
With the Advent of Artificial Reproductive Technologies is There a Fundamental Right to a Child?

Katarina Lee[†]

INTRODUCTION

Artificial reproductive technologies (ARTs), most specifically in-vitro fertilization (IVF), gestational surrogacy, and uterine transplants,¹ have raised the question of whether there should be a legal right to a child. These technologies have opened up a plethora of legal concerns including legal parentage and citizenship issues,² as well as whether embryos are deemed marital property. Additionally, the legalization of same-sex marriage in several countries further complicates many of these legal issues, as outdated parentage laws often do not accommodate same-sex relationships. The purpose of this paper is to focus on how recent court decisions have *in effect* instituted a right to a child and how the impact of same-sex marriage further supports this movement. There are four parts to this paper, **Part I** will provide relevant background information regarding ARTs; **Part II** will address several domestic and international court decisions regarding ARTs; **Part III** will address the bioethical reasons why it is ethically impermissible to institute a fundamental right to a child; and **Part IV** will address relevant counter-arguments.

I. BACKGROUND

*This paper was submitted in fulfillment of the writing requirement for the Edmund Burke Fellowship program held by the Center for Family & Human Rights (C-Fam). Special thanks to Susan Yoshihara and Stefano Gennarini for selecting the best submissions.

[†] The author holds a BA in Philosophy from the University of Dallas; a MA in bioethics from New York University and a JD from the University of Minnesota concentrating in health law and bioethics. She is currently a clinical ethics fellow at Baylor College of Medicine's Medical Ethics and Health Policy Center and an adjunct professor of Philosophy at the University of St. Thomas.

¹ Artificial Reproductive Technologies: Mechanisms primarily used to assist in pregnancy. In Vitro Fertilization: The process in which an ovum is fertilized by sperm in glass for the purposes of transfer. Gestational Surrogacy: The process in which an embryo is transferred to a woman whom it is not genetically related to for the purposes of gestation. Uterine Transplantation: The process of transplanting a uterus into a woman who lacks a uterus for the purposes of becoming pregnant.

² HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A Study of Legal Parentage And The Issues Arising From International Surrogacy Arrangement*, (March 2014), <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf>.

Conceivably, the initial purpose for artificial reproductive technologies was to provide a potential treatment for infertility.³ Artificial insemination and IVF increased the rate of fertilization for heterosexual couples and women who had difficulty conceiving. Eventually, for women who could not carry their own child(ren) a solution was found in gestational surrogacy.⁴ This provided the opportunity for intended parents who had difficulty conceiving to be genetically related to their child. However, these technologies are no longer solely marketed to these individuals. While ARTs continue to provide medical infertility assistance, they are now widely used in a variety of family planning situations, most notably for male and female homosexual individuals and couples. Arguably, the individuals most impacted by alternative family planning options are male homosexuals who need a gestational surrogate and an ovum to create children that they are genetically related to.

The majority of the ART markets in countries that permit these practices are within a private market,⁵ separated from governmental assistance. Of those countries that do provide governmental assistance, it is provided for in different forms such as tax breaks or a “free” program with significant caveats.⁶ As a result, the question of who has access to these private services comes into question. A related concern is the issue of fertility practitioners discriminating as to whom they will provide their services to. While the concern about discriminatory fertility practices is related to the question of a fundamental right to a child, the purpose of this paper is to address the ethical concerns associated with rights to children.

II. LEGAL FRAMEWORK REGARDING A LEGAL RIGHT TO A CHILD

³ NATIONAL INSTITUTES OF HEALTH, *Assisted Reproductive Technology*, <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/Pages/art.aspx>.

⁴ John Robertson, *Other women’s wombs: uterus transplants and gestational surrogacy*, 3. J. L. AND BIOSCIENCES 1 (April 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5033439/>.

⁵ Ellie Kincaid, *A booming medical industry in the US is almost totally unregulated*, BUSINESS INSIDER: SCIENCE (July 7, 2015, 3:50 PM), <http://www.businessinsider.com/assisted-reproduction-ivf-industry-regulation-2015-6>; HARRIS WILLIAMS & CO., *FERTILITY MARKET OVERVIEW*, http://www.harriswilliams.com/sites/default/files/content/fertility_industry_overview_-_2015.05.19_v10.pdf.

