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# ARTICLES

## YOU'RE ON YOUR OWN, BABY: REFLECTIONS ON *CAPATO*'S LEGACY

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"[A]t the base of American civilization is the concept of the family and . . . the perpetuation of that concept is highly important."[1]

### INTRODUCTION

Robert (Nick) Nicholas Capato and Karen Kuttner met in the mid-1990s, lived together for a few years, and later married.[2] Shortly after their wedding, Mr. Capato was diagnosed with cancer and was told that chemotherapy "might render him sterile."[3] The Capatos, however, desired to have children together, and so, before beginning medication, Nick deposited sperm in a sperm bank to be frozen and stored.[4] Despite Nick undergoing "aggressive treatment," the Capatos were able to conceive through sexual intercourse, and Karen gave birth to a son.[5] Shortly thereafter, Nick's health deteriorated.[6] Still, the Capatos "wanted their

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1. *Hearings Relative to the Social Security Act Amendments of 1939 Before the H. Comm. on Ways and Means*, 76th Cong. 1217 (1939) (statement of Douglas J. Brown, Chair of Advisory Council on Social Security).

2. Astrue v. Capato *ex rel.* B.N.C. (*Capato III*), 132 S. Ct. 2021, 2026 (2012). The Courts referred to Mr. Capato using his formal first name. *Id*. at 2025; *see also* Capato *ex rel.* B.N.C. v. Astrue (*Capato I*), No. 08-5405 (DMC), 2010 WL 1076522, at *1 (D.N.J. Mar. 23, 2010), *aff'd in part*, *vacated in part*, Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec. (*Capato II*), 631 F.3d 626 (3d Cir. 2011), *rev'd*, *Capato III*, 132 S. Ct. at 2021. I have chosen to use his nickname. *See* Brief for Respondent at *4, *Capato III*, 132 S. Ct. 2021 (2012) (No. 11-159).

3. *Capato III*, 132 S. Ct. at 2026.

4. *Id.*

5. *Id.*

6. *Id.*

son to have a sibling."[7] However, just a few months later, Nick passed away, leaving a will naming Karen, their son, and his children from a prior marriage as his heirs.[8] After Nick's death, Karen underwent fertility treatments, using Nick's frozen sperm.[9] She gave birth to twins, Brian Nicholas and Kayla N. Capato, eighteen months after their father's death.[10] Soon after the twins' birth, Karen applied for surviving child's insurance benefits under the Social Security Act on the twins' behalf, based on Nick's earning record.[11] Her claim was the basis of the U.S. Supreme Court's recent decision in *Astrue v. Capato*,[12] and is the focus of this Article. While the case made headline news,[13] there currently is a paucity of scholarship analyzing the case.[14] This Article explores the *Capato* decision.

Title II of the Social Security Act (the "Act") provides retirement and

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7. *Id*.

8. *Id.*

9. *Id*.

10. *Id*.

11. *Id.*

12. *See id.* at 2027. The case will no doubt catalyze the already growing scholarship on the legal and ethical ramifications of assisted reproductive technology ("ART"). *See, e.g.*, Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91 (2004) [hereinafter Knaplund, *Postmortem Conception*]; I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423 (2011); I. Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431 (2012); Ruth Zafran, *Dying to Be a Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL'Y 47 (2007). The *Astrue* decision will likely invigorate the never ending debate over administrative discretion under the *Chevron* doctrine. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984). The *Astrue* case may also impact scholarship on the significance of blood ties and genetic parenthood in families headed by same-sex parents. *See* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1191-94 (2010); *see also* NAOMI CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES 3-4 (2013). While posthumous conception implicates numerous ethical and legal issues, this Article will focus on the decision's lessons regarding the ideology and legal construction of the family.

13. *E.g.*, Adam Liptak, *Children Not Entitled to Dead Father's Benefits, Justices Rule*, N.Y. TIMES, May 21, 2012, http://www.nytimes.com/2012/05/22/us/children-not-entitled-to-dead-fathers-benefits-justices-rule.html; Associated Press, *Twins Conceived After Dad Died Won't Get Benefits*, FOX NEWS (May 21, 2012), http://www.foxnews.com/us/2012/05/21/twins-conceived-after-dad-died-wont-get-benefits/; Katie Moisse, *Twins Born to Dead Father Ineligible for Benefits*, ABC NEWS (May 22, 2012, 3:10 PM), http://abcnews.go.com/blogs/health/2012/05/22/twins-born-to-dead-father-ineligible-for-benefits/.

14. Recently some commentary has addressed the ramifications of the case, *see* Alycia Kennedy, Note, *Social Security Survivor Benefits: Why Congress Must Create a Uniform Standard of Eligibility for Posthumously Conceived Children*, 54 B.C. L. REV. 821, 843-54 (2013); Benjamin C. Carpenter, *Sex Post Facto, Advising Clients Regarding Posthumous Conception*, AM. C. TR. & EST. COUNS. J. 10-21 (forthcoming 2013), *available at* http://papers.ssrn.com/abstract=2184506.

disability benefits to insured wage earners.[15] In 1939, Congress amended Title II to provide benefits to a deceased wage earner's surviving family members, including minor children, who were dependent on the wage earner.[16] The question at issue in *Capato* was whether posthumously conceived children of a deceased wage earner qualify for survivors' benefits under the Act.[17] After a technical, black-letter examination of the statute at hand, the Court held that the twins, conceived from their dead father's frozen sperm, were not entitled to social security survivors' benefits.[18] Rejecting Karen's argument that the children of a predeceased wage-earning parent should obtain child survivor's insurance, the court deferred to the Social Security Administration's reliance on the state law governing the dead parent's will to determine who are his children for purposes of entitlements to Social Security benefits.[19]

One social implication of the *Capato* decision concerns the ability to create children without sexual intercourse (which traditionally has consummated the nuclear family), and to enable new forms of families to function. On its face, the mere fact that the U.S. Supreme Court, for the first time in history, heard and decided a case considering the status of children born of assisted reproductive technology, involving a non-traditional family and advanced technological developments, is cause for celebration. It demonstrates that the Supreme Court is up-to-date, in keeping with technological advances and social changes, and open to considering new forms of family. However, another social implication concerns the legal construction of power dynamics *within* heterosexual families. A broader look at the case, embedded in context, exposes just how pervasive old-norms of the family, as male-dominated, still govern the law, and are reflective in the issue at hand.

While the Supreme Court noted that "[t]he technology that made the twins' conception and birth possible . . . was not contemplated by Congress when the relevant provisions of the Social Security Act originated[,]"[20] it is nonetheless crucial in order to critically evaluate *Capato*'s legacy, to take a fuller account of the legislative history of the Act and of the historical context of reproduction and breadwinning, than that offered by the Court. Although it is likely that Congress did not contemplate posthumous conception when enacting the Social Security Act in the 1930s, history can shed light on the purposes of the Act and allow us to better interpret and understand its goals and underlying concepts.

This Article goes beyond *Capato*'s technical and narrow analysis and offers an analysis rooted in the historical context of reproduction and breadwinning. The Article illustrates that institutions enabling male control of female reproductive powers have long dominated history, and that breadwinning came

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15. 42 U.S.C. §§ 401-34 (2006 & Supp. V 2011).

16. Social Security Act Amendments of 1939, Sec. 201, Pub. L. No. 76-379, § 202, 53 Stat. 1360, 1364.

17. *Capato III*, 132 S. Ct. at 2027.

18. *Id.* at 2033-34.

19. *Id.* at 2028-34.

20. *Id.* at 2026.

to be one such institution. It further demonstrates that behind the enactment of Social Security survivors' benefits lays a concept of male power within the family. It is by situating *Capato* within this larger context that it becomes clear how the Act at issue in *Capato*, and the Court's affirmation of the Social Security Administration's statutory interpretation of the Act are underlined by a traditional male-dominated concept of family, in which male control over reproduction governs. The Supreme Court's decision, at least in the context of opposite-sex spouses, unfortunately, weakened women's power vis-à-vis their spouses regarding reproduction and left patriarchy to reign by tying men's desires regarding reproduction to their financial power.

