Terms and Conditions of Use of Digitised Theses from Trinity College Library Dublin

Copyright statement

All material supplied by Trinity College Library is protected by copyright (under the Copyright and Related Rights Act, 2000 as amended) and other relevant Intellectual Property Rights. By accessing and using a Digitised Thesis from Trinity College Library you acknowledge that all Intellectual Property Rights in any Works supplied are the sole and exclusive property of the copyright and/or other IPR holder. Specific copyright holders may not be explicitly identified. Use of materials from other sources within a thesis should not be construed as a claim over them.

A non-exclusive, non-transferable licence is hereby granted to those using or reproducing, in whole or in part, the material for valid purposes, providing the copyright owners are acknowledged using the normal conventions. Where specific permission to use material is required, this is identified and such permission must be sought from the copyright holder or agency cited.

Liability statement

By using a Digitised Thesis, I accept that Trinity College Dublin bears no legal responsibility for the accuracy, legality or comprehensiveness of materials contained within the thesis, and that Trinity College Dublin accepts no liability for indirect, consequential, or incidental, damages or losses arising from use of the thesis for whatever reason. Information located in a thesis may be subject to specific use constraints, details of which may not be explicitly described. It is the responsibility of potential and actual users to be aware of such constraints and to abide by them. By making use of material from a digitised thesis, you accept these copyright and disclaimer provisions. Where it is brought to the attention of Trinity College Library that there may be a breach of copyright or other restraint, it is the policy to withdraw or take down access to a thesis while the issue is being resolved.

Access Agreement

By using a Digitised Thesis from Trinity College Library you are bound by the following Terms & Conditions. Please read them carefully.

I have read and I understand the following statement: All material supplied via a Digitised Thesis from Trinity College Library is protected by copyright and other intellectual property rights, and duplication or sale of all or part of any of a thesis is not permitted, except that material may be duplicated by you for your research use or for educational purposes in electronic or print form providing the copyright owners are acknowledged using the normal conventions. You must obtain permission for any other use. Electronic or print copies may not be offered, whether for sale or otherwise to anyone. This copy has been supplied on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

The Potential Role of the Right to Procreative Autonomy in Irish Law in Relation to the Use of Assisted Reproductive Technologies

A Thesis Submitted for the

Degree of Doctor of Philosophy

2013

Laura Byrne

School of Law, Trinity College Dublin

Declaration By Author

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

I agree to deposit this thesis in the University's open access institutional repository or allow the library to do so on my behalf, subject to Irish Copyright Legislation and Trinity College Library conditions of use and acknowledgement.

SUMMARY

This thesis promotes the recognition of a right to procreative autonomy in Irish law in relation to the use of assisted reproductive technologies (ARTs). Ireland has yet to legislate for ARTs. The thesis suggests that the right to procreative autonomy under the Irish Constitution should protect the interests of individuals in future legislation. It could also enable the Irish courts to police any regulation of ARTs, or afford weight to individual interests in the absence of legislation in this jurisdiction. The availability of ARTs has profound implications for society in general. It forces us to question our fundamental assumptions about the value of human life, the importance of parenthood and family, and the need for pluralism and diversity in our society. This thesis therefore recognises that the right to procreative autonomy must be balanced against communitarian interests and the interests of others.

The thesis argues for a right to procreative autonomy based on the promotion of dignity under the Irish Constitution. It maintains that a dignity-based right articulates the fundamental values that inform the protection of these personal decisions. The Irish Constitution provides a framework for considering both the right to procreative autonomy and its limitations.

The Constitution's promotion of the 'common good' as a limitation to fundamental rights protection may be utilised to justify restrictions on the right to procreative autonomy. The promotion of the individual right to procreative autonomy forces detailed consideration of the reasons why limitations are said to promote the common good, and why this value should be prioritised over the rights of individuals. The forthcoming referendum on children's rights pushes the notion of the individual rights of the child and the best interests of the child to the fore. This thesis argues that the best interests of the child should be afforded great respect and weight in any future regulation of

ARTs. It also maintains that the adult-centred right to procreative autonomy can promote the interests of the child.

The thesis will study many of the contentious uses of ARTs, as well as the controversial implications of these technologies for legal parenthood and parental rights. It considers the extent of basic rights of control over embryos, including the possible right to destroy, sell or clone embryos or gametes. It examines the right to access ARTs. The thesis also considers: the scope of rights to enter into enforceable agreements regarding the use of ARTs; the clash between positive and negative rights to procreative autonomy; the right to be recognised as a legal parent of a resulting child, and the extent of the right to use preimplantation genetic diagnosis to select embryos for implantation.

In each instance the thesis scrutinises the respective weights of the right to procreative autonomy and the communitarian interests that justify restrictions on this right. A detailed examination of the underlying assumptions and concerns that inform the content of both the right and its limitations will facilitate proportionate regulation of ARTs in Irish law.

Acknowledgments

I would like to sincerely thank my supervisor, Professor William Binchy, for all his advice and encouragement throughout this thesis.

I would like to thank the staff at the Berkley Library for all their help.

I would like to thank my friends for their support throughout this thesis, especially Kyra, Susan, Annette and Ailse.

I wish to thank my parents, Joe and Ann, and my sister, Sandra, for all their support. I also wish to thank my aunt and uncle, Laura and Jack, for their unwavering kindness.

My final words of appreciation go to my future husband, Patrick. His support and patience, especially in the final months, have been invaluable.

TABLE OF CONTENTS

Chapter I: Introduction

"The law cannot impose a dictatorship, however benevolent, which insists that it knows best how people should conduct their private and family lives... But that does not mean that everyone has to be supplied with the means of doing things differently".[1]

The availability of assisted reproductive technologies (ARTs) across the globe has challenged our perceptions of parenthood, family and humanity. It forces us to question how we value life itself, the unique and flawed nature of human beings, and what it means to be a parent or part of a family. Despite the profound implications of ARTs for family life and society as a whole, there is no legislative regulation in Ireland to date concerning ARTs. The Irish Commission on Assisted Human Reproduction issued its recommendations regarding future legislation in March 2005.[2] Medical Council Guidelines regulate practitioners on certain aspects of ARTs, but clinics are operating without the aid of any uniform regulation in this jurisdiction.

This thesis argues that a right to procreative autonomy based on the promotion of human dignity exists in Irish constitutional law. Bunreacht na hÉireann provides a framework where both the individual right to procreative autonomy and communitarian limitations on the ambit of the right can co-exist. The thesis uses this constitutional right to procreative autonomy as the starting point for considering the shape of regulation of ARTs. The right to procreative autonomy in relation to ARTs has had limited impact on the regulation of access or the uses of these technologies in other jurisdictions. Concerns about public morality, the exploitation of certain individuals and respect for the embryo have operated, along

---

[1] Mrs. Justice Hale (now Baroness Hale), *From the Test Tube to the Coffin: Choice and Regulation in Private Life (Hamlyn Lecture Series)* (London: Sweet & Maxwell, 1996), at 125.

[2] Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (Department of Health, 2005), available at http://www.dohc.ie/publications/cahr.html (accessed 10 March 2010).

with many other ethical considerations, to shape legislative and judicial responses to these technologies. The notion that an individual right exists in this area is usually overlooked or afforded little weight in determining regulation or the outcome of cases.

The phrase "right to procreative autonomy" will be treated as an umbrella term and is composed of a number of specific rights considered in this thesis. These include: the right to decide to become, or not to become, a parent; the right to access reproductive technologies; the right to destroy or make different uses of embryos; the right to legal recognition of parenthood arising from the use of these technologies; the right to use preimplantation genetic diagnosis to determine the characteristics of future children, and the right to enter into contracts regarding the use of reproductive material or surrogacy.

The fact that this thesis promotes the constitutional right to procreative autonomy should not be mistaken for support for unlimited individual discretion concerning the use of ARTs. Individual uses of ARTs cannot be divorced from the implications such technologies have for other directly connected parties, and for society as a whole. Mary Ann Glendon has criticised the absolute and isolated nature of "rights talk". Glendon argues that the absence of the notion of responsibilities in rights discourse seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations.[3] Glendon also maintains that the notion of a rights bearer as a separated individual bears little resemblance to any living person.[4] Human beings interact with each other and the state on a daily basis. Glendon's concerns about the isolated and limited nature of rights discourse are well-founded. It is suggested that the Irish

[3] M. A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), at 14.
[4] *Ibid*, at 47-48.

Constitution's values, rights and principles of interpretation can accommodate these concerns.

The availability of ARTs has profound implications for society. The state therefore has a role in regulating and limiting the use of ARTs. The thesis argues that placing the right to procreative autonomy at the start of the discussion will force an honest examination of the reasons why someone should not be allowed use ARTs, or why certain techniques should never be permitted. In some instances, the application of this right to procreative autonomy will ground arguments for fundamental reform, for example, in relation to the law regarding recognition of legal parenthood. In other areas, the application of the right will support calls for legislation that mirrors positions held in other jurisdictions. The Constitution has always balanced fundamental individual rights with the interests of the community as a whole.

The absence of legislation in Ireland allows us to consider the regulation of ARTs within the wider framework of the Constitution. This thesis argues that this constitutional right should be based on the notion of human dignity rather than privacy. This right will operate to inform the content of future legislation on ARTs, and will also prompt scrutiny of such legislation when individual freedom is limited in the interests of society or the rights of others. A renewed appreciation of the right to procreative autonomy in accessing and utilising ARTs offers a new perspective on the core values informing future regulation of ARTs. It challenges assumptions about the ethics or morality of certain uses of technologies. The vacuum created by the current absence of ART legislation provides an ideal forum for dealing with the difficult moral and legal questions that will shape future legislative regulation.

I. Methodology

This thesis examines Irish constitutional case law and academic commentary in order to argue for the right to procreative autonomy based on dignity within the Constitution. The application of this right to different contentious uses of ARTs will be considered by looking at the regulation of ARTs in other jurisdictions, and considering the impact of a constitutional right to procreative autonomy on such regulatory positions.

This thesis examines case law and legislation concerning the regulation of ARTs from the common law jurisdictions of the United Kingdom, New Zealand, Australia, Canada, and the United States. It will also consider relevant case law from the European Court of Human Rights. It analyses the primary sources of case law and legislation, and secondary sources like expert reports and relevant academic commentary. These jurisdictions are chosen because of the different timelines for legislative regulation and reform, and their case law concerning ARTs. This thesis also looks at legislation and case law from Germany and France. These civil law jurisdictions provide more conservative and restrictive regulation of ARTs than their common law counterparts. This thesis examines the different regulatory approaches in order to determine the prominence or absence of the right to procreative autonomy and the reasons behind limitations to this right. Consideration of such diverse approaches and attitudes towards ARTs will enhance substantive discussions on the scope to the right to procreative autonomy in the Irish constitutional context.

This thesis will examine case law and legislation concerning abortion, adoption and other aspects of family law, in order to comprehensively consider the treatment and ambit of the right to procreative autonomy. Legal academic commentary concerning case law, legislative and ethical positions will be considered. Some secondary sources discuss purely philosophical and ethical positions regarding the permissible

uses of ARTs, the extent of the right to procreative autonomy, and the rationale for limiting the right. As the Irish Constitution suffers from a lack of clear philosophical grounding, the consideration of some philosophical concepts is justified to supplement an examination of the scope of the right to procreative autonomy.

II. Outline of Chapters

Chapter II examines the philosophical framework of Bunreacht na hÉireann and the values that will inform the basis and shape of the right to procreative autonomy. Chapter III considers the treatment of the right to procreative autonomy to date in Ireland, and the potential of a dignity based right under the Constitution. Chapter IV will outline the possible limitations to this right. Some of these limitations are expressly found within the Constitution itself, while other limitations are found in the legislative frameworks of the other jurisdictions considered. This thesis will consider the extent to which such limitations are supported under the Constitution.

The Chapters which follow will then consider the application of this balance between the right to procreative autonomy and communitarian concerns in relation to specific uses of ARTs. Chapter V will examine basic control rights in relation to gametes and embryos. These rights include the possible right to destroy embryos, to sell gametes and embryos, or to clone one's embryos. Chapter VI studies the positive and negative aspects of the right to procreative autonomy when considering custody disputes over frozen embryos. Chapter VII examines the right of access to use ARTs. Chapter VIII looks at the right to enter into legally enforceable contracts in relation to the future use or legal implications arising from uses of ARTs. Chapter IX focuses on the question of the right to recognition of parenthood arising from the use of ARTs. Chapter X considers the permissibility of preimplantation genetic diagnosis to screen for

disability or sex, or to create siblings to help treat an illness of an existing child.

Chapter II: The Philosophical Framework of the Irish Constitution

This chapter examines the philosophical foundations of the Constitution as well as core principles and values that will determine the recognition and application of the right to procreative autonomy. The philosophical foundations of the Irish Constitution are underdeveloped in case law. The prominence of natural law seems to have faded and contemporary values are more important. However, substantial debate is required on the values informing the Constitution. Part I outlines the natural law foundations of the Constitution. Part II examines the susceptibility of constitutional values to change in light of developments in society. Part III considers the notion of the "common good' as a limitation to fundamental rights. Part IV considers the importance of fundamental rights protection in the Constitution. It also highlights the reluctance of the judiciary to disregard the separation of powers when promoting fundamental rights. Part V considers the protection afforded to potential life under the Constitution. This protection is a core principle that will inform the shape of the right to procreative autonomy in Irish law. This examination shows that the Constitution offers checks and balances so that the right to procreative autonomy can be both promoted and constrained by individualistic and communitarian concerns.

I. The Natural Law Foundations of the Constitution

The Irish Constitution is not a positivist document that exhaustively lists the compact rights and obligations of individuals and organs of the State. The Constitution may be considered to rest on a distinctive philosophy involving a network of rights and responsibilities of people relative to each other and to society.[5] The Constitution does

[5] W. Binchy, "Article 40.3.3 of the Constitution: Respecting the Dignity and Equal Worth of Human Beings", in J. Schweppe (ed.), *The Unborn Child, Article 40.3.3*

not merely list a number of human rights, it outlines a socio-political philosophy which seeks to promote values like the common good and human dignity.[6]

The values and ideals which emanate from the Constitution have a natural law foundation. The role of natural law in shaping constitutional rights and values has two implications for the right to procreative autonomy. In the first instance, it may promote the right to procreative autonomy in Irish law. The notion that rights exist beyond those positively outlined within the Constitution supports the case for the right to procreative autonomy. Secondly, natural law may impede the recognition of a right to procreative autonomy. This Part suggests that any perceived opposition of natural law to the existence of the right to procreative autonomy is misguided. Such suggestions are based on the assumption that the natural law informing the Constitution is purely based on Catholic teaching. They also conflate the recognition of the existence of a right with the application or scope of the right. The Chapters to come will recognise that in certain instances the right to procreative autonomy will not champion exclusive and unfettered control by gamete providers or intended parents over the use and fate of genetic material. These limitations are based on the recognition of many different values and concerns, like the common good and the need to avoid harm to others. Such values are certainly part of the natural law informing the interpretation of constitutional rights. Natural law will not oppose the recognition of the existence of the right to procreative autonomy. The application of the right will be scrutinised by the permissible limitations. Diarmuid Rossa Phelan argues that natural law means a number of different things within the context of Irish constitutional law.[7] He argues that

---

and Abortion in Ireland- Twenty Five Years of Protection? (Dublin: Liffey Press, 2008) 189, at 189.

[6] See W. Binchy, "*Meskell*, the Constitution and Tort Law" (2011) 33 *D. U. L. J.* 339, at 343-346, where the argument is made that the Constitution describes a network of rights and responsibilities rather than merely listing positive rights.

[7] D. Rossa Phelan, "Natural Law and Popular Sovereignty: The Irish Legal Order" (1997) 86 *Studies* 215, at 217.

natural law is a test, control or a limit which assesses a law. Natural law is also a source of rights and principles, the vindication of which may require the legal invalidation of certain acts of the state and popular sovereign.[8] Both potential applications of natural law are accepted in this thesis.

Natural law in the Irish Constitution is said to be informed by the work of St. Thomas Aquinas. Aquinas, in *Summa Theologiae* defined law as "naught else than an ordinance of reason for the common good made by the authority who has care for the community".[9] St. Thomas outlined four main types of law- the eternal law, the divine law, the natural law, and positive, human law.[10] The sharing of eternal law by intelligent creatures was found to be natural law. Aquinas claimed that the first command of the law is that good is to be sought and done, and evil be avoided.[11] St. Thomas argued that since good has the nature of an end, all these things to which man has a natural inclination are naturally apprehended by human reason as being good, and are therefore objects of pursuit.[12] Aquinas was of the view that the contents of natural law corresponded to man's natural inclinations. Since man sought his own preservation, the natural law contained all that makes for the preservation of human life, and all that is opposed to its dissolution.[13] Aquinas argued that human law should be then governed by what can be rationally known to be right and wrong.[14]

---

[8] *Ibid*, at 217-218.
[9] T. Murphy, "St. Thomas Aquinas and the Natural Law Tradition", in T. Murphy (ed.), *Western Jurisprudence* (Dublin: Thomson Round Hall, 2004) 94, at 111.
[10] For a summary of this categorisation see T. Aquinas, *Political Writings* (translated and edited by R.W. Dyson) (Cambridge: Cambridge University Press, 2002), at 83-91 (citing *Summa Theologiae* IaIIae91)
[11] See J. Finnis, *Aquinas: Moral. Political, and Legal Theory* (Oxford: Oxford University Press, 1998), at 219-224.
[12] *Supra* n. 5, at 114.
[13] M. De Blacam, "Justice and Natural Law" (1997) 32 *Ir. Jur.* 323, at 325.
[14] S. B. Drury, *Aquinas and Modernity: The Lost Promise of Natural Law* (Plymouth: Rowman & Littlefield Publishers, 2008), at 136.

Various constitutional provisions and seminal judgments have supported the notion that natural law is a superior source of law to positive law. The Preamble's references to "the Most Holy Trinity" and "our Divine Lord, Jesus Christ" clearly display the Christian influences of the Constitution.[15] Article 6 states that "all powers of government, legislative, executive and judicial derive, under God, from the people". Articles 41 and 42 guarantee that the rights possessed by the family are "inalienable" and "imprescriptible", and "antecedent and superior to all positive law". Article 43.1 outlines that the "State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods".

