeau et al., *Siblings in Family Transitions*, 49 FAM. REL. 77, 83 (2000).

59. Step-siblings who were not raised together from birth and did not spend their entire childhood together have a different relationship: their connection is weaker and their emotional support for each other is more limited. Kathryn Harker Tillman, “Non-Traditional” Siblings and the Academic Outcomes of Adolescents, 37 SOC. SCI. RES. 88, 91 (2008). The study ascribes these differences to the fact that they were not together from birth and to the shorter amount of time they spent together, rather than to other differences. *Id.*

60. The detailed survey presented by Plewes, which covers a range of findings (some contradictory) from studies about step-siblings and half-siblings, as well as their direct conclusions, indicates similarity between step-siblings and blood siblings. See Pamela Sandeau Plewes, *The Presence of Siblings and Stepsiblings and Adolescent Adjustment in Stepfamilies* (2002) (unpublished Ph.D. dissertation, University of Miami) (on file with author); see also E. Mavis Hetherington & Kathleen M. Jodl, *Stepfamilies as Settings for Child Development*, in STEPFAMILIES: WHO BENEFITS? WHO DOES NOT? 55, 74–75 (Alan Booth & Judy Dunn eds., 1994) (finding no positive or negative relationship differences between established step-siblings and biological siblings, but also finding less rivalry amongst unrelated siblings); KLUGER, *supra* note 27, at 137–45 (explaining scientific and sociological debate regarding genetic factors in biological and step-sibling closeness). See generally WILLIAM R. BEER, STRANGERS IN THE HOUSE: THE WORLD OF STEPSIBLINGS AND HALF-SIBLINGS (1989) (analyzing step-sibling relationships).

61. Michael Yee Shui, *Blended Families and Their Influence on Sibling Relationships and First Union Formation* 84–85 (Dec. 2015) (unpublished Ph.D. dissertation, Graduate College of Bowling Green State University), <https://core.ac.uk/download/pdf/47055757.pdf>.

62. Shelley R. Joseph, *The Relationship Between Adopted Young Adults and Their Non-Adopted Siblings in the Perceptions of Current Family Relationships* 63–64, 58–60 (2002) (unpublished Psy.D. dissertation, University of San Francisco) (on file with author).

however, found greater complexity in the relationship between half-siblings, stemming, it argued, from the asymmetry in their links to their parents: one has a double genetic affinity, while the other has a genetic affinity to only one of the parents. Such asymmetry may cause jealousy and competition.⁶³ However, this particular finding is ascribed, in part, to the fact that these were second-marriage families, formed following a divorce, rather than families that were thus shaped originally. According to this study, at least some of the characteristics are explained by the resistance children from a previous marriage feel toward the very decision their parent made to establish a new family.⁶⁴

The other case this Article discusses is that of “unknown donor-siblings”—those who share a genetic bond, created by sperm donation from the same donor, but do not live in the same family unit, and likely do not know one another. The relationships between unknown donor-siblings are fundamentally different from those of siblings growing up in the same household. This Article refers to their relationship at the point in time where there is no affective sibling connection (or any other kind of relationship) between them, but curiosity (and other valid interests)⁶⁵ motivate them to embark on a journey in search of one another. Some of the research to date has examined the motivations of mothers of children conceived via sperm donation to search for their children’s donor siblings. The extant research has revealed the motives for such a search—from curiosity to a longing for information, but also the desire to create familial bonds between the siblings.⁶⁶ A study of donor siblings themselves (most of them adults already) found similar motives. The overwhelming majority of those who sought out their unknown donor-siblings reported curiosity as a motive for their search, and many indicated it was their primary motivation.⁶⁷ Many also reported the desire to create a family bond, a desire that was stronger among children of single-parent families.⁶⁸ Other studies reported that the contact did not end after a single

63. Tillman, *supra* note 59, at 91–92.

64. Beer talks mostly about second-marriage families, in which offspring from a previous marriage are obliged to merge into the new marital structure and compose a step-family. Beer, *supra* note 60. In many of these families, he uncovers animosity and rivalry. *Id.* at 14–16.

65. People who were born via sperm (or egg or embryo) donation commonly feel the desire to find their siblings (and maybe also the donor himself) for other reasons as well. They may need or want to gain a full family-health history, for example, or to make sure they are not romantically engaged with one another. The fear of inadvertent incest is also a religious concern. Although the probability of accidental incest is relatively low, the fact that there is no meaningful limit on the number of specimens a man can give, we cannot entirely ignore the possibility.

66. Tabitha Freeman et al., *Gamete Donation: Parents’ Experiences of Searching for Their Child’s Donor Siblings and Donor*, 24 *HUM. REPROD.* 505, 505 (2009); Rosanna Hertz & Jane Mattes, *Donor-Shared Siblings or Genetic Strangers: New Families, Clans, and the Internet*, 32 *J. FAM. ISSUES* 1129, 1142 (2011); Joanna E. Scheib & Alice Ruby, *Contact Among Families Who Share the Same Sperm Donor*, 90 *FERTILITY & STERILITY* 33, 33 (2008).

67. Vasanti Jadva et al., *Experiences of Offspring Searching for and Contacting Their Donor Siblings and Donor*, 20 *REPROD. BIOMED. ONLINE* 523, 527 (2010); Sherina Persaud et al., *Adolescents Conceived Through Donor Insemination in Mother-Headed Families: A Qualitative Study of Motivations and Experiences of Contacting and Meeting Same-Donor Offspring*, 31 *CHILD. & SOC’Y* 13, 13 (2017).

68. Jadva et al., *supra* note 67, at 528.

meeting and that an ongoing relationship was formed, with meetings as frequent as monthly.⁶⁹ The great majority reported a high level of satisfaction from the contact and relationship formed with their donor siblings, and some reported an instant connection, as one subject reflected: “[I]t is like we have known each other all our lives.”⁷⁰

II. SIBLINGHOOD IN FAMILY LAW: GENERAL TRENDS

This Article explores sibling relationships from the perspective of the law in Western legal systems (mostly Common Law systems) and discusses some of the key challenges that can arise at the intersection where law and the notion of family meet. This Article focuses in particular on the non-economic aspects of the sibling relationship, examining the question of how to protect it and ensure its future realization vis-à-vis other influential parties—mostly the state and its authorities, courts, Child Protection Services, and also the (biological) parents or other caregivers.⁷¹

The primary focus of interest in the relationship between young siblings in current legal thinking is concerned with maintaining those relationships in crisis situations and during the dissolution of the family unit. Two key issues are regulated by some legal systems, either by statutes or by courts, including those of various U.S. states (although they are focused on families where siblinghood is recognized as a factor—meaning heteronormative ones). The first has to do with preserving the siblings’ relationship after their parents have separated, in the context of custody arrangements.⁷² The other relates to maintaining the sibling relationship following adoption or placement in foster care, children’s homes, orphanages, or the like.⁷³ Additional issues arise in related areas, such as abduction to a foreign country by one of the parents in the context of a dispute,⁷⁴ or in adoption cases in which one sibling searches for the other(s) years later.⁷⁵

69. *Id.* at 529.