On one level, this Article's contribution is shedding necessary light on an important case, and so far a rather under-studied one, pertaining to families using ART. This Article seeks to uncover some of the underlying presuppositions pertaining to the nature of the twenty-first century family by broadening the scope of inquiry and delving into context. The Article understands the *Capato* decision to be part of a long process of family construction, in which reproductive powers are male-dominated.

On a second level, this Article is part of an emerging area of law—the Law of Work and Family ("LWF")—which seeks to demonstrate the implications and connections between the family and the labor market.[21] This Article combines insights from two usually distinct areas of law, employment law and family law—insights regarding breadwinning and reproduction, which converge in the discourse over Social Security benefits awarded to surviving children of a deceased wage earner. Combining insights from these two distinct areas of law allows for close observation of the mutual effects of breadwinning on reproduction, and vice versa, and exposes the gendered family model espoused in *Capato*.

On a third level, this Article exemplifies how inequality is often hidden under the guise of a formally gender-neutral law, and that such law can have disparate implications for men and women because of the unequal gendered realities of familial care and breadwinning. It exposes *Capato*'s message to women to be financially independent, however, in a world in which financial independence and caretaking seldom go hand in hand.

Part I discusses the *Capato* case and the Supreme Court's interpretation of the provisions of the Act at hand. Part II offers a contextual history of reproduction and breadwinning in America. Part III probes into the history of the Act, and especially the provisions at issue in *Capato*. Part IV analyses the *Capato* decision in light of the context put forth, offers an explanation of the Court's opinion that

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21. *See*, *e.g.*, Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415 (2011); Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 119 (2012) [hereinafter Renan Barzilay, *Labor Regulation as Family Regulation*]; Arianne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL'Y REV. 407 (2012) [hereinafter Renan Barzilay, *A New Paradigm for the Family and Medical Leave Act*].

is informed by history, and shows how the Court drew the lines of the hetero-family model as, for the most part, still male-dominated. As this Article will demonstrate, the *Capato* Court's recent embarking into the world of reproductive technologies provides a unique opportunity to discuss the Court's construction of family, family relationships, and power dynamics for the twenty-first century.

## I. A TWENTY-FIRST CENTURY FAMILY—THE CAPATOS IN COURT

Brian Nicholas Capato and Kayla N. Capato were conceived using the frozen sperm of their deceased father, Nick.[22] Robert (Nick) Nicholas Capato and Karen Kuttner (later: Karen Capato) met in the mid-1990s in Washington, lived together in Colorado and Florida, and were married in 1999 in New Jersey.[23] Shortly after their wedding, "[Mr. Capato] was diagnosed with esophageal cancer and was told that the chemotherapy he required might render him sterile."[24] However, the Capatos yearned to have children together, and so, before beginning chemotherapy, Nick "deposited his semen in a sperm bank" in Florida, where it was cryopreserved.[25] Despite Nick's undergoing an aggressive course of treatment for his disease, the Capatos were able to conceive through sexual intercourse, and Karen gave birth to a son, D.C., in August 2001.[26] Shortly thereafter, however, Nick's health worsened.[27] Still, the Capatos wanted their son to have a sibling.[28] But by March 2002, Nick passed away in Florida, where the Capatos had then resided.[29] After Nick's death, Karen underwent fertility treatments, first in Florida, then in New Jersey, using Nick's frozen sperm.[30] Karen conceived in January 2003 and gave birth to twins, eighteen months after Nick's death.[31] Soon after the twins' birth, Karen applied for surviving child's insurance benefits under the Act on their behalf, based on Nick's earning record.[32]

Today there are over half a million embryos in frozen storage in the U.S., countless vials of cryopreserved sperm, and a burgeoning fertility industry.[33] There is a growing trend of using ART, specifically including posthumous

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22. *Capato I*, No. 08-5405 (DMC), 2010 WL 1076522, at *3-6 (D.N.J. May 23, 2010), *aff'd in part*, *vacated in part*, *Capato II*, 631 F.3d 626 (3d Cir. 2011), *rev'd*, *Capato III*, 132 S. Ct. 2021 (2012).

23. *Capato II*, 631 F.3d at 627.

24. *Capato III*, 132 S. Ct. at 2026.

25. *Id.*

26. *Capato I*, 2010 WL 1076522, at *1.

27. *Capato III*, 132 S. Ct. at 2026.

28. *Id.*

29. *Id.*

30. *Capato I*, 2010 WL 1076522, at *3.

31. *Capato III*, 132 S. Ct. at 2026.

32. *Id.*

33. Judith Daar, *Is There Life After Death? The Rise of the High-Tech Family*, 54 ORANGE CNTY. LAW. 16, 17 (2012), *available at* http://www.calbarjournal.com/april2012/topheadlines/th3.aspx.

conception. Over one hundred women have already applied on behalf of their posthumously conceived children for social security benefits.[34]

Title II of the Act provides retirement and disability benefits to insured wage earners.[35] In 1939, Congress amended Title II to provide benefits to a deceased wage earner's surviving family members, including minor children, who were dependent on the wage earner.[36] Title II allows certain categories of children to receive survivors' benefits following the death of an insured individual.[37] To qualify for the child's insurance benefits under the Act, the applicant must be the child, as defined in § 416(e) of the Act, of an individual entitled to benefits.[38]

Section 416(e) defines "child" broadly.[39] But another provision, § 416(h) entitled "Determination of family status," contains reservations:

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death.[40]

Section 416(h) therefore refers to state intestacy law to determine whether a child is eligible for Social Security benefits. The question in *Capato* was which statutory provisions govern the availability of child survivors' benefits,[41] and the interpretation of the relationship between § 416(h) and (e) was at the forefront of the judicial opinions issued in the case, at all the different stages.

At first, the Social Security Administration rejected Karen's claim, and she subsequently applied for a hearing before an administrative law judge ("ALJ"), who upheld the denial.[42] The ALJ found that although allowing benefits appears

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34. Petition for a Writ of Certiorari at *19, *Capato III*, 132 S. Ct. 2021 (2012) (No. 11-159).

35. 42 U.S.C. § 40 (2006).

36. Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 202, 53 Stat. 1362 (current version at 42 U.S.C. § 402 (2006)).

37. 42 U.S.C. § 402(d)(1) (2006).

38. *See id.* § 416(e) (For example, the term "child" in this provision means "(1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse," in certain circumstances).

39. *See infra* discussion. Additionally, the child must (A) have filed an application for benefits, (B) be unmarried and less than eighteen years old, and (C) have been dependent upon the deceased individual at the time of his or her death. 42 U.S.C. § 402(d)(1)(A)-(C) (2006).

40. 42 U.S.C. § 416(h)(2)(A) (2006).

41. *Capato II*, 631 F.3d 626, 628 (3d Cir. 2011), *rev'd*, *Capato III*, 132 S. Ct. 2021 (2012).

42. *Id.*

"consistent with the purposes of the Social Security Act," the twins were not eligible for Social Security survivor benefits.[43] The ALJ referred to § 416(h) and determined Nick was domiciled in Florida at the time of death and that, under Florida law, the twins were neither heirs nor beneficiaries of Nick's will and, therefore, they were not children of the deceased wage earner according to § 416(h)(2)(A) of the Act.[44]

The denial was upheld on appeal to the U.S. District Court for the District of New Jersey.[45] According to the district court, for purposes of determining survivors benefits under the Social Security Act, a "child" can mean (1) "the child or legally adopted child of an individual[,]" (2) a stepchild, and (3) a grandchild or step-grandchild.[46] However, the court stated that in determining whether one is a "child," § 416(h)(2)(A) provides the proper guideline: that the administration shall apply the applicable state law determining the devolution of intestate property.[47] Under Florida law, a child posthumously conceived is not eligible to inherit unless the child has been provided for in the decedent's will.[48] Nick did not include unborn children in his will.[49] Thus, the district court held the Capato twins were not entitled to inherit from their father and accordingly were not entitled to benefits pursuant to § 416(h)(2)(A)'s intestacy-law criterion.[50]

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 629; *see also* 42 U.S.C. § 416(e) (2006).