Natural Law as a Source of Rights

Natural rights theory presupposes that the individual human being has rights which exist prior to law and which inhere in him or her simply by virtue of being a person.[16] Kenny J in *Ryan v Attorney General* famously suggested that "[t] here are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40 at all".[17] Walsh J in *McGee v Attorney General* held that

> "Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority; the family, as the natural primary and

[15] See F. Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective* (Dublin: Round Hall Sweet & Maxwell, 1997), at 7.
[16] R. Humphreys, "Interpreting Natural Rights" (1993-95) 30 *Ir. Jur.* 221, at 225.
[17] [1965] I.R. 294, at 312.

fundamental unit group of society, has rights as such which the State cannot control".[18]

The High Court in *Northampton County Council v A.B.F. & M.B.F.*, noted that "natural law is of universal application and applies to all human persons... These rights are recognised by Bunreacht na hÉireann and the courts created under it as antecedent and superior to all positive law".[19] Doyle J in *Murphy v PMPA Insurance Co.* found that it was "well established that certain natural and personal rights may exist side by side with the Constitution although not specifically referred to or comprehended in the Articles of the Constitution which give personal guarantees".[20] The whole doctrine of unenumerated rights under Article 40.3 was based on the notion that rights existed beyond those expressed in the Constitution, and indeed natural law acted as a source of these rights.

While the Constitution clearly recognises the importance of natural law and natural rights, it does not elaborate on the content of this natural law. The lack of a general consensus on the meaning and content of natural law theory in Irish constitutional law is well documented.[21] Some rights are couched in secular language, while other rights are clearly inspired by the Christian view of natural law.[22] It is suggested that the notion of human dignity promoted in Chapter III is consistent with the values that influenced the role of natural rights jurisprudence to date.

Natural Law and Catholicism

It has been argued that the application of natural law principles in the Irish courts constitutes the wilful imposition of traditionalist views on

---

[18] [1974] I.R. 284, at 310.
[19] [1982] I.L.R.M. 64, at 66.
[20] [1978] I.L.R.M. 25, at 30.
[21] For a comprehensive discussion of the different possible meanings of the term "natural" in Irish constitutional law, see D. Clarke, "The Role of Natural Law in Irish Constitutional Law" (1982) 17 *Ir. Jur.* 187.
[22] D. Costello, "The Natural Law and the Irish Constitution" (1956) 45 *Studies* 403, at 414.

a population that is denouncing such views.[23] The notion of that natural law under the Constitution was based on Catholic teaching at the time may certainly promote this position, but the core idea of values and rights greater than those expressed in constitutions or legislations is a principle worth pursuing in considering the right to procreative autonomy. It should also be remembered that Article 44 of the Constitution prohibits the endowing of any religion by the State, and prohibits discrimination or the imposition of disabilities on the grounds of religious belief. While Christian principles influenced the Constitution, the Constitution does not exclusively uphold these principles.[24]

This is an important point to make as many uses of ARTs considered in this thesis would be contrary to Catholic teaching.[25] It is widely recognised that the prominent role of natural law under the 1937 Constitution was connected to the power of Catholicism in Irish society at that time.[26] Aquinas did not provide that a state had to be Christian for this theory of natural law to apply.[27] However, it is difficult to divorce Aquinas's natural law theory from its Christian legacy and reliance on divine law and revelation.[28]

The references to the Holy Trinity or God in the Constitution clearly illustrate the religious influences on the constitutional drafters.

---

[23] V. Bradley Lewis, "Liberal Democracy, Natural Law and Jurisprudence: Thomastic Notes on an Irish Debate", in T. Fuller & J. Hittinger (eds.), *Reassessing the Liberal State: Reading Maritain's Man and the State* (Washington: Catholic University of America Press, 2001) 140, at 147.

[24] B. McCracken, "The Irish Constitution- An Overview", in J. Sarkin & W. Binchy (eds.), *Human Rights, the Citizen and the State- South African and Irish Approaches* (Dublin: Round Hall Sweet and Maxwell, 2001) 52, at 55.

[25] For discussion of Catholic views of reproductive technologies, see Irish Catholic Bishops' Conference, Assisted Human Reproduction: Facts and Ethical Issues (2008), available at: http://www.catholicbishops.ie/2008/02/07/assisted-human-reproduction (accessed 15th August 2012).

[26] J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 2005), at 374. See also D. Keogh, "Church, State and Society", in B. Farrell (ed.), *De Valera's Constitution and Ours* (Dublin: Gill & McMillan, 1988) 103, at 105.

[27] C. O'Connor, L. Kelly & E. McSwiney, "Natural Law: A Bible for Judicial Reasoning" (2012) 15 *T.C.L.R.* 75, at 88.

[28] S. B. Drury, *Aquinas and Modernity: The Lost Promise of Natural Law* (Plymouth: Rowman & Littlefield Publishers, 2008), at 135.

However, it is argued that the underlying values within natural law transcend any influence of religion. The Christian values of prudence, justice and charity which are mentioned in the Preamble, have desirable moral value in their secular application.[29] Natural law was recognised not just because of the influence of Catholicism, but arguably because the rights recognised by the Constitution were rights that had already existed outside and beyond the law.[30] The values informing this position are more complex than merely the power of the Catholic Church over Irish society in 1937.

Can Natural Law Prevent the Recognition of Certain Rights?

Justice O'Hanlon, extra-judicially, argued that the cases and the provisions of the Constitution which supported natural law proved that no law could be enacted nor the Constitution amended in a way that was inconsistent with natural law.[31] O'Hanlon claimed that the State is founded on a Constitution which acknowledges that all authority comes from the Most Holy Trinity to Whom, as our final end, all actions both of men and States must be referred, and which states that all powers of government derive under God from the people.[32] The debate surrounding the O'Hanlon thesis and the role of natural law after the *Abortion Information* case is relevant for the present discussion. Beyond the religious connotations of this argument, the suggestion that natural law can determine whether certain rights are constitutionally permissible has to be considered. It is submitted that the *Abortion Information* decision did not really represent the death of natural law in Ireland.[33] The case does

---

[29] F. von Prondzynski, "Natural Law and the Constitution" (1977) 1 *D. U. L. J.* 32, at 37.

[30] B. Walsh, "The Constitution and Constitutional Rights", in F. Litton (ed.), *The Constitution of Ireland, 1937-1987* (Dublin: Institute of Public Administration, 1988) 86, at 95.

[31] R. O'Hanlon, "Natural Rights and the Irish Constitution" (1993) 11 *I.L.T.* 8, at 9-10.

[32] *Ibid.*

[33] Tim Murphy argues that the significant role of natural law in the development of Irish constitutional rights ended with the *Abortion Information* case (see T. Murphy, "The Cat Amongst the Pigeons: Garrett Barden and Irish Natural law

represent a shift away from the prominence of natural law in the sense that popular sovereignty prevailed over the assertion that the Amendment was contrary to natural law. It is argued that this does not end the relationship between natural law and the Constitution.[34]

In *In Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* counsel for the unborn child argued that natural law was the foundation of the Constitution and ranked superior to the Constitution.[35] Counsel therefore claimed that no provision of the Constitution or legislative act, or judicial interpretation thereof, could be contrary to natural law, and if it was, this provision or interpretation could not be enforced.[36] The Supreme Court noted that this argument was based on the claim that natural law was "antecedent and superior to all positive law, including the Constitution and that it [was] impermissible for the People to exercise the power of amendment of the Constitution unless such amendment is compatible with the natural law and existing provisions of the Constitution".[37] The court went on to outline the role of popular sovereignty under the Constitution as the source of powers of government, and the supremacy of the Constitution in relation to legislative matters.[38]

The Court considered cases like *Ryan* and *McGee* which used natural law to base their respective fundamental rights in the Constitution. The court stated:

> "From a consideration of all the cases which recognised the existence of a personal right which was not specifically

---

Jurisprudence", in O. Doyle & E. Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 121, at 122).

[34] Patrick Hanafin argues that the case represented another step in the gradual shift in the Irish constitutional paradigm from that of the natural law to a more rights-based model (see P. Hanafin, "Reproductive Rights and the Irish Constitution: From Sanctity of Life to the Sanctity of Autonomy?" (1996) 3 *Eur. J. Health L.* 179, at 179).

[35] [1995] 1 I.R. 1, at 37 (hereinafter referred to as *Abortion Information*).

[36] *Ibid*, at 38.

[37] *Ibid.*

[38] *Ibid*, at 38-39.

> enumerated in the Constitution, it is manifest that the Court in each such case had satisfied itself that such personal right was one which could be reasonably implied from and was guaranteed by the provisions of the Constitution, interpreted in accordance with its ideas of prudence, justice and charity. The courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which the organs of the State were subject and at no stage recognised the provisions of the natural law as superior to the Constitution".[39]

The Court held that the people were entitled to amend the Constitution in accordance with the provisions of Article 46 of the Constitution, and the Constitution as so amended by the Fourteenth Amendment was the fundamental and supreme law of the State representing as it does the will of the People.[40] It can be argued that the Supreme Court's decision in the *Abortion Information* case was inconsistent with the judgments of the court in earlier decisions like *Norris v Attorney General*[41] and *Ryan*.[42] The court has been criticised for failing to engage with judicial precedents and constitutional provisions that supported the argument by counsel for the unborn on the supremacy of natural law.[43] The *Abortion Information* case certainly relegated natural law below popular sovereignty.[44] However it is arguable that this is all the case really did. It says nothing about the potential of natural law to impede the recognition of rights or values that are contrary to its teaching, whatever that may be. The uncertainty surrounding the content of natural law and its mistaken

---

[39] *Ibid*, at 43.
[40] *Ibid*.
[41] [1984] I.R. 36.
[42] A. Twomey, "The Death of the Natural Law?" (1995) 13 *I.L.T.* 270, at 272.
[43] G. Whyte, "Natural Law and the Constitution" (1996) 14 *I.L.T.* 8, at 11.
[44] It is interesting to contrast the position of the Supreme Court in the *Abortion Information* case with Indian constitutional jurisprudence which argues that certain amendments to the Constitution are unconstitutional as there was implied limits to amendments to certain provisions (see G. Jeffrey Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective" (2006) 4 *I-CON* 460).

association with Catholic teaching could act as an obstacle for the recognition of the right to procreative autonomy. It is argued that the core values of the common good, avoiding harm to others, the promotion of human life and the value of that life which are visible in Aquinas's teachings are protected in the Constitution. It is suggested that natural law principles like the common good will limit the ambit of the right. The role of such natural law principles should be to shape the right rather than deny its very existence.

II. The Malleability of the Constitution

The right to procreative autonomy in relation to the use of ARTs would not be arguably supported by the drafters of the Constitution in the 1930s. This claim is not fatal for the right to procreative autonomy under Irish law. The courts have recognised that the Constitution can adapt to reflect shifting values. It may be argued that the Supreme Court decision in *McGee* proved to be the watershed in the relationship between Church and State.[45] The use of natural law and unenumerated rights to find that the right to marital privacy protected a couple's ability to use contraceptives certainly seems to break with Catholic teaching.[46] Walsh J held "[i]t is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time".[47] However, a re-examination of the facts of the case forces one to question how malleable the Constitution really was.

The case concerned a married couple who already had three children. The health problems suffered by the wife in her pregnancies were quite severe, and indeed endangered her life. *McGee* can be painted as the case that cut any perceived ties with catholic teaching in the

[45] G. Hogan, "Law and Religion: Church-State Relations in Ireland from Independence to the Present Day" (1987) 35 *Am. J. Comp. L.* 47, at 69.
[46] *Supra* n. 38, at 8-9.
[47] *Supra* n. 14, at 319.

Constitution, or the hard case with the difficult facts which prompted a narrow passage for the marital right to use contraceptives. The Court's judgment did represent a potential first step on the road to procreative autonomy for all. However the specific facts which influenced this ruling shed some light on its potential to show the changing values of the Constitution.

In *The State (Healy) v Donoghue*, O'Higgins C.J. stated that "the preamble makes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity, which may gradually change or develop as society changes and develops and which fall to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a Constitution which can absorb or be adapted to such changes. In other words, the Constitution did not seek to impose for all times the ideas prevalent or accepted with regard to these virtues at the time of the enactment".[48] McCarthy J in *Norris* argued that the understanding of the Constitution of 1937 could not be reasonably held in 1938. He argued that the Constitution's protection of unenumerated rights should rest on an account of "the human personality" itself.[49]

John Kelly argued that the "present tense" approach to constitutional interpretation was appropriate in relation to standards and values, including notions like "personal rights", "common good" and "equality". Such concepts should be interpreted according to the lights of today as the judges perceive and share them.[50] There is a danger that reliance on decisions like *McGee* will lead to the suggestion that fundamental principles of natural law concerning human rights are to be determined by a sense of what the majority of the community at any particular time might favour, a danger of

---

[48] [1976] I.R. 325, at 347.
[49] *Supra* n. 37, at 99. This observation is made in V. Bradley Lewis, "Natural Law in Irish Constitutional Jurisprudence" (1997) *2 Cath. Soc. Sci. Rev.* 171, at 175.
[50] J. Kelly, "The Constitution: Law and Manifesto", in F. Litton (ed.), *The Constitution of Ireland, 1937-1987* (Dublin: Institute of Public Administration, 1988) 208, at 215.

human rights by opinion poll.[51] However, the interpretation of the fundamental values informing the fundamental rights provisions should not be stuck in a 1937 reading of rights for modern Ireland. The purpose of this brief recognition of the flexibility of the Constitution is to highlight that rights that were not envisaged and arguably would have been opposed in 1937 can be promoted within the Constitution. For example, in *Meskell v C.I.E.*,[52] Walsh J in the Supreme Court held that a party could recover damages from a non-state third party when their constitutional rights were infringed. This right was not articulated in the Constitution itself, but derived from the argument that, if the Oireachtas could not infringe constitutional rights, then a lesser body or individual could not do so.[53]

This observation is true of all domestic constitutions and international conventions. The authors of the European Convention in the 1950s arguably did not predict its use by post-operative transsexuals to recognition of gender change, or by homosexual couples in challenging sexual discrimination or the failure of the state to recognise same sex marriage or civil partnership. The values informing the rights outlined in the Convention inform modern day interpretations and applications of rights like the right to private and family life. The express declaration of rights in positive law can never set out all aspects of a particular right enunciated.[54] Positive law does not expressly identify every aspect of a right or regulation. The gaps or peripheral areas must be interpreted and clarified by courts and further legislation or constitutional amendment. Constitutions and international conventions usually contain general statements concerning rights protection. The right to liberty or the right to life may be guaranteed, but these express guarantees do not outline the detailed aspects of the right.

---

[51] *Supra* n. 1, at 200.
[52] [1973] I.R. 121.
[53] *Ibid*, at 135.
[54] J. Waldron, "Introduction", in J. Waldron (ed.), *Theories of Rights* (New York: Oxford University Press, 1984) 1, at 4.

Murray J in *Sinnott v Minister for Education* recognised that the Constitution should be regarded as a living document and interpreted in accordance with "contemporary circumstances", including prevailing ideas.[55] However, Murray J went on to argue that this did not mean that the Constitution could be divorced from its historical context.[56] This is a fair approach to interpreting notions like dignity and the common good for the purpose of this thesis. It embraces the foundational values of the Constitution and the need for a modern interpretation of its provisions.

III. The "Common Good" as a Limit to Individual Freedom

Aquinas argued that law must contribute to the common good of society. For Aquinas, every law was ordained for the common good.[57] Aquinas argued that the common good had to be a directive principle for all humans living in a community, because the pursuit of individual goods without reference to the collective would cause problems for the community.[58] The pursuit of individual goods has the effect of collectively undermining the common good, which then paradoxically undermines our individual goods.[59]

The need to promote the common good is expressly recognised in the Preamble to the Constitution. The Preamble states that "the protection of the common good" is one of the objectives of the Constitution. Article 43.2.2, concerning property rights, provides that the exercise

---

[55] [2001] 2 I.R. 545, at 680. Denham J also supported the view that the Constitution be interpreted in light to today's prevailing ideas (at 664). See also A. O'Sullivan, Same Sex Marriage and the Irish Constitution" (2009) 13 *Intl. J. H.R.* 477, at 484.
[56] *Ibid.*
[57] T. Aquinas, "Concerning the Nature of Law from *Summa Theologica*", in J. Feinberg & H. Gross (ed.), *Philosophy of Law* (California: Dickenson Publishing, 1975) 9, at 9.
[58] P. Eardley & C, Still, *Aquinas: A Guide for the Perplexed* (London: Continuum, 2010), at 97.
[59] For detailed consideration of the notion of the common good in Aquinas's political theory, see M. Keys, *Aquinas, Artistotle, and the Promise of the Common Good* (Cambridge: Cambridge, 2006), at 118-124.

of property rights may be delimited by law with a view to reconciling their exercise with the exigencies of the common good. A number of cases concerning breaches of constitutional property rights are grounded in considering the balance between the right to private property and the promotion of the common good and social justice.[60] In *Buckley & Others (Sinn Fein) v Attorney General*, the Supreme Court quoted the Preamble, with its stated aims of promoting the common good with due observance of prudence, justice, charity, so that the dignity and freedom of the individual may be assured. The court argued that these laudable objects seemed to inform the various articles of the Constitution, and that the Constitution should be construed as to give them life and reality.[61] Kenny J in *Abbey Films Ltd v Attorney General* held that courts had jurisdiction to determine whether what is purported to be done in the interests of the common good is or is not repugnant to the Constitution.[62]

Walsh J in *McGee* recognised that the State was the guardian of the common good and that the individual, as a member of society, and the family, as a unit of society, had duties and obligations to consider and respect the common good of that society.[63] Henchy J in his dissenting judgment in *Norris v Attorney General* argued that sanctions of the criminal law may be attached to immoral acts only when the common good requires their proscription as crimes.[64] The interests of a pluralistic society and the expert evidence led to the learned judge's position that the common good did not require the criminal sanction of homosexual activities.[65] The Constitution Review Group, in its 1996 Report, criticised notions like the common good as they were capable of different interpretations.[66] There is little elaboration in constitutional jurisprudence about what constitutes the

---

[60] Chapter V will provide an outline of property rights under the Constitution.
[61] [1950] I.R. 67, at 80-81.
[62] [1981] I.R. 158, at 171.
[63] *Supra* n. 14, at 310.
[64] *Supra* n. 37, at 78.
[65] *Ibid.*
[66] Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996), at 229.

common good. There certainly seems to be an assumption in case law concerning the common good that it is apparent in any set of circumstances. The fact that the notion of the common good is subject to different interpretations will be both an advantage and a disadvantage for this thesis. It is an advantage as it can accommodate communitarian concerns about certain uses of ARTs. It also affords weight to the claim that human dignity should be interpreted to protect both individual and communitarian concerns. The fact that concerns about commodification, exploitation or the morality of certain uses of ARTs can be voiced through the Constitution's protection is also a disadvantage. The fact that the notion of the common good can be manipulated to shape different concerns should be appreciated. Amatai Etzioni also cautions against the potential that the promotion of the common good will foster moral judgmentalism on the part of the community against individuals.[67] Any limitations justified on the basis of the common good have to be clearly outlined before they are balanced with the right to procreative autonomy.