70. *Id.* at 530.

71. This Article does not deal with issues of financial support, inheritance, or succession of/between siblings. For these areas, see generally Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-Blood Statutes to Reflect the Evolving Family*, 58 SMU L. REV. 137 (2005). Nor does it deal with the unique case of organ or tissue donation between siblings. See generally Michele Goodwin, *My Sister’s Keeper?: Law, Children, and Compelled Donation*, 29 W. NEW ENG. L. REV. 357 (2007); Richard F. Storrow, *Therapeutic Reproduction and Human Dignity*, 21 LAW & LITERATURE 257 (2009). Nor does this Article deal with the prohibition of sibling incest, although this prohibition is indirectly connected to the idea of protecting a healthy and caring relationship between siblings. For the complexity of the issue, see, for example, *State v. Sharon H.*, 429 A.2d 1321 (Del. Super. Ct. 1981).

72. Hasday, *supra* note 1, at 912.

73. *Id.* at 903.

74. Rhona Schuz, *Separating Siblings in Hague Convention Abduction Cases*, FAM. L. NEWSL. (Int’l B. Ass’n, London, Eng.), Sept. 2013, at 39, 39; Rhona Schuz, *Habitual Residence of the Child Revisited: A Trilogy of Cases in the U.K. Supreme Court*, 26 CHILD & FAM. L.Q. 342, 343 (2014).

75. Mary Kate Kearney & Arrielle Millstein, *Meeting the Challenges of Adoption in an Internet Age*, 41 CAP. U. L. REV. 237, 259 (2013); see also Ruth Zafran, *The Right of Offspring to Seek Out Their Biological Parents* (2004) (unpublished LL.D. thesis, Hebrew University of Jerusalem) (on file with author).

As noted in the Introduction, these subjects have been studied by Hasday and others and will be referred to only briefly in this Article.⁷⁶

An examination of the contexts in which questions surrounding sibling relations arise in traditional families reveals the relative weakness (and therefore vulnerability) of this relationship in the legal sense.⁷⁷ It is a relationship taken for granted—as the family broadly functions as a single integrated unit—and hence it is not fully protected when the family breaks up.⁷⁸ In certain legal contexts, the siblings receive no legal consideration at all, while in others they are “present absentees,” in the sense that the law implicitly recognizes their sibling status, their rights, and the need to protect their interests, but this recognition is barely expressed and is perceived as “self-evident.”⁷⁹

One explanation for this silence surrounding siblinghood might be the long-standing conflation (which still persists to an extent) between parental and sibling relations. In the past, as children began to be recognized as separate legal entities in their own right, parent-child relations were wholly intertwined with the parent-parent relationship—that is, the relationship of the couple (or the breakdown thereof). Consequently, the parent-child relationship was addressed solely as part of the regulation of the spousal relationship, rendering the former a “mediated” bond rather than an independent one.⁸⁰ To the extent that the regulation of the parent-child relationship is a derivative of the regulation of the *spousal* relationship (especially upon separation), matters concerning the regulation of the *sibling* relationship remain obscured by the adults’ interests, and have thus evaded distinct acknowledgement. In short, while the law has not ignored the concerns of siblings in their relationships with one another, it has neither bestowed upon them an independent status nor regulated them separately.⁸¹

The need for separate regulation was not prioritized, among other reasons, because there was a naturally occurring overlap or correlation between the law’s interest in maintaining the parent-child bond and the siblings’ interest. As there

76. Hasday, *supra* note 1, at 899.

77. Dailey & Rosenbury, *supra* note 1, at 1490–92.

78. The situation is different in Australian states, in two important respects. In the context of child custody decisions, the siblings’ relationship is protected through the concept of the “best interest of the child,” and the criteria defined in the statute and by courts include (indirectly at least) protection of the sibling link. In the context of adoption, the law specifically mentions the interest to protect the sibling connection. For child custody, see *Family Law Act 1975* (Cth) pt VII div 1 sub-div BA s 60CC(3)(b)(ii) (Austl.). For adoption, see *Adoption Act 2000* (NSW) ch 2 s 8(2)(f) (Austl.). However, in the case of the United Kingdom, things are handled differently. There, at least in care and adoption proceedings, the sibling relationship does not enjoy full protection. DANIEL MONK & JAN MACVARISH, SIBLINGS, CONTACT AND THE LAW: AN OVERLOOKED RELATIONSHIP? 56 (2018), <https://www.nuffieldfoundation.org/sites/default/files/files/Siblings%20Full%20Report%202018.pdf>.

79. See e.g., Aaron Edward Brown, *He Ain’t Heavy, He’s My Brother: The Need for a Statutory Enabling of Sibling Visitation*, 27 B.U. PUB. INT. L.J. 1, 13–14 (2018).

80. See Rebecca L. Scharf, *Separated at Adoption: Addressing the Challenges of Maintaining Sibling-of-Origin Bonds in Post-Adoption Families*, 19 U.C. DAVIS J. JUV. L. & POL’Y 84, 123 (2015).

81. According to Dailey & Rosenbury, *supra* note 1, at 1490, under the present legal model, sibling relations are recognized as deriving from the parent-child relationship.

was rarely a sibling relationship that was not the result of sharing the same biological parents, the regulation of sibling relations was covered by the legally recognized parent-child relationship, and it drew primarily on parental rights.⁸² This was particularly true in the key issue of custody. Custody arrangements, which guaranteed the relations between a parent and his or her children, also *de facto* protected the relationships between the children themselves. More complex issues did not arise in the shaping of custody arrangements, since these arrangements usually had one sole non-negotiable format: maternal custody of all the children and visitation rights for the father. In these circumstances, the sibling relationship was ensured in any case. Now, however, with transformations in the division of household labor, leading to a growing paternal participation in childcare, the recognition of the father as a caregiver even after separation, and the increased variation in family structures,⁸³ there is no longer a self-evident correlation between parental and sibling relations. This social evolution requires legal adaptation, which is now slowly taking shape in the realm of *heteronormative* families. This Article is the first of its kind to call for similar advances in regulation in the case of *donor-conceived* families.

Another possible reason that the law, traditionally, did not formally recognize sibling relationships could be the way these relationships are formed; as noted, siblinghood is, inevitably, the result of the decisions and actions of others. As siblings do not choose to become siblings and cannot voluntarily leave that relationship, this feature could explain the law's reluctance to place legal obligations on them. Thus, for example, economic responsibilities toward one another, such as alimony, are undeveloped.⁸⁴ It is possible that this basic legal position, refraining from defining siblinghood as a status entailing positive legal rights and obligations, has influenced the shaping of this relationship as an extralegal one, thereby also affecting other aspects of the relationship discussed in this Article—specifically those concerned with maintaining it. In other words, it might be that the relational bond between siblings enjoys such limited legal protection because the law does not recognize siblinghood as having a fully-fledged legal status and does not deal with it in the legal contexts of other family relationships.⁸⁵

All the same, changes over time have led to the sibling relationship receiving greater care and attention from the law, such as in matters of custody arrangements, as well as certain reinforcement by the laws and policies of

82. For a general discussion of the existing legal emphasis on hierarchical rather than vertical relations, see *Id.* at 1456–72.