47. *Capato II*, 631 F.3d at 630. There is an alternative mechanism under 42 U.S.C. § 416(h)(2)(B), § 416(h)(2)(C)(i), or § 416(h)(2)(C)(ii), that requires the insured to be alive at the time of the child's conception, and, therefore, does not apply. *See* 42 U.S.C. § 416(h)(2)(B) (2006) (applicant is deemed to be the child of the insured if the insured and the other parent "went through a marriage ceremony resulting in a purported marriage between them" that would have been valid "but for [certain] legal impediment[s]"); *id.* § 416(h)(3)(C)(i) (applicant is deemed the child of the insured if the insured had acknowledged paternity in writing, or if a court decreed the insured to be the parent or ordered the insured to pay child support, and "such acknowledgment, court decree, or court order was made before the death of such insured"); and *id.* § 416(h)(3)(C)(ii) (applicant is deemed the child if there is satisfactory evidence that the insured was the applicant's parent, and the insured was living with or supporting the applicant at the time of death).

48. Under Florida's inheritance law, possible heirs to an intestate estate include children. FLA. STAT. §§ 731.201(9), 732.103(1) (2012). The law of intestate succession specifically refers to "[a]fterborn heirs" as "[h]eirs of the decedent conceived before his or her death, but born thereafter." *Id.* § 732.106. Florida law also provides that

> [a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.

*Id.* § 742.17(4).

49. *See Capato III*, 132 S. Ct. 2021, 2026 (2012).

50. *Capato I*, No. 08-5405 (DMC), 2010 WL 1076522, at *5 (D.N.J. Mar. 23, 2010), *aff'd in part*, *vacated in part*, *Capato II*, 631 F.3d at 626, *rev'd*, *Capato III*, 132 S. Ct. at 2021.

Karen appealed to the U.S. Court of Appeals for the Third Circuit, which reversed the district court's ruling on the question of whether the twins were "children" under the Act.[51] The Third Circuit found the twins were "children" within the meaning of the Act,[52] then vacated and remanded to determine whether, as of the date of Mr. Capato's death, his children were "dependent" on him, which was an additional criterion for eligibility. Importantly, the *Capato II* court did not accept the district court's usage of § 416(h)(2)(A) to determine who is a child under § 416(e).[53] It held that the twins qualified as "children" under the Act according to § 416(e), and that § 416(h) had no relevance for determining whether a claimant was the "child" of a deceased wage earner when parentage was not in dispute.[54] The *Capato II* court noted that "[i]t goes without saying that these [reproductive] technologies were not within the imagination, much less the contemplation, of Congress when the relevant sections of the Act came to be,"[55] but held that the plain language of the statute dictates that the term "child" in § 416(e) of the Act requires no further definition when it is clear that the twins are the biological offspring of the Capatos.[56]

The U.S. Supreme Court granted certiorari, as the question of statutory interpretation raised was of recurring significance in the administration of social security benefits, and the courts of appeal were divided.[57] During oral argument, questions from the bench focused on understanding the doctrinal relationship between provision § 416(e) and (h).[58] In resolving the case, the Supreme Court embarked on a technical, black-letter examination of the relationship between the Act's provisions to determine whether the twins were eligible for benefits under the Act's definition of "children."[59] Karen Capato relied on the definition of "child" in § 416(e) when, as was here, the children were the uncontested

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According to the Court, since the twins did not meet the requirements of § 416(e) and § 416(h), there was no need to address dependency, the Act's second requirement of eligibility for benefits under 42 U.S.C. § 402(d) (2006). *Id.* at *7.

51. *Capato II*, 631 F.3d at 632 (2011).

52. *Id.*

53. *Id.* at 631.

54. *Id.* at 631-32.

55. *Id*. at 627.

56. *Id*. at 631.

57. *Compare id. and* Gillett-Netting v. Barnhart, 371 F.3d 593, 596-97 (9th Cir. 2004) (finding biological but posthumously conceived child of insured wage earner and his widow qualified for benefits), *with* Beeler v. Astrue, 651 F.3d 954, 960-64 (8th Cir. 2011), *and* Schafer v. Astrue, 641 F.3d 49, 54-63 (4th Cir. 2011) (finding posthumously conceived child's qualification for benefits depends on intestacy law of state in which wage earner was domiciled).

58. Transcript of Oral Argument at 4-8, 15-17, 23-24, 27, 38, 45, 52, 54, *Capato III*, 132 S. Ct. 2021 (2012) (No. 11-159); *see also* Kristine Knaplund, *Argument Recap: Old Law, New Technology, and Social Security Benefits*, SCOTUSBLOG (Mar. 22, 2012, 2:59 PM), http://www.scotusblog.com/2012/03/argument-recap-old-law-new-technology-and-social-security-benefits/.

59. *Capato III*, 132 S. Ct. at 2029.

biological child of a married couple.[60] By contrast, the Social Security Administration argued that § 416(h) governs the meaning of "child" in § 416(e)(1) and serves as a gateway through which all applicants for insurance benefits as "child" must pass.[61]

The Supreme Court examined the relationship among the different provisions of the Act, paying specific attention to its cross-references and textual cues, and determined that the Administration's "reading is better attuned to the statute's text and its design to benefit primarily those supported by the deceased wage earner [during] his . . . life time."[62] It declared that the Third Circuit's interpretation, that § 416(h) governs when a child's family status needs to be determined and § 416(e) governs when it does not, could not stand.[63] According to the Third Circuit, there was no need to determine a child's family status whenever the claimant was the biological child of a married couple.[64] But the Supreme Court ruled that "[n]othing in § 416(e)'s tautological definition" of "'child' referr[ed] only to children of married parents, . . . [n]or d[id] § 416(e) indicate that Congress intended 'biological' parentage to be a prerequisite to 'child' status."[65] The Supreme Court explained that a biological parent is not always a child's parent under law, and that marriage does not make a child's parentage certain, nor does the absence of marriage make a child's parentage necessarily uncertain.[66] It refused to treat children born in wedlock under a different statutory provision, as the Third Circuit decided.[67] The Supreme Court held that in order to qualify for benefits, the twins must pass through § 416(h)(2)(A)'s intestacy-law criterion.[68] While the Court sympathized with the Capatos, calling their circumstances "tragic," the Court nevertheless concluded that the application for benefits was governed by reference to state intestacy law rather than an interpretation of the federal rule that "the statute's text scarcely supports."[69]

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60. *Id.*

61. *Id.*

62. *Id.* at 2026. Furthermore, the Court noted that even if the administration's interpretation was not the only reasonable one, it was at least a permissible construction entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

63. *Capato III*, 132 S. Ct. at 2029, 2031.

64. *Capato II*, 631 F.3d 626, 631-32 (3d Cir. 2011), *rev'd by Capato III*, 132 S. Ct. at 2021.

65. *Capato III*, 132 S. Ct. at 2029-30.

66. *Id.* at 2030.

67. *Id.*

68. *Id.* at 2028.