Communitarianism rejects the individualistic nature of liberal society, and recommends that laws and social arrangements be reconfigured, to recognise the centrality of the community.[68] It recognises that human beings are not isolated individuals, and their lives are lived out within deeply penetrating social, political, and cultural institutions and practices.[69] Communitarians contend that the idea of an unencumbered self is unrealistic.[70] Individuals are social creatures whose identity is shaped by their community.[71]

---

[67] A. Etzioni, *The Common Good* (Oxford: Polity, 2004), at 2.
[68] L. Campbell, "From Due Process to Crime Control- The Decline of Liberalism in the Irish Criminal Justice System" (2007) 25 *I.L.T.* 281, at 281.
[69] D. Callahan, "Principalism and Communitarianism" (2003) 29 *J. Med. Ethics* 287, at 288.
[70] K. Powell, "The Other Double Standard: Communitarianism, Federalism, and American Constitutional Law" (1996) 7 *Seton Hall Const. L. J.* 69, at 72.
[71] S. Caney, "Liberalism and Communitarianism: a Misconceived Debate" (1992) 40(2) *Political Studies* 273, at 273. Liberalism is rejected by communitarianism for its excessive individualism, and for ignoring the manifest ways in which we are embedded or situated in various social roles and communal relationships (W.

Raz argues that a common good is a good "which, in a community, serves the interest of people generally in a conflict-free, non-exclusive and non-excludable way". Raz also argued that fundamental rights are not opposed to common goods, that in fact rights depend on and serve common goods.[72] Those who promote the notion of the common good argue that it provides for the ordered community that is necessary for individuals to achieve happiness.[73] It does not promote the private good of individual members, but rather the public welfare or common good of society as a whole.

The notion of common good in the aggregative sense is similar to utilitarian thinking about the role of law.[74] There are many different theories of utilitarianism. Utilitarianism states that we ought to make the world as good as we can by making the lives of people as good as we can.[75] Utilitarian supporters like Bentham and Mill argue that legislature should promote laws which ensure the greatest happiness for the greatest number of people. Bentham's support for the greatest happiness for the greatest number lead to the suggestion that utilitarianism represented the tyranny of the majority on the minority. There are a number of different ways of determining the common good for society. The content of the common good in any particular situation is not clear or certain.[76] Mark Murphy outlines three different conceptions of the common good: instrumentalist, distinctive good, and aggregate common good.[77] The instrumentalist

---

Kymlicka, "Liberalism and Communitarianism" (1988) 18(2) *Canadian Journal of Philosophy* 181, at 181).

[72] See J. Chan, "Raz on Liberal Rights and Common Goods" (1995) 15 *O.J.L.S.* 15, at 16.

[73] L. Stang, "The Role of the Common Good in Legal and Constitutional Interpretation" (2005-2006) 3 *U. St. Thomas L. J.* 48, at 55.

[74] See A. Swiffen, "Life, Law, and the Common Good" (2010-2011) 11 *Insights on Law & Society* 4.

[75] K. Bykvist, *Utilitarianism: A Guide for the Perplexed* (London: Continuum, 2010), at 1.

[76] P. Riordan, "A Blessed Rage for the Common Good" (2011) 76 *Irish Theological Quarterly* 3, at 6.

[77] M. C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006), at 62.

view of the common good consists of the presence of the conditions that are necessary or helpful for members of the community to realise their own worthwhile ends.[78] Under the distinctive good view, the common good consists of obtaining an intrinsically good state of affairs that is literally the good of the community as a whole.[79] Murphy promotes the notion of an aggregative common good. This concerns the realisation of some set of individual intrinsic goods, the goods of all persons who are members of the community.[80] The distinction between these notions is not apparent in constitutional jurisprudence to date. Aquinas's reliance on the common good seems to suggest more than the sum of all individual goods. The brief discussion of the common goods and its role in limiting rights under the Constitution suggests something more like the distinctive good view. The promotion of the common good in Irish constitutional law shows that the Constitution promotes both individual and communitarian interests. The only concern to be raised in relation to the use of such a notion is that it may be coloured by other factors when argued in order to limit a right to procreative autonomy in Irish law. The courts and the legislature will be tasked with openly considering the content of each side of this argument and balance them accordingly.

IV. The Protection of Fundamental Individual Rights

It has been recognised that the fundamental rights provisions in the Constitution were not intended by the drafters to lead to such incursion into legislative powers.[81] However, rights protection is at the core of the Irish Constitution. While constitutional rights may be

---

[78] *Ibid.*
[79] *Ibid*, at 63.
[80] *Ibid.* Daniel Sulmasy argues that there are four different types of common good, each of which has different sub-types (see D. Sulmasy, "Four Basic Notions of the Common Good" (2001) 7 *St. John's L. Rev.* 303). Such examinations highlight that the contents of this notion are far from settled or certain.
[81] J.M. Kelly, *Fundamental Rights in the Irish Law and Constitution* (2nd ed.) (Dublin: Allen Figgis & Co, 1967), at 18-19.

regulated by law in furtherance of the common good, a safeguard exists as such regulation is open to review by the courts. Such constitutional rights cannot be totally abrogated by law.[82] Legislation or actions by the State which are contrary to fundamental rights are deemed unconstitutional. The institution of rights represents the majority's promise to minorities that their dignity and equality will be respected.[83]

The suggestion that there is a right to X as opposed to an interest or stake in X is a powerful political and legal statement in any jurisdiction. To have a right to something is to be specifically entitled to have and enjoy something.[84] Society recognises a right and does not interfere with an individual's choice, even when the choice is one that is perceived to be wrong by the majority.[85] To claim that one has a right is to assert in such a manner as to demand or insist that what is asserted be recognised.[86] By contrast, Richard Pildes argues that rights do not protect atomistic interests in autonomy or liberty, or dignity.[87] Rather Pildes suggests that rights police the kinds of justifications that government can act on in different spheres. Pildes argues that this less individualistic notion of rights is visible in constitutional jurisprudence, where rights are justified because they serve the collective interests of society rather than merely the interests of the individual in question.[88] Irish constitutional law embraces these related notions of rights. The right to procreative autonomy is framed as a claim against the state, usually in the form of

---

[82] B. Doolan, *Constitutional Law and Constitutional Rights in Ireland* (3rd ed.) (Dublin: Gill & Macmillan, 1994), at 153.
[83] R. Dworkin, *Taking Rights Seriously* (London: Duckworth Publishing, 1997), at 205.
[84] J. Donnelly, *Universal Human Rights in Theory and Practice* (London: Cornell University Press, 1989), at 11.
[85] *Supra* n. 79, at 184. (it should be noted that Dworkin was predominantly speaking about political right or the right against government interference. However, it is suggested that the observations in question hold true for the present discussion also).
[86] J. Feinberg, "Duties, Rights and Claims" (1966) 3(2) *American Philosophical Q.* 137, at 143.
[87] R. Pildes, "Why Rights are not Trumps: Social Meanings, Expressive Harms and Constitutionalism" (1998) 27 *J. Legal Stud.* 725, at 725.
[88] *Ibid*, at 729.

non-interference into personal decision-making, or in recognition of the role of a party in the creation of the child. The recognition of a constitutional right to procreative autonomy equally forces detailed consideration of any limitations to this right. The true value of the right in the chapters that follow will often be its role in forcing greater debate about assumptions underpinning current regulatory approaches to ARTs. When a constitutional right is infringed without justification, the applicant is entitled to relief. When the state advances a justification for the infringement, the courts will have to balance the impact on the individual against the public interest claimed by the state.[89]

Article 40.3.1 provides: "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen". Article 40.3.2 states: "The State shall, in particular, by its laws, protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen". Kenny J's seminal judgment in *Ryan v Attorney General* prompted recognition of personal rights that were not already expressed under the Constitution under Article 40.3.1.[90] Kenny J argued that the personal rights which may be involved to invalidate legislation were not confined to those specified in Article 40.[91] The learned judge argued that such rights included all those rights which result from the Christian and democratic nature of the State.[92] Kenny J focused on the words "in particular" in Article 40.3.2, and argued that these words showed that Article 40.3.2 was a detailed statement of something already protected in Article 40.3.1 by a general guarantee.[93] The High Court therefore argued that the general guarantee in Article 40.3.1 extended to rights that were not specified in Article 40. The decision of Kenny

---

[89] M. De Blacam, *Judicial Review* (2nd ed.) (Haywards Heath: Tottel Publishing, 2009), at 303.
[90] *Supra* n. 13.
[91] *Ibid*, at 312.
[92] *Ibid.*
[93] *Ibid*, at 313.

J in *Ryan* will be considered later in relation to the role of natural rights in the Constitution. The right to bodily integrity, the right to privacy, and the right to travel are some of the rights that have been recognised under this doctrine.

While Kenny J's reading of the words "in particular" were logically flawless according to John Kelly, the learned author raised early concerns about the uncertainty surrounding this doctrine.[94] Gerard Hogan also criticised the subjectivity of jurisprudence surrounding unenumerated rights.[95] It was argued that Kenny J's judgment in *Ryan* did not provide objective means of ascertaining the provenance of the personal rights referred to in Article 40.3.1.[96] Hogan claimed that the courts should be very slow to accept arguments based on the existence of new unenumerated rights unless they can point to other constitutional provisions to support this conclusion.[97] Desmond Clarke also argues that the background to the drafting of Article 40.3 showed a lot of confusion about the text.[98] It is not clear that the ambiguity leading to Kenny J's position in *Ryan* was intended to be read into the provisions of the Constitution.[99]

The Constitution Review Group argued for greater judicial restraint in relation to the use of Article 40.3.1. The Review Group favoured an amendment of Article 40.3.1 which would provide a comprehensive list of fundamental rights.[100] This list would encompass the personal rights recognised by the Irish courts to date, and could also include those set out in the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The Group

---

[94] J. M. Kelly, *Fundamental Rights in the Irish Law and Constitution* (2nd ed.) (Dublin: Allen Figgis & Co, 1967), at 42.
[95] G. W. Hogan, "Unenumerated Personal Rights: Ryan's Case Re-Evaluated" (1990-2) 25-27 *Irish Jurist* 95, at 95.
[96] *Ibid*, at 104.
[97] *Ibid*, at 115.
[98] D. Clarke, "Unenumerated Rights in Constitutional Law" (2011) 34 *D. U. L. J.* 101, at 120.
[99] *Ibid.*
[100] *Supra* n. 61, at 235.

argued that the amended Article should confine further recognition of fundamental rights by the courts to those necessarily implicit in the rights expressly listed.[101] This approach would create certainty in relation to the nature and scope of personal rights guaranteed by the Constitution.[102] Keane J in *I. O'T. v B.* noted that there was no discussion in *Ryan* about whether, given that unenumerated rights clearly existed in the contemplation of the framers of the Constitution, it was intended that the judiciary rather than the Oireachtas would have the duty of declaring these rights.[103] Keane J also recognised the problems in developing a coherent jurisprudence in the area, and argued that, save where personal rights had already been identified, some degree of judicial restraint was called for in identifying new rights under Article 40.3.1.[104]

The Constitution's fundamental rights jurisprudence shows the courts' willingness to promote the interests of the individual against majoritarian concerns. This analysis suggests that the judiciary would be unwilling to promote the right based on dignity advocate in this thesis. It would depend on the strength of the argument that notions like dignity are already protected and promoted under the Constitution, and therefore the right to procreative autonomy is an extension of values and interests already recognised in law. The inertia of the legislature may make this judicial activism attractive. The question of judicial lawmaking is usually raised when the decisions send a ripple through society, and these decisions are usually concerning areas where the legislature is slow to regulate.[105]

V. The Protection of Potential Life under the Constitution

---

[101] *Ibid.*
[102] S. Mullally, "Searching for Foundations in Irish Constitutional Law" (1998) 33 *Ir. Jur.* 333, at 341.
[103] [1998] 2 I.R. 321, at 369.
[104] *Ibid*, at 370.
[105] D. Gwynn Morgan, *Constitutional Law of Ireland* (Dublin: Round Hall Press, 1990), at 20.

The status of the embryo in vitro and its potential protection under the Constitution is arguably the most contentious limitation to the right to procreative autonomy in Irish law. While the embryo may not be a legal human being, its potential to become a human means that certain limitations may be justified regarding certain uses of embryos.[106] This Chapter will outline the current status of the embryo under Irish law. It highlights the uncertainty created by *Roche v Roche*.[107] The Supreme Court judgment provides little guidance to the legislature on the rights of progenitors in relation to their embryos, or indeed on the status of the embryo in Irish law. As noted in Chapter I, there is no legislative framework in Ireland for regulating access to or the implications of reproductive technologies. It was hoped that a case like *Roche* would clarify the status of the embryo in Irish law and pave the way for legislation in this area. The Commission on Assisted Human Reproduction's report highlighted the ethical problems surrounding the possible protections afforded to the embryo. It recognised the lack of clarity on the applicability of Article 40.3.3's protection of the unborn to the embryo.[108] It noted the wide spectrum of opinions on the status of the embryo.[109]

The Commission majority recommended that the embryo formed by IVF should not attract legal protection until placed in the human body.[110] It suggested that a Supreme Court decision on the application of Article 40.3.3 was required in order to clearly establish the constitutional status of the embryo with certainty.[111] While the Supreme Court did consider the applicability of Article 40.3.3, the narrow focus of the decision leaves many important questions unanswered. This section will first outline the background to the

---

[106] Chapter V outlines basic rights of control over embryos and genetic material. It considers whether one can sell, destroy, genetically manipulate or experiment with embryos or gametes under a rights based argument.
[107] [2010] 2 I.R. 321.
[108] Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (Department of Health, 2005), at xii.
[109] *Ibid*, at 30.
[110] *Ibid*, at 34.
[111] *Ibid*, at xii.

Eighth Amendment and the potential protection of the embryo under Article 40.3., before considering the *Roche* decision itself. It is suggested that the Constitution does promote protection for the potential of the embryo in vitro, and that this will limit certain uses of such embryos. It has already been recognised that the protection of life was an important value under the teaching of Thomas Aquinas. It is argued that this interpretation of the Constitution is consistent with its foundations and core values.

Background to Article 40.3.3 and its Subsequent Interpretation

Article 40.3.3 of the Irish Constitution protects the right to life of the unborn.[112] Article 40.3.3 was inserted by a referendum in 1983, and provides that

"[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right".

Tom Hesketh's account of the debate, political positions and facts surrounding the Eighth Amendment's wording and intended effect highlights the complex background to the referendum.[113] The wording of the amendment was published by the then Fianna Fail government in November 1982, a couple of weeks before a general election was called and lost by Fianna Fail.[114] The new Attorney General (Murray C.J.) in a memo to the Taoiseach argued in August 1982 that the wording of the "pro-life" amendment should be articulated in a positive rather than negative way, which is interesting to appreciate when considering the judgment of Murray C.J. in *Roche* above.[115]

---

[112] For a detailed case note on both decisions, see F. Gough, "Ireland and the Frozen Embryo: A Slight Thawing?" (2010) *Medical L. Rev.* 239.
[113] T. Hesketh, *The Second Partitioning of Ireland? The Abortion Referendum of 1983* (Brandsma Books: Dublin, 1990).
[114] *Ibid*, at 145.
[115] Memo 20 August 1982, *ibid*, at 152.

The amendment proposed by the new Fine Gael-Labour Government would constitutionally protect the criminalisation of abortion. The suggested wording was:

"Nothing in this Constitution shall be invoked to invalidate or deprive of force or effect any provision of a law on the grounds that it prohibits abortion".[116]

The Oireachtas favoured the original Fianna Fail motion, and this amendment was considered in the referendum. One could speculate that the more positive assertion of the right to life of the unborn may therefore have a wider applicability than protecting the prohibition against abortion.

Most of the Dáil debate surrounding the introduction of the amendment focused on the question of abortion.[117] The then Minister for Justice, Michael Noonan, noted that the underlying principle of the amendments was that the practice of abortion in the ordinary sense of that term should not be permitted to creep into the law.[118] However, the Minister noted that the words "the unborn" quite probably would be interpreted by the Supreme Court as being applicable from conception for reasons independent either of Catholic or Church of Ireland theology.[119] Dr Michael Woods also noted that "[t]he right to life of the unborn is based on the indisputable scientific fact that human life begins at fertilisation".[120] However, Dr Woods went on to note the deliberate ambiguity in the notion of the right of the unborn:

> "Despite what would undoubtedly have been the wish of the promoters of this amendment and the majority church in this island, there is no attempt in the wording of the amendment to define the moment at which the life of the unborn begins. The amendment does not attempt to make this definition. Most, of

[116] J. Kingston & A. Whelan, *Abortion and the Law* (Dublin: Sweet & Maxwell, 1997), at 5.
[117] 339 *Dáil Debates* 1353 (9th February 1983).
[118] *Ibid*, at 1358.
[119] *Ibid*, at 1362.
[120] *Ibid*, at 1385.

> course, would argue that it begins at the time of conception, but this is a matter of theological and scientific argument and in preparing the wording of the amendment we felt it was not appropriate to the Constitution to have such definitions".[121]

The Dáil debates provide a mixed message about the definition of the unborn and the ambit of Article 40.3.3. As was noted above, most of the debate focused on abortion but the deliberate and recognised ambiguity of the definition of the unborn suggested that there was a more general rationale behind the amendment which was fuelled by the desire to protect the sanctity of life in general.