⁶ Amy Smith, *Couples Flock to eastern Europe for cheaper IVF*, EXPRESS, (Apr. 5, 2015), <http://www.express.co.uk/news/uk/167203/Couples-flock-to-eastern-Europe-for-cheaper-IVF>; Katarina Lee, *A Comparison of Canadian and American ART Law*, VOICES IN BIOETHICS, (Oct. 14, 2015), <http://voicesinbioethics.org/2015/10/14/a-comparison-of-canadian-and-american-art-law/>.

Much of the legal discussion surrounding ARTs focuses on the distinction between genetic, gestational, and intended parents.⁷ Traditionally, parentage laws focused on genetic or gestational ties to children; however, with the advent of these technologies the emphasis has now begun to focus on intention. Conceivably, this movement has attempted to mirror the intentional relationship between adoptive parents and their adopted children. Notably, there have been several cases in the United States and abroad that have conferred intention to be the determining factor in regard to legal parentage. Prior to engaging in dialogue surrounding the ethics of this practice, I will provide a brief summary of several relevant court cases evidencing a movement to recognizing intended parents are legal parents.

In *Johnson*,⁸ a heterosexual couple (Calverts) entered into a contract with a surrogate in order to gestate their genetic child.⁹ The parties had a falling out and the gestational surrogate threatened to keep the child.¹⁰ The Supreme Court of California ruled that the gestational surrogate was not the “natural mother” of the child and that a genetic tie, as well as an intention to become the legal mother, meant that Mrs. Calvert was the legal mother.¹¹ Similarly, in *In Re Marriage of Buzzanca*, a husband and wife entered into a surrogacy contract using an embryo that had been created through donor gametes.¹² The couple divorced and the husband claimed that he was not the lawful parent, while the wife petitioned to establish herself as the legal mother.¹³ The trial court ruled that because neither the husband nor the wife had a biological connection to the child, and that neither was the legal parent.¹⁴ However, the California Court of Appeals reversed, holding that even when there is no genetic or biological

⁷ Amy Larkey, *Redefining motherhood: determining legal maternity in gestational surrogacy arrangements*, 51 Drake L. Rev. 3 (2003),

<http://heinonline.org/HOL/LandingPage?handle=hein.journals/drklr51&div=24&id=&page=>; John Lawrence Hill, *What Does It Mean To Be A “Parent”? The Claims Of Biology As The Basis For Parental Rights*, 66 NYU L. Rev. (1991),

<http://heinonline.org/HOL/LandingPage?handle=hein.journals/nylr66&div=23&id=&page=>; Malina Coleman, *Gestation, Intent, And The Seed: Defining Motherhood In The Era Of Assisted Human Reproduction*, 17 Cardozo L. Rev. 497 (1995/1996),

<http://heinonline.org/HOL/LandingPage?handle=hein.journals/cdozo17&div=25&id=&page=>
⁸ *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).

⁹ *Id.*

¹⁰ *Id.* at 87.

¹¹ *Id.* at 101.

¹² *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410 (1998).

¹³ *Id.* at 1410.

¹⁴ *Id.*

connection to a child, if a parties' actions suggest that they intend to become parents they can be the lawful parents.¹⁵

Raftopol evidences how some of these assisted reproductive technology arrangements can involve several parties from different countries.¹⁶ Raftopol and his domestic partner were a homosexual couple who lived in Romania.¹⁷ They jointly entered into a gestational agreement with an American gestational surrogate.¹⁸ The surrogate gave birth to two children who were genetically related to Raftopol, but the surrogate agreed to the adoption of the children by Raftopol's partner.¹⁹ The Supreme Court of Connecticut found that the surrogacy agreement was valid and that both Raftopol and his partner were legal parents of the children.²⁰ Notably, foreign courts are recognizing these legal parentage arrangements as well. The Supreme Court of Germany recognized a parentage order from a California court that recognized a male homosexual couple both as legal parents of a child born through the use of a gestational surrogate, even though only one was genetically related to the child.²¹

The Italian government removed a child from his intended parents because the child was not genetically related to either of them and was birthed by a gestational surrogate in Russia.²² Under Italian law, gestational surrogacy is illegal and thus a legal mother is typically the woman who gives birth to the child.²³ However, the European Court of Human Rights found that there was a family connection between the child and his intended parents and therefore the child should not have been removed from his intended parents.²⁴ Eventually, the court ruled that because the child had "developed emotional ties with his foster family" the

¹⁵ *Id.* at 1411.

¹⁶ *Raftopol v. Ramey*, 299 Conn. 681 (2011).

¹⁷ *Id.* at 687.

