



# *The Right to Parenthood*

## *An Argument for a Narrow Interpretation<sup>1</sup>*

Daniel Statman

### ABSTRACT

The paper argues for two kinds of limitations on the right to parenthood. First, it claims that the right to parenthood does not entail a right to have as many children as one desires. This conclusion follows from the standard justifications for the right to parenthood, none of which establishes the need to grant special protection to having as many children as one desires. Second, with respect to the right to receive assistance from the state in IVF, it is suggested that the state should also be allowed to take non-medical considerations into account in determining whether or not an applicant is entitled to this service, particularly in cases where the applicant seems to lack mothering ability.

### KEYWORDS

Parenthood; Negative and Positive Rights; Assisted Reproduction

### *Introduction*

Let me begin with two true stories. The first is that of David Oakley from Wisconsin, a story quite well known by now, one which has aroused wide legal and public discussion in the US.<sup>2</sup> Oakley was convicted of deliberately failing to pay child support for his nine children. He was placed on probation, one of the conditions being that he not father any more children for the term of his probation, unless he could prove that he was capable of supporting those he had already sired and any additional children he wanted to bring into the world. The ruling was upheld by the Wisconsin Supreme Court in August 2001 and opened (or reopened) a debate about the nature and limits of the right to procreate.

The second story is one I heard from a former student of mine, Rebecca, who works as a psychologist in a big IVF centre in Israel. Ms. A, a single woman in her thirties, turned to the centre asking to receive IVF treatment. She was referred to Rebecca who saw immediately that A was suf-

fering from serious psychological and social difficulties. She was not working and lived on welfare benefits, even needing to reside in an apartment rented by the department for social services. She had no social connections and had difficulties in communication, often manifested in verbal aggression. Apparently A's family was also problematic, with most of its members suffering various forms of retardation, mental illnesses and behavioural difficulties. The psycho-social report written at the end of 2000 concluded that, though her parental capability was low, it was impossible to determine unequivocally that A could not mother a child. The report added that, though she probably lacked the resources and the ability to raise a child by herself, she might be able to do so with "massive support" and "close surveillance". Following this assessment, the IVF centre called a meeting with all those involved in the case. They decided to refuse treatment to Ms. A. In his report, the director of the centre added a letter, commenting in conclusion: "I'm sorry but the woman ought not to be treated. I hope that, in spite of all the pain, this

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AUTHOR INFORMATION: Daniel Statman, PhD. Dept. of Philosophy, University of Haifa, Haifa 31905 (Israel). E-mail: dstatman@research.haifa.ac.il



decision will prevent further confusion and misery.” To date, Ms. A has not received IVF treatment from any other centre in Israel and most probably will never bear a child.

In both cases, that of Mr. Oakley and that of Ms. A, the question to be asked is whether the right to parenthood was violated. The purpose of my paper is to offer a framework for thought on this question. In the first part, I look at it through the prism of negative rights, i.e. the right to non-interference in the satisfaction of an interest, while, in the second, I utilize the prism of positive rights, i.e. the right to be granted assistance in the satisfaction of interests.

### *1. Interfering in the Right to Parenthood*

When claims concerning rights are invoked, two issues must be settled: first, whether the person who claims to be the holder of the right does, indeed, have the relevant right, and second, whether the right is strong enough to compete with conflicting considerations. Admittedly, in cases where the supposed right is easily overridden by other considerations, it is hard to decide whether the best conceptualization of the case is in terms of a right being overridden, or in terms of a right which was non-existent in the first place. I am not convinced that the distinction is a significant one, but, in any case, I believe it can be ignored for the purpose of the present discussion.

Did Mr. Oakley, then, have a right to procreate that was violated by the court? I shall assume, following Raz and others, that rights are interests that deserve special protection or enhancement, interests that impose various duties on others. I shall also assume that the notion of right is essentially non-utilitarian, that is to say, the very fact that violating the right would cause greater utility than not doing so is insufficient to justify the violation.