Senator McGuinness at the Report stage of the Bill attempted to introduce an amendment to the protection afforded in qualifying the term unborn with the words "which shall not include the fertilised ovum prior to the time at which such fertilised ovum becomes implanted in the wall of the uterus".[122] This proposed amendment was suggested out of concern for the possible effect of the Amendment on the legality of different forms of contraception. The argument was that certain types of contraception like IUD and the morning after pill could not be challenged under the reform if one accepted that the unborn only starts after implantation.[123] Senator Robinson also called for clarity on the scope of the term unborn, arguing that this was not a clear legal or medical concept.[124] The motion was defeated 18 votes to 10.

The failure of this motion does suggest some degree of shared uncertainty by the legislators about whether the Amendment applied beyond the realm of abortion. The availability of contraception in Ireland has never been challenged under Article 40.3.3 but again consideration of the background to the Amendment raises as many

---

[121] *Ibid*, at 1386.
[122] 100 Seanad Debates 1092 (25th May 1983)
[123] *Ibid*, at 1094.
[124] *Ibid*, at 1100.

questions as it answers. It must be recognised that the first part of Article 40.3.3 makes a positive statement on the recognition of the right to life of the unborn. It is suggested that the High Court and Supreme Court failed to recognise the ambiguity of the statement and debates surrounding the amendment. This thesis will support a distinction between an implanted embryo and the embryo in vitro in Chapter V when determining the right of couples to destroy unwanted embryos. This brief outline of the background to Article 40.3.3 questions the Supreme Court's ease with completely grounding the Amendment in terms of abortion prevention.

The Green Paper on Abortion in 1999 noted that at the time of the 1983 Amendment there were certain parties suggesting that the rights of the unborn were already protected under the Constitution.[125] It highlighted the ambiguity around the term of unborn in the specific context of abortion. It recognised that there was a variety of views about the definition of this term. The Report noted that the majority of the submissions considered that human life begins at conception, while others claimed human life began when the foetus was viable i.e. capable of staying alive if delivered.[126] It argued that analysis of the campaign surrounding the 1983 amendment suggested that most supporters of the amendment were satisfied that the term "unborn" provided constitutional protection from the time of conception or fertilisation.[127] The Constitution Review Group in its Report in 1996 suggested that a definition of the unborn was required.[128] It noted that the word 'unborn' seemed to imply on the way to being born, or capable of being born.[129] The Review Group recognised that uncertainty surrounded when this was the case: was it at fertilisation

---

[125] Department of Taoiseach, *Green Paper on Abortion* (10 September 1999), at 3. Available at: http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2006?Publications_for_1999?GreenPaperOnAbortion.pdf (accessed 12th July 2010).
[126] *Ibid*, at para. [5.78].
[127] *Ibid*, at para. [7.08].
[128] *Supra* n. 62, at 253.
[129] *Ibid*, at 252.

of the ovum, at implantation, or some other point?[130] It also recognised the possible protections for the unborn found under Articles 40.3.1 and 40.3.2, which will be considered below.

In *Ugbelase v Minister for Justice*, the High Court held that the right under Article 40.3.3 was the right of the unborn to be born, and to prevent unnatural intervention that would harm or jeopardise the expectation of the unborn being born in normal good health.[131] Cooke J considered the interrelationship of the rights of the mother and the rights of the unborn, which is consistent with Denham J's interpretation of Article 40.3.3 in *Roche*.[132] The circumstances of the case, which considered the rights of an unborn child to have his or her father present at birth, must be appreciated. The purpose of this assessment of various interpretations of Article 40.3.3. is to highlight the uncertainty surrounding the exact remit of the provision. The Supreme Court in *Roche* failed to consider any suggestion that Article 40.3.3 made a positive statement about the value of potential life beyond the permissibility of abortion.

The Right to Life of the 'Unborn" under Article 40.3

The *Roche* courts were not directly asked to consider the pre 1983 protections afforded to the unborn under the Constitution. However, it is worth considering the potential protection afforded to the embryo under Article 40.3. In the Supreme Court reference *In Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995*,[133] the court noted that prior to the enactment of the Eighth Amendment, the right to life of the unborn had been acknowledged.[134] The Supreme Court noted the judgment of Walsh J in *G. v An Bord Uchtala*, where the learned judge argued that the child's right to life implied the inclusion of the

---

[130] *Ibid.*
[131] [2010] 4 I.R. 233, at 249-250. See also *Kangethe v Minister for Justice* [2010] I.E.H.C. 351.
[132] *Ibid.*
[133] *Supra* n.31.
[134] *Ibid*, at 27.

right to be born.[135] It also considered the comments of McCarthy J in *Norris v Attorney General*, which focused on the preamble of the Constitution in finding that the right to life of the unborn was a sacred trust requiring the support of all organs of state.[136] The Supreme Court in the *Article 26 Reference* also found that the right to life of the unborn was clearly recognised by the courts as one of the unenumerated personal rights which the State had guaranteed in its laws to respect.[137]

Walsh J in *McGee v Attorney General* also recognised that "any action on the part of either the husband or wife or the State by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question".[138] Barrington J in *Finn v Attorney General* also noted in an obiter statement that the right to life of the unborn was already protected under Article 40.3,[139] the learned judge suggesting that the notion of the rights of the citizen rather than the rights of the person, should not be interpreted narrowly.[140] In this case, the plaintiff sought an injunction against the proposed referendum on the grounds that it was superfluous. This position was based on the claim that the right to life of the unborn child was already protected in the Constitution.[141] Barrington J noted that the heading to Article 40 was 'personal rights' and suggested that the rights derived from man's nature as a human being.[142] The Supreme Court did not consider this issue.

Hamilton P in *Attorney General (Society for Protection of Unborn Children (Ireland) Ltd) v Open Door Counselling Ltd and Dublin Well Woman Clinic Ltd* held *obiter* that the right to life of the unborn

---

[135] [1980] I.R. 32, at 69.
[136] [1984] I.R. 36, at 103.
[137] *Supra* n. 31, at 28.
[138] *Supra* n. 14, at 315-316.
[139] [1983] I.R. 154, at 160.
[140] *Ibid.*
[141] *Ibid*, at 157.
[142] *Ibid*, at 159-60.

was an unenumerated personal right recognised and protected by the Constitution prior to the Eighth Amendment.[143] O'Flaherty J in *Attorney General v X* also claimed that the Eighth Amendment did not bring about any fundamental change in Irish law.[144] However, O'Flaherty J went on to praise the measures taken in our statute and case law to affirm and protect the rights of the child in the womb.[145]

While it is clear that cases like the *X* case and the *Article 26 Reference* were considering the rights of the unborn in the specific context of pregnancy and abortion, it may be argued that the rights of the embryo could be protected under Article 40.3 in general. This provision would not be limited by discussion of the relationship between mother and child in Article 40.3.3, and could not be marginalised to the protection of the foetus from abortion. The Supreme Court did not consider this issue, and the focus of the arguments before the court was on the applicability of Article 40.3.3.

The Status of the Embryo after Roche

The *Roche* case considered the possible constitutional protection afforded to three frozen embryos. The Roches were a married but separated couple at the time of litigation. The plaintiff requested that three frozen embryos stored by a clinic be released to her a number of years after the separation. The clinic required the consent of Mr. Roche before the embryos could be released. Mr. Roche refused to give his consent. The plaintiff adopted two main arguments in asking for custody of the embryos: a private law argument based on contractual consent of her husband to the use of the embryos, and the constitutional arguments that the embryos had a right to life, which obliged the state to transfer the embryos to Mrs. Roche.

---

[143] [1988] I.R. 593, at 597.
[144] [1992] 1 I.R. 1, at 86.
[145] *Ibid.*

McGovern J in the High Court held that the couple did not make an agreement in relation to the fate of the frozen embryos if the implantation of the first three embryos was successful.[146] The court also found that Mr. Roche did not provide express or implied consent to the transfer of the embryos. The learned judge noted the decision of the High Court in *The Attorney General (S.P.U.C.) v. Open Door Counselling Limited,* [147] which stated that the right to life of the foetus, the unborn, is afforded statutory protection from the date of its conception.[148] The High Court also considered the statement of Hederman J, dissenting, in the *X* case,[149] where the learned judge stated that the "Eighth Amendment establishes beyond any dispute that the constitutional guarantee of the vindication and protection of life is not qualified by the condition that life must be one which has achieved an independent existence after birth. The right of life is guaranteed to every life born or unborn. One cannot make distinctions between individual phases of the unborn life before birth or between unborn and born life." [150] McGovern J suggested that it was evident from Hederman J's judgment that the statements were made in the specific context of pregnancy.[151] McGovern J concluded that the courts have declared that the purpose of the Eighth Amendment to the Constitution, giving rise to the wording in Article 40.3.3, was to secure the prohibition on abortion expressed in s.57 and 58 of the Offences Against the Person Act, 1861 and to confine constitutionally

---

[146] [2006] I.E.H.C. 359. The High Court decision on the private law matters were reported in [2006] 3 I.R. 449.
[147] [1988] I.R. 593, at 598.
[148] *Supra* n. 142, at 13.
[149] *Ibid*, at 15.
[150] *Attorney General v X* [1992] 1 I.R. 1, at 72. This famous constitutional law case considered whether a 14 year old girl who became pregnant could travel to England for an abortion. The Supreme Court noted that the mother could travel in light of the serious risk to her mental health if prevented from doing so. This case lead to amendments of Article 40.3.3 which provided for the right to travel to another jurisdiction for an abortion and the right to seek information in relation to abortion.
[151] *Supra* n. 141, at 15. McGovern J noted Hederman J's subsequent examination of the special relationship between the unborn child and its mother, and references to the termination of a pregnancy. McGovern J also noted similar statements from McCarthy J. Hardiman J also emphasised the context of Hederman J's decision in the Supreme Court ruling in *Roche.*

permissible abortion to where there was a risk to the life of the mother.[152]

The Supreme Court upheld the High Court's decision in relation to the questions of consent and the constitutional status of the embryo. The court adopted the same interpretation of Article 40.3.3 as McGovern J. Denham J noted that in the context of the statutory law prior to the introduction of Article 40.3.3 of the Constitution (sections 58 and 59 of the Offences Against the Person Act 1861), state protection of an embryo only arose after implantation.[153] The learned judge also emphasised the wording of Article 40.3.3, especially its discussion of the relationship between the unborn child and its mother.[154] Denham J held that the "concept of unborn envisages a state of being born, the potential to be born, the capacity to be born, which occurs only after the embryo has been implanted in the uterus of the mother".[155]

Hardiman J suggested that in a strict linguistic sense the right to life of the unborn meant the right of the "living without birth" to their life.[156] Like Denham J, Hardiman J also noted the Article 40.3.3. right was afforded with due consideration to the equal right of the mother to her life.[157] The learned judge suggested that this right made no sense unless the close linkage existed between the unborn and the mother, a connection that could only exist when the woman was pregnant.[158] Geoghegan J also argued that given the complexity of the

---

[152] *Ibid*, at 18-19. The High Court held that no evidence had been adduced by the plaintiff which would enable the court to hold that the word "unborn" in Article 40.3.3 included embryos outside the womb or in vitro (*ibid*, at 338).
[153] *Supra* n. 103, at 369.
[154] *Ibid*, at 370. Denham J noted that this relationship existed only when there was a physical connection between the mother and the unborn.
[155] *Ibid*, at 371.
[156] *Ibid*, at 378.
[157] *Ibid*.
[158] *Ibid*. Hardiman J concluded that the temporal scope of Article 40.3.3 protection was intended to be the period of pregnancy when the unborn life was implanted in the mother's womb (*ibid*, at 378-379).

issues at hand, the Eighth Amendment could not be said to govern the matter.[159]

Murray C.J. offers some interesting observations on the potential scope of Article 40.3.3. While the learned judge noted the centrality of the prohibition on abortion to the debate surrounding the Eighth Amendment,[160] Murray C.J. also queries the conclusiveness of the Supreme Court's decision.[161] Murray C.J. suggested that public debate at the time of the Eighth Amendment transcended mere problems with the legislative prohibition on abortion.[162] The learned Chief Justice argued that the object of the Amendment was to afford constitutional protection to human life before birth.[163] Murray C.J. rejected the argument that the fact the embryo exists outside the womb meant it did not enjoy the protection of Article 40.3. It was argued that the creation of embryos outside the womb was not contemplated at the time of the Amendment.[164] The learned judge suggested that the reference to the rights of the woman in Article 40.3.3 should not be interpreted as intending to remove protection from human life because it is outside the womb or to devalue human life on this basis.[165]

Murray C.J. held that *if* the frozen embryos fell to be considered as having the qualities of human life then they would fall under the rubric of the constitutional provision.[166] Murray C.J. noted that the human embryo was generally accepted as having moral qualities and a moral status.[167] As it was arguably the first step in procreation and contained within it the potential for life, its creation and use could not

---

[159] *Ibid*, at 392-3.
[160] *Ibid*, at 347.
[161] Murray C.J. held the position of Attorney General for part of the period in which the wording of the Amendment was drafted.
[162] *Supra* n. 102, at 347.
[163] *Ibid.*
[164] *Ibid*, at 348.
[165] *Ibid*, at 349.
[166] *Ibid* (emphasis in the original).
[167] *Ibid*, at 350.

be divorced from our concepts of human dignity.[168] However, the learned Chief Justice concluded that the plaintiff had not established that the frozen embryos constituted "life of the unborn" within the meaning of Article 40.3.3.[169] Murray C.J. suggested that the moral status of embryos and the respect or protection which society may feel they are owed was a different issue to the question under consideration, which was when life begins.[170]

This judgment poses some important questions about the status of the embryo for future regulation of ARTs. The finding that the embryo did not strictly come within Article 40.3.3 did not diminish recognition of the moral status of the embryo. Murray C.J. seems to recognise that protection for the embryo was still possible, though not found under Article 40.3.3. The judgment also suggests that the potential of the embryo to become a human being may be something that Article 40.3.3 could have covered. It will be suggested that a wider interpretation of Article 40.3.3 may be possible, if one argues that the purpose of the Amendment was to protect the right to life in general as opposed to just preventing the legalisation of abortion in Ireland. Such considerations may impact the extent to which freedom to experiment on, destroy or use embryos is curtailed under Irish law.

The Supreme Court decision in *Roche* does not provide a definitive account of the potential constitutional protection afforded to the embryo. It appears that the ambiguity of the term 'unborn' was a deliberate omission on the part of the Oireachtas,[171] an ambiguity that has led to legal uncertainty about the protection to be afforded to embryos. Geoghegan and Fennelly JJ in the Supreme Court decision both recognised that the Constitution could afford respect to the

---

[168] *Ibid.*
[169] *Ibid*, at 352.
[170] *Ibid*, at 351.
[171] G. Hogan & G. Whyte, *J.M. Kelly: The Irish Constitution* (Dublin: Butterworths, 2004), at 1511.

potential of the embryos.[172] Geoghegan J claimed that the absence of legislation was contrary to the spirit of the Constitution in light of the fact that the spare embryos were lives, or potential lives, and therefore worthy of respect.[173] Fennelly J suggested that it may be open to the courts in a future case to consider whether an embryo enjoys constitutional protection under another provision of the Constitution.[174] This thesis suggests that the judgment in *Roche* does not mean that we can do whatever we like to embryos. It is suggested that such a position would be contrary to the underlying message of the Constitution, if not the specific wording of Article 40.3.3.

VI. Conclusion

Constitutional adjudication is not simply a matter of simply *finding* the right theory in the constitutional text. It is one of *justification* of a particular theory as the best interpretation of the Constitution we have.[175] The Constitution is based on a system of rights and responsibilities between individuals and individuals and the state. The natural law foundations of the Constitution should not be confused with Catholic teaching to the extent that the religious opposition on the use of ARTs should influence the existence of the right to procreative autonomy. It has been argued that the natural law foundation can promote rather than prevent the recognition of the right to procreative autonomy. The importance of notions of the common good and the value of potential life were outlined. These values will inform the shape of any right to procreative autonomy. While the Constitution is a malleable document that is not stuck in 1937, modern interpretations cannot be divorced from the fundamental principles of the Constitution. This position cannot

---

[172] See I. Clissmann & J. Barrett, "The Embryo in Vitro after *Roche v Roche*: What Protection is now offered? (2012) *M.L.J.I.* 13, at 16-17 for discussion of this argument.
[173] *Supra* n.103, at 393.
[174] *Ibid*, at 396.
[175] A. Kavanagh, The Quest for Legitimacy in Constitutional Interpretation" (1997) 32 *Ir. Jur.* 195, at 216 (emphasis in the original).

detract from the core values already outlined. The notion of recognising an unenumerated right to procreative autonomy is would be difficult in light of the courts' current reluctance to promote judicial activism. The next Chapter will highlight that the core values underpinning the right to procreative autonomy are already protected by the Constitution.

Chapter III: The Right to Procreative Autonomy under the Constitution

"Human reproduction is not about sperm, eggs or even embryos. It is about people, their hopes and dreams in fulfilling their lives by having a child".[1]

This thesis argues that an individual right to procreative autonomy should operate in Irish law to both shape and police future legislation on ARTs in Ireland. Part I considers the failure of the Irish courts to promote a right to procreative autonomy in relation to abortion. It maintains that this failure is not fatal to the claim that a right to procreative autonomy in relation to ARTs exists in Irish constitutional law. Part II outlines the treatment of the right to procreative autonomy to date under Irish law. The obvious way to promote an individual right to procreative autonomy would be to extend the recognised right of married couples to make decisions regarding procreation. It will be suggested that this approach is problematic in light of the special position enjoyed by the marital family under the Constitution. The general unenumerated right to privacy could include a right to privacy in making decisions concerning procreation. Part III cautions against reliance on privacy rights as the basis of the right to procreative autonomy.

Part IV considers the notion of dignity in general and outlines why dignity should form the basis of the right to procreative autonomy. It examines the treatment of dignity as a constitutional value or right in a variety of Irish cases. This section will look to jurisprudence from South Africa and Germany, where dignity is afforded a greater role in shaping the content of human rights protection. It argues that dignity, as both an individualistic and communitarian value, provides an accurate foundation for the right to procreative autonomy in Irish law.