69. *Id.* at 2034. The case was remanded for further proceedings to determine domicile and the applicable intestacy law. *Id.* State intestacy laws vary on whether and under which restriction posthumously conceived children may inherit. *See, e.g.*, CAL. PROB. CODE § 249.5(c) (2013) (allowing inheritance if child is in utero within two years of parent's death). Similar provisions are contained in COLO. REV. STAT. § 15-11-120(11) (2012); GA. CODE ANN. § 53-2-1(b)(1) (2012); IDAHO CODE ANN. § 15-2-108 (2013); IOWA CODE § 633.220A(1) (2013); LA. REV. STAT. ANN. § 9:391.1(A) (2013); MINN. STAT. § 524.2-120(10) (2012); N.D. CENT. CODE § 30.1-04-19(11) (2013); S.C. CODE ANN. § 62-2-108 (2012); and S.D. CODIFIED LAWS § 29A-2-108 (2013). *But*

The Supreme Court, it appears, was mindful of new forms of family in which biological bonds are non-conclusive in determining benefits, and marriage is not a prerequisite—perhaps specifically thinking of unmarried couples, single parents, or same-sex partners. Furthermore, from a doctrinal perspective, the Court's opinion is reasonable. The Social Security Administration's interpretation and application of an old statute to new technology resulted in an interpretation that merits deference under *Chevron*. There may also be ample normative, distributive and bio-ethical reasons to agree with the Court's conclusion, but these were not addressed as part of the opinion.

However, situating the decision within the context of the history of reproduction, breadwinning, and the purposes of Social Security precisely illuminates which power relations between a hetero-married couple are reconstructed by the decision, exposing the contours of gender and family legitimacy. Therefore, in order to understand the broader significance of the *Capato* decision, one must take account of a fuller context of reproduction, wage earning, and dependency.

## II. REPRODUCTION AND PRODUCTION IN CONTEXT

Historically, postmortem deliveries took place when a husband passed away while his wife was pregnant, with the child born within a period of gestation after the father's death and considered the decedent's child for all purposes.[70] Today, reproductive technology, as exemplified in *Capato*, has made things more complex.[71]

Today, reproductive technologies, such as artificial insemination and in-vitro fertilization ("IVF"), are common practice and used in great numbers annually.[72] The first documented use of artificial insemination goes back to the late eighteenth century,[73] but artificial insemination did not become widely used until

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*see*, *e.g.*, ALA. CODE § 26-17-707 (2013); DEL. CODE ANN. tit. 13, § 8-707 (2013); FLA. STAT. § 742.17(4) (2012); N.M. STAT. ANN. § 40-11A-707 (2013); TEX. FAM. CODE ANN. § 160.707 (West 2013); UTAH CODE ANN. § 78B-15-707 (West 2013); VA. CODE ANN. § 20-158(B) (2013); WASH. REV. CODE § 26.26.730 (2012); WYO. STAT. ANN. § 14-2-907 (2013) (all either excluding posthumously conceived children from intestate succession or limiting the inheritance rights of such children to situations in which the deceased parent consented in a record to posthumous conception).

70. Daar, *supra* note 33, at 16.

71. *See* Transcript of Oral Argument, *supra* note 58, at 47.

72. Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J. L. & PUB. POL'Y 347, 352-54 (2011); *see also* Michael E. Eisenberg, Comment, *What's Mine is Mine and What's Yours is Mine—Examining Inherence Rights by Intestate Succession from Children Conceived Through Assisted Reproduction Under Florida Law*, 3 BARRY L. REV. 127, 127 (2002); Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 404 (2009).

73. Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at*

the 1950s.[74] By the 1980s, the first child was born in the U.S. using IVF, and today over 1% of all children born annually are conceived through IVF.[75] But, for those who have difficulty conceiving "naturally," using ART to have genetically related children is a very expensive endeavor. The average cost per cycle of IVF is over $12,000, and "actually producing a live birth through IVF" costs, on average, between $66,000 and $115,000.[76] Recent reports suggest that around one-third of women using ART are unmarried.[77]

Specifically for this analysis, cryopreservation of gametes offers gamete providers an option to freeze and store their gamete in order to procreate at a later time.[78] Posthumous conception is the fertilization of egg and sperm from a gamete provider who is deceased at the time of conception and implantation but who had gametes cryopreserved.[79] Cryopreservation may be used with either artificial insemination or IVF.[80] "The ability to freeze sperm and later thaw it while still retaining its fertility has been available since at least the 1940s,"[81] "and the first human pregnancy resulting from a frozen sperm was reported in" the 1950s.[82] The use of posthumous conception was considered by legal scholars as early as 1962,[83] but it is only recently that this trend has grown. Success rates using thawed eggs are substantially lower than those using thawed sperm, and the usage of cryopreserved sperm is significantly more common than that of cryopreserved eggs.[84] Furthermore, cryopreserved sperm can remain viable for decades.[85] Today, in the United States, all clinics that provide assisted reproduction services offer cryopreservation as well.[86]

It is, however, important to step back and realize that the history of scientific theorizing about reproduction is, for the most part, "a history of scientists

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*Artificial Insemination*, 77 WASH. L. REV. 1035, 1037 (2002).

74. Carpenter, *supra* note 72, at 353.

75. *Id.* at 354.

76. I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 486 (2010).

77. Joslin, *supra* note 12, at 1178.

78. Gloria I. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 272-73 (1999).

79. *Id.*

80. Carpenter, *supra* note 72, at 355; *see also* Judith Daar, Litowitz v. Litowitz*: Feuding Over Frozen Embryos and Forecasting the Future of Reproductive Medicine*, *in* 97 HEALTH LAW & BIOETHICS: CASES IN CONTEXT, ch. 5 (Sandra H. Johnson et al. eds., 2009).

81. Knaplund, *Postmortem Conception*, *supra* note 12, at 93.

82. Carpenter, *supra* note 72, at 355-56.

83. *See* W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942, 942 (1962).

84. Carpenter, *supra* note 72, at 356.

85. *Id.* at 356-57.

86. *Id.* at 355.

emphasizing the *male* contribution" to reproduction while "minimizing the degree to which" women are primarily responsible for creating offspring.[87] Scholars have recently shown that "since Aristotle, philosophers and scientists have" minimized the importance of gestation and have emphasized the prominence of the *male*'s role in reproduction.[88] To Aristotle, male "semen [supposedly] contained the motive force" that acted upon woman to form a new being."[89] Later, the medieval church believed that "a minuscule, fully formed *homunculus*, complete with soul, was deposited by the male in the female body, which simply acted as incubator."[90] Still later, Enlightenment scientific theory too envisioned that the semen is like a "seed" growing in a "field." "Erasmus Darwin, grandfather of Charles . . . , held 'that the embryo[] is produced by the male,'" with a supporting role by the female who provides nourishment but played no role in producing any part of the embryo itself.[91] In the modern-era, with the discovery of DNA in the late nineteenth century and genetic coding residing in both sperm and egg, scientists concede that women contribute not only the "field" but part of the "seed" as well.[92] Today, some scientists have moved to challenge the dichotomy between genes and environment, believing that the maternal environment itself *and* parents' genetics influence embryos and their future generations.[93] The notion, however, of conception as a "seed" being planted is still culturally prevalent.[94]

Throughout history, men's disconnect from their "seed" in the process of creating offspring "has underpinned . . . a relentless male desire to master nature, and to construct social institutions and cultural patterns that will not only subdue the waywardness of women but also give men an illusion of procreative . . . power."[95] Thus marriage long consisted of "coverture"—men's legal control of the household.[96] A vivid example is that first attempts at artificial insemination in the late eighteenth century included husbands' administration of the procedure.

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87. Jennifer S. Hendricks, *Not of Woman Born: A Scientific Fantasy*, 62 CASE W. RES. L. REV. 399, 402 (2011) (emphasis added).

88. *Id.* at 418.

89. *Id*. at 419. Similarly, in Ancient Greek mythology, Apollo resonated, "The mother is no parent of that which is called her child, but only nurse of the new-planted seed that grows." 1 AESCHYLUS, THE COMPLETE GREEK TRAGEDIES (David Grene & Richmond Lattimore eds., 1942) (*The Eumenides*).

90. ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 120 (1976).

91. Hendricks, *supra* note 87, at 420.

92. *Id.* at 422-24.