83. See *infra* Part III (dealing with siblinghood in non-traditional families).

84. See Allan V. Horwitz, *Siblings as Caregivers for the Seriously Mentally Ill*, 71 MILBANK Q. 323, 324 (1993) (“Sibling roles encompass some obligation, but the commitment to aid brothers and sisters is highly variable.”).

85. In making this affirmation, I do not mean to imply that siblings are entirely outside the legal sphere. For example, siblinghood is considered in some criminal aspects, including incest prohibitions and liability for sexual assault.

relevant authorities.⁸⁶ Scholarly legal literature is also increasingly interested in these relations.⁸⁷ I believe there are two reasons for this shift, which, I wish to emphasize, is still very much in its infancy. First, it accords with the overall changes in the general societal and legal treatment of children and their status in the family. The traditional position relegated children to the margins of society and law, while family law was understood primarily as addressing the relationship between spouses,⁸⁸ and later also their relationship with one another vis-à-vis their children. But for some time now, children as people in their own right have been granted more significant attention in academic discourse, the legal sphere, and in social reality.⁸⁹ This evolution, it seems, has not overlooked sibling relationships in recent decades, either as a separate category, or as part of a general recognition of siblings' relationships with other significant persons.⁹⁰ The discourse that followed *Troxel v. Granville*, which addressed children's relationships with their grandparents in situations where the parental relationship breaks down,⁹¹ has repercussions for the sibling relationship as well.⁹²

Second, this transformation appears to be taking place in parallel to changes in other fields of research, and it might even be influenced by those changes. In the past, there was little recognition among scholars and professionals—social workers, pediatricians, and clinical psychologists, for instance—of the importance of siblinghood to the welfare and development of children, and thus, no apparent legal justification for recognizing and defending it. However, the turn in psychological research over the last two decades, toward examining this relationship more extensively and highlighting its positive elements, seems to be reflected in changes in the law.⁹³ The greater emphasis on child welfare in general legal discourse and the more prominent role played by psychology in shaping child custody decisions specifically,⁹⁴ combined with

86. Dailey & Rosenbury, *supra* note 1, at 1490 n.157, 1511 n.251. For an extreme example of an adoption agency's disregard for the connection between siblings, see *THREE IDENTICAL STRANGERS* (CNN Films 2018).

87. Brown, *supra* note 79, at 19–20.

88. With an emphasis on the couple's relationship within a marriage, see Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 *STAN. L. REV.* 167, 177 (2015).

89. For an extensive review, see generally Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 *MICH. L. REV.* (forthcoming 2020).

90. Dailey & Rosenbury, *supra* note 1, at 1487–89; see also Susan Tomaine, Comment, *Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 *CATH. U. L. REV.* 731, 748–49 (2001).

91. *Troxel v. Granville*, 530 U.S. 57, 60–61 (2000) (plurality opinion).

92. On the position that differentiates siblings from third parties, such as grandparents, see Natalie Amato, *Black v. Simms: A Lost Opportunity to Benefit Children by Preserving Sibling Relationships When Same-Sex Families Dissolve*, 45 *FAM. L.Q.* 377, 385 (2011); Brown, *supra* note 79, at 13–14; Scharf, *supra* note 80, at 122.

93. See CASPI, *supra* note 36, at 1 (“An emerging body of work, however, documents that siblings are indeed important and can influence one another in various ways.”); Conger, *supra* note 35, at 151 (explaining a study that found that there were benefits to including siblings in interventions).

94. Robert F. Kelly & Shawn L. Ward, *Allocating Custodial Responsibilities at Divorce: Social Science Research and the American Law Institute's Approximation Rule*, 40 *FAM. CT. REV.* 350, 363 (2002); Daniel W.

growing recognition of the psychological significance of siblinghood, indicate possibly that this relationship is beginning to be recognized as deserving of its own legal protections. Although the link between psychological and legal fields in this sense may be self-evident,⁹⁵ it is possible that the increasing recognition of the importance of sibling relations in the legal world is taking place independently of the aforementioned recognition in the psychology sphere. In either case, the shift in legal thinking is apparent and highly significant.

III. SIBLINGHOOD IN NON-TRADITIONAL FAMILIES

A. OVERVIEW

In conventional nuclear families, the formation of the sibling relationship requires being born to the same parents and living together in the same household. That is, a mother bears children who inherit her genes and those of her male partner. The children are full biological siblings and have a genetic affinity with each other and with their two parents. As they are born into the same household and are cared-for by the same parents, in principle they also form significant relational bonds. Hence, their “status as siblings” is obvious and unquestioned. Should their parents decide to separate, in many cases the maintenance of the siblings’ relationship over time is derived, as noted, from the arrangements made by the parents and the legal protections offered to them to ensure their continued relationship with their children, post-separation.⁹⁶ In effect, in this scenario the continued connection between the siblings themselves is a happy byproduct of the law’s protection of parental rights, rather than the result of legal recognition of the importance of this specific bond.

The need to recognize siblinghood as separate legal category and to assign that category its own protections has only become more apparent as family units become increasingly varied in their composition and the types of affinity between children transform.⁹⁷ The range of family types typically found now in contemporary Western society challenges intuitive or unthinking definitions of siblinghood. For example, as we have seen, children may grow up in the same household without having any genetic affinity to one another, or alternatively, grow up in separate homes, sometimes without even knowing one another, despite their genetic affinity. Under such circumstances, sibling affinities (of various kinds) can exist independently of parental links or mediation. That is, two children might be siblings without sharing the same caregiver parents, or without having genetic parents in common. Without shared parenting, the needs,

Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 FAM. L.Q. 135, 136–37 (2002).

95. Including, as explained in detail by Huntington, as part of a trend over the last thirty years to give psychological considerations prominence in family law cases. Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 241–57 (2018).

96. See *supra* note 81 and accompanying text.

97. Amato, *supra* note 92, at 377.

rights, or preferences of the children to remain in contact with one another can “slip between the cracks” and fail to receive recognition by the existing law. An adequate response to these interests and their protection entails explicit recognition of such sibling relations.

This reality would seem to call for a preliminary discussion of the definition of siblinghood. Who may be recognized as siblings, such that they are entitled to be included under the distinct category of siblinghood and receive protections accordingly? As noted, non-traditional families, such as those created with the aid of artificial reproductive technologies, but also blended families, create sibling affinities of different kinds. Relational (non-genetic) siblings, unknown donor-siblings,⁹⁸ or same-donor siblings, for example, all present varying types and depths of bond—but whatever its precise nature, it is a bond that is in urgent need of legal recognition.