---

[1] E. Shuster, "The Posthumous Gift of Life: The World According to Kane" (1999) 15 *J. Contemp Health L & Pol'y* 410, at 422.

Individual decisions are not protected under law because they are private, or because individuals should be free to make their own choices. These decisions demand prima facie respect because of their centrality to the human person and the personal importance and implications of such decisions. In this way the right to procreative autonomy in Irish constitutional law can provide more substantive respect to the interests of those making decisions regarding future parenthood.

I. The Right to Procreative Autonomy and Abortion

This section questions whether a right to procreative autonomy can be recognised in a jurisdiction that generally prohibits abortion.[2] It is suggested that notions of procreative autonomy do not directly influence the legal permissibility of abortion in other jurisdictions. The respective jurisdictions take a variety of positions with varying degrees of reliance on the notion of rights to justify the legality of abortion. It is suggested that the constitutional prohibition on abortion does not prohibit the recognition of a right to procreative autonomy in relation to the use of ARTs. This Part outlines the refusal of the Irish courts to recognise a right to procreative autonomy in relation to abortion. It also outlines the role of the right to procreative autonomy in shaping different legislative and judicial approaches to abortion in other jurisdictions.

The Prohibition on Abortion in Ireland

The Supreme Court in *Ryan v Attorney General* recognised that the right to bodily integrity was a constitutionally guaranteed right under Article 40.3.[3] However, the courts have not afforded any weight to the right to bodily integrity or autonomy in considering the permissibility of abortion or questions of travel or receipt of

[2] Except in circumstances where the life of the future mother is at risk.
[3] [1965] I.R. 294.

information. The wording of Article 40.3.3 only considers the right to life of the mother in determining whether an abortion is permissible.

Finlay C.J. in the Supreme Court in *Attorney General (S.P.U.C. (Ireland) Ltd.) v Open Door Counselling Ltd.* found that there could not be an implied and unenumerated constitutional right to information about the availability of abortion outside the State.[4] The court held that this information could lead to the destruction of the expressly guaranteed constitutional right to life of the unborn. Finlay C.J. held that no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child.[5] The Supreme Court in the subsequent decision of *S.P.U.C. (Ireland) Ltd. v Grogan (No. 1)* also held that where the right sought to be protected by an injunction is the right to life, there can be no question of a possible or putative right which might exist in European law as a corollary of a right to travel.[6] Walsh J discussed the future mother's right to bodily integrity. The learned judge stated that "[w] hen a woman becomes pregnant she acquires rights which cannot be taken from her, namely, the right to protect the life of her unborn child and the right to protect her own bodily integrity against any effort to compel her by law or by persuasion to submit herself to an abortion... The destruction of life is not an acceptable method of birth control. The qualification of certain pregnancies as being totally unwanted is likewise a totally unacceptable criterion".[7]

The position of the courts on the legal permissibility of dissemination of information concerning abortion or to travel abroad to seek an abortion is now superseded by the Thirteenth and Fourteenth Amendments to the Constitution, which were enacted in 1992. These amendments provide that Article 40.3.3 "shall not limit freedom to

---

[4] [1988] I.R. 593, at 625.
[5] *Ibid.*
[6] [1989] I.R. 753, at 765.
[7] *Ibid*, at 767.

travel between the State and another state", and "shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by the law, information relating to services lawfully available in another state".

Geoghegan J in *A and B v Eastern Health Board* held that the Thirteenth Amendment concerning the ability to travel to another state was negative rather than positive in its effect.[8] In light of the circumstances surrounding the *X* case, Geoghegan J argued that the purpose of the amendment was to prevent injunctions against travel or having abortions abroad.[9] The court rejected the idea that the Amendment created a new right to travel.[10] The positions outlined in these cases illustrate that the right to procreative autonomy was not afforded any weight by the Irish courts in the context of abortion.

The Supreme Court in *Attorney General v X* balanced the right to life of the foetus, and the right to life of the expectant mother.[11] The Supreme Court articulated different tests in determining when abortion was constitutionally permissible. Finlay C.J. held that abortion was permissible under Article 40.3.3 if it was established as a matter of probability that there was a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy.[12] Hederman J, dissenting, held that abortion was permissible where the consequences of the continuance of the pregnancy would, to an extremely high degree of probability cost the mother her life and that such opinion must be based on the most competent medical opinion available.[13] Hederman J rejected evidence from a psychologist in the case concerning the threat of suicide of the mother posed by the unwanted pregnancy. Hederman J cited *S.P.U.C. v Coogan* in finding

---

[8] [1998] 1 I.R. 464, at 482
[9] *Ibid.*
[10] *Ibid.*
[11] [1992] I.R. 1.
[12] *Ibid*, at 53-54.
[13] *Ibid*, at 75.

that the fact a pregnancy was unwanted was no justification for terminating it or attempting to terminate it.[14]

McCarthy J argued that the true construction of Article 40.3.3 was that, paying due regard to the right to life of the mother, when there is a real and substantial risk attached to her survival not merely at the time of application but in contemplation at least throughout the pregnancy, then it may not be practicable to vindicate the right to life of the unborn.[15] Egan J held that the true test should be that a pregnancy might be terminated if its continuance as a matter of probability involved a real and substantial risk to the life of the mother. Egan J underlined that the risk in question must be to the mother's life, but it was irrelevant whether the risk was of self-destruction as opposed to another risk to the life of the mother.[16] One can see from the different tests offered by the Supreme Court that the life of the mother rather than concerns about freedom to make decisions during a pregnancy was the determining factor for the courts.

The decision of the European Court of Human Rights in *A, B & C v Ireland*,[17] concerning abortion law in Ireland, was hailed by many as a landmark decision that should pave the way for legislation in Ireland.[18] It is argued that the decision provides a limited contribution

---

[14] *Ibid.*
[15] *Ibid*, at 80.
[16] *Ibid*, at 92.
[17] (2011) 53 E.H.R.R. 13. See S. Donnelly, "*A, B and C v Ireland*: A Commentary" (2011) 17 *M.L.J.I.* 43, and S. Krishnan, "What's the Consensus: The Grand Chamber's decision on abortion in *A, B and C v Ireland*" (2011) 2 *E.H.R.L.R* 200.
[18] Susan McKay from the National Women's Council of Ireland stated that the judgment was "an important victory for women" (see National Women's Council of Ireland, "The NWCI welcomes European Court ruling and calls on the Government to legislate for women's right to women's rights to full reproductive rights" (16th December 2010), available at: http://nwci.ie/news/2010/12/16/the-nwci-welcomes-european-court-ruling-and-calls/ (accessed 17th January 2011). The Irish Family Planning Association also stated that judgment marked a "landmark day for women in Ireland" (see Niall Behan (Chief Executive Officer), "Irish Family Planning Association Welcomes Landmark Decision for Women" (16th December 2010), available at: http://www.ifpa.ie/eng/Media-Info/News-Events/IFPA-Nwes-andEvents/IFPA-Welcomes-Landmark-Decision-for-Women (accessed 17th January 2011)).

to the recognition of a general right to procreative autonomy concerning ARTs. The case was initiated by three female applicants who all underwent abortions in England due to the perceived illegality of the abortions in Ireland. Only one of the three applicants (Applicant C) was successful in her Article 8 arguments.

The Grand Chamber stated that the primary complaint of A and B was the prohibition of abortion for health and well-being reasons in Ireland.[19] Applicant C had been treated for a rare form of cancer.[20] In light of the uncertainty surrounding the effect of pregnancy on her cancer, C travelled to England for an abortion and experienced problems receiving a medical abortion as she was a non-resident.[21] The Grand Chamber summarised C's argument under Article 8 as concerning the failure to implement the constitutional right to an abortion in Ireland in cases where there was a risk to the life of the woman.[22]

The Grand Chamber emphasised that the right to private life was conditioned by recognition of the connection between the pregnant woman and the developing foetus, and any right to respect for private life must be weighed against other competing interests like the rights of the unborn child.[23] The Court therefore held that Article 8 did not confer a right to abortion.[24] In regard to the arguments of A and B, the Grand Chamber held that the prohibition of termination of pregnancy for reasons of health or well-being amounted to an interference with their right to respect for private life.[25] The Court went on to hold that this was a justified interference as it pursued the legitimate aim of the protection of morals by protecting the right to

---

[19] *Ibid*, at para. [3] and [167].
[20] *Ibid*, at para. [23].
[21] *Ibid*, at para. [25].
[22] *Ibid*, at paras. [3] and [167].
[23] *Ibid*.
[24] *Ibid*, at para. [214].
[25] *Ibid*, at para. [216].

life of the unborn.[26] In relation to C's argument, the Court held that the Irish authorities failed to respect C's right to private life as there was no implementing legislative or regulatory regime providing an accessible and effective procedure by which C could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3.[27] The claim that this was a landmark decision for women's rights in general must be questioned. The extreme circumstances of C's abortion distinguished her claim from that of A and B. While the decision may lead to the introduction of legislation on the limited instances where abortion will be permissible in Ireland, the decision does not champion a general right to procreative autonomy in relation to abortion.

The Absence or Limited Use of Rights Discourse in other Jurisdictions

It is widely recognised that the United Kingdom's Abortion Act 1967, which does not operate in Northern Ireland,[28] was not enacted in order to provide women with the right to terminate their unwanted pregnancies. Its purpose was to counteract high mortality rates resulting from illegal abortions and to enable medical practitioners to act as gatekeepers for those seeking abortions.[29] The House of Commons Science and Technology Committee in 2007, in reviewing the application of the 1967 Act, recommended that the requirement of two doctors' signatures in section 1(1) of the Act be removed in order to avoid the delay caused by the requirement, and to encourage early

---

[26] *Ibid*, at paras. [222] and [227].
[27] Ibid, at paras. [267].
[28] The law is Northern Ireland is the same as was in the rest of the United Kingdom before the 1967 Act. Sections 58 and 58 of the Offences Against the Person Act 1861 and section 24 and 25 of the Criminal Justice (Northern Ireland) Act 1945 criminalise abortion, except in instances where the life of the mother is under threat, or there is a risk of to the physical or mental health of the mother.. Abortions are legal once the Bourne criteria have been satisfied: the probable consequences of the continuance of the pregnancy will be to make the woman a physical and emotional wreck (*R. v Bourne*, [1938] 3 All E.R. 615).
[29] E. Jackson, *Medical Law* (2nd ed) (Oxford: Oxford University Press, 2010), at 667. For interesting insight into MPs' personal views of women seeking abortions debating the 1967 Act, see S. Sheldon, "The Abortion Act 1967: A Critical Perspective", in E. Lee (ed.), *Abortion Law & Politics Today* (London: Macmillan, 1998) 43, at 43.

as opposed to later abortion.[30] The removal of the need for the signature from two medical practitioners was not tabled during debate surrounding the Human Fertilisation and Embryology Act 2008.[31] While the focus on the opinion of medical practitioners is arguably inconsistent with a women's right to self-determination,[32] in reality the Abortion Act has facilitated the procreative autonomy of pregnant women.

Abortion is regulated by the individual states and territories in Australia.[33] Again, the focus of the legislation is often on the role of the doctor rather than the rights and wishes of the women involved.[34] While in practice the wishes of the woman seeking termination will prompt the doctors to sign off on the abortion (often without examining the patient), the absence of a clear right to procreative

---

[30] House of Commons Science and Technology Committee, *Scientific Developments Relating to the Abortion Act 1967* (12th Report of Session 2006-07) (November 2007), at para [99]. noted that there were a number of reasons behind the requirement of two signatures. They included: the protection of women; a demonstration of the concerns from Parliament that the 1967 Act did not make abortion legal but conferred upon doctors a defence an otherwise illegal act; the need to show the seriousness of the decision to terminate the pregnancy, and to appease the pro-life lobby (see para. [85]).

[31] S. Sheldon, "A Missed Opportunity to Reform an Outdated Law" (2009) 4 *Clinical Ethics* 3, at 4.

[32] E. Jackson, "Abortion, Autonomy and Prenatal Diagnosis" (2000) *Social and Legal Studies* 467, at 468.

[33] For discussion of political reluctance to deal with abortion at a federal level, see H. Pringle, "Urban Mythology: The Question of Abortion in Parliament" (2007) 22(2) *Australasian Parliamentary Review* 5.

[34] Some Australian states have not legislated for abortion; rather the respective state courts have given expansive interpretations of when abortion is lawful for the purposes of criminal legislation based on the Offences Against the Person Act 1861. In South Australia, section 82A the Criminal Law Consolidation Act 1935 (SA) is very similar to the 1967 Act in the UK, as it requires that abortions may be carried out only in approved hospitals provided that two medical practitioners certify that the continuation of the pregnancy would constitute a greater physical or mental risk to the patient's health than would an abortion. For background to abortion in South Australia see F. Yusuf & S. Siedlecky, "Legal Abortion in South Australia: A Review of the First 30 years" (2002) 42(1) *Australian and New Zealand Journal of Obstetrics & Gynecology* 15. Recent legislative reform in Tasmania, where the Criminal Code Amendment Act (No 2) 2001 inserted a new section 164 of the Criminal Code Act 1924 (Tas), combines the risk test from South Australia and the informed consent test from Western Australia. In 2002, the Crimes (Abolition of Offence of Abortion) Act in the Australian Capital Territory repealed the criminal laws concerning abortion found in the Crimes Act 1900. Abortion is available without criminal sanction as long as it is performed by a medical practitioner.

autonomy as one of the determining factors within the legislation must be appreciated for the purpose of this thesis.

Article 2(2)(1) of the German Basic Law provides that the life which is developing in the womb of the mother is an independent legal value which enjoys the protection of the Constitution.[35] The West German Federal Constitutional Court in 1975 held that the foetus has a constitutional right to life, and that the state has a positive duty to protect this right by passing criminal laws to prevent unjustified harm to the foetus.[36]

The Constitutional Court, in the *First Abortion* case, noted that any reform of abortion law must do justice to the principle of the legal inviolability of developing life and at the same time strike a balance between the right of the unborn child and the human dignity of the pregnant woman.[37] The Court held that the right of the unborn to life and the woman's right to privacy could not be balanced as termination of the pregnancy resulted in the destruction of the unborn life.[38] The Court also noted that Article 2 of the Basic Law placed a positive duty on the state to protect the foetus.[39] It found that the legislature would violate its duty by legally allowing the destruction

---

[35] For detailed analysis of German law concerning the rights of the foetus and embryos, see J. Robertson, "Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics" (2004) 43 *Colum. J. Transnational L.* 189, at 195-202. See also E. Eberle, "Human Dignity, Privacy, and Personality in German and American Constitutional Law" (1997) *Utah L. Rev* 963, at 1035-37.

[36] *Entscheidungen des Bundesverfassungsgerichts* BVerfGE 39 (25th February 1975). An English translation of this case is available in R. Jonas & J. Gorby, "West German Abortion Decision: A Contrast to *Roe v Wade*" (1976) 9 J. *Marshall J. Prac. & Proc.* 605. (the analysis of this case is based on this translation). Section 281a of the Penal Code in the Fifth Statute to Reform the Penal Code 1974 decriminalised abortion in certain cases. It permitted abortion on demand during the first twelve weeks of pregnancy, and up to twenty two weeks of pregnancy where there was a foetal defect (*Funftes Gesetz zur Reform des Strfrechts* (5. StrRG), (v. 18.6.1974)). The purpose of this reform was to reduce the number of abortions, by requiring women seeking terminations to undergo pro-pregnancy counselling (J. Kingston & A. Whelan, *Abortion and the Law* (Dublin: Round Hall Sweet & Maxwell, 1997), at 311).

[37] *Ibid*, at 618.

[38] *Ibid*, at 643.

[39] *Ibid*, at 624.

of unborn life within the first twelve weeks of pregnancy, if the only condition of the destruction is that it be performed by a physician with the consent of the pregnant woman.[40] The revised law allowed an abortion only if two doctors determined that exceptional circumstances existed. These exceptional circumstances are: a threat to the woman's health, the presence of birth defects; the child was conceived due to rape of the woman, or a "general situation of need" existed.[41]

The reunification of East and West Germany in 1990 led to a liberalisation of abortion law.[42] The Federal Constitutional Court in the *Second Abortion case* again recognised the right to life of the unborn foetus under German Basic Law.[43] The court distinguished between the notions of legality and criminality of abortion, noting that while abortion was illegal, the state should be afforded some discretion in relation to implementing this illegality, which meant that it need not criminalise abortion in all instances.[44] The Court reaffirmed its affirmative duty to protect potential life.[45] The Court still required counselling and noted that the purpose of counselling was to act as preventative protection for the unborn life. The Pregnant Women's and Family Aid (Amendment) Act 1995 was passed as a response to the *Second Abortion* case. It reiterated that abortion was a criminal offence, but provided that abortion within the first twelve weeks would not be punished as long as the woman in question had received anti-abortion counselling from a third party.[46] The protection of human dignity under the Basic Law is often used as a rationale for

---

[40] *Ibid*, at 625.
[41] Funfzehntes Strafrechtsanderungsgesetz (15 StRAndG), v. 18.05.1976.
[42] J. Robertson, "Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics" (2004) 43 *Colum. J. Transnational L.* 189, at 198.
[43] 88 *Entscheidungen Des Bundesverfassungsgerichts* 203 (28th May 1993). The Act for Assistance to Pregnant Women and Families 1992 provided that a women could lawfully seek an abortion within the first twelve weeks of pregnancy.
[44] *Supra* n. 42, at 199.
[45] See L. Jonker, "Learning From the Past: How the Events That Shaped the Constitutions of the United States and Germany Play Out in the Abortion Controversy" (2011) 23 *Regent U. L. Rev.* 447, at 469.
[46] *Supra* n. 36, at 329.

Germany's stance on abortion, and strict regulation of ARTs under the Embryo Protection Act 1990.