As noted by numerous writers,<sup>3</sup> the notion of a right to procreate is a bit misleading, because we don't seem to have an interest in procreation per se. If Mr. Oakley had been allowed to donate sperm and had been promised that his sperm

would be used to fertilize many women anywhere in the world, he wouldn't have felt that his desire for parenthood had been respected, while, similarly, Ms. A would not have accepted a solution according to which her ova would be donated to infertile women in some remote corner of the world to help them produce children that are genetically related to her. The interest we have is not in procreation itself, namely, in merely replicating our genes, but in rearing children that are genetically connected to us, or, at least, in rearing children with whom we can enjoy a significant relationship. This interest in having or rearing children can be satisfied even when the genetic connection is absent, e.g. when a woman receives ova from a donor to be fertilized with sperm from her husband or partner, or, of course, when a woman or a couple adopt a child genetically unrelated to either of them. For most human beings throughout history, the first choice would be to have children genetically related to them and, only if this were impossible, would they settle for forms of adoption. Bonnie Steinbock is right to conclude that individuals who lack the capacity to be rearing parents, such as severely retarded people, do not have an interest in reproducing, and, as a necessary corollary, do not have a right to reproduce either.<sup>4</sup> Thus, in what follows, when I talk about the right to reproduce or procreate, I'll always have in mind the right to parenthood, a term which captures the interest under discussion more successfully.

But why should the interest to parenthood be entitled to special protection in the form of a right? American jurisprudence has emphasized the connection between parenthood and privacy, implying that protection of the former is anchored in the importance of the latter. But while the importance of privacy can explain why the state ought not to interfere in procreation, it offers no explanation as to why the state might be required to help people procreate, as in the case of Ms. A. Refusing to offer such help might be morally wrong on other grounds, but it is hard to see how such refusal would violate an individual's privacy. Hence, though privacy might play some role in a theory



of parenthood, it can't be the whole story.<sup>5</sup> What needs to be added is the deep value attached to parenthood by human beings, and its crucial role in their well-being. I will not list here all relevant reasons for this value. Among other things, they have to do with the desire to achieve a kind of immortality by continuing to live through descendants, the desire to live vicariously through one's children, getting a second chance, as it were, the desire for the deep and enduring intimate relations that one hopes to achieve with one's offspring, the longing for a home, a nest, a secure place with a close network of relationships in which one belongs, and, in addition, the interest of couples to found a family.<sup>6</sup>

Now if these are the kind of considerations that underlie the right to parenthood, they have crucial implications regarding the nature of this right. I will mention one in brief, while elaborating at more length on another. The first implication, then, is that the right to be a parent does not include, or entail, the right not to be one.<sup>7</sup> Some of the judges in the Israeli case of *Nachmani v. Nachmani* thought otherwise and argued that a woman's right to be a mother by having her fertilized eggs planted in a surrogate mother's womb is equivalent to the right of her husband not to be a father against his will. In my view, this is a mistake. Maybe Mr. Nachmani did have a right to prevent his wife from continuing the artificial process of procreation against his will, but this right was not part of, nor entailed by, the right to parenthood because the reasons explaining the importance of parenthood for human beings are not those establishing the importance of not being a parent.

The second implication I'd like to draw from the above kind of considerations supporting the right to parenthood is that, contrary to what Justice Bradley stated in the *Oakley* case, it is not a right to have "as many children as one desires".<sup>8</sup> In terms of any of the considerations just mentioned, two or three children should definitely suffice. If, for instance, we want children so that in a real or a symbolic way, we continue to exist in the world after we die, then we don't need ten children to

achieve that goal. Furthermore, if, as argued in the *Symposium*, this immortality has to do with the rearing and education of offspring<sup>9</sup>, then, surely, there's a limit to the number of children one can rear and educate effectively. Similarly, if a deep human need to build a 'nest' exists, a need to create a place where one will always have a sense of safety, of belonging, and of meaningfulness, then, again, the nest need not include more than two or three children to fulfill its role. Finally, if having children is essential to the bonding together of two souls and to the founding of a family, there's no need for ten children to achieve these goals.

To be sure, people's perception of the size of a 'normal' family and their idea of the number of children a respectable member of the community should have are significantly influenced by the particular culture. For some, the nest must include at least five children. For others, two would be enough. But if there is a grain of truth in the idea of a universal right for parenthood, then – as with all human rights – there must be some core interest in parenthood shared by all human beings, regardless of the distinctive features of their culture. And if I'm right in my argument, then, in normal circumstances, the satisfaction of this fundamental interest does not require more than two or three children. Even the Biblical patriarchs were satisfied with small families. Sarah had one child. Rebecca had twins. When Rachel's moving plea to her husband "Give me children else I die" was answered, one child was enough for her to state that "God had taken away my reproach", while the most she aspired to was one more child. "And she called his name Joseph for she said God will add to me another son" (Genesis 30, 22-24). Thus, in the eyes of the Biblical narrator, one or two children are enough to satisfy the interest in parenthood.