¹⁸ *Id.* at 686.

¹⁹ *Id.* at 687.

²⁰ *Id.* at 717.

²¹ CHILD RIGHTS INTERNATIONAL NETWORK, *Supreme Court of Germany Decision XII ZB 463/13*, (Dec. 10, 2014), <https://www.crin.org/en/library/legal-database/supreme-court-germany-decision-xii-zb-463/13-bundesgerichtshof-beschluss-xii>.

²² Lady Justice Arden, *Surrogacy: how the law develops in response to social change*, OUPBLOG (citing *Paradiso and Campanelli v. Italy*) (Feb. 24, 2015), <http://blog.oup.com/2015/02/international-surrogacy-law/>.

²³ Victoria Ferrara, *Update On Surrogacy In Italy*, Worldwide Surrogacy (Jan. 30, 2015, 11:01 AM), <http://info.worldwidesurrogacy.org/blog/update-on-surrogacy-in-italy>.

²⁴ CHILD RIGHTS INTERNATIONAL NETWORK, *Paradiso and Campanelli v. Italy*, (Jan. 27, 2015), <https://www.crin.org/en/library/legal-database/paradiso-and-campanelli-v-italy>.

child is not being returned to the intended couple.²⁵ In effect, the court ruled that an intentional parent with no genetic tie can be a legal parent.

While the culmination of these court decisions evidences a willingness to view intended parents as legal parents, it does not *necessitate* that there is a legal right to a child. Plausibly, conversation regarding rights to children has not been as prevalent prior to (1) same-sex marriage and (2) the advent of ARTs. The reason for this is that there is a presumption that heterosexual marriage may involve children, and those who cannot have children may seek out adoption or, now with ARTs, other forms of family creation. However, there has been a shift with recognizing whether all individuals should have the right to children, or the right to the opportunity of children.²⁶ This means individuals suffering from infertility should be financially supported throughout the ART process, and similarly homosexual individuals, who do not have the procreative capacity to beget children, should be provided with these services.²⁷

The purpose of this paper is to focus on whether countries that permit same-sex marriage have in effect granted these couples the right to a child. The reason to highlight the impact on same-sex couples is that much of the conversations surrounding same-sex marriage focuses on the ability or inability of same-sex couples to create families. Evidently, the creation of families is more difficult for same-sex couples including the fact that some countries prohibit adoption by same-sex couples.²⁸ Even in countries that are more willing to assist same-sex individuals and couples in creating families, these individuals are often faced with the additional financial burden of using ARTs.²⁹

Notably, in the recent U.S. Supreme Court case legalizing same-sex marriage, the conversation of children runs throughout the entire opinion. The Court in *Obergefell* references previous Supreme Court cases *Zablocki* and *Meyer* stating that “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process

²⁵THE LOCAL, *Italy wrong to take child born to surrogate: ECHR*, <http://www.thelocal.it/20150127/echr-italy-wrong-to-take-child-born-to-russian-surrogate> (last visited March 10, 2015).

²⁶See generally, John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 33 Case Western Reserve L. Rev. 323 (2005), <https://law.utexas.edu/faculty/jrobertson/robertson.DARBY.pdf>.

²⁷*Id.*

²⁸CHILD RIGHTS INTERNATIONAL NETWORK, *LGBT: Slovak Referendum Against Gay Rights Fails on Low Turnout*, <https://www.crin.org/en/library/news-archive/lgbt-slovak-referendum-against-gay-rights-fails-low-turnout>.

²⁹Connolly et. al. *The costs and consequences of assisted reproductive technology: an economic perspective*, 16 Human Reproduction Update 6 (2010), <http://humupd.oxfordjournals.org/content/16/6/603.full>.

Clause.”³⁰ However, what happens when the Court grants individuals the right to marry, but due to procreative differences these individuals cannot create a child? If we have already deemed intention sufficient for parenting, and the Supreme Court emphasizes protecting the ability to raise children, should there be a right to a child? Additionally, should other countries recognize a legal right to a child given the international relationship with many of these ART agreements?

Furthermore, what does a right even mean? In a general sense, legal rights are privileges and protections granted by a governmental system.³¹ Rights have been divided into two forms: positive rights, in which the government is required to actively do something and negative rights, in which the government should abstain from acting.³² Additionally, as Immanuel Kant states, “Where there are no rights there are no duties.”³³ Negative rights have already been associated with procreative capacities,³⁴ while the fundamental right to a child would require a positive right.