Both Canada and the United States have considered the notion of a right to autonomy in determining the constitutionality of abortion, restrictions on the use of contraception and sterilisation. The extent of the right to procreative autonomy in both jurisdictions is often uncertain. The Canadian Supreme Court in *R v Morgentaler*[47] rejected the argument that the Charter's recognition of the right to "life, liberty and security of the person" protected a wide ranging right to control one's own life and to promote one's individual autonomy".[48] Dickson C.J. held that state interference with bodily integrity and the imposed psychological stress due to this regulation constituted a breach of security of the person.[49] The learned judge argued that it was not necessary to determine whether the right extended further to the protection of interests central to personal autonomy such as the right to privacy. Beetz J, in a concurring judgment, held that a pregnant woman's person cannot be said to be secure if, *when her life or health is in danger*, she is faced with a rule of criminal law which precludes her from obtaining effective and timely medical treatment.[50] Wilson J's concurring opinion provided the most expansive interpretation of section 7 in the case. The learned judge noted the role of human dignity in many of the Charter rights, and argued that an aspect of the respect for human dignity which formed the basis of the Charter was the right to make fundamental decisions without interference from the state.[51]

---

[47] [1988] 1 S.C.R. 30.
[48] *Ibid*, at para. [13].
[49] *Ibid*, at para. [25].
[50] *Ibid*, at para [96] (emphasis added). McIntyre and La Forest JJ's dissenting judgment rejected the proposition that women enjoy a constitutional right to have an abortion under section 7 of the Charter (*ibid*, at para. [230]). It was argued that any infringement of section 7 had to be based on more that state-imposed stress or strain, and had to be an infringement of an interest which was of such a nature and importance as to warrant constitutional protection (*ibid*, at para [234]).
[51] *Ibid*, at para. [289].

The seminal ruling of the U.S. Supreme Court in *Roe v. Wade* attempted to reconcile the privacy rights of women with the interests of states in regulating the legal permissibility of abortions.[52] The Court balanced the conflicting interests involved by affording varying weights to the interests according to the different trimesters or stages of pregnancy. The interests of the state in regulating abortion and therefore curtailing access to it increased as the pregnancy entered the second trimester. This approach has been criticised for failing to directly balance a woman's right of choice and the state interests in curtailing this by using the trimester test.[53] Justice Blackmun also rejected the suggestion that the right to privacy articulated in the decision included an unlimited right to do what one wanted with one's own body.[54] Justice Douglas suggested that the right of privacy included the privilege of an individual to plan his own affairs, where every American is left to shape their lives in the way they think best.[55]

Roe v Wade has never been overruled by the Supreme Court, but the content and extent of rights discourse has been refined by the cases that followed. In *Webster v Reproductive Health Services*,[56] the Supreme Court, in a plurality opinion, upheld the constitutionality of provisions of the Missouri statute which declared in its preamble that life began from the moment of conception, prohibited the performance of abortions by employees in public facilities, and

---

[52] 410 U.S. 113 (1973). For comprehensive consideration of abortion law and women's rights in the United States, see A. McColgan, *Women Under the Law: The False Promise of Human Rights* (Harlow: Longman, 2000), at 58-80.
[53] J. Van Detta, "Compelling Governmental Interest Jurisprudence of the Burger court: A New Perspective on *Roe v Wade*" (1986) 50 *Albany L. Rev.* 675, at 678. It can be argued that *Roe v Wade* heavily relied on the medicalisation of abortion rather than purely rights concerns (see B. Jessie Hill, "Reproductive Rights as Health Care Rights" (2009) 18 *Colum. J. Gender & L.* 501, at 507).
[54] *Supra* n.52, at 154.
[55] *Ibid*, at 213.
[56] 492 U.S. 490 (1989). For detailed background into this decision, see K. Kolbert, "Webster Amicus Curiae Briefs: Perspectives on the Abortion Controversy and the Role of the Supreme Court- Did the Amici Effort Make a Difference?" (1989) 15 *Am. J. L. & Med.* 153.

provided for foetal viability testing prior to performing an abortion for women who were over 20 weeks pregnant.[57]

It is important to note the lack of discussion of the right to procreative autonomy in Chief Justice Rehnquist's decision as well as the judgments of the plurality. Justice Blackmun, dissenting, argued that the fundamental constitutional right of women to decide whether to terminate a pregnancy was no longer secure.[58] He considered it clear from the plurality's approach to the case that they would overrule *Roe* and return the states to virtually unfettered authority to control these personal decisions.[59] In *Planned Parenthood v Casey*,[60] a number of members of the Supreme Court emphasised the precedential value of *Roe*, with the majority implying that some of them would have taken a different position on the constitutional status of abortion if not bound by the value of *Roe*.[61]

While *Roe* and *Morgentaler* do afford some weight to the right to procreative autonomy, there are different degrees of reliance on the importance of rights discourse in these jurisdictions. This brief overview of abortion case law and legislation shows that only some jurisdictions have recognised and utilised the rights of individual parties to mould the law on abortion and contraception. The stringent position of the Irish Constitution regarding the permissibility of abortion cannot act as an automatic bar to the right to procreative autonomy in relation to ARTs. The absence of right to procreative autonomy jurisprudence in relation to abortion will force consideration of the foundation of the right to procreative autonomy in relation to ARTs.

---

[57] *Ibid*, at 490-492 (per Chief Justice Rehnquist).
[58] *Ibid*, at 537.
[59] *Ibid*, at 537-538.
[60] 505 U.S. 833 (1992).
[61] E.M. Maltz, "Abortion, Precedent, and the Constitution: A Comment on *Planned Parenthood of Southeastern Pennsylvania v Casey*" (1992) 68 *Notre Dame L. Rev.* 11, at 19.

II. The Right to Procreative Autonomy of Married Couples

The most obvious way of integrating an individual right to procreative autonomy under Irish constitutional law is to argue that the privacy rights enjoyed by married couples should be extended to unmarried couples and single individuals. Chapter VII will consider the limited impact of the general procreative *equality* argument in the context of the right to use ARTs. A more fundamental obstacle to the extension of the right of married couples to privacy and procreative autonomy is that this right is firmly based on the value of this very institution. It is because the couple are married that the right exists in the first place.

The meaning of 'family' is not outlined in the Constitution; however the Supreme Court has consistently held that it means exclusively the family based on marriage.[62] Therefore unmarried couples and their children do not enjoy the extensive rights provided under Articles 41 and 42.[63] Articles 41 and 42 of the Irish Constitution only protects the marital family from intrusion by the state. It promotes the sanctity of marriage and the marital family by placing value on the decisions made by married couples. The State may only intervene without parental consent in matters concerning the welfare of a marital child when the parents have failed in their duty towards their children. Article 41.1.1 recognises the family as 'the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law'.

---

[62] Article 41.3.1 provides that the State pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack. This is used as authority for the contention that the Constitution only recognises the family based on marriage (see M. Staines, "The Concept of 'The Family' Under the Irish Constitution" (1976) 11 *Ir. Jur.* 223).

[63] For greater analysis of the Irish Constitution and its protection of the family see F. Ryan, "21st Century Families, 19th Century Values: Modern Family Law in the Shadow of the Constitution", in O. Doyle & E. Carolan (eds.), *The Irish Constitution: Governance and Values* (Thomson Round Hall, Dublin 2008) 356, at 356.

The Supreme Court in *In re Article 26 and the Matrimonial Home Bill 1993* found a Bill, which intended to establish joint ownership in the family home, to be unconstitutional.[64] Finlay C.J. emphasised the "extreme importance of the family as acknowledged in Article 41 of the Constitution and to the acceptance in the Article of the fact that the rights which attach to the family including its right to make decision within its authority are inalienable and imprescriptible and antecedent and superior to all positive law".[65] The Supreme Court in *O'B. v S.* held that discrimination in favour of the marital family over other family forms was constitutionally permissible.[66]

North Western Health Board v H.W. concerned a dispute between the plaintiff health board and the defendant parents of an infant child (Paul) in relation to the parents' refusal to consent to the carrying out of a PKU blood test on the child.[67] The test in question would ascertain whether the child was suffering from biochemical or metabolic disorders that were serious but treatable. The question for the court was whether the state had the constitutional power, under Article 42.5, to override the wishes of the parents and carry out the test. The court's refusal to accept that the threshold for intervention had been crossed, despite the fact that it accepted that the test would be in the child's interests, subsequently led Fennelly J in *N and Others v Health Services Executive* to assert that the case provided the most cogent example of the presumption that the rights of the child are secured within the family constituted by nature and by marriage.[68]

In the Supreme Court, Denham J suggested that if the State were entitled to intervene in every case where professional opinion differed from that of parents, or where the State considered the parents were

---

[64] [1994] 1 I.R. 305.
[65] *Ibid*, at 326.
[66] [1984] I.R. 316.
[67] [2001] 3 I.R. 622.
[68] [2006] 4 I.R. 374, at 578.

wrong in a decision, we would be rapidly stepping towards the 'Brave New World' in which the State always knows best.[69] The court recognised that the child has personal rights under Article 40.1[70] so the majority decision is not a product of the absence of express recognition of children's rights in the Constitution. Rather it is the result of the reconciliation of the rights of the child and the welfare principle with Article 41, which placed the family at the centre of the child's life.[71] The Constitution promotes the institution of marriage, and treats the marital family more favourably than other family forms. The right to procreative autonomy based on marital privacy cannot be extended to individuals who are not married.

The Irish Supreme Court in *McGee v Attorney General* primarily focused on the right to marital privacy to find that a ban on the importation of contraceptives was unconstitutional.[72] Henchy J did note that the plaintiff's privacy rights were violated in a wider sense than merely her rights in relation to marital relations. It was suggested that the legislation frustrated any efforts by the plaintiff and her husband to use contraception to ensure the plaintiff's life and health and the integrity of her marriage.[73] Walsh J noted that if a husband and a wife decide to limit their family or avoid having children by the use of contraceptives, this was a matter the state could not intrude into because it questioned the impact of the decision on the common good.[74] The question of whether the use of contraceptives by married couples within the marriage was contrary to the moral codes they professed to subscribe to, did not justify state intervention.[75] Walsh J held that Article 41 of the Constitution guaranteed the husband and wife against any invasion of their privacy by the state.[76] The learned judge held that it was a matter exclusively for the husband and wife to

[69] *Ibid*, at 713.
[70] *Ibid*, at 718.
[71] *Ibid*, at 719.
[72] [1974] I.R. 284.
[73] *Ibid*, at 328.
[74] *Ibid*, at 312.
[75] *Ibid*.
[76] *Ibid*, at 313.

decide how many children they wish to have, and that it was outside the competence of the state to dictate or prescribe the number of children they might have or should have.[77]

Fitzgerald C.J. argued that it was fundamental to the married state that the husband and wife- and they alone- shall decide whether they wish to have children, or the number of children they wish to have.[78] Griffin J supported the protection of morals through the deterrence of fornication and promiscuity is a legitimate legislative aim and a matter not of private but of public morality.[79] The learned judge held that for the purpose of the action in question, it was only necessary to deal with the plaintiff as a married woman in the light of her particular circumstances.[80] It should be noted that Walsh J did focus on Article 40.3 in relation to the right of the woman in this case whose health was threatened by the ban on contraceptives.[81]

The positions outlined above are firmly based on the rights of married couples, but they also illustrate an appreciation for the personal importance of procreative decisions. The legislative response to the *McGee* decision came in the Health (Family Planning) Act 1979. Section 4(2) mandated that a medical prescription was required in order to obtain contraceptives, and that contraceptives could only be sold to a person seeking them for family planning or for adequate medical reasons. The legislative response to the decision affords limited respect to the right to procreative autonomy, and was couched in the specific circumstances of the *McGee* decision.[82]

In *Murray v Ireland*, the High Court found that the Constitution, by explicitly recognising and protecting the concept of the institution of

---

[77] *Ibid*, at 311.
[78] *Ibid*, at 302.
[79] *Ibid*, at 336.
[80] *Ibid*.
[81] *Ibid*, at 315.
[82] Section 2 of the Health (Family Planning) (Amendment) Act 1985 amended section 4, by permitting the sale of contraceptives to all persons over the age of 18.

marriage, implicitly recognises and protects the right of each spouse in marriage to beget children.[83] Costello J argued that if the rights to marry, to marital privacy and the right to resolve matters relating to the procreation of children enjoyed constitutional protection under Article 40 rather than Article 41, there were strong reasons for supposing that the right of spouses to beget children should also be protected under Article 40.[84]

The Supreme Court on appeal highlighted that the right to procreative autonomy of the married couple was part of the constitutional protection afforded to the institution of marriage.[85] McCarthy J cited *N. (otherwise K.) v K.*[86] where Costello J noted that the right of each spouse to beget children was implicitly recognised and protected by virtue of the explicit constitutional protection afforded to the institution of marriage.[87] McCarthy J held that the right to procreate *within marriage*[88] was one of the unenumerated rights guaranteed by Article 40 as being essential to the human condition and personal dignity.[89] The court held that the right was independent of and antecedent to all positive law, and was of the essence of humanity.[90] The court dismissed the plaintiffs' case as it held that the right to procreate children could be limited by the deprivation of liberty in accordance with the law.

The judgment of McGovern J in the High Court decision of *Roche v Roche* shed little light on the right to procreative autonomy of married couples.[91] The case focused on the implied terms of the agreement in place between the couple and the clinic and on the possible rights of the embryo under the Constitution. It only indirectly and briefly

---

[83] [1985] I.R. 532, at 536.
[84] *Ibid*, at 537.
[85] [1991] I.L.R.M. 465.
[86] [1986] I.L.R.M. 75.
[87] *Supra* n. 85, at 474.
[88] Emphasis added.
[89] *Supra* n. 85, at 476.
[90] *Ibid.*
[91] [2006] I.E.H.C. 359.

considered the rights of the couple to privacy and autonomy. McGovern J rejected the suggestion that Article 41 of the Constitution and therefore the right of privacy in *McGee* applied because the embryos did not enjoy a right to life under Article 40.3.3.[92] The inherent suggestion in this brief statement is that privacy rights in this area are enjoyed by the family unit under Article 41 rather than as an individual right.

Article 12 of the European Convention on Human Rights speaks of the right to marry and found a family. It is assumed that the right to found a family is extended only to those who can legally marry as the Article refers to 'this right' rather than 'these rights'.[93] The recent *Dickson v United Kingdom* decision concerning the rights of a prisoner and his wife to use artificial insemination considered the matter under Article 8 rather than Article 12. However, the fact the couple were married must be appreciated. Article 23 of the International Covenant on Civil and Political Rights provides protection for the right to found a family as well as the right to marry and equality of spouses. Again, the right to procreative freedom is bound up with marriage. The right to procreative autonomy based on dignity will not be bound up with the institution of marriage. It should be noted that the similar right under Article 9 of the European Charter of Fundamental Rights separated the right to marry and the right to found a family.[94] The explanatory notes to the Charter state that the aim of separating the rights is to "modernise" the right to found a family to "arrangements other than marriage for founding a family".[95] Recent English case law has highlighted the division of

---

[92] *Ibid*, at 24. Chapter VI will criticise the High Court's failure to acknowledge the different individual rights of both parties in this case.
[93] R. White & C. Ovey, *The European Convention on Human Rights* (4th ed) (Oxford: Oxford University Press, 2010), at 354.
[94] C. McGlynn, "Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo" (2001) 26(6) *European L. Rev.* 582, at 593.
[95] 4473/00 & 4423/00 Charter 31 July 2000 & 1 October 2000.

marriage from procreation,[96] as did Dunne J's decision in *Zappone v The Revenue Commissioners*.[97]

It could be argued that in the 21st Century the "family" under Articles 41 and 42 should be extended to family units other than the marital family. Diversity in Irish family life certainly challenges the notion that marriage as an institution should exclusively created such extensive parental rights and family rights. The constitutional precedent outlined would negate this possibility. It is also maintained that the argument for such an extended interpretation of the constitutional family avoids an important examination about the core values that underpin the very rationale for the right to procreative autonomy in Irish law.

III. The Limited Utility of the Constitutional Right to Privacy

The right to procreative autonomy is usually based on the promotion of privacy. This approach is visible in Canada,[98] the United States,[99] the European Convention on Human Rights[100] and in Ireland. This thesis rejects privacy as a basis for the right to procreative autonomy. Privacy offers little substance to, and a circular rationale for, the right to procreative autonomy. In *McGee v. Attorney General*, the Supreme Court recognised the right to privacy as an unenumerated right

---

[96] See *Wilkinson v Kitzinger* [2007] 1 F.L.R. 295.

[97] [2008] 2 I.R. 417.

[98] Parker J in the Canadian case of *R v Mortgentaler* held that section 7 of the Canadian Charter (which protects the right to life, liberty and security of the person) provided broad protections for the person against governmental interference, and that the notion of liberty under the Charter protected reproductive liberty.

[99] See *Griswold v Connecticut* 381 U.S. 479 (1965), at 482; *Eisenstadt v Baird* 405 U.S. 438 (1972), at 442, and *Roe v Wade* 410 U.S. 113 (1973), at 169. See criticism of this position in *Roe* in C.L. Neff, "Woman, Womb, and Bodily Integrity" (1991) *Yale J. L. Feminism* 327, at 328

[100] The Court in *Evans v United Kingdom* held that the right to procreative autonomy was protected under the right to respect for private life under Article 8 of the Convention. The recent decisions of *Gas & Dubois v France* and *H, v Austria* have reiterated this position.

protected by the Constitution.[101] In *Norris v Attorney General*, Henchy J, dissenting, held it was well attested that the right to privacy inheres in each citizen by virtue of his human personality, and that such a right is constitutionally guaranteed as one of the unspecified personal rights comprehended by Article 40.3.[102]

In *Kennedy v Ireland*, Hamilton P held that the right to privacy was protected under Article 40.3 of the Constitution.[103] The court relied on *Norris v Attorney General* to articulate the right to privacy. The High Court found that while the right of privacy was not specifically guaranteed by the Constitution, it was one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State.[104] This thesis cautions against the temptation to simply argue that decisions about using ARTs and their implications are private and therefore protected by the right to privacy.