It is interesting to note in this context that the Biblical injunction to multiply and replenish the earth is not interpreted in the Talmudic tradition as an obligation to reproduce as many children as possible, though such an interpretation would be a natural reading of the above order, but rather as an obligation to give birth to one boy and one girl.



If one assumes that the dictates of religion often manifest deep human concerns, then we might see here another confirmation of the idea that to satisfy interest in procreation, no more than two or three children are needed.

As far as I know, my suggestion to limit the right to parenthood with respect to the number of offspring goes against most, if not all, accepted wisdom and legal conventions in this area, according to which the right under discussion entails the right to determine the size of one's family. Of course I do not deny that people often have a deep desire to have big families and, moreover, that this desire might at times enjoy the protection of a right – but it will not be the right to parenthood. Maybe the right to culture, for example, could justify special protection of the procreation norms which are accepted in some religious or ethnic minority groups. Or maybe freedom of religion could justify a right to have as many children as a couple wants, in cases where the dictates of some religion call for big families or forbids the use of contraceptives.<sup>10</sup> The point is that, in the absence of these special rights, the right to parenthood does not imply interest in bearing ten or more children.

Returning now to Mr. Oakley. If my understanding of the right to parenthood is correct, the conclusion is that, at the time of his appeal, he no longer had such a right. Nine children are far more than needed to satisfy the human craving for offspring, hence Oakley's desire for more children could not enjoy the status of a right. Therefore, it could be overridden by considerations concerning the welfare of the actual or potential children, or by utilitarian considerations in general. Since the court was convinced that, if Oakley fathered more children, he would fail to provide for their needs, and would continue to fail to fulfill his responsibilities to his existing family, the court was right in trying to limit his right to father more children. Though the legal picture was more complicated,<sup>11</sup> at least from a moral point of view, Oakley's claim should have been rejected outright.

At this point, I would like to refer to a different argument against understanding the right to

procreate as a right to have as many children as one wishes, an argument often made by environmentalists. The argument is based on the assumed negative relation between population growth and its impact on the environment. The simple idea is that the more children one has, the more one contributes (a) to the depletion of the world's resources — food, water etc. — and (b) to environmental damage, such as pollution, global warming, etc. The logic of the argument seems undeniable: If, on average, each individual has a negative impact,  $i$ , on the environment, then eight individuals have an impact of  $i$  times eight. A couple that bears eight children thus makes four times a worse negative impact on the environment than does a couple with only two. Hence, the right to parenthood must not be interpreted as a right to bear as many children as one likes, but rather — as suggested above — as a right to bear two or three children. Yet this argument overlooks the complexities of the social reality. The fact is that families with eight children are (a) typically poorer than families with only two children, hence they consume less, and (b) they contribute less to environmental damage. Yaakov Garb examined this issue in detail regarding the situation in Israel, where the fertility level of two social groups, Arab-Muslims and Jewish Ultra-Orthodox, is much higher than that of other groups. Garb has shown that the consumption of water, for instance, is, on average, about two times smaller in Muslim and Ultra-Orthodox villages and neighbourhoods than in affluent secular communities, while the number of cars is three times lower.<sup>12</sup> Thus, contrary to what the argument under discussion suggests, a right to have as many children as one wants — which might result in the production of more children — might, in certain social conditions, be advantageous, rather than detrimental to the environment. Furthermore, from the point of view of environmentalism, not only is bearing many children problematic, but so is bearing any child. As Thomas Young nicely shows, if overconsumption is morally wrong in face of an overcrowded world, the same should apply to



procreation, and if the latter is all right, so is the former.<sup>13</sup> Hence, environmentalism does not lend clear support to my suggestion to respect the right to parenthood only for two or three children.

Needless to say, the conclusion above regarding Mr. Oakley would apply also to women in similar circumstances. Consider, for instance, the current debate in the US about the proposal to offer women additional welfare bonuses on the condition that they agree to temporary sterilization (using Norplant or Depo-Provera) while they are on welfare. Following my previous argument, if such women have already produced two or three children, they can't say that their right to parenthood is violated by such a proposal, though it does put some pressure on them not to produce more offspring while on welfare.<sup>14</sup>

The temporariness of the limitations on the right to parenthood might also be significant. One's right to bear children is not violated if one is forced to postpone one's procreative plans by a week, a month, or even by a year or so. Though it is impossible to draw an exact line here, surely a reasonable delay might be consistent with a true concern for one's interest in parenthood. This is true of other rights too. One's freedom of speech is violated if one is prevented from publishing a book expressing one's opinions. It is not violated if the publication of the book is delayed by a year or so (assuming that things are more or less equal in the relevant aspects). Similarly, as the Supreme Court of Israel ruled some twenty years ago, rescheduling a TV programme from Friday evening to Saturday evening does not violate the producers' right of expression, even if the rating would decrease as a result.<sup>15</sup>