III. ETHICAL CONSIDERATIONS OF A FUNDAMENTAL RIGHT TO A CHILD

As aforementioned, the “fundamental right to a child” language would not simply impact homosexual individuals and couples, it would additionally impact all married heterosexual individuals and potentially single individuals. While one is sympathetic to the desire for an individual or couple to create a family, having a fundamental right to a child creates an opportunity to exploit and degrade children and therefore is ethically impermissible. There are several arguments in opposition to a fundamental right to a child; however, for the purposes of this paper I will address the following two concerns: (1) permitting a fundamental right to a child violates a child’s autonomy, risks exploitation, and degrades a child’s dignity and (2) permitting the fundamental right to a child unethically infringes upon the rights of several other parties.

³⁰*Obergefell v. Hodges*, 135 S. Ct. 2584, (2015) from *Zablocki*, 434 U.S., at 384, 98 S.Ct. 673 (quoting *Meyer, supra*, at 399, 43 S.Ct. 625).

³¹STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *Legal Rights*, (Marc 20, 2013), <http://plato.stanford.edu/entries/legal-rights/>.

³²UNIVERSITY OF ALBERTA: CENTRE FOR CONSTITUTIONAL STUDIES, *Positive and Negative Rights*, (2016), <http://ualawccsprod.srv.ualberta.ca/ccs/index.php/pr/534-positive-and-negative-rights>.

³³2 LEWIS VAUGHN, *BIOETHICS: PRINCIPLES, ISSUES AND CASES*, 147 2010.

³⁴*Eisenstadt v. Baird*, 405 U.S. 438, (1972).

A. Violation of the Child's Right

Fundamentally the greatest concern about rights language associated with children is the notion that no individual should have the legal right to another person. Children are afforded similar rights and protections of those that are afforded to adults. Notably, these protections are supported on an international scale as the U.N. in its Convention on the Rights of the Child placed a strong emphasis on children's ability to have "freedom of thought, conscience and religion," as well as requiring all State Parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation."³⁵ Children are separate entities from their parents and guardians. While they may not be able to make all decisions for themselves, parents and guardians are meant to raise children, not have a proprietary capacity over them. Rights language negates the fact that children are separate entities from their parents or guardians; moreover, it treats them as if they are commodities.

Arguably, it commodifies children in a variety of ways: (1) the monetary exchange needed to create embryos resulting in children is only a nuanced difference from exchanging money for live children and (2) it begins to treat children like another entity in life to be acquired, with little difference to that of acquiring other goods. Additionally, this may have a detrimental effect on the parent-child relationship. Creating a child through ARTs potentially risks the relationship between parents and their children primarily due to the money that is exchanged to create them.³⁶ With the risk of commodification, it is inconsequential where the resources come from, whether they are public or private funds.

B. Infringement upon other's Rights

Not only does a fundamental right to a child infringe upon the rights of a child, it arguably infringes upon the rights of many other parties.

³⁵ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *Convention on the Rights of the Child*, (2002), <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

³⁶ Katarina Lee, *Selecting Embryos for Intelligence*, 40 ETHICS AND MEDICS 3-4 (Jan. 2015), <http://ncbcenter.org/document.doc?id=680>.

There are four other parties that would be affected by this form of rights language: (1) private fertility clinics; (2) adoption agencies; (3) gestational surrogates; and (4) ova and sperm donors.

Providing the opportunity for individuals to have children through the services that private fertility clinics offer would necessitate that each clinic would have to serve anyone who wanted a child. The reality of this is that it infringes upon medical practitioner's ability to practice. As mentioned earlier, the discriminatory practices of fertility clinics are outside the scope of this paper. However, regarding the rights conversation, rights should not be conferred to someone if it infringes upon another's rights. Not only would rights language impact private fertility clinics, it would greatly impact practices of adoption agencies and services. Scholars have voiced their concerns that adoption agencies should not have the ability to discern who is a "fit" parent as this practice is discriminatory, similar to fertility clinics withholding services³⁷. However, granting rights language regarding the ability to have a child would infringe upon these agencies.