The notion of a right to privacy in this area supports to the classic conception of liberty as a negative concept, the right to be free from interference. This is probably why many commentators look solely at this concept as the cornerstone of the right to procreative autonomy in ARTs. The most basic autonomy is arguably the right to decide how one is to live one's life; in particular, how to make the critical life decisions.[105] The notion of privacy in human rights jurisprudence has evolved beyond Warren and Brandeis's famous support for the "right to be left alone".[106] The constitutional right to privacy under U.S. constitutional law has enveloped the related values of autonomy and liberty. The constitutional right now protects against the undermining

---

[101] [1974] I.R. 284. For recent application of the right to privacy see *Herrity v Associated Newspapers (Ireland) Ltd* [2009] 1 I.R. 316.
[102] [1984] I.R. 51, at 71.
[103] [1987] I.R. 587, at 590.
[104] *Ibid*, at 592.
[105] J. Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideas in the Constitution?" (1983) 58 *Notre Dame L. Rev.* 445, at 454.
[106] D. Warren and L. D. Brandeis, "The Right to Privacy" (1890) 4 *Harv L. Rev.* 193.

of our own intimate actions.[107] The argument that there is a protected zone of intimate decision-making is an area within which the personal calculus used by an individual to make fundamental decisions must be allowed to operate without the injection of disruptive factors by the state.[108] It must be recognised that the right of privacy was discovered by the U.S. Supreme Court in the variety of primary constitutional rights is meant to be a personal autonomy and not merely "privacy" in the usual sense.[109] This thesis urges against the attractive malleability of the notion of privacy in promoting the right to procreative autonomy.

Using privacy as the justification for procreative autonomy has little substance and only offers circular reasoning regarding the conncetion of privacy to procreative autnomy. Stanley Benn has noted that privacy is respected because it embodies our respect for each person's autonomy. Benn suggested that allowing men privacy would not give them a better chance to be autonomous, but rather that a person was worthy of respect on account of their potential autonomy.[110] Judith Jarvis Thomson argued that the right to privacy was derivative in the sense that each right within the notion of privacy could be explained by reference to another right without recourse to the right to privacy at all.[111] Thomson correctly notes that the fact we have a right to privacy does not explain our having any of the rights in the cluster of rights to privacy.[112] A constitutional right to procreative autonomy cannot be based on privacy for privacy's sake and cannot protect

---

[107] See J.C. Inness, *Privacy Intimacy and Isolation* (Oxford: Oxford University Press, 1992).
[108] G.L. Bostwick, "A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision" (1976) 64 *Cal. L. Rev.* 1447, at 1466.
[109] *Supra* n. 105, at 488.
[110] S. Benn, "Privacy, Freedom and Respect for Persons", in J.W. Chapman & J. Roland Pennock (eds.), *Privacy: Nomos XIII* (New York: Atherton Press, 1971) 1, at 26.
[111] J. Jarvis Thomson, "The Right to Privacy" (1975) 4(4) *Phil. & Pub. Affairs* 295, at 306. Note the similar argument by Justice Rehnquist, who extra-judicially claimed that there was a group of separate values that had been assembled under the constitutional right to privacy in the U.S., and suggested that they should be clearly catalogued and evaluated, see W.H. Rehnquist, "Is an Expanded Right to Privacy Consistent with Fair and Effective Law Enforcement?" (1974) 23 *Kansas L. Rev* 1.
[112] *Ibid*, at 312.

freedom for freedom's sake. This circular reasoning fails to engage with the more fundamental bases for the right to procreative autonomy and also stretches privacy beyond its valuable remit.

IV. Connecting Dignity and Procreative Autonomy under the Constitution

The notion of human dignity is mentioned in the preamble of the Universal Declaration of Human Rights, as well as both the International Covenants on Civil and Political Rights and Social and Economic Rights.[113] The Preamble to the Universal Declaration begins with the recognition of the "inherent dignity and of equal and inalienable rights of all members of the human family". The Preamble to the Council of Europe's Convention on Human Rights and Biomedicine requires that parties to the Convention take such measures as are necessary to safeguard human dignity and fundamental rights and freedoms of the individual with regard to the application of biology and medicine.

These instruments do not provide a definition of this concept or its exact relationship to the notion of human rights, and often indeed demonstrate conflicting intended uses of the term. Ruth Macklin makes the common argument that, on close inspection, arguments for dignity are either vague restatements of other, more precise notions, or mere slogans that add nothing to an understanding of the topic.[114] This thesis acknowledges the uncertainty surrounding the meaning of the notion of human dignity in human rights discourse. It also accepts that there is no one authoritative definition of human dignity. However, it will outline two related functions of the value of human

---

[113] For a detailed outline of the international documents and national constitutions that discuss the notion of human dignity in their text see P. Verspieren, "Dignity in Political and Bioethical Debates", in R. Ammicht-Quinn, M Junker-Kenny & E. Tamez (eds.), *The Discourse of Human Dignity* (London: SCM Press, 2003) 13, at 13-17. See also V. Jackson, "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse" (2004) 65 *Mont. L. Rev.* 15, for examination of the role of dignity in U.S. state and federal constitutional law.

[114] R. Macklin, "Dignity is a Useless Concept" (2003) 377 *British Medical Journal* 1419, at 1419.

dignity in order to clearly articulate its role in promoting the right to procreative autonomy.

Human dignity is a multi-faceted and complex notion. It is used both to promote individual autonomy and self-determination and to curtail individual freedoms in the interests of the dignity of all human beings. This thesis argues that the protection of human dignity may be used to justify the promotion of freedom and curtailment of freedom in the interests of protecting the dignity of others or the community as a whole. The Irish Constitution, like the South African and German Constitutions, promotes both roles of dignity. In this regard, the right to procreative autonomy will be based on the value of human dignity, but the promotion of dignity will also operate as a limitation to the ambit of this right.

Personal or individual dignity and the communitarian notion of the dignity of humanity together are the core values that form the basis of the right to procreative autonomy. Respect for both aspects of human dignity grounds the right at a general and individual level and promotes such values as freedom, self-determination, equality and the intrinsic value or worth of each human being. However, this simple claim does not, without further elaboration, offer anything substantive to the debate about the role of procreative autonomy. The uncertainty surrounding the meaning of human dignity has disrupted and limited its utility in bioethics and reproductive technologies in particular.[115] One needs to offer a better outline of the notions of human dignity adopted for the purposes of this thesis.

The expression "dignity of man" was famously formulated in Stoic anthropology. The original Latin term *dignitas hominis* denotes

---

[115] See S. Malby, "Human Dignity and Human Reproductive Cloning" (2002) 6(1) *Health and Human Rights* 102; T. Caulfield & R. Brownsword, "Human Dignity: A Guide to Policy Making in the Biotechnological Era?" (2006) 7 *Nature* 72, and R. Andorno, "Human Dignity and Human Rights as a Common Ground for a Global Bioethics" (2009) 34 *J. Med. & Phil.* 223.

worthiness, the outer aspect of a person's social role which evokes respect, and embodies the esteem residing in office, rank or personality.[116] It is suggested that modern conceptions of dignity do not depend on any particular additional status of the person in question.[117] The fundamental idea behind this articulation of human dignity is that, on earth, humanity is the greatest type of beings and that every member deserves to be treated in a manner consonant with the high worth of the species.[118]

The inherent nature of dignity is often highlighted in academic discourse regarding the definition of this concept.[119] Dignity is said to be inherent in each and every person simply because of his or her being human.[120] This conception of dignity has altered the original narrow Stoic notion and represents the clearest shift in definition of the idea.[121] We respect persons because of their intrinsic worth, not because of the value they have in serving the interests of others. One does not have to be worthy to possess dignity. When we degrade human beings by violating their human rights, we treat them in a way that fails to respect their intrinsic worth.[122] Baroness Hale in *Ghaidan v Godin-Mendoza* argued that treating someone as automatically having less value than others violates the human dignity of that

---

[116] H. Cancik, "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Reflections on Cicero, *De Officiis I 105-107*", in D. Kretzmer & E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer International Law), 19, at 19.
[117] C. McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *E.J.I.L.* 655, at 657.
[118] G. Kateb, *Human Dignity* (Harvard University Press, Cambridge, 2011), at 3.
[119] J. Kahn, "Bringing Dignity Back to Light: Publicity Rights and the Eclipse if the Tort of Appropriation of Identity" (1999) 17 *Cardozo ARTs & Ent. L. J.* 213, at 218.
[120] B. Klein Goldewijk, "From Seattle to Porto Alegre: Emergence of a New Focus on Dignity and the Implementation of Economic, Social and Cultural Rights", in B. Klein Goldewijk et al (eds.), *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (New York: TCM Asser Press, 2002) 1, at 3.
[121] For examples of debate regarding this aspect of dignity, see S. Hennette-Vauchez, "A Human *Dignitas*? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept" (EUI Working Papers: Law 2008/18), at 7.
[122] A.I. Melden. *Rights and Persons* (Berkley: University of California Press, 1977), at 189.

person".[123] The definition of dignity use in the French Bioethics Laws limiting the availability of ARTs and prohibiting most uses of PGD is based on this conception of dignity, which in turn is focusing on the intrinsic value of all humans - dignity as protection and constraint. The German Basic Law similarly uses the idea of the inviolability of human dignity to promote liberty, and simultaneously constrain it. This is not a weakness of dignity as a foundation for the right to procreative autonomy. It is the trademark of a concept that respects the intrinsic value of human lives. The notion of dignity in the Preamble of the Irish Constitution embraces both aspects of the idea, as is required in order to give dignity its full value.

Beyleveld and Brownsword similarly distinguish between two conceptions of human dignity - "human dignity as empowerment" and "human dignity as constraint".[124] The notion of human dignity as empowerment acts as a background justification for the recognition of human rights. The empowerment in question is that which comes with the right to respect for one's dignity as a human, and the right to the conditions in which human dignity can flourish.[125] The notion of human dignity as constraint concerns the instances where this acts as constraint on free choice, either by virtue of being the collective good that represents each society's desirable vision of itself, or because it is wrong to compromise an individual's dignity.[126] Under the view of human dignity as empowerment, as all human beings have dignity they are to be recognised as members of a class of beings that have a value, and they are entitled to the conditions in which they can experience their own dignity and exercise the distinctive human capacities that account for their dignity.[127] Each concept of dignity is connected and promoted by the other.

---

[123] [2004] 2 A.C. 557, at 605.
[124] D. Beyleveld & R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001), at 11.
[125] *Ibid*
[126] *Ibid.*
[127] *Ibid*, at 27.

Why Does Procreative Autonomy Engage Dignity?

Ronald Dworkin claims that the most important feature of western culture is a "belief in human dignity: that people have the moral right and the moral responsibility to confront the most fundamental questions about the meaning and value of their own lives for themselves."[128] The decision whether to bear a child, the timing of childbearing and the means of avoiding or promoting pregnancy are examples of reproductive freedoms which are pivotal life decisions that are arguably central to respecting the dignity of the person.[129] It may seem an obvious suggestion that the ability to make such decisions promotes the human dignity of each individual, yet this notion, and the protection it affords, are open to many different interpretations.

Margaret Radin argues that the premise underlying personhood is that to achieve proper self-development an individual needs some control over resources in the external environment.[130] Personhood captures "those attributes... irreducible on [one's] selfhood" with which the state must not be allowed to tamper."[131] The term personhood includes elements of the concepts of individuality, autonomy, and agency, but none of these words are sufficient to capture the essence of identity and individuality articulated by this notion.[132]

Commentators like John Robertson, John Harris and Ronald Dworkin have considered the right to procreative autonomy to different extents in the context of ARTs. John Robertson's seminal work has suggested that rights to control genetic material and decide to become a parent are respected because of the centrality of reproduction to

---

[128] R. Dworkin, *Life's Dominion* (London: Harper Collins, 1993), at 166.
[129] N. Gertner, "Interference with Reproductive Choice", in S. Cohen & N. Taub (eds.), *Reproductive Laws for the 1990s:Contemporary Issues in Biomedicine, Ethics and Society* (Clifton: Humana Press, 1989) 307, at 307.
[130] M. Radin, "Property and Personhood" (1982) 34 *Stan, L. Rev.* 957, at 957.
[131] J. Rubenfeld, "The Right to Privacy" (1989) 102 *Harv. L. Rev.* 737, at 753.
[132] J. Braxton Craven Jr, "Personhood: the Right to Be Let Alone" (1976) *Duke L. J.* 699, at 702.

personal identity, meaning and dignity.[133] However, there is little development concerning the foundation of the right beyond such statements. Harris has similarly suggested that this liberty upholds an important facet of human dignity and personhood. The freedoms to choose one's own way of life and live according to one's most deeply held beliefs are at the heart of procreative choice.[134] Harris also argues that the right to freedom to found a family expresses something so basic and deep-rooted in human psychology and social practice that it seems hardly worthy of special attention, but it problematic in the extreme.[135]

This can only come from an appreciation of the profound implications of parenthood, the importance of decisions concerning if, when and how to become a parent, and decisions in relation to the genetic identity of future children. Privacy and autonomy protect such decisions because of their fundamental importance to each individual, and the consequences these decisions and opportunities present for those using or seeking to avail of ARTs to become parents.

The Many Faces of Dignity in Constitutional Law

The Preamble to the Constitution states: "[w]e the people of Éire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, who sustained our father through centuries of trial, ... and seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our

---

[133] J. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press, 1994), at 30. The right to procreative autonomy outlined in this thesis differs from Robertson's articulation in a number of ways, including the basis of the right, the recognition of the right beyond genetic connection, and the role of rights in relation to the enforceability of surrogacy contracts.

[134] J. Harris, "Rights and Reproductive Choice", in J. Harris & S. Holm (eds.), *The Future of Human Reproduction* (Oxford: Clarendon Press, 1998) 5, at 35.

[135] J. Harris, "The Right to Found a Family", in G. Scarre (ed.), *Children, Parents and Politics* (Cambridge: Cambridge University Press, 1989) 133, at 133.

country restored, and concord established with other nations, do hereby adopt, enact, and give to ourselves this Constitution."

The express mention of the notions of dignity and freedom has spurred courts and commentators to argue that a constitutional right to dignity exists. While the Preamble clearly acknowledges the importance of dignity and freedom of the individual, the context of this statement should be appreciated within this extensive quotation of the Preamble. Teresa Iglesias argues that the significance of the paragraph outlining the notions of dignity and freedom of the individual is not dependent on other parts of the Preamble.[136] It was therefore claimed that the universal ethico-legal content of this paragraph stands on its own.[137] It is suggested that the values of dignity and freedom cannot be divorced from values of prudence, charity and justice, and the goal of social order. Dignity itself cannot be divorced from these other notions. The co-existence of dignity as both empowerment and constraint is visible in the constitutional jurisprudence of Germany and South Africa, and is consistent with the philosophical framework of the Irish Constitution. Dignity not only promotes autonomy, it can also constrain it in order to protect the dignity of others.

The notion of dignity in the Irish Constitution is used in a number of contexts in different areas, including the protection of dependent and vulnerable individuals; social equality and discrimination, and the protection of personal self-identity and freedom of sexuality.[138] The diverse uses of dignity show that the courts are open to provide a colourful context for dignity related rights and interests, based on instinctive understandings of human beings and society. The diverse

---

[136] T. Iglesias, "The Dignity of the Individual in the Irish Constitution – The Importance of the Preamble" (2000) 89 *Studies* 19, at 21.
[137] *Ibid.*
[138] For detailed analysis of the seminal cases concerning the notion of human dignity as the basis for constitutional principles, see J. O'Dowd, "Dignity and Personhood in Irish Constitutional Law", in G. Quinn, A. Ingram & S. Livingstone (eds.), *Justice and Legal Theory in Ireland* (Dublin: Oak Tress Press, 1995) 163, at 163.

application of the notion adds strength to the argument that dignity can promote a right to procreative autonomy under the Constitution. This instinctive discussion and application of dignity unfortunately offers little elaboration on the contours of dignity. This outline also shows that the courts see dignity as being capable of contextual application in different circumstances. This section will highlight that dignity as a value has been used by the courts on a number of occasions.[139]

In *In the matter of A Ward of Court (withholding medical treatment) (No. 2)*, the Supreme Court considered the role of dignity and autonomy under the Constitution.[140] Denham J held that the right to be treated with dignity was an unspecified right under the Constitution.[141] The court held that decision-making in relation to medical treatment was an aspect of the right to privacy, but a component in the decision may relate to personal dignity.[142] Denham J also noted that the right to privacy was the giving and refusing of consent to medical treatment.[143] The court held that a constituent of the right of privacy was the right to die naturally, with dignity and with minimum suffering. The Supreme Court recognised the requirement of respect for the dignity of the individual as a corollary of the right to life.[144] The court has also been criticised for not basing its decision on what the ward would have wanted prior to incapacity. Therefore, while the court invoked a right to self-determination, it has been argued that it was not properly applied in the case.[145] The right to dignity seems to be informed by notions of agency and autonomy that are not covered by the right to privacy.

---

[139] For analysis of the different uses of dignity as a right and a value in constitutional law, see W. Binchy, "Dignity as a Constitutional Concept", in O. Doyle & E. Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 307.
[140] [1996] 2 I.R. 100.
[141] *Ibid*, at 163.
[142] *Ibid.*
[143] *Ibid.*
[144] J. Harrington, "Withdrawal of Treatment from An Incompetent Person" (1995) 17 *D.U.L.J.* 120, at 131.
[145] D. Feenan, "Death, Dying and the Law" (1996) *I.L.T.* 90, at 91.

The right to self-determination was recognised by O'Higgins C.J. in *Re Ward of Court* as an aspect of the right to privacy.[146] The learned judge did not consider how a right to self-determination was different from the general right to privacy. O'Flaherty J also recognised the ward's right to self-determination but did not elaborate on its basis or content.[147] Denham J's judgment affords greater consideration to the right of privacy and dignity of the ward, as outlined in previous sections. The learned judge also recognised the right of choice of the patient in determining whether to accept medical treatment. The context of the decision in *Re Ward of Court* has to be appreciated. Notions of dignity and autonomy were supported in a case concerning the continued treatment of the ward against the wishes of her family. Unlike the other cases which follow, this case views dignity as a right rather than a value informing the content of other fundamental rights.

In *C.C. v Ireland*, Hardiman J held that a provision which criminalises and exposes a maximum sentence of life imprisonment a person without mental guilt did not respect the liberty or the dignity of the individual. It did not meet the obligation imposed on the state by Article 40.3.1 of the Constitution.[148] The Court of Criminal Appeal in *The People (D.P.P.) v Murray*,[149] highlighted that human dignity was a constitutional objective protected by the Preamble to the Constitution. Finnegan J argued that the unlawful use of violence in serious offences against the person involved an affront to human dignity. In *Zappone v Revenue Commissioners*, the applicants argued that the right to marry was a right that extends to all persons by virtue of their dignity as human beings.[150] In *Kennedy v Ireland*, Hamilton P held that the nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society

[146] [1996] 2 I.R. 100, at 126.
[147] *Ibid*, at 132.
[148] [2006] 4 I.R. 1, at 80.
[149] [2012] I.E.C.C.A. 60
[150] [2008] 2 I.R. 417, at 461.

envisaged by the Constitution, namely, a sovereign, independent and democratic society.[151] These cases do not elaborate on the meaning of dignity, but do illustrate the potential of dignity as a notion promoting human worth and intrinsic value in circumstances where pure privacy or liberty interests are ill-equipped to engage with such values.