I indicated earlier that often it makes no real difference whether we say that some interest falls short of constituting a right, or whether we say it constitutes a weak one, that is, an interest easily overridden by conflicting considerations. With respect, however, to disturbances of a temporary nature, like the ones just listed, it seems truly artificial to conceptualize them in terms of a threat to rights. Neither the justifications underlying the

importance of speech, nor those underlying the importance of parenthood, entail the importance of speech or procreation at a particular point of time, rather than at a reasonably later one.

Finally, let me repeat the obvious point that while denying some interest the status of a right weakens its normative power, it, of course, does not deny it. As Dworkin emphasizes, with rights, mere utilitarian considerations are insufficient to justify intervention in the relevant domain, be it speech, movement, association, or any other protected domain. This does not mean that intervention needs no justification whatsoever, that the state can disregard the individual interests of its members. What it does mean is that the onus of justification is lighter. Regarding the case of Oakley with which we began our discussion, it means that the public interest in taking care of children and of ensuring that no more children will be born who will become a burden on society overrides the individual interest of Oakley to father more children. Similarly, in the case of women on welfare, the public interest in not having children in society for whom their parents cannot provide justifies making some bonuses conditional on temporary sterilization, especially if the women already have children and, if not, assuming that the delay would be of no consequence in this regard.

That in normal circumstances the state must not prevent anybody from procreating applies to so-called 'natural' procreation, i.e. through sexual intercourse, as well as to so-called 'artificial' procreation, via artificial insemination, or in vitro fertilization (IVF). There seems to be no relevant difference between natural and artificial procreation that could explain why the former should enjoy a stronger protection than the other<sup>16</sup>.

Or is there? Some feminists have argued that the availability of IVF often has negative effects on women, who suffer from what Phyllis Tobin called "the addiction to high tech promise".<sup>17</sup> During the often painful and frustrating process of IVF, women are under the illusion that they can make it happen, which is combined with the illusion that they are in control and can stop any time



they wish. The need to maintain these illusions “can result in a woman becoming increasingly compulsive and obsessive in her attempt to conceive... she becomes crisis oriented... she lives only for herself, for her next treatment, and between treatments can feel nothing but the emptiness within her”.<sup>18</sup> From the point of view of the welfare of the women involved, it would be better for many of them to accept their infertility and quit, so to say, the race, rather than get involved in this *Via Dolorosa* with its high psychological cost.<sup>19</sup> The availability of IVF makes it hard for women to appreciate the option of seeing themselves as child-free rather than as childless.<sup>20</sup> But Tobin does not suggest, nor do most feminists, that the right to procreate via IVF — for those women who so wish — should be entitled to less protection vis-à-vis the state than the right to procreate through intercourse. Preventing access to IVF would be an extreme case of maternalism<sup>21</sup> and would be hard to justify.<sup>22</sup>

Let me sum up the main conclusions so far. First, people have a right to procreate which is anchored in fundamental human concerns. Second, the right exists whether the procreation is ‘natural’ or ‘artificial’. Third, the limits of the right — like those of all rights — are determined by the limits of the above concerns, which means, among other things, that one does not have a right to have as many children as one wants. Fourth, when the interest in parenthood does not enjoy the status of a right, it can be overridden by considerations concerning the welfare of the potential children, as well as by considerations of fairness suggesting that one ought not to produce children, the burden of whom will fall upon society.

That one has a right to non-interference in the realm of procreation does not, of course, imply that one has a right to positive assistance by the state in cases of infertility, i.e. that the state has an obligation to provide IVF and other treatments to those in need through the public health system and national insurance. Here, the feminist concerns indicated above are powerful, especially the fear that public finance for IVF and other expensive

fertility treatments would confirm and perpetuate the view that a woman who fails to procreate is deeply deficient, a view with harmful psychological and social consequences. In the present discussion, I shall skip this question and focus on a different one. Given that in some countries, such as Israel, the public health system does offer IVF as one of its medical services, the question I’d like to address is who should be entitled to it. This will be the topic of the next section.

## 2. Assistance in Procreation

State-granted assistance to enable parenthood raises two questions:

- (a) Is it permissible for the state ever to refuse to grant IVF treatment to women on the grounds that they are incapable of being reasonable mothers, or do such women, nevertheless, have a right to parenthood which the state must respect?
- (b) Given that state resources are limited, namely, that it cannot afford to grant as many IVF treatments as its citizens might request, how should it distribute this resource?