However, the lack of recognition of the sibling relationship—the fact that it is not a “legal status” that entails a given set of rights and obligations, and there is no registry of siblinghood—enables society to avoid the need to define precise criteria for the identification of siblings. The ever-more-diverse variety of familial forms that is characteristic of our times demands a close examination of the range of sibling affinities and the existing interests in protecting them. It is reasonable to expect that, the stronger the affinity between two siblings, containing both genetic-biological components and relational ties, the greater the protection it should enjoy. It may even be argued that a relational (non-genetic) sibling bond originating in a shared life in the same family unit is worthy of greater protection than a solely genetic bond. All the same, even a sibling relationship founded exclusively on a genetic affinity and lacking any relational affinity created through cohabitation is deserving of protection, even if less so. This relationship is not insignificant. The supreme importance we attach to a sense of genetic belonging in Western culture,⁹⁹ as well as the emotional significance ascribed to genetic origins and elements of similarity and continuity between those who share genes, justify legal recognition of the importance of this relationship as well, even if only to create the conditions in which a relational bond can later develop. Such conditions are premised on the understanding that forming the initial bond will probably require some facilitation (above and beyond merely making contact) if it is to become steady enough to form a significant relationship, should the siblings aspire to that.¹⁰⁰

98. Termed by Hertz & Mattes, *supra* note 66, as “genetic strangers.”

99. DOROTHY NELKIN & M. SUSAN LINDEE, *THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON* 14–16 (2004). Specifically, in the context of siblings, see Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 422–23. For the dangers of focusing on the genetic connection, see Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1093–1106.

100. On the significance of the genetic connection and its psychological importance vis-à-vis the donor in the context of sperm donation, see *supra* note 65 and accompanying text; see also Lucy Frith et al., *Searching for “Relations” Using a DNA Linking Register by Adults Conceived Following Sperm Donation*, 13 *BIOsoc’YS* 170, 175–87 (2018); Rosanna Hertz et al., *Donor Sibling Networks as a Vehicle for Expanding Kinship: A*

In the following subparts, I will discuss three case studies featuring families created following conception with the aid of a sperm donation. All three cases are composites, based on facts from real-life families. The detailed discussion that follows will look into the distinctions between the types of bonds created between siblings, including half-siblings, relational (non-genetic) siblings, and unknown donor-siblings, as well the interests formed by these bonds and the appropriate protection they need. It will also highlight the legal dilemmas exemplified by such cases. Nonetheless, it is important to reiterate that this discussion on the issue of sibling relationships in non-traditional families is by no means exhaustive, and it is only intended to make explicit the questions emerging in this field's early stages of formation. My goal here is to stimulate scholarly discussion in making a call for these questions to be considered as part of the shaping of judicial and legislative rulings.

B. SIBLINGHOOD IN WOMEN-LED FAMILIES

The first two case studies discussed here involve children born into families headed by two mothers. In both cases, conception was made possible by the use of sperm donation via a sperm bank, with no involvement of the biological father or legal recognition of him as a parent. In each case, the children have at least one (genetic or caregiving) parent in common, and another parent who is not shared. The legal status of the children vis-à-vis one of their mothers (the partner of the biological mother, who is also the legal mother) has not been settled, and when the family unit breaks down following parental separation, a dispute arises over the continued care of the children and the protection of the sibling relationship.¹⁰¹ To facilitate the discussion, I have given some of the central characters names, but these are entirely fictional.¹⁰²

1. *Case Study One: Relational Siblings—Protecting the Relational Bond*

In this first case, two women have been in a relationship for many years. The first woman, Sarah, conceives via sperm donation and delivers a baby girl. Then, two years later, her partner, Karen, also conceives via sperm donation and delivers another baby girl. They do not regulate their formal parental status regarding each other's biological child (either because the law does not allow it

Replication and Extension, 38 J. FAM. ISSUES 248, 250–51 (2017) (exploring popular and academic developments of kinship understanding).

101. Amato, *supra* note 92, at 378–80.

102. In opting to give names only to the parents and not to the children featured in the case studies, I am mindful that this may be interpreted as indicating that the children are somehow less important than the adults. This is not the case. My entire claim in this Article is based on the premise that children *are* important and have to be positioned at the center of our discussion. Saying that, I was able to differentiate between the children by giving them a gender affiliation (girls in the first case and boys in the second case), and by age distinction—a differentiation I could not achieve for the mothers without resorting to names.

or because they do not think it is necessary).¹⁰³ The girls are being raised together by the two, with Sarah and Karen sharing parental care.¹⁰⁴

When the older daughter is six years old, Sarah and Karen separate. Sarah wants to keep her parental role, not only for her biological and legal child, but also with respect to Karen's biological daughter, whom she considers her own child as well. Her former partner, Karen, in contrast, prefers to disengage completely and refuses to let her daughter remain in touch with Sarah. What protections, guarantees, or recourse can the legal system offer their daughters—girls who have functioned and experienced life as siblings from the day they were born? In a possible offshoot of this scenario, both women might wish to sever all connections—Sarah to Karen's child, and Karen to Sarah's child—and to split into two households and two separate families. What might become of the sibling relationship then?

It is hard to dispute the fact that these are two siblings. After all, even if they do not share a genetic affinity, they grew up together sharing a life experience that creates siblinghood. They were born into the same family and have never had to question whether they would be part of the foundations of that same family forever and live together as siblings throughout the natural course of life. The fact that their mothers separated should not dictate the severing of the relationship between them. Even if it were possible to theoretically justify their separation from a parental figure who raised them together with their birth mother (and it cannot be justified, in my opinion), the state should at least protect their relationship with one another. I believe it is the state's duty to create a framework that ensures the sibling relationship receives adequate protection, and the courts should rule to protect it, just as the sibling relationship in traditional families should be protected.¹⁰⁵

It is interesting to note that, in some cases similar to this, the women might be assisted by the same donor in conceiving their children and thus they share a genetic affiliation *and* a genetic progenitor. The question then arises: if the

103. On the endeavor of women to be recognized as mothers in families headed by same-sex parents, see Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 *YALE J.L. & FEMINISM* 99, 108 (2018); Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 *AM. U. J. GENDER SOC. POL'Y & L.* 467, 470 (2012); Douglas Nejaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260, 2316–30 (2017); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 2 *STAN. J. CIV. RTS. & CIV. LIBERTIES* 201, 225–26 (2009); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 *U.C. DAVIS L. REV.* 305, 331–32 (2006).

104. Different scenarios may raise similar dilemmas. For example, in this British case, one of the mothers was acting to distance her two girls (born by mutual consent via sperm donation during the women's relationship) from her former partner. This, in turn, threatened the connection the girls had with the former partner's son, who had lived with them since birth and was happily fulfilling the role of loving brother. In *re G (children)* (FC) [2006] UKHL 43, [3]–[4] (appeal taken from EWCA Civ). Needless to say, similar issues can also arise in families that were created *without* the assistance of sperm donations, in more complex family structures in which one of the partners, or both, has children from a former relationship.