93. *Id.* at 424.

94. Barbara Katz Rothman, *Daddy Plants a Seed: Personhood Under Patriarchy*, 47 HASTINGS L.J. 1241, 1244-45 (1996).

95. Michelle Stanworth, *Reproductive Technologies and the Deconstruction of Motherhood*, *in* REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD, AND MEDICINE 16 (Michelle Stanworth ed., 1987).

96. *See* HENDRIK HARTOG, MAN & WIFE IN AMERICA: A HISTORY 119-22 (2000).

At that time, doctors did not perform artificial insemination but gave husbands syringes containing sperm and directed them to inject their wives with them after intercourse.[97] In the nineteenth century, husbands continued to execute at least part of the procedure with medical guidance.[98] This insistence on involving husbands in the artificial procedure of insemination indicates a reluctance to sever husbands' control over procreation. "Because men are biologically uninvolved in gestation and birth, they are more dependent on women than women are on them in achieving parenthood."[99] Scholars have argued that historically, "men have designed" such practices and institutions to offset women's reproductive powers and "to appropriate for themselves the procreative potential they feared and admired in women."[100]

And so, as science came to the stark discovery, shattering the belief in male dominance in the makeup of their offspring, the industrial revolution, and twentieth century welfare capitalism, seems to have helped restore man's virility: the Industrial Revolution transformed the majority of working people from self-employed agricultural workers to wage earners working for large industrial concerns.[101] Unlike the pre-industrial, agrarian era in which the family worked together to sustain itself, the Industrial Revolution invented an "iconic" figure of dependency—"the housewife."[102] This figure melded women's traditional sociological and political subordination with new economic dependence.[103] The Industrial Revolution created a stark line between the public and the private spheres. Men and women were engaged in separate spheres of activity in the nineteenth century: men in the market, business, and the professions, and women in the home. The public sphere, in which males worked productively in marketplace for money, was seen as an essential engine of human survival and development.

However, by the turn of the twentieth century, some "women began to move beyond the . . . domestic sphere and into the paid labor force."[104] Many believed

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97. Bernstein, *supra* note 73, at 1049-50.

98. *Id.* at 1050.

99. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 306.

100. *Id.* at 306 n.20.

101. *See* Arianne Renan Barzilay, *Women at Work: Towards an Inclusive Narrative of the Rise of the Regulatory State*, 31 HARV. J. L. & GENDER169, 175 (2008) [hereinafter Renan Barzilay, *Women at Work*].

102. Nancy Fraser & Linda Gordon, *A Genealogy of* Dependency*: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 318 (1994).

103. *Id.*

104. Renan Barzilay, *Labor Regulation as Family Regulation*, *supra* note 21, at 126 (citing JOANNE J. MEYEROWITZ, WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880-1930, at xvii (1988)). "While poor, black and immigrant women had long labored in the marketplace, 'they had excited little public controversy because they had not been considered subject to middle class expectations of domesticity.'" *Id.* at 126 n.34 (quoting LYNN Y. WEINER, FROM WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES, 1820-1980, at 4

that working mothers and wives would undermine the institution of marriage, as working wives might no longer need their husbands' economic support.[105] Others thought that the family might dissolve altogether if women earned enough to provide for themselves.[106] Yet, that did not occur.

In the 1930s, in the midst of the Great Depression and as the national government was ready to enact national labor standards to alleviate unemployment, "the focus of public concern about unemployment was [on] working *men*," who were "understood as providers for their families."[107] During the New Deal era, males legally constituted the breadwinners, and their wives and children constituted dependents.[108] Legislative debates over national labor standards have revealed promotion of an underlying concept of family in which the husband is productive and the major actor in the market place.[109] Scholars contend that the New Deal helped re-erect husbands' place in the family as necessary breadwinners and providers.[110] This is especially evident in the context of Social Security and, specifically, in the 1939 Amendments to the Act, which were at issue in *Capato*.[111]

## III. A LEGAL HISTORY OF SOCIAL SECURITY CHILD SURVIVOR BENEFITS

Even before the Depression hit, states had been forced to deal with the problems of economic insecurity in a wage-based, industrial economy.[112] Workers compensation programs were established at the state level, and "Mother's Aid" and other forms of public assistance predated New Deal welfare policies,[113] but still the government established the American welfare state predominantly during the 1930s.[114] At that time of dire unemployment, working

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(1985)).

105. ANNELISE ORLECK, COMMON SENSE AND A LITTLE FIRE: WOMEN AND WORKING-CLASS POLITICS IN THE UNITED STATES, 1900-1965, at 102 (1995).

106. *See* KATHRYN KISH SKLAR, FLORENCE KELLEY & THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830-1900, at 182 (1995).

107. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 172 (2000).

108. Renan Barzilay, *Labor Regulation as Family Regulation*, *supra* note 21, at 121-22.

109. *Id.* at 142.

110. COTT, *supra* note 107, at 158, 172-74.

111. In 1965, the Act was amended again and codified § 416(h)(3)(c), but this section had little, if any, barring on the case. Old Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 409; *see also* S. REP. NO. 404-89, at 109 (1965).

112. Renan Barzilay, *Women at Work*, *supra* note 101, at 182-86; Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L. J. 314, 325 (2012).

113. "Mother's Aid" was a program designed to support mothers of children "maintain[ing] households . . . without husbands" and was precursor to the later Aid to Families with Dependent Children Program which became Title IV of the Act. LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935, at 42, 61, 256 (1994).

114. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 152-53 (2002); Renan

men's ability to provide for their families was "at the heart of New Deal domestic policies."[115]

Congress enacted the Act in 1935 providing, inter alia, old-age pensions, unemployment compensation, and aid to dependent children.[116] It contained two distinct segments: Title II of the Act incorporated a "social insurance" model in social security's old-age insurance and unemployment compensation, while Title IV incorporated a discretionary welfare model in social security's public assistance programs—i.e., Aid to Families with Dependent Children.[117] The former is known as "social security,"[118] an honorable, rather generous though restricted program ("Social Security"), while the latter is known as "welfare," a "stingy and humiliating" form of public assistance.[119] Social Security disproportionally served white males while public assistance programs served mainly women and minorities.[120] President Roosevelt envisioned work-related social insurance as the main route to social security (acknowledging the necessity of some form of public assistance crafted narrowly to apply to particularly "deserving" groups).[121] Scholars note that this segmentation helped "create[] a new hierarchy of" families in which female-headed households were economically and socially at rock bottom.[122]

A pillar of Social Security is that it provides a financial safety net and "protection for workers from the cradle to the grave."[123] In the original Act, retirement benefits were to be paid to the primary worker when he retired at age sixty-five.[124] Benefits were to be based on payroll tax contributions that the worker made during his working life.[125] Social Security was "[f]iercely

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Barzilay, *Women at Work*, *supra* note 101, at 174.

115. COTT, *supra* note 158, at 173.

116. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620-48.

117. NICHOLAS BARR, THE ECONOMICS OF THE WELFARE STATE 29 (2d ed. 1993).

118. Robert M. Ball, *The 1939 Amendments to the Social Security Act and What Followed*, *in* NAT'L CONFERENCE ON SOC. WELFARE, 50 ANNIVERSARY EDITION: THE REPORT OF THE COMMITTEE ON ECONOMIC SECURITY OF 1935, at 159 (1985); COTT, *supra* note 158, at 174-75.

119. GORDON, *supra* note 113, at 253-54. *But see* Tani, *supra* note 112, at 334 (claiming mid-level administrators didn't make such stark distinctions at the time).

120. GORDON, *supra* note 113, at 293-94.

121. SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY 55 (1998).

122. GORDON, *supra* note 113, at 254-56; *see also* METTLER, *supra* note 121, at 81-82; GWENDOLYN MINK, THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942, at 134-38 (1995).