Question (a) is about rights. It asks who has, and, particularly, who does not have a right to parenthood, in the sense of a positive right to assistance from society to become a parent. Question (b) is about distribution or about distributive justice. It asks how parenthood should be allocated, so to speak, given that society’s resources are limited. The question arises with regard to IVF treatments, and even more so with regard to ova for transplant.

In the actual world, where resources are and will probably continue to be limited, questions about the right to parenthood can be formulated as questions about priority in allocation, so that a woman seen as unfit to be a mother would get a low ranking in the queue, which in effect would mean that she’d never reach its top. Nevertheless, I think it is worthwhile, both theoretically and practically, to discuss question (a) separately, as a question about rights. If the answer to it is in the



affirmative, then even if our resources become less limited, it might still be permissible to refuse requests for parenthood. The rest of the paper will be devoted to question (a), and issues of distribution will have to await some other occasion.

The question about limiting the positive right to parenthood takes us back to the case of Ms. A. The IVF centre to which Ms. A turned had enough resources to provide her with the required treatment. No doubt she would have been a problematic patient, in terms of complying with the instructions, and in terms of human relationships, but with a lot of patience and assistance by the staff she could have still borne a child. Given the pessimistic assessments about the quality of her potential motherhood, was it morally acceptable to refuse to help her have a child? Let me work my way to answering this question through another case reported to me by the head of that IVF centre. In this case, a woman had a child through IVF, but was incapable of taking care of it and gave it up for adoption two months after delivery. It seems safe to say that, retroactively, the decision to help her conceive and bear a child was a mistake. Had we known when this woman turned to the IVF centre that she would not be able to rear a child, we would have had no duty to help her, in fact we might have had a duty not to help her have a child.

If this last assumption is granted, then we have shown that, in principle, it is permissible for a public IVF centre to refuse to provide IVF treatment on non-medical grounds. It all depends on the gravity of the parental incapacity, that is to say, under a certain threshold women can be denied state-funded IVF treatment.<sup>23</sup> And this seems to lend support to the decision, mentioned at the outset, to turn down Ms. A's request for IVF.

Such limits on the positive right to parenthood are based on two arguments. The first is based on concern for the potential child. Just as it would be morally acceptable to refuse to help a woman conceive a child expected to suffer from a terribly painful and paralyzing disease, so it would be morally acceptable to refuse to help in the conception of a child expected to be neglected or

abused by a parent with very minimal parental capabilities. For the present purpose, I believe we can bracket the question of whether to conceptualize the concern under discussion as a personal concern for the child,<sup>24</sup> which will get us into well-known problems of non-identity, or as an impersonal concern for a world with less suffering. On either view, I can't imagine that anybody would claim that there's a moral duty to help a woman conceive a child expected to suffer in the ways just mentioned. To be sure, psychological and educational deprivation is different from physical pain and limitation, but when the former is grave enough, I see no reason why the argument should not apply.

The second argument for limiting the positive right to parenthood is based on the idea that society has a right to refuse to grant parenthood when the burden of taking care of the potential children would almost certainly fall on its own shoulders. As you will recall, that was exactly the case with Ms. A, who was assumed not to be able to bring up a child without massive and ongoing help by the social services. In such cases, the individual is asking for more than help in procreating, but is also requesting significant help in rearing the child. I think it is reasonable for society to refuse at least some of these requests. There's something unfair about a person asking to bring a child into the world while knowing in advance that he or she cannot care for it, thus planning in advance to take advantage of the good will of society.<sup>25</sup>

The natural objection to these arguments is that they apply not only to IVF, or to artificial procreation in general, but to natural parenthood too. If the concern for the child's quality of life is legitimate, and if the argument from fairness is sound, then why not limit the right of potential parents to have children in the natural way too? Since such limitations would be unthinkable, continues the argument, we ought not to use them in procreation through high-tech methods either. I myself argued earlier that insofar as violating the right to parenthood is concerned, it makes no difference whether access to parenthood is via sexual intercourse, or



via IVF. What does seem to make a difference, however, is whether the individual has an ability to conceive by herself, or whether she needs assistance from society. In the latter case, it seems that society is entitled to a say about how its money is to be used and about the burdens it agrees to take upon itself.