105. For a recommended infrastructure to regulate siblings' relationship in heteronormative families, see Hasday, *supra* note 1, at 919.

system provides another solution for the siblings in this case, does it matter that they also have a genetic affinity? One would assume that the system would carry a greater obligation to find a proper solution to safeguard the siblings' relationship in such a case, although in my opinion the genetic affiliation (or its absence) should not make a significant difference. It is the relational aspect of their relationship that should be the decisive factor.¹⁰⁶

It can be argued that this situation is not unique to families headed by two women. Heterosexual couples in the process of separation might also decide, in principle, to “divide” their shared children between them, so that one sibling is placed in the mother's household and the other in the father's, thereby severing (completely or partially) the bond between them. If this were the result of their own freely agreed arrangement and the courts played no part in it, no one, in theory, would know of the situation and act to protect the sibling bond.¹⁰⁷ However, if the case were brought before the courts (for example, as part of a process of endorsing the agreement, or if one of the parents changed their minds), the courts might intervene and attempt to prevent the separation. Nevertheless, in contrast to opposite-sex families, where parenthood is automatically recognized from birth, in single-sex families there is no formal, legal recognition of parental status unless there is a *genetic* link between the adult and the child in question.¹⁰⁸ Therefore, the courts might endorse the couple's separation agreement without interfering in its content and without acting to safeguard a sibling relationship that is not recognized by the law.¹⁰⁹ This is also true in the case of second-marriage families, when a couple brings children from their previous relationships into the same unit. The children, who then grow up together in the same household for a significant number of years, lack any biological or formal legal connection, and might find themselves in a similar situation if the couple separates later.¹¹⁰

Each one of these issues deserves independent attention, both judicially and legislatively.

106. In a different context, see Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 86 (2004).

107. Unless the law requires a pre-approval of the arrangement to ensure it has been made with respect to the welfare and development of the children. Thus, even a request for a consent order must stipulate, to the satisfaction of the court, what the care arrangements are. This is the case of divorce in Australia. *Family Law Act 1975* (Cth) pt VI s 55A (Austl.).

108. For the complexity of parental recognition in same sex families see, for example, Feinberg, *supra* note 103, at 123–24; Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J.F. 589, 590–91 (2018); Nejaime, *supra* note 103, at 2316–30; Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 463–64 (1990).

109. Amato, *supra* note 92 at 392.

110. June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 19–23 (2017).

2. *Case Study Two: The Bearing of Siblinghood on Parenthood*

In the second case, one of the women (Kim) cannot become pregnant due to infertility. Kim and her partner (Diane) decide to have two children with the assistance of sperm donation and agree that it will be Diane who carries both the pregnancies on behalf of their joint family. The women raise the first child—a boy—together, sharing care and parental responsibilities. After four years, they have their second baby by the same means. In the meantime, they regulate Kim's parental status with the first child by court order (parentage order or second-parent adoption).¹¹¹ But, unfortunately, they separate a few weeks before Diane gives birth to their second child, also a boy, and before regulating Kim's status as his legal parent. Diane, the biological mother, refuses to allow Kim to see the baby, thereby making it impossible for her to form a bond with him, let alone formalize her parental status. Kim subsequently petitions the court for legal recognition of her status as a mother and, accordingly, visitation rights.¹¹²

This set of circumstances leads us to question whether the law should take into consideration the status of the siblings, their mutual affinity, and their interest in preserving the bond between them, as part of the deliberations over a woman's petition for maternity and visitation rights in the case of a child born to a former partner. The question of the sibling connection is less crucial in this case than in the first one (even if Kim's motherhood is not recognized, and even if her rights to visit the second child are unrecognized) because the siblings' interest in a connection is not overlooked completely. After all, their connection is guaranteed, at least partially, through Diane's motherhood, during the times and days that the first-born child is in her care under the terms of the visitation agreement (or court order) she has with Kim.

Nonetheless, it is obvious that splitting the siblings up and differentiating between them in terms of their legal status, by recognizing the first as the legal child of both Diane and Kim and the second as Diane's only, is far from optimal in all that concerns the sibling relationship. The distinction in the status of the mothers, and certainly the failure to recognize Kim's right to a relationship with the second child, will at the very least mean distinct custody arrangements for each child, and in extreme circumstances, may even lead to a severing of the connection between the siblings. This could arise, for example, if Diane were declared unfit to have joint custody of the first child and thus sole custody is ruled for Kim, or if Diane were to die. In the first case, Kim would have custody of the older child, while the younger one would remain with Diane or be taken away, and the link between them might be broken completely. If Diane were to die, the older child would remain in Kim's custody while the younger would most probably be transferred to the custody of a third party. In such cases, even

111. For these options, see Feinberg, *supra* note 103, at 110–12; Harris, *supra* note 103, at 471–72.

112. On the possibility of forming parental status or gaining visitation rights, see, for example, Carbone & Cahn, *supra* note 110; Naomi Cahn & June Carbone, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399 (2018).

if the connection between the siblings were not entirely severed, it would nevertheless be severely curtailed.¹¹³

To this complex situation we must add the specific nature of the sibling relationship at the point in time in which the family breaks up. In the first case presented, the siblings were raised in the same household from birth and cared-for by the same parental figures throughout their childhood, and thus, the interest in protecting the sibling bond is intuitive. In contrast, no sibling bond was formed in the second case because the family break-up occurred prior to the second child's birth, despite the fact that the children share common genes (at least Diane's, and perhaps also the genes of the common sperm donor). All the same, it is impossible to overlook the emotional significance of the sibling bond that may already have developed for the older child. This child, one may assume, is aware of the pregnancy and is expecting the birth. As far as he is concerned, he has already begun establishing a relationship with his sibling—the brother who will be, or has just been, born. Even if the sibling relationship is not mutual or concrete yet, its emotional significance is not dismissible.

It is worth noting that (in a case outside the United States) recognition of the importance of the sibling bond under similar circumstance led to recognition of a former (female, same-sex) spouse's petition to form a relationship with the newborn baby.¹¹⁴ In this case, the family court decided to recognize the former partner's claim for visitation with the second child, based on the children's "best interest" and based on their siblinghood. Note that the court did not question whether there was, or should be, a sibling bond between the children (given that they did not yet have the opportunity to establish a meaningful relationship), but rather understood that the relationship would be generated through their shared genetic heritage and common birth mother. From this, it was willing to draw the conclusion that the woman who did not give birth to the child, did not share a genetic connection, and had not yet formed a relationship with him/her, should nonetheless be in a position to enjoy visitation rights. The court did not mention whether the children shared the same sperm donor, but in any event, a semi-parental status was granted based on the *interest of the siblings* to have the same familial narrative and symmetrical relationships.¹¹⁵

Although such a ruling probably would not have been made in most U.S. states, where the legal parent's rights are a significant barrier to recognition of

113. Cf. Lisa Westergaard, *What's Going to Happen to Us? The Legal Right of Half-Siblings to Remain Together Once Their Custodial Parent Has Succumbed to a Terminal Illness*, 70 UMKC L. REV. 471, 479–82 (2001) (explaining existing policies that facilitate sibling visitation rights based on the Constitution, and providing an example of a case where an older step-sibling was given custody as a half-sister and foster parent).

114. FamA (Hi) 72549-01-18 Anonymous v. Anonymous, Nevo Legal Database (Mar. 11, 2018) (by subscription, in Hebrew) (Isr.).