123. Jill S. Quadagno, *Welfare Capitalism and the Social Security Act of 1935*, 49 AM. SOC. REV. 632, 634 (1984).

124. *Id.*

125. The Social Security Administration explains, "The significance of the new social insurance program was that it sought to address the long-range problem of economic security for the aged through a contributory system in which the workers themselves contributed to their own future retirement benefit by making regular payments into a joint fund." *Historical Background*

challenged . . . after its passage . . . because it restricted individual autonomy and assumed that government" responsibility was essential for the economy.[126] Additionally, these old-age insurance provisions of the Act received only meager support due to three major hindrances. First, contributions were rapidly accumulating a surplus that threatened to carry out "a deflationary effect" in the depression economy.[127] Second, the state sponsored, non-contributory, old-age public assistance programs were gaining popular support.[128] Third, old-age insurance in Social Security "excluded nearly half the working population," such as agriculture, casual, domestic, or self-employed workers.[129]

The government needed to take dramatic measures to save the Social Security system. In 1936, "[t]he Democratic Party's presidential platform . . . pledged [greater] protection of the family and the home."[130] By 1937, the U.S. Senate set up a Federal Advisory Council ("Council") to propose ways of revising the two-year-old Social Security system by recommending a way to deal with ballooning reserves and to garner wider support.[131] The Council chose to reduce the surplus by providing benefits to dependents and survivors of primary wage workers.[132] The years between the enactment of the Act in 1935 and the passage of the 1939 amendments, "witnessed an 'amazing change'" in the relationship between government and citizens,[133] and the amended Social Security system gathered wider support due, in large part, to the 1939 amendments.[134]

The Council's goals in constructing the 1939 amendments were to provide adequate support of the family as a unit[135] and promote protection of the family.[136] But, historians have questioned what it means to protect the family. Specifically, whose families were to be protected?[137] Which families would be entitled? The Advisory Council, as history shows, adopted the notion of the *male-centered*

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*and Development of Social Security*, U.S. SOC. SEC. ADMIN., http://www.ssa.gov/history/briefhistory3.html (last visited Aug. 6, 2013). However, researchers have long argued that despite the contributory rhetoric, in effect Social Security redistributes income from the poor to the rich. *See generally* GORDON, *supra* note 113.

126. Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, *in* U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 90 (Linda K. Kerber et al. eds., 1995).

127. *Id*. at 92.

128. *Id.*

129. *Id*.

130. MINK, *supra* note 122, at 135 (internal quotation marks omitted).

131. Kessler-Harris, *supra* note 126, at 92-93.

132. *Id.* at 93.

133. David Waldron, *Social Security Amendments of 1939: An Objective Analysis*, 7 U. CHI. L. REV. 83, 83 (1939).

134. Kessler-Harris, *supra* note 126, at 90.

135. *See* H.R. REP. NO. 728-76, at 5,7 (1939).

136. MINK, *supra* note 122, at 135.

137. Kessler-Harris, *supra* note 126, at 94.

family.[138] First, the Advisory Council agreed that benefits would be allocated to fatherless children, as the derivation "of thoughtful and thrifty fathers."[139] Additionally, the Council provided insurance to widowed mothers, with "[t]he sums granted, and the restrictions on them," signifying this pension was "conceived of as a matter of peace of mind for the husband."[140] According to historians, the discussions within the Council and the adopted provisions "negated any possibility that the [accumulated] pension might be considered a . . . product of the *joint* efforts of" the marriage, and that women might have a fair, vested interest in and of themselves in the pension as partners in their husband's wage earning efforts.[141]

The 1939 amendments incorporated the Council's vision and made a fundamental change in the Social Security program.[142] The amendments "promoted family security by bringing the insured male worker's family under the umbrella of social insurance."[143] The amendments added two new categories of benefits to the existing retirement benefits: the first, payments to the spouse and minor children of a retired worker (so-called dependents benefits) and the second, survivors' benefits paid to the family in the event of the premature death of a covered worker.[144] This change altered "Social Security from a retirement program for workers [only] into a *family-based* economic security program."[145] However, such support was to take place by enlarging the rights of male breadwinners in the family by granting *them* benefits that would strengthen their capacity to perform their assigned gender roles as breadwinners, and by "enabling [*males*] to provide for their families, even after their own deaths."[146] For example, the Council eliminated any annuity to a widow who remarried.[147] Importantly, the Council overrode an objection made by one Council member, who pointed out that during the years the widow was married to the insured wage earner, she was also accumulating certain rights because she was a partner in his rights.[148] Although policy makers added survivors' benefits to dependents of a deceased wage-earner and revised the system to improve standards of living for some Americans, policy makers did not extend coverage to already excluded

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138. *Id.* at 94-98.

139. *Id.* at 94; *1937-1938 Advisory Council on Social Security—Final Report*, *in* NAT'L CONFERENCE ON SOC. WELFARE, *supra* note 118, at 173-204 [hereinafter *Final Report*].

140. Kessler-Harris, *supra* note 126, at 94.

141. *Id*. at 94-95 (emphasis added).

142. *See* Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360 (codified as amended in scattered sections of 42 U.S.C.); *see also* ARTHUR J. ALTMEYER, THE FORMATIVE YEARS OF SOCIAL SECURITY: A CHRONICLE OF SOCIAL SECURITY LEGISLATION AND AMENDMENTS, 1934-1954, at 99-117 (1968); *Final Report*, *supra* note 139, at 173-204.

143. MINK, *supra* note 122, at 135.

144. COTT, *supra* note 158, at 176; U.S. SOC. SEC. ADMIN., *supra* note 125.

145. U.S. SOC. SEC. ADMIN., *supra* note 125.

146. METTLER, *supra* note 121, at 99 (citing Kessler-Harris, *supra* note 126, at 94-100).

147. Kessler-Harris, *supra* note 126, at 94-95.

148. *Id*.

workers, where females and minorities were heavily gathered (such as "part-time, seasonal, agricultural, domestic[, or] philanthropic" workers).[149] Instead, policy makers gave more privileges to the worker-husbands already covered as an "incentive [for] men to marry and have families" and for women to remain dependents rather than enter the work-force.[150] Social Security assumed the male earner to be the primary breadwinner and granted entitlements to him as provider while codifying women's dependency.[151]

Thus, the 1939 amendments rewarded and reconstituted male workers as husband-providers and the economic center of their family.[152] Congress's 1939 amendments provided a monthly benefit for designated surviving family members of a deceased wage earner, and the child survivor benefits at issue in *Capato* were among these "family-protective" measures.[153] Not only has the legislature constructed family, but as the following section demonstrates, the Court has re-established a vision of the modern American family.

## IV. RE-POWERING THE AMERICAN FAMILY—*CAPATO* REVISITED

The rise of the modern American family accompanied the emergence of industrial capitalist society, which reorganized work and home life.[154] "The 'modern' family of historical convention and sociological theory describes an intact nuclear family unit, in which husband is the breadwinner, and his wife is dependent—although this designation was unrealistic for many groups.[155] The modern family, composed of father-mother-children, has a long "assumed

149. COTT, *supra* note 158, at 175-76.

150. *Id.* at 176-77.

151. *Id*. at 178. Almost forty years later, the Supreme Court accepted then lawyer Ruth Bader Ginsburg's argument in *Weinberger v. Wiesenfeld* that Stephen Wiesenfeld, a widower and lone parent of an infant child, was entitled to Social Security benefits based on his late wife's contributions. 420 U.S. 636, 651-52 (1975). The Court struck down "archaic and overbroad generalization[s]" that did not grant survivors' benefits to male widowers as unfairly discriminating against women because their contributions to Social Security did not buy as much as the contributions of men. *Id*. at 643 (internal quotation marks omitted). However, yet again, the benefits were not regarded as a result of a *joint*-contribution of the married couple. Furthermore, the fact that women might be primary breadwinners does not negate the male-centered concept of family espoused by Congress, nor make the *Capato* decision less gendered. *See* discussion *infra* Part IV.