But doesn't the above suggestion create unjust inequality between fertile and infertile women? While fertile women would be able to have as many children as they wish, deprived and ill as the children might be, supported as they might be by society, infertile women would be denied access to parenthood. This seems unfair, because the method of conception looks morally irrelevant, hence, the same limitations based on concern for the child's physical and psychological welfare and on society's right to refuse to take upon itself in advance the burden of bringing up the children of a bad parent should apply equally to natural parents too — or should apply to none.

I'd like to offer two answers to this question. First, the distinction between a right to non-interference in X and a right to be granted X is not easy to justify. The difficulties in doing so mirror the familiar difficulties in justifying the distinctions between doing and allowing, killing and letting die, action and inaction. My point is that if the former distinction is accepted — and I believe most of us do accept it — it necessarily entails a difference between those who already have X and those who do not. The right of movement protects the human interest in free movement, but the protection benefits only those who have the means to avail themselves of this right. Those who cannot travel far, because they are too poor to afford transport, cannot require, under the right to freedom of movement, that the state give them a car or cover their travel expenses. Similarly in the present context: those women who are lucky enough to be fertile, or to have enough money for IVF, enjoy the protection of the right to parenthood, which means that under normal conditions their procreative plans should not suffer interference. Yet, this right does not automatically entail that women who can nei-

ther procreate naturally, nor pay for IVF, can demand that society provide the help they need. To be sure, some philosophers would respond by saying that this initial inequality between those who have X and those who don't must be reversed to achieve a just society, because all differences based on brute luck must be eliminated. All I can say about this challenge in the present context is that making claims for IVF, claims which depend on a specific view about equality, namely egalitarianism, seems to weaken them, not strengthen them, because they would then be accepted only by those who accept the egalitarian view.

My second response to the assumed inequality between fertile and infertile women is that, in principle, we might have been happy to use the criteria listed above to limit natural parenthood too, but such use would raise such grave practical difficulties as to make the proposal unfeasible. Here I am following the argument developed by David Archard about whether individuals should be given a licence to be parents. "Why," he asks, "shouldn't the state, or society as a whole, decide whether a child should be born and, if it is, to which parents it should be allocated?"<sup>26</sup> He then lists a few good reasons why the state should make such decisions, reasons of the kind mentioned above when we discussed criteria for receiving or non-receiving IVF. Nevertheless, in the end he rejects this proposal, on the basis of four practical objections which I shall not rehearse here.<sup>27</sup> On Archard's view, these practical considerations explain the difference between the rules governing natural parenthood and those governing adoption. While no individual needs a licence to be a natural parent, one does need to satisfy some criteria in order to qualify as an adoptive parent. On Archard's view, we would license natural parents too if we could do it practically, but we cannot. With adoption we can, therefore we should.

My suggestion, then, is that, in the relevant respects, parenthood through IVF is closer to parenthood through adoption than it is to natural parenthood. Since we can screen candidates for IVF in a way that would be close to impossible with





natural parents, and since we have control over the ability of such candidates to procreate which we don't have with natural parents, we are entitled to refuse to grant IVF treatment in some cases, just as we are entitled to reject candidacy for adoption in cases where the candidates seem unsuitable.

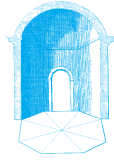
More than twenty years ago, Hugh LaFollette argued the provocative thesis that parents ought to be licensed.<sup>28</sup> The rationale for his proposal was simple. The state has a duty to regulate all potentially harmful activities; parenting is an activity potentially very harmful to children (abuse, neglect); therefore, parenthood, too, must be regulated. For many years, this proposal hasn't been taken seriously, but, as noted by Carl Hedman, "things seem to be changing," and he refers to what he sees as relatively wide support for the idea of licensing parents as a way of reducing child abuse.<sup>29</sup> The conditions imposed on Oakley, as well as those imposed on mothers on welfare, seem to be consistent with this development. When I look back at the line of argument, it seems that my paper too expresses this shift in opinion about the status of the right to parenthood. I have no wish to deny the depth of the human interest in parenthood, nor to reject its status as a right, i.e. the need to grant it special protection. Yet, the boundaries of this right, as with other rights, depend on the rationales establishing it, hence, as I showed at length in the first part of the paper, one does not have a right to have as many children as one desires, whenever one so desires.