On a practical matter, there simply would not be enough children to provide each married couple or single individual with a child.³⁸ Even if they all did not want children, what happens when they want multiple children? As a result, many of these individuals will seek ARTs to provide them with the opportunity to create children. However, (1) where would the genetic material come from and (2) are women going to be forced to be gestational surrogates? There are already many concerns about providing financial inducement for individuals to donate their sperm and ova.³⁹ Presumably, there would need to be more sperm and ova donated in order to accommodate the need. It would be highly unethical and illegal to force individuals to give or sell their genetic material. Similarly, woman could not be forced to become gestational surrogates. Additionally, there is already significant concern about these fertility practices in international situations where individuals are being exploited.⁴⁰ Lastly, would the

³⁷Silvers et. al., *Reproductive Rights and Access to Reproductive Services for Women with Disabilities*, 18 *AMA J. of Ethics* 430 (April 2016), <http://journalofethics.ama-assn.org/2016/04/msoc1-1604.html>.

³⁸ CONGRESSIONAL COALITION ON ADOPTION INSTITUTE, *Facts and Statistics*, http://ccainstitute.org/index.php?option=com_content&view=category&id=25&layout=blog&Itemid=43.

³⁹Dorothy Flower, *Assisted reproduction: should egg and sperm donors be paid?* 20 *J. Family Health Care* 69 (2010), <https://www.ncbi.nlm.nih.gov/pubmed/20518376>.

⁴⁰Stephen Wilkinson, *Exploitation in International Paid Surrogacy Arrangements* 33 *J. Applied Philosophy* 125 (May 2016),

intention of parenthood trump the rights of those that are genetically or gestationally tied to the children?

IV. COUNTER-ARGUMENTS: WHY THERE SHOULD BE A FUNDAMENTAL RIGHT TO A CHILD

The two main arguments in favor of recognizing a legal right to a child are that there are concerns that while same-sex marriage has become legal: (1) homosexual individuals and couples will be discriminated against in their ability to create a family and (2) because of the cost of ARTs, many individuals will not be able to create a family⁴¹. While discriminatory practices are a valid concern, there are two issues that would need to be addressed.

The first concern is that while some governments have begun to provide assistance in paying for these procedures, the majority of ARTs are still performed in private clinics funded by individuals seeking these treatments or through generous compensation packages from employers.⁴²

As a result, proponents of a “fundamental right to a child” could argue that if it is a right, intended parents cannot be discriminated against. While this argument is valid, as was stated earlier, the tension between private business practices of fertility clinics and the rights of intended parents come into opposition with one another. This right arguably infringes upon the ability for individuals to practice medicine and the practices of private business.

The second concern is that both heterosexual and homosexual individuals and couples wanting to create a family may not be able to afford to do so due to the high cost of ARTs. As a result, if there is a fundamental right to a child, this would necessitate that the government would have to provide means in order to be able to do so. While this practice is already happening in Canada, the “fundamental right to a child” language still would come into contradiction with many individuals’ beliefs and freedoms. This would vary by each country, but individuals arguably may not want their tax dollars funding practices that they find

<http://onlinelibrary.wiley.com/store/10.1111/japp.12138/asset/japp12138.pdf;jsessionid=30A43DECF2D0A060E370CBD8254768AC.f01t02?v=1&t=iz07wios&s=2ffc7e4318aace7eaa170a692bcb566b45beb43f>

⁴¹ Connolly, *supra* note 23.

⁴² Sarah Elizabeth Richards, *Why companies are paying for IVF for their workers but don't want to talk about it*, MARKETWATCH (Feb. 10, 2017, 1:04 PM), <http://www.marketwatch.com/story/companies-are-increasingly-helping-people-have-babies-but-they-dont-want-to-talk-about-it-2017-02-07>.

controversial. Rights based language is focused on giving rights without infringing upon another's rights. Not only does a "fundamental right to a child" infringe upon the rights of a child, but it also infringes upon the rights of others.

CONCLUSION

The real question to be addressed is whether society has greater obligations to those who, for a variety of reasons, cannot procreate. While being sympathetic to the plight of these individuals, the assertion of greater privileges to these individuals unethically infringes on the rights of many others. Additionally, while there are controversies about using the judicial process to determine parenthood,⁴³ allowing the courts to appropriately determine legal parentage is the best means of determining the best interest of a child. Creating a general blanket rule that all may have a right to a child negates the specificity needed when protecting the interests of children.

⁴³ Margalit et. al., *The New Frontier Of Advanced Reproductive Technology: Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 Harvard J. of Law & Gender, 107 (2014), <http://harvardjlg.com/wp-content/uploads/2014/02/Margalit.NewFrontierofARTs.pdf>; Stanford Encyclopedia of Philosophy, *Parenthood and Procreation* (Aug. 2, 2016), <https://plato.stanford.edu/entries/parenthood/>.