152. COTT, *supra* note 158, at 176-78.

153. *Capato III*, 132 S. Ct. 2021, 2027 (2012) (citing Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360, 1364 (codified as amended at 42 U.S.C. § 402(d) (2006))).

154. JUDITH STACEY, BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE-TWENTIETH-CENTURY AMERICA 8 (1998); *see also* Pierre Bourdieu, *On the Family as a Realized Category*, 13 THEORY, CULTURE & SOC'Y 19, 20-21 (1996) (considering the family "a well-founded fiction").

155. STACEY, *supra* note 154, at 5-10.

'naturalness,'" institutionalized and supported by law,[156] with marriage, consummated by sexual intercourse, constituting a pillar of the nuclear family.[157] The marital, nuclear family has been characterized as "one that encourages monogamy, procreation, industriousness, [and] insularity," meaning that the "family is understood as a closed unit."[158]

In the modern family, "[f]amily work and productive work became separated, rendering women's work invisible as [women] and their children became economically dependent on the earnings of men."[159] Some feminist scholars have therefore characterized marriage as a hierarchical relationship in which women are subordinate to men, as an economic dependence of woman on man, "as [with] the guarantee to a man of 'his' children," and "the denial [of] work done by women at home [as] part of 'production.'"[160] Furthermore, the law's preference for nuclear family situates "[]responsible reproduction" firmly within this traditional male-centered family context, in which reproductive decisions are considered and controlled by responsible fathers.[161]

Reproductive technology has long threatened to disintegrate the social-legal norms of the nuclear family.[162] By contrast to the marital unit, some argue that single motherhood "should be viewed . . . as a practice resistive to patriarchal ideology . . . because it presents a 'deliberate choice' in a world with birth control" to reproduce without marriage.[163] Others have further noted the "radical potential" of reproductive technologies that separate sex from conception to have a profoundly transformative potential for women by "alter[ing] the basic reproductive unit, destroying the centrality of (hetero)sexed couple and re-centering woman."[164]

If during most of the twentieth century manhood has rested on the ability to earn and to provide for a family, many women today share substantial economic responsibility for families.[165] If substantial earning capacity is now shared by

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156. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 150 (1995).

157. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1251-52 (2010).

158. *Id.* at 1256-57.

159. STACEY, *supra* note 154, at 8 ("Women devoted increased attention to nurturing fewer . . . children as mothering came to be [a] demanding vocation [and] [l]ove and companionship became the ideal purposes of marriages that were to be freely contracted by individuals.").

160. RICH, *supra* note 90, at 276-77.

161. FINEMAN, *supra* note 156, at 213.

162. Bernstein, *supra* note 73, at 1042, 1047.

163. FINEMAN, *supra* note 156, at 125.

164. Kate Harrison, *Fresh or Frozen: Lesbian Mothers, Sperm Donors, and Limited Fathers*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 167-68 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

165. RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 20, 40, 47 (2011); *see also* Renan Barzilay, *A New Paradigm for the Family and Medical Leave Act*, *supra* note 21, at 411; Sarah Jane Glynn,

women, and reproductive technology allows women to have babies "on their own"[166] without male control, then what role is there for men in the future of the family and the human race? This anxiety seems to be an underlying presupposition in the *Capato* debate.

As the twentieth century neared a close, a postindustrial labor market enmeshed in a postindustrial society gave increasing rise to post-modern families.[167] Today, postindustrial society has opened up a diverse array of familial relationships, as same-sex partnerships, single-parent households, and dual-earner households are increasingly common.[168] The post-modern family's boundaries are uncertain, fluid, its contours unclear and its implications unresolved.[169] It is an unsettled alternative, accentuating possibly more joint, and vertically collaborative features of family than the modern family currently affords.[170] Today, one can no longer speak of "the family"; there are many types, and "family" is in flux. Yet, some of its modern elements have remained intact.

Families have long been recognized by scholars as sites of value formation and moral socialization,[171] with the state encouraging, incentivizing, and subsidizing familial institutions that "produce the right kind of citizens."[172] Some scholars have noted that the Supreme Court has long had a share in constituting the American family as a mostly modern, marital, and nuclear family,[173] with constitutional jurisprudence constructing the marital, nuclear family as an ideal family.[174] The Act, as interpreted by the *Capato* Court, fits that mold. Indeed,

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*The New Breadwinners: 2010 Update*, CTR. FOR AM. PROGRESS 31-32 (2012), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/awn/breadwinners.pdf.

166. I share the critique that there is really no such thing as being "on one's own," and that dependency is part of the human condition, independence illusionary. MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 30-40 (2004). However, my use of the term in this paper is meant to illustrate how the law constitutes us so as not to be dependent on the state.

167. STACEY, *supra* note 154, at 16-17.

168. Ariela R. Dubler, *Constructing the Modern American Family: The Stories of* Troxel v. Granville, *in* FAMILY LAW STORIES, 95, 111 (Carol Sanger ed., 2008) [hereinafter Dubler, *Modern American Family*].

169. STACEY, *supra* note 154, at 16-18, 251.

170. *Id.* at 30.

171. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 17-23 (1989) (discussing "the family as a school of justice").

172. Ristroph & Murray, *supra* note 157, at 1251; *see also* Bernstein, *supra* note 73, at 1047.

173. *See generally* Ristroph & Murray, *supra* note 157; Dubler, *Modern American Family*, *supra* note 168, at 95-112.

174. Ristroph & Murray, *supra* note 157, at 1251-59 (arguing constitutional law has established a marital, nuclear, and ideal legal family form); *see also* Dubler, *Modern American Family*, *supra* note 168, at 96, 107-11 (illustrating how the Court constructed the modern family as complicated, yet nuclear); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1020 (2000) (arguing marriage is the reigning normative model against which all other unions are evaluated).

on its face, *Astrue v. Capato* makes an effort to update the legal understanding of family and reflect the increasing diversity of family life[175]—*Capato* insisted that marriage need not determine a child's status, and that biology needn't either.[176] The Court supported a progressive, diverse meaning of family: children need not be biological children to be entitled to benefits, nor does a couple necessarily have to be married for their children to be eligible, on par with children born in wedlock, for benefits.[177]

However, this seemingly departure from the marital family ideal model may be less promising than it first appears, as a deeper look casts doubts on just how progressive the Court's construction is actually. Consider Karen Capato's predicament following Nick's death: in mourning, with a baby at hand, she used her reproductive powers to promote her vision of family. Her actions demonstrate that her vision included siblings to her orphaned child. The family she created, under her vision, did not receive the law's support, in that it did not entitle the twins to benefits.[178] Had Nick indicated in his will his wish to include future offspring, they would have received Social Security survival benefits, under the Court's interpretation, but Nick had not issued a will stating his desire as such.[179]

It has long been noticed that "technological change[s] require[] new choices and responsibilities."[180] Greater reproductive choices may provide an opportunity "for greater personal fulfillment"[181] but may also increase pressure to use the new available technologies.[182] Some strenuously object any change in the basic procreative process, while others recognize that the particular choices are highly controversial, as they are bound up with issues of sexuality, family, and gender.[183] Some scholars have feared that reproductive technologies that use women's bodies by the masculine nature of the medical profession,[184] are an attempt to seize the reproductive capacities which have traditionally been "women's [distinctive] source of power."[185] Certainly, most women are subject to social

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175. *Capato III*, 132 S. Ct. 2021, 2029-31 (2012).

176. *See* discussion *supra* Part I.

177. *Capato III*, 132 S. Ct. at 2029-31.

178. *Id.*

179. *Id.* at 2026.

180. Shultz, *supra* note 99, at 299.

181. *Id.* at 300.