Moreover, the interest in parenthood must be balanced against the interests of the potential child and those of society in general. While monitoring parenthood is very problematic in natural parents, it is more practical in adoption and in high-tech parenthood, and, in these cases, I find it legitimate.<sup>30</sup> This latter conclusion is less provocative than it sounds. With adoption, it has long been accepted that candidates must be monitored according to clear non-medical criteria, such as age, education, etc. But with IVF too, I suspect that the actual policy of IVF centres is more open

to non-medical criteria than they are willing to admit. With respect to organ allocation, Volker Schmidt has found that "there is a tendency to rationalize non-medical criteria in medical terms",<sup>31</sup> and I guess that a similar phenomenon exists with IVF too. From my inside information, I have the feeling that one way of evading giving IVF to women who formally qualify, but are perceived as unfit by the staff, is to delay the treatment with all kinds of excuses until the women are too old according to existing regulations.

Needless to say, limitations on the right to parenthood are not to be imposed lightly, even if they are imposed through weak forms of coercion, such as denying bonuses, or conditioning probation. Such limitations were often motivated by forms of hatred and racism, and were part of despicable political agendas. We should never underestimate these dangers. Yet neither should we overlook the interests of children who suffer as a result of irresponsible and unsuitable parents, and the interest of society not to bear the burden of children whose parents cannot care for them.

Finally, and to avoid any possible misunderstanding, let me emphasize that all the suggestions I put forward for limiting the right to parenthood — in terms of number, timing and assistance from the state — apply only to what David Heyd has called potential children.<sup>32</sup> The rights of actual children vis-à-vis their parents and vis-à-vis the state, and the right of parents to actual children vis-à-vis the state are a different story altogether. If Mr. Oakley fathers another child while on probation and if Ms. A manages to conceive a child through some IVF centre, these children will, of course, deserve full rights as human beings and as members of society. This paper dealt with a different issue, that of whether Oakley and Ms. A have a right to bring children into the world in their special circumstances, by claiming the right to parenthood. And, to this question, I answer in the negative: neither Mr. Oakley, nor Ms. A, have a right to parenthood which was violated by their respective states.



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## Notes

<sup>1</sup> I wish to thank the participants of the Bremen workshop on reproductive rights for helpful comments on an earlier draft. I am also grateful to Ariel Zisman for his invaluable research assistance.

<sup>2</sup> See *State v. Oakley*, 629 N.W.2d (Wis. 2001) at 219.

<sup>3</sup> See e.g. Bonnie Steinbock, "Reproductive Rights and Responsibilities," *Hastings Center Report*, 24/3 (1994): 15-16.

<sup>4</sup> *Ibid.*, p.15. See John Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press, 1994), 30.

<sup>5</sup> A similar argument should be made against the claim that "the demand for reproductive freedom seems to derive ultimately from the idea of having control over one's body". Gillian Douglas, *Law, Fertility and Reproduction* (London: Sweet & Maxwell, 1991), p. 16.

<sup>6</sup> On this last consideration, see Athena Liu, *Artificial Reproduction and Reproductive Rights* (Aldershot: Ashgate, 1991), 41, who argues that the claim of the wife or the husband to exercise an individual right to reproduce might reflect additionally, and as importantly, the interest of the couple in founding a family. I should add that the relatively new notion of 'single-parent families' makes it hard to acknowledge this interest, because if a family can include merely a woman and her child, then the founding of a family is a necessary result of any act of procreation and cannot constitute a separate consideration.

<sup>7</sup> The thought that it does is often motivated by a general misconception about rights, see Daphna Barak-Erez and Ron Shapira, "The Delusion of Symmetric Rights," *Oxford Journal of Legal Studies* 19 (1999): 297.

<sup>8</sup> Justice Bradley in *State v. Oakley*, *supra* note 2, at 219.

<sup>9</sup> *Symposium*, 208-209.

<sup>10</sup> The right to culture and freedom of religion are intimately connected, as the former is a main rationale of the latter. See e.g. Gideon Sapir "Religion and State: A Fresh Theoretical Start" *Notre Dame Law Rev.* 75 (1999): 579.

<sup>11</sup> For a detailed argument in favour of the court's decision, see William Betesh, "Has the State Gone Too far? Testing the Constitutionality of Probation Conditions that limit a Probationer's Right to Procreate," *Seton Hall Legis. J.* 26 (2002): 459-497. For the opposite view, see David Corneal, "Limiting the Right to Procreate: *State v. Oakley* and the Need for Strict Scrutiny of Probation Conditions," *Seton Hall Legis. J.* 33 (2003) 447-478.

<sup>12</sup> See Yaakov Garb, "Population Dynamics and Sustainability in the Israeli Context," in *Paths to Sustainability: Shadow report to the Government of Israel's Assessment of Progress in Implementing Agenda 21 Presented at the World Summit for Sustainable Development* (Johannesburg, 2002).