115. As manifested by the family court judge that was cited in the appeal: "[W]e [the court] should keep the "family narrative" that was built by the parties before the separation, to the best interest of the two minors." *Id.* at § 23.

other people's visitation or guardianship rights,¹¹⁶ it is nonetheless interesting to consider siblinghood as having the potential to shape parental affinity.

3. Case Study Three: Tracing Unknown Donor-Siblings

The third case, versions of which feature prominently in the work of Naomi Cahn, deals with offspring who are conceived using the same sperm donor, but are raised in separate families that have no *a priori* relationship to one another.¹¹⁷ These children might one day decide to search for one another.¹¹⁸ This case reveals their interest in finding their siblings, rooted in the desire to complete missing information and acquire a fuller picture of their genetic heritage, as well as possibly create a personal connection, a friendship, or even a family bond.¹¹⁹ This interest exists regardless of whether the sperm donation is anonymous or if information about the donor is available.¹²⁰

Today, such interest is not fully recognized legally, and the question of such offspring's access to information is largely shaped privately by the parties concerned.¹²¹ Parents can select an anonymous or identified sperm donation, via an option that allows children to receive identifying information about their siblings or one that does not.¹²² In the United States, in many cases, sperm banks do not provide information about siblings, whether general or specific,¹²³ and therefore the offspring have no professional recourse and no one to turn to for help in locating one another. Even if two genetic siblings wish to meet one another, they have no means of doing so in any formally organized or legally facilitated way.

116. See Susan L. Pollet, *Still a Patchwork Quilt: A Nationwide Survey of State Laws Regarding Stepparent Rights and Obligations*, 48 FAM. CT. REV. 528, 532–33 (2010) (providing example that step-parent interests must be reconciled with the primary interests of legal parents); Katie Sieber, *Custody Involving a Non-Parent: The Rights of Step-Parents Under the De Facto and Psychological Parent Doctrines*, 12–22 (2016) (unpublished J.D. thesis, Michigan State University College of Law), <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1264&context=king>.

117. See generally CAHN, *supra* note 13; Naomi Cahn, *No Secrets: Openness and Donor-Conceived "Half-Siblings"*, 39 CAP. U. L. REV. 313 (2011) [hereinafter Cahn, *No Secrets*].

118. I use the term "children," yet, in most relevant cases, the issue arises when they are young adults. Their adulthood changes their stand vis-à-vis their parents and their parents' potential objection to the relationship they wish to establish.

119. Sonia Allan, *Donor Conception, Secrecy and the Search for Information*, 19 J.L. & MED. 631, 637–38 (2012); Cahn, *No Secrets*, *supra* note 117, at 336–37; Jadva et al., *supra* note 67, at 527–30.

120. For an extensive discussion of this case, see Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 383–86 (2012). See generally SONIA ALLAN, *DONOR CONCEPTION AND THE SEARCH FOR INFORMATION: FROM SECRECY AND ANONYMITY TO OPENNESS* 30–37 (2017).

121. Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1119–22 (2014).

122. Glenn Cohen et al., *Sperm Donor Anonymity and Compensation: An Experiment with American Sperm Donors*, 3 J.L. & BIOSCIS., 468, 469 (2016).

123. In general and in the United States, see Eric Blyth & Lucy Frith, *Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity*, 23 INT'L J.L. POL'Y & FAM. 174, 182–83 (2009); Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 11 (2008).

One might argue that such cases have nothing to do with siblinghood. The emphasis on the relational bond—on siblinghood as the result of intimacy, care in the same household by shared parents, and shared education and life experiences—is indeed appropriate and justified. These elements form the foundation of familial relationships. Yet, despite the fact that genetic affinity is not, and should not, be everything, it still is an important cornerstone of familial bonds.¹²⁴ It is impossible to ignore the significance of genetic origin as an element of one’s self-perception, because of the prominent place that a sense of genetic belonging holds in our culture.¹²⁵

There are two types of interest: one is fueled by a desire for general information, first and foremost, to discover whether there are any genetic siblings, and, if so, how old they are, their gender, roughly where they live, whether they have other siblings, and so on; the other is driven by the desire for identifying data.¹²⁶ The search for identifying data (specific name, address, and/or other contact details) might be grounded in a specific interest (such as to avoid the potential for inadvertent romantic involvement with a sibling)¹²⁷ or, as noted, the attempt to establish a personal relationship, be it a friendly interpersonal connection or a familial connection with the sibling(s). The identifying data, which make it possible to locate siblings, can thus form the foundations for a future relationship of some sort.¹²⁸

Clearly, in the age of social networks¹²⁹ and of voluntary genetic databases such as “23andMe” and “AncestryDNA,”¹³⁰ there are alternative options for conducting a search. However, these options are not regulated by law, and it is doubtful whether they properly protect the interests of all relevant parties.¹³¹ The expanding access to data means that, in practice, it is possible to circumvent restrictions meant to preserve anonymity.¹³² The protection of family privacy—

124. The most typical example of this, of course, is parent-child relations, in which genetics is, even today, the starting point for their identification and definition.

125. NELKIN & LINDEE, *supra* note 99, 11–15; Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 316–21 (1992).

126. Eric Blyth, *Information on Genetic Origins in Donor-Assisted Conception: Is Knowing Who You are a Human Rights Issue?* 5 HUM. FERTILITY 185, 187–88 (2002).

127. Naomi Cahn, *Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 104 (2009).

128. The most up-to-date research indicates that many offspring (71%) categorize this relationship as a familial connection after they meet. Hertz et al., *supra* note 100, at 274–76.

129. Hertz & Mattes, *supra* note 66, at 10–15.

130. James W. Hazel & Christopher Slobogin, *Who Know What, and When?: A Survey of the Privacy Policies Proffered by U.S. Direct-to-Consumer Genetic Testing Companies*, 28 CORNELL J.L. & PUB. POL’Y 35, 37 (2018).

131. For a general discussion on dilemmas that have arisen in the age of genetic testing, see Joanne L. Hustead & Janlori Goldman, *Genetics and Privacy*, 28 AM. J.L. & MED. 285 (2002); Radhika Rao, *A Veil of Genetic Ignorance? Protecting Genetic Privacy to Ensure Equality*, 51 VILL. L. REV. 827 (2006); Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077 (1998); Christine Rosen, *Liberty, Privacy, and DNA Databases*, NEW ATLANTIS, Spring 2003, at 37.

132. See e.g., *Educating, Connecting and Supporting Donor Families*, DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com> (last visited Mar. 20, 2020).

both that of the mothers using sperm donation and that of the rest of their family members—requires that general information (and even more so, identifying data) only be provided through a regulated framework that is mediated by sperm banks or other professionals.

In all three scenarios highlighted by these composite case studies, the current regulation is unsatisfactory. The siblings' rights are not addressed fully—if at all—and their legitimate interest in forming and, especially, maintaining their relationship is not protected. I will now comment on some of the primary questions they raise. It is beyond the scope of this Article to answer all of them directly (indeed I am not sure that proper answers exist for all of them at this point), but they should be addressed in future research.

IV. SIBLINGHOOD IN DONOR-CONCEIVED FAMILIES: NEW LEGAL QUANDARIES

The primary question is: How should we define the sibling relationship? That is, under what circumstances should we legally and formally recognize two children as siblings?