182. Arianne Renan Barzilay, *Working Parents*, 35 TEL AVIV U. L. REV. 307 (2012).

183. The Catholic Church has voiced religious objections over all types of ART. *See* Shultz, *supra* note 99, at 300 n.9. Some feminists fear that reproductive technology accelerates dominance over women's reproduction. *See* GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS 272-324 (1985). Other feminists contend that reproductive technologies may free women from the bonds of pregnancy, and therefore, from vulnerability caused by reproduction. *See* SHULAMITH FIRESTONE, THE DIALECTIC OF SEX 233 (1970).

184. Stanworth, *supra* note 95, at 10, 13.

185. Michelle Stanworth, *Editor's Introduction*, *in* REPRODUCTIVE TECHNOLOGIES, GENDER,

pressures to procreate and mother in varying degrees even when unable to conceive through sexual intercourse. Yet women respond to these pressures in myriad "ways, depending upon their social circumstances, their health and their fertility," culture, and class.[186] The energy and commitment involved in achieving and sustaining a wanted pregnancy, in giving birth, and raising the children, however, cannot be disregarded. Karen Capato's decision is especially costly, putting her body, health, and finances through cycles of IVF.

But what was there for Karen Capato to do? "Women have always been seen as waiting: waiting to be asked, . . . waiting for men to come home from wars, or from work," or waiting for a new man to take over the place of an old-sponsor.[187] Karen Capato could not wait. She had been through enough. She wanted to have a family. She had a one-year-old at hand. She was in mourning of her husband's tragic death. One can imagine that she was hardly in mood for dating. Yet, she strongly desired to create her vision of family. She would not wait for a new sponsor. She viewed her physicality as a source of making that dream a reality.

But a woman's sole decision to consciously and deliberately create *a-priori* a single parent family, centered on the women, and to fully control and determine her reproductive life is perhaps too much for law to currently fully enable and support. An important distinction has been made between the potential relationship of a woman to her powers of reproduction and the institution of motherhood which aims to ensure that women's powerful potential "remain[s] under male control."[188] "[T]he legal and technical control by men" of reproduction, are symbols of a patriarchal system.[189] Behavior that threatens the *institution* of motherhood, such as women choosing the terms of their reproductive, familial lives, cannot, under this view, be supported.[190]

The law's incorporation of the male need to feel in control of female reproductive power is an underlying issue in *Capato*. The ancient continuing "dread" of the male for the female capacity to make life[191] may have played out yet again in the Social Security Administration's interpretation of the Act and the Court's subsequent decision, telling women that if they do not procreate under male authority, they are left to fend for themselves. By not granting social security benefits, women like Karen Capato will now have less control over their reproductive lives and bodies. They may become more dependent upon male sponsorship. By tying the twin's benefits to state intestacy law, asking who under these laws is entitled to inherit the wage earner's property, the law gives power to fathers' control over reproductive decision-making.

True, one can argue that the Court's result is equitable as it may work both ways: if a woman were to be the deceased wage earner, her husband's claim on

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MOTHERHOOD, AND MEDICINE, *supra* note 95, at 3.

186. *Id.* at 3-4.

187. RICH, *supra* note 90, at 39.

188. *Id.* at 13.

189. *Id.* at 34.

190. *Id.* at 42-43.

191. *Id.* at 40.

behalf of posthumously conceived children, would be denied in similar circumstances. But such formal equality does not take into account the disparate ways this law impacts husbands and wives. One must not mistake men and women to be on even ground in this context for three reasons. First, technologically, frozen eggs are much less likely to produce live births after extended periods of time.[192] Technology, however, has nearly perfected the act of freezing sperm, retaining its fertility for decades and making posthumous conception far more common by using frozen sperm than frozen eggs.[193] Second, such a hypothetical husband would need to contract with a surrogate mother, which is far more complicated than becoming pregnant by one's own reproductive capacity. Third, women still conduct more family carework and earn less in the market than men, , thus making their dependency on benefits different from men's.[194] *Capato*, thus, will have a different effect on women than it will on men. If a woman today is more independent in reproduction by technology, she remains dependent in production by law and society.[195]

Women's bodies are full of contradiction; they are a space invested both with unprecedented power and acute vulnerability. Law and society can choose to support this power or enhance its vulnerability. The Act, the Social Security Administration's interpretation, and the subsequent Supreme Court decision have chosen the latter. Furthermore, they have constructed the hetero-married American family as *male-centered*. In the twenty-first century, the Court insisted that the hetero-family definition to be promoted by law is the modern, rather than the postmodern, one: the family in which male control of women's reproductive power persists through an economic mechanism. For heterosexual couples, at least, the Court has kept traditional gendered power dynamics intact.

## CONCLUSION

ART is a source of ambivalence; it is celebrated as eliminating "the pain of infertility" and yet "vilified as challenging appropriate methods of family

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192. Carpenter, *supra* note 72, at 356.

193. *Id.*

194. *See* Glynn, *supra* note 165, at 4-5 (stating that women still conduct more family carework and earn less in the market than men).

195. Albeit granting benefits to the Capato twins would have perhaps increased Karen's power, but is not enough to increase women's power over reproduction in cases where there is no husband, and there are no husband's benefits to begin with. Enhancing power for mothers not necessarily associated with a male breadwinner could require, as some scholars have suggested, *inter alia*, extended welfare rights (GORDON, *supra* note 113, at 291, 293, 305-06), remuneration of motherhood (*see generally*, Martha M. Ertman, *Love and Work: A Response to Vicki Schultz's* Life's Work, 102 COLUM. L. REV. 848 (2002)), and a more egalitarian workforce geared towards caretakers (*see* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 8 (1999); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000); Renan Barzilay, *A New Paradigm for the Family and Medical Leave Act, supra* note 21, at 407-08, 430, 432-33). Of course, these measures were outside the Court's scope in *Capato*.

formation."[196] This ambivalence resonates with the practice of reproduction itself. Recently, and for the first time in history, the U.S. Supreme Court addressed the status of children born through ART in *Astrue v. Capato*.[197] It issued an opinion addressing the status of twins, conceived after their biological father's death, for purposes of obtaining Social Security survivors' benefits.[198] The unanimous opinion provides a strict, black-letter analysis of the Act, technically examining the relationship among its competing provisions.[199] My objective in analyzing the case was not to argue for a correct interpretation of the statute at hand, nor to argue for the desirability of posthumous conception but to show the complex family ideology underlying the Act and the Court's decision. Considering context has proved essential to understanding the underlying assumptions and future lessons of this decision.

By providing a context of reproduction and breadwinning history, this Article illustrates that developments in reproductive technology have created social and biological options that expose old assumptions about gender and the family and posit new dilemmas for legal policy. A critique of reproductive technologies regulation must ask how society may "create the political and cultural conditions in which" women can employ these technologies according to their own definitions of parenthood and family.[200] *Capato* has not done so. Even when the Court tries to modify the social norm of the nuclear family in considering new family forms, it does not undermine the basic premise of the hetero- family as patriarchal.[201] By choosing to rely on formal black-letter interpretation of the law, the Court refrained from opening up the underlying questions regarding familial power relations. The decision, thus, missed an important opportunity by choosing to amplify and reinforce, rather than soften and offset, gendered dependency that presently is a dominant feature of the modern American family. The male-dominated family unit has been cast, yet again, as the norm.[202] Following *Capato*, if a legislature is committed to the pursuit of reproductive choices, maintaining that women deserve the social, financial, political, and legal conditions required to make genuine choices about reproduction, then it must break with current paradigms on reproduction and production and be to creating a legal world in which reproductive choices are respected, enabled, and supported.

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196. Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 295 (2005).

197. *Capato III*, 132 S. Ct. 2021 (2012).

198. *Id.* at 2025-26.

199. *Id.* at 2029-34.

200. *See* Stanworth, *supra* note 95, at 35.

201. *Capato III*, 132 S. Ct. at 2029-31.

202. *See* FINEMAN, *supra* note 166, at 227.