<sup>13</sup> Thomas Young, "Overconsumption and Procreation: Are they Morally equivalent?" *Journal of Applied Philosophy* 18 (2001): 183-192.

<sup>14</sup> For a defence of the above welfare condition, see Kimberly A. Smith, "Conceivable Sterilization: A Constitutional Analysis of a Norplant/Depo-Provera Welfare Condition," *Indiana L.J.* 77 (2002): 389-418.

<sup>15</sup> 2437/92 *Yigal Lev v. Minister of Education* P.D. 46(3): 756.

<sup>16</sup> Cf. Robertson (*supra* note 4), 32: "If the moral right to reproduce presumptively protects coital reproduction, then it should protect noncoital reproduction as well."

<sup>17</sup> Phyllis Tobin, *Motherhood Optional: A Psychological Journey* (Northvale, N.J.: Jason Aronson, 1998), 109.

<sup>18</sup> *Ibid.*, 110.

<sup>19</sup> On the psychological costs of IVF see also Linda S. Williams, "No Relief Until the End: The Physical and Emotional Costs of In Vitro Fertilization," in *The Future of Human Reproduction*, ed. Christine Overall (Toronto: Women's Press, 1989), 120-138; Christine Overall, "Access to IVF: Costs, Care and Consent," *Dialogue* XXX (1991): 383-397.

<sup>20</sup> *Ibid.*, 117-118.

<sup>21</sup> Overall, 392.

<sup>22</sup> See Mary Anne Warren, "IVF and Women's Interests: An Analysis of Feminist Concerns," *Bioethics* 2 (1988): 33-57, section II, who objects to denying IVF, for paternalistic reasons, to all women. After considering the various feminist objections to IVF and to other new reproductive technologies, she concludes that "the costs and risks of IVT treatment are substantial, but they are not known to be so great as to clearly outweigh the potential benefits, in every case" (p. 53).

<sup>23</sup> Torbjörn Tännsjö puts forward a powerful argument against "meddling with our reproductive decisions" (p. 249). In his view, "the use of techniques for assisted reproduction should not be regulated by political authorities



(nor by doctors)” (p. 247). Torbjörn Tännsjö, “Compulsory Sterilization in Sweden,” *Bioethics* 12 (1998): 236-249. I concur – insofar as this use is not funded by the state.

<sup>24</sup> See, e.g., Torbjörn Tännsjö, “Who Are the Beneficiaries?” *Bioethics* 6 (1992): 288-296, 289, who argues that if the life a child has to live is clearly worse than no life at all, it would be wrong to conceive it. By doing so, the would-be parents “would wrong it.”

<sup>25</sup> See David Heyd, *Genethics: Moral Issues in the Creation of People* (Berkeley: University of California Press, 1992), 111, who argues that “it is wrong for a young girl to decide on motherhood when she knows that she will not be able to fulfill her duties as a mother — not a wrong to the child, but to her own moral integrity.”

<sup>26</sup> David Archard, *Children: Rights and Childhood* (London: Routledge, 1993), 139.

<sup>27</sup> *Ibid.*, pp. 142-146.

<sup>28</sup> Hugh LaFollette, “Licensing Parents,” *Philosophy & Public Affairs* 9 (1980): 182-197.

<sup>29</sup> See Carl Hedman, “Three Approaches to the Problem of Child Abuse and Neglect,” *Journal of Social Philosophy* 31 (2000), 268-293, and his references on p. 283, notes 3-7 to the discussion around Jack Westman, “Licensing Parents: Can We Prevent Child Abuse and Neglect?” *The Milwaukee Journal*, January 22, 1995.

<sup>30</sup> Needless to say, such monitoring must not be arbitrary. A good example of an *unjustified* limitation on IVF is an age limitation, i.e. denying access to IVF to ‘old’, post-menopausal women. On why such denial is unjustified, see Jennifer Parks, “On the Use of IVF by Post-Menopausal Women,” *Hypatia* 14 (1999): 77-96, and Guido Pennings, “Post-Menopausal Women and the Right of Access to Oocyte Donation,” *Journal of Applied Philosophy* 18 (2001): 171-181. Private IVF centres typically have no such age limit, see e.g. the conditions listed in [www.givf.com/ivf.cfm](http://www.givf.com/ivf.cfm), where it says explicitly that “there is no age limit for couples who may be considered for IVF in our institute.”

<sup>31</sup> Volker H. Schmidt, “Selection of Recipients for Donor Organs in Transplant Medicine,” *Journal of Medicine and Philosophy* 23 (1998): 50-74.

<sup>32</sup> See Heyd, *Genethics*, Introduction.

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