In the spirit of the times, when there is a push to move away from one single, strict, definition of family relations (including parenthood and couples), and in light of the fact that siblinghood is not currently a distinct status entailing rights and obligations, there is no need (and indeed it would not be right) to draw a strict definition of siblinghood. As we have seen in this Article, siblinghood can exist even without a genetic component and without shared care by a common parent, but at least *one* of these conditions must be fulfilled. The relational bond—be it already formed, or an initial, imagined, or potential connection—is of central importance, and constitutes the heart of the recognition of siblinghood and its legal consequences.

Assuming we can successfully answer the question of who are defined as siblings, the next question is: What are the legal consequences of being recognized as siblings? And consequently, is siblinghood a fixed and defined legal structure, which must always confer the same rights and protections, or can we speak of different kinds of siblinghood that deserve different rights and different levels of protection? For instance, do siblings who share a genetic connection deserve more protection by the law than relational siblings who do not, assuming in both instances that the children in question were raised by the same parental figures in the same household for a significant period of time?

While I contend that the key element of siblinghood that should confer legal protection upon siblings is the relational bond, I also believe that genetics plays a highly significant role. I have emphasized here the importance of genetics in relation to siblings who do not know (of) each other (“unknown donor-siblings”), where it fuels the motivation to trace the siblings and demands society's recognition of the siblings' interest in identifying one another. In the case presented here, shared genetics adds weight to the recognition, even if it is important to allow for protection of a relationship based on actual shared family

life experience. The significance of genetics might be greater in borderline cases, when the relational-caring bond has not existed for many years. In any case, this Article does not claim to define precisely the necessary conditions or details of arrangements, but rather to indicate the appropriate general direction.

Another valid question raised during the discussion of the three case studies is: Can siblings be recognized as such without having any legal parents in common? And, framed more generally: What is the connection between parenthood and siblinghood? Can we separate the two statuses?

In traditional families, siblinghood is derived from parenthood. Siblings are siblings because they were born to the same parents. The siblings' relationship has always been, to a great extent, recognized legally through the parental connection. For instance, in custody and visitation arrangements, their ongoing contact was assured as part of their parents' rights to custody or visitation; and to some extent this was also the case in adoptions, since contact between siblings was maintained as a natural byproduct of their connection with their parents. In the case of non-traditional families, we have seen that siblinghood may evolve, *de facto*, without formal-legal shared parentage.

Some may argue that recognizing siblings who do not share common parents, or recognizing siblings separately from their parents' status is, without a doubt, another step toward the complete fragmentation of the family.¹³³ Broadly, this began during the last century as part of the separation of marriage from parenthood and as part of granting children individual rights independent from their parents (sometimes even contradicting their parents' rights). Yet I would argue that this fragmentation does not lead to the erosion of the family, but rather to its revival and regeneration. New forms of families are being created all the time and new familial relations woven. This may not only be the creation of new relations, but also the recreation of old relations in a novel way. So now the question is: To what extent can siblinghood create parenthood?

Let us think about the second case presented earlier. As described, two women separated a short time before the delivery of their second child and already had a four-year-old child who was legally adopted by the former partner. In a similar case, a court outside of U.S. jurisdiction decided to recognize the ex-partner's claim for visitation rights with the second child, and *de-facto* granted her parental rights based on the children's "best interests" and rights in recognition of their siblinghood.¹³⁴ On that basis, it granted parental rights, including visitation, to a woman who had neither given birth to the child (and

133. For a more philosophical perspective, see BRENDA ALMOND, *THE FRAGMENTING FAMILY* 98–118 (2006).

134. FamA (Hi) 72549-01-18 *Anonymous v. Anonymous* (Mar. 11, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.) ("A minor right to identity and belonging reflects his life story and roots. This right is separated from his parents. His voice should be heard separately from his parents and his opinion, will and best interest should be taken into consideration. In these circumstances the voice of the two minors and their best interest lead to the decision to enable the connection between the minor (the second child) and the plaintiff (the ex-partner)"). See Fam (Hi) 60666-06-16 *Anonymous v. Anonymous* (June 8, 2018), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

hence had no biological link) nor formed a tangible relationship with him/her. The quasi-parental status was also granted *indirectly*, based on the best interest of the child, which gives special weighting (as defined by the court) to the siblings' connection as a fundamental contributor to the welfare of both children. This weighting was intended to lend support to the continuity of the "family story" that all parties had started to narrate before the family unit was dissolved.

A final question: Is it possible to recognize and protect the connection between siblings *in spite of* the objections of their respective parents? I believe we can say, preliminarily, that even if siblings who do not share the same genetic parents can be recognized, their relations (as siblings) are part of a larger web of relationships from which they should not be detached. Families form a complex and delicate fabric of interactions and relations, and we have to deal with them with the necessary sensitivity. As we learn from relational theory, the individual is not an isolated atom.¹³⁵ In the same way, the sibling relationship is not an isolated relationship, but rather operates within a network of multiple relationships. This means we cannot disregard the position of the parents altogether (unless they do not act as parents, as in the case of sperm donors).¹³⁶ Equally, giving voice and legal recognition to siblinghood should not automatically entail bestowing upon this status the power of veto over all other relationships.¹³⁷ But I do believe it should give sibling bonds a preference when they are already fully formed and are the expression of a significant relationship. This is especially true for children, who need external protection. However, to reiterate, I also believe the fulfillment of their interest in securing their sibling relationship should be approached in a way that respects other primary relationships—first and foremost, that of the parents. As for the "potential" relationship between minor donor siblings, who are born and raised in separate families, a strong parental objection to contact being established between them may lead to the children's wish remaining unfulfilled until late adolescence and their legal coming-of-age, but nevertheless the conditions to enable its fulfillment should be secured.¹³⁸

CONCLUDING REMARKS

Modern families and the artificial reproductive technologies to which they have access are creating unprecedented situations that challenge the scope and content of well-established family law. Although family law has evolved to define doctrines capable of dealing with new family dynamics (doctrines such

135. Ruth Zafran, *Children's Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER SOC. POL'Y & LAW 163, 202–04 (2010).

136. Naturally, a change in the definition of parenthood goes hand-in-hand with my argument here. See Polikoff, *supra* note 108, at 463–64, 472 (calling for a new definition of parenthood). For a current discussion of "who is a parent?," see Joslin, *supra* note 108, at 600–04; Nejaime, *supra* note 103, at 2336–45; *Uniform Parentage Act (2017): An Overview*, AM. BAR ASS'N. (May 11, 2018), https://www.americanbar.org/content/dam/aba/events/family_law/2018/16uniformparentage.pdf.

137. For a suggestion on resolving the conflict through mediation, see Scharf, *supra* note 80, at 161–65.

138. Meaning keeping the records and making them accessible at the relevant point in time.

as the best interest of the child), the particular scenarios that can arise in the case of donor-conceived families may challenge some basic principles and common insights we have developed in this area.¹³⁹

It used to be the case that siblinghood received its protection (albeit sometimes too limited, as shown by Hasday) through the parents and their right to establish and secure relations with their children. Nowadays, when siblinghood may be formed independently of parenthood—and sometimes even of coupledness—we need to look at it quite separately.

The three cases presented in this Article are all distinct. Although all represent the consequences of having children with the aid of a sperm donor, each case entails a different kind of siblinghood: some are future potential relations that have yet to come into being, while others are established at birth. The interests underlying each are also different, among other reasons, because of the types of relationships between the siblings. In the first case, the relational/psychological bond is most important, based on the intimacy formed between children sharing a common life; in the second case, these were potential relations that should have developed, but were cut short by the separation of the mothers prior to their actual establishment; and the third case examines an unknown and perhaps even abstract genetic affinity, which gives rise to the desire to gain information about (and even make contact with) siblings born to the same donor. This latter case has to do with access to data that can, under certain circumstances, lead to the establishment of a relationship and, ultimately, a possible new family configuration.

In this discussion, we have considered different affinities, different interests, and the different level of protection they deserve. An up-to-date understanding of familial relationships requires recognition of the emotional and psychological connections within these relationships, and these demand (and deserve) robust legal protection. Certainly, when such protection conflicts with other interests, including those of the parents, a cautious and complex balance must be shaped. Nonetheless, the focus of this consideration must be the children, for whom the sibling bond, that uniquely close familial relationship, is deserving of preservation and legal protection. Where such a bond is absent, as in the case of unknown donor-siblings raised in different households who have no acquaintance or relationship with one another, this does not necessarily mean that their interests should be ignored. Genetic affinity may not be everything. But it is the starting point for a relationship and the grounds for forming a connection (real or imagined) with the other, someone with whom one shares a physical link with potentially lifelong consequences.

Although siblinghood has always been a key component of any individual's life, it remained for years on the margins of academic scholarship and received only partial recognition by legal regulations.¹⁴⁰ This situation, it

139. Particularly, for example, in light of the emphasis in classical family law on the marriage-based family—see Huntington, *supra* note 88—and the emphasis on judicial autonomy and parental rights.

140. Hasday, *supra* note 1, at 902.

would appear, is now changing.¹⁴¹ Sibling relations enjoy more prominent recognition by the psychology discipline than they did in the past, and they are also more present in legal discourse. All the same, an awareness of siblinghood in the realm of general family law is still absent when it comes to families formed beyond the safe ground of the conventional format.

Recognition of siblinghood generally, and as distinct from parenthood specifically, is an expected development in the present law. It is necessary, among other reasons: because of the personal-emotional importance of the relationship, increasingly recognized also in psychological research;¹⁴² the growing recognition of children's rights and efforts to protect their interests separately from those of adults; the central place afforded to the term 'function' in family law (in place of 'status' or 'contract'); and the growing variety in family structures. All these changes justify a reconsideration of siblinghood in family law and awarding it legal protection.

One further question in this context is how to go about creating a separate legal category for siblings. This question is concerned with the legal need to establish protection of siblinghood *as siblinghood*, as opposed to, for example, the courts' instructions to protect the child's "significant relationships"—the guideline that tasks the courts with locating and identifying familial and extra-familial relationships that require special treatment by the law.¹⁴³ This becomes even more pertinent in light of the trend critiquing the use of categories and calling for a radical move away from them, as part of identifying their alleged shortcomings. I believe the real problem is the use of imprecise categories that suffer, almost by definition, from being over-general, rigid, and detrimental to judicial discretion, and can subsequently lead to less-than-optimal solutions to a variety of problems.¹⁴⁴

This critique and the questions it entails are substantial and should not be dismissed. They deserve attention while siblinghood is established as a separate category and its norms come into being. Despite the criticism of categories, there are advantages to creating them—not least that they assist in the formal identification of interests and their protection.

The call to recognize siblinghood as a separate legal category does not rule out recognizing other categories of significant relationships.¹⁴⁵ All the same, despite the fact that I believe there is room to cast our gaze even further afield and discuss the need to legally recognize children's relations with a range of significant figures in their lives—both caregivers (such as grandparents) and

141. For the change in England, see MONK & MACVARISH, *supra* note 78, at 7–12. For the change in the United States, see Hasday, *supra* note 1, at 906–19.

142. See *supra* Subpart I.B.

143. The more common ones are parental figures, grandparents and other caretakers. For an illuminating discussion in a far-reaching context, see generally Pamela Loufer-Ukeles, *Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25 (2009).

144. Carl E. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REFORM 1039, 1040–41 (1985).

145. As presented in Dailey & Rosenbury, *supra* note 1, at 1508–14.

peers (such as close friends)—I do think that sibling relations deserve a separate discussion. First, as noted at the beginning of this Article, siblinghood is a relationship of unique importance. Second, the parties to this relationship, in some of the contexts addressed in this Article, are children. It is precisely children who deserve a category that will provide them with effective protection. Setting it as a legal category obligates decision-makers—officials in the executive authorities, primarily welfare personnel, and the courts—to recognize the children concerned and provide them with legal protection, even if they cannot be heard and there is no one else to speak for them while the parents are focused on representing their own interests or when there are no functioning parents who *can* speak for them.

However, in the process of shaping this category, I hold that it is both possible and necessary to define the norms derived from the category as a standard, rather than a non-negotiable list of rules. In other words, the norms accompanying the category of siblinghood should be broad and flexible enough to enable variety in the types of siblinghood, in their characteristics, the interests voiced in their name, and the balance struck with conflicting interests of key figures such as other family members, and parents in particular. In any case, siblinghood cannot dictate the treatment of all siblings as one type. We should note that the call to recognize the category of siblings, which is crucial in the legal and administrative realms, is no substitute for legislation. The legislator must reexamine the legislative processes (those that are already in place and future ones) to ensure that siblings and the protection of their relationship are afforded their proper place. That is, where there is legislation that embodies the interest to preserve siblinghood, and certainly in places where legislation already recognizes the protection of other familial relationships (parenthood or coupledness), a systematic examination by the legislator to determine whether that protection should be extended to siblinghood (including that created by donor-conceived families) is necessary. In other areas that are uniquely relevant to siblinghood, such as in the context of determining parental custody or maintaining an independent relationship between the siblings, the law should recognize siblinghood explicitly. Until that time comes, the task of protecting the relationship falls to the courts. In the context of family law, where the child's best interest is, in any case, recognized as a leading principle, the courts must ensure that the preservation of the sibling connection is being considered and afforded sufficient protection in their rulings.¹⁴⁶

This Article does not presume to exhaust the discussion of the various legal questions raised by siblinghood, and by donor-conceived siblinghood in particular; but I hope it provides the first stage in a more extensive and detailed debate that must take place elsewhere. The discussion here does not detail the range of conflicting interests and the complexity entailed in ruling on them, and

146. Erin Bajackson, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. LAW. 311, 315–16 (2013); Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & LAW 5, 16 (2002).

nor does it attempt to outline the solution for each case. It does, however, submit the basic normative argument that the legislators and the courts must acknowledge siblings' interests, support them, and provide them with protection—in general, and in the context of non-traditional families specifically.