In *Redmond v Minister for the Environment*, Herbert J held that the deposit systems required by s. 47 of the Electoral Act 1992 and s. 13 of the European Parliament Election Act 1997 discriminated on the basis of money between the plaintiff and other citizens of the state and were an attack upon the dignity of those persons who did not have money.[152] In *Re Article 26 and the Health (Amendment)(No. 2) Bill 2004*, counsel argued that the unenumerated rights under Article 40.3.1 of the Constitution included the right to human dignity of the person.[153] The Supreme Court did not focus on this position in its judgment. Hardiman J in *North Western Health Board v H.W.* noted that ample source must be given to the fundamental values of human dignity.[154] As noted already, these statements fail to offer greater consideration of the meaning or weight of idea of human dignity.

McKechnie J in *Foy v An tArd-Chlaraitheoir*[155] held that "everyone as a member of a society has the right to human dignity, and with individual personalities, has the right to develop his being as he sees fit; subject only to the most minimal of state interference being essential for the convergence of the common good. Together with human freedom, a person, subject to the acquired rights to others, should be free to shape his personality in the way best suited to his person and to his life".[156] Henchy J in *Norris* stated that "[t]here is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or

[151] *Supra* n. 103, at 593.
[152] [2001] 4 I.R. 61, at 80.
[153] [2005] 1 I.R. 105, at 111 and 160.
[154] [2001] 3 I.R. 622, at 747.
[155] [2007] I.E.H.C. 470
[156] *Ibid*, at para. [118].

immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged".

The High Court in *B. F. v Clinical Director of Our Lady's Hospital* recognised the constitutional rights to dignity, autonomy, privacy and bodily integrity.[157] The court in *Mulligan v Governor of Portlaoise Prison* also noted the right of dignity and privacy of the applicant.[158] Section 4(3) of the Mental Health Act 2001 provides that in making a decision under the Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person) due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy. In *Quinn Supermarkets v Attorney General*,[159] the Supreme Court argued that the equality guarantee under Article 40.1 was a guarantee related to the dignity of persons as human beings.[160] The court related discrimination directly to the effect of impairment of human dignity.[161]

While the courts have not offered any comprehensive analysis about the meaning of dignity, the potential of this concept as a constitutional value can be seen in the simple statements contained in the case law above. The message coming form this case law is that dignity is infringed if one is discriminated on economic ground. It is infringed when one if imprisoned without mental guilt for the offence in question. The equality guarantee under Article 40.1 is related to the dignity of persons as human beings. Dignity is closely linked to autonomy, privacy and self-determination. Respect for dignity promotes a right to individual self-development with limited interference by the state. It is suggested that the constitutional jurisprudence on dignity supports the contention that dignity

[157] [2010] I.E.H.C. 243.
[158] [2010] I.E.H.C. 269.
[159] [1971] I.R. 11.
[160] *Ibid*, at 13.
[161] O. Doyle, The Human Personality Doctrine in Constitutional Equality Law" (2001) 9 *I. S. L. R.* 101, at 112.

promotes the inherent value of equal worth of every human being. It is clearly used to justify freedom and self-determination. On the other hand, the context the express mention of dignity in the Preamble shows that it cannot be divorced from concerns about the communitarian interests of society as a whole.

It is suggested that protection of human dignity is a value that will ground the right to procreative autonomy. The protective function of the promotion of human dignity will act as a limitation of this right. Using human dignity as a foundational principle for the right to procreative autonomy, rather than as a stand alone right is consistent with the wording of the Preamble and Irish case law to date. It also avoids confusion between dignity being a justification for autonomy and dignity being equated purely with autonomy.[162]

Dignity in South African and German Constitutional Law

Dignity plays a more prominent role in the constitutional jurisprudence of Germany and South Africa. The South African Constitution arguably uses dignity as a tool for empowerment, to promote autonomy and freedom. While the German Grundgesetz also uses dignity to promote self-determination, it has used its recognition of the inviolability of dignity to constrain freedom. The regulation of abortion and ARTs is partly informed by this protection. It is interesting to highlight these different uses of dignity. It is suggested that the framework of the Constitution requires the application of both notions.

Dignity in Germany[163]

---

[162] C. O'Mahony, "There is no Such Thing as a Right to Dignity" (2012) 10 *I-CON* 551, at 565.

[163] The translations of these cases are primarily taken from D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed.) (Durham: Duke University Press, 1997).

Article 1(1) of the German Basic Law declares that the "dignity of man shall be inviolable. Article 1(2) provides that "[t]he German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world". The German Basic Law, like the South African Constitution seems to promote dignity both as an objective legal norm and an individual basic right.[164] The Federal Constitutional Court of Germany in the *Life Imprisonment* case held that human dignity under the Basic Law means not only the individual dignity of the person but the dignity of man as species.[165] Unlike the South African and Irish Constitutions, the Basic Law provides that human dignity has an absolute effect. All of the basic rights outlined in the Basic Law are in the service of human dignity.[166] Human dignity cannot be balanced with other individual or communitarian interests.[167]

The Court in the *Investment Aid Case I* held that the image of man in the Basic Law is not that of an isolated, sovereign individual. Rather, the Basic Law was said to favour a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value.[168] There is a strong link in German law between the concept of personhood and the social community.[169] In the *Mephisto* case, the Court provided that the human person is an autonomous being, developing freely within the social community.[170] The human is not to be an isolated and self-regarding individual. An aspect of the promotion of human dignity is the state's duty to prevent individuals from infringing upon one another's dignity. The protection must be

---

[164] E. Benda, "The Protection of Human Dignity (Article 1 of the Basic Law)" (2000) 53 *S.M.U. L. Rev.* 443, at 444.
[165] (1977) 45 BVerfGE 187, at 229.
[166] Census Act Case (1983) 65 BVerfGE 1, at 41.
[167] E. Klein, "Human Dignity in German Law", in D. Kretzmer & E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 145, at 149.
[168] (1954) 4 BVerfGE 7, at 15.
[169] E. Eberle, "Human Dignity, Privacy, and Personality in German and American Constitutional Law" (1997) *Utah L. Rev.* 963, at 971.
[170] (1971) 30 BVerfGE 173.

adequate to ward off the type, the scope and the intensity of potential violations.[171] In the *Peepshow* case, the German Federal Administrative Court used Article 1(1) to justify the prohibition on peepshows in order to protect the human dignity of the women involved.[172] The promotion of human dignity meant limiting the freedom of the women to take part in these shows.[173]

The German courts have used dignity to promote as well as to limit freedom. In the *Transsexual* case, the Court argued that Article 1(1) of the Basic Law protects that dignity of a person as he understands himself in his individuality and self-awareness.[174] The court went on to hold that this was connected with the idea that each person is responsible for himself and controls his own destiny. The abortion cases outlined in Part I illustrate how the human dignity of human life can limit freedom.[175] German abortion law and the Embryo Protection Act 1990 illustrate the ability of human dignity to restrain rather than promote freedom. The Embryo Protection Act prohibits the destruction of embryos, primarily by prohibiting the cryopreservation of embryos.[176]

Dignity in South Africa

The notion of dignity has influenced constitutional jurisprudence in South Africa. The use of dignity as a value informing human rights jurisprudence illustrates the utility of the concept, and its potential in

---

[171] C. Starck, "The Religious and Philosophical Background of Human Dignity", in D. Kretzmer & E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 179, at 189.

[172] (1981) 64 BVerwGE 274. This application of dignity has been recently criticised as transferring moral argument into a legal text (see T. Hornle, "Criminalising Behaviour to Protect Human Dignity" (2012) 6 *Criminal Law & Philosophy* 307).

[173] N. Foster, *German Legal System and Laws* (Oxford: Oxford University Press, 2002), at 238. The Court has distanced itself from such uses of Article 1(1) in subsequent cases.

[174] (1979) 49 BVerfGE 286.

[175] R. Siegel, "Dignity and Sexuality: Claims on Dignity in Transnational debates over Aboriton and Same-Sex Marriage" (2012) 10 *I-CON* 355, at 363.

[176] For an outline of the implications of this interpretation of human dignity in relation to stem cell research, see T. Takala & M. Hayry, "Benefiting from Past Wrongdoing, Human Embryonic Stem Cell Lines, and the Fragility of the German Legal Position" (2007) 21 *Bioethics* 150, and J. Beckmann, "On the German Debate on Human Embryonic Stem Cell Research" (2004) 29 *J. Medicine & Phil.* 603.

Irish constitutional law. The 1996 Constitution mentions dignity in a number of articles, including a specific right to dignity in section 10, which states that "[e]very person shall have the right to respect for and protection of his or her dignity". The emphasis on the notion of dignity is clearly linked to the nation's history.[177] The numerous references to dignity also arguably justify the importance of the notion in interpreting many rights under the Constitution. The repetition of these values emphasises their centrality under the Constitution, and is a fact that has to be appreciated regarding dignity's single mention in the Preamble of the Irish Constitution.[178] The impact of dignity in South African jurisprudence illustrates the potential of dignity from an Irish perspective in shaping the constitutional right to procreative autonomy. Unlike the German Basic Law, there is no hierarchy of rights in the South African Constitution.[179] However, dignity does occupy a central position in light of the struggle against apartheid.[180]

The Preamble to the 1996 Constitution discusses the "inherent dignity" of all people. Chaskalson argues that the Constitution asserts that respect for human dignity and all the flows from it, is an attribute of life itself and not a privilege granted by the state.[181] The Constitution makes numerous references to dignity, liberty and equality.[182] The Constitutional Court in *Christian Education South Africa v Minister of Education*[183] described dignity as the cornerstone

---

[177] L. W.H. Ackermann, "The Legal Nature of the South African Constitutional Revolution" (2004) *New Zealand L. Rev.* 633, at 645. See also L. W. H. Ackermann, "Equality and the South African Constitution: The Role of Dignity" (2000) 60 *Heidelberg J. Intl. L.* 537 for discussion of the historical background leading to the important role of human dignity in the Constitution, and constitutional jurisprudence.

[178] J. Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Lansdowne: Juta & Co., 2004), at 56.

[179] *State v Mamabolo (E.TV & Others Intervening)* (2001) 3 S.A. 409, at para. [41].

[180] *N.M. & Others v Smith & Others* (2007) 5 S.A. 250, at para. [49].

[181] A. Chaskalson, "Human Dignity as a Foundational Value of Our Constitutional Order" (2000) 16 *S. A. J. H. R.* 193, at 196.

[182] See S. Baer, "Dignity. Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism" (2009) 59 *U. of Toronto L. J.* 417 for greater discussion of the interrelationship of these notions in the South African Constitution.

[183] (2000) 4 S.A. 757.

of human rights. The court has also held that human dignity is a central value of the "objective, normative value system".[184] In *State v Makwanyane*, Chaskalson P underlined the absolute nature of the right to life and dignity, and argued that they were the source of all other rights under the Constitution, and the essential content of all rights.[185] O'Regan J emphasised the importance of dignity as a founding value of the Constitution. The learned judge held that the recognition of the right to dignity was "an acknowledgment of the intrinsic worth of human beings", emphasising that "human beings [were] entitled to be treated as worthy of respect and concern".[186]

Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* noted the difficulty in defining the concept of dignity, but argued that at its least, the constitutional protection of dignity required the courts to "acknowledge the value and worth of all individuals as members of our society.[187] The Court has also stated that a necessary element of freedom and dignity of any individual is an entitlement to respect for the unique set of ends that the individual pursues.[188]

Dignity assumes the role of a residual right which is used to interpret and give shape to more specific rights, and which is relied upon only in cases where no other more specific right is available.[189] Dignity has informed decision concerning the right to vote,[190] the right to privacy, and the right to protection against cruel, inhuman and

---

[184] *Carmichele v Minister of Safety and Security* (2001) 4 S.A. 938, at para. [56]. See also *The Citizen 1978 (Pty) Ltd. V McBride* (2011) 4 S.A. 191, at para. [143].
[185] (1993) 3 S.A. 391, at para. [84].
[186] *Ibid*, at para [329].
[187] (1999) 1 S.A. 6, at para. [28].
[188] *MEC for Education: Kwazula-Natal & Others v Pillay* (2008) 1 S.A. 474, at para. [64].
[189] H. Botha, "Human Dignity in Contemporary Perspective" (2009) 20 *Stellenbosch L. Rev.* 171, at 199.
[190] *August v The Electoral Commission* (1999) 3 S.A. 1. Sachs J noted that "[t]he vote of each and every citizen is a badge of dignity and of personhood... it says that everybody counts" (para [17]).

degrading treatment.[191] Equality case law under the Constitution is heavily influenced by the concept of dignity.[192] Human dignity as a value has informed the Constitutional Court's approach to the socio-economic rights in the Constitution.[193] The value of dignity has been influential in promotion the justiciability of socio-economic rights in South African jurisprudence.[194] In the famous case of *Government of the Republic of South Africa v Grootboom*, the Constitutional Court focused on the Constitution's promise of dignity and equality in finding that a right to housing existed.[195] Yacoob J argued that a society must ensure that the basic necessities of life are provided to all, if it is to be society based on human dignity, freedom and equality.[196]

In *Dawood v Minister of Home Affairs*, the Court used the importance and centrality of the notion of human dignity under the Constitution to ground a right to family life which was not expressly guaranteed within the Constitution.[197] Similarly, in *Minister of Home Affairs v Fourie*, Sachs J argued that discrimination against gay and lesbian couples denied that all persons had the same inherent worth and dignity as human beings, whatever their differences may be.[198]

---

[191] *State v Williams* (1995) 3 S.A. 632. See also *Christian Education South Africa v Minister of Education* (2000) 4 S.A. 757, where the Constitutional Court held that corporal punishment of children violated the teacher and pupil's human dignity (see para. [12]).

[192] See S. Cowen, "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17 *S. A. J. H. R.* 34, for discussion of the role if dignity in shaping equality jurisprudence.

[193] S. Liebenberg, "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *S. A. J. H. R.* 1, at 3.

[194] See G. E. Devenish, *A Commentary on the South African Constitution* (Durban: Butterworths, 1998), at 51; and J. Burchell, "Personality Rights in South Africa: Re-Affirming Dignity", in N. Whitty & R. Zimmermann (eds.), *Rights of Personality in Scots law: A Comparative Perspective* (Dundee: Dundee University Press, 2009) 349.

[195] (1996) 4 S.A. 744, at paras. [2] and [23].

[196] *Ibid*, at para. [44]. The recent decision of *Minister of Home Affairs v Tsebe* (2012) 5 S.A. 467 emphasised the values of human dignity, the achievement of equality and the advancement of human rights and freedoms a number of times.

[197] (2000) 1 S.A. 997, at paras. [34-35].

[198] (2006) 1 S.A. 524, at para. [50].

The South African experience of human dignity as promoting the intrinsic value and worth of each person, and requiring the state to foster the conditions under which this dignity can be promoted illustrates the potential of dignity for Irish case law. The repetition of dignity as a value and as a right within the Constitution has lead to its prominence, but its prominence illustrates a more fundamental way of thinking about autonomy interests beyond privacy rights.

V. Conclusion

The role of dignity as a value promoting the intrinsic value and equal worth of all human beings supports judicial recognition of a right to procreative autonomy under Irish law. The Constitution privileges the marital family unit, and affords parents extensive autonomy on the basis of the stability and certainty generated by this family unit. It is therefore suggested that the right to procreative autonomy of the marital family cannot be extended to unmarried couples or individuals. Recognition of the right to procreative autonomy warrants appreciation of the personal significance and importance of the parent-child relationship. The application of dignity in the Irish courts in a number of settings shows the potential of the value to ground a right to procreative autonomy. The comparative analysis with Germany and South Africa shows the ability of dignity to promote and constrain freedom. This dual ability is evident in the express wording of the Preamble and the application of dignity in case law to date.

Chapter IV: Limitations to the Right to Procreative Autonomy

This chapter examines the different justifications for limiting the scope of right to procreative autonomy. The general right to procreative autonomy advocated in this thesis is not absolute. The Irish Constitution has always recognised that fundamental rights are tempered by communitarian concerns for the interests and welfare of others and the common good. Analysis of the right to procreative autonomy in Irish constitutional law offers an opportunity to examine the co-existence of individualistic rights with communitarian values.

The notion of human rights operating at all in this area is opposed by a number of commentators. Dame Mary Warnock, for example, claims that to assert procreation as a general right would be to erode the distinction between relative and basic needs, and would allow wanting and needing to slide into each other.[1] Dame Warnock has argued that the notion of a right to procreative autonomy blurs the difference between claiming a right and expressing a strong desire for something.[2] Such concerns about the potential of rights ignore the potential for such rights to be limited.

The use of ARTs has profound implications for all individuals using the procedures, for the future children created by this technology, and for society as a whole. Drawing on the previous chapters' discussions of the significance of the notion that a right exists, any limitation or curtailment of the right must be justified in light of the importance of the right to procreative autonomy. The existence of this constitutional right demands that all opposition to its implementation be scrutinised. The Irish Constitution forces debate regarding the balance between individualistic and communitarian concerns. It is suggested that the

---

[1] M. Warnock, *Making Babies: Is there a Right to have Children?* (Oxford: Oxford University Press, 2002), at 27-28.
[2] M. Warnock, "The Limits of Rights Based Discourse", in A. Du Bois-Pedain & J.R. Spencer (eds.), *Freedom and Responsibility in Reproductive Choice* (Oxford: Hart Publishing, 2006) 3, at 3.

communitarian considerations that dominate debate on the regulation of ARTs can be promoted by the Constitution.

Part I outlines the doctrine of proportionality in Irish constitutional law. This highlights the need for a balance between rights and limitations in regulating ARTs. Part II considers notions that will fall under the constitutional protection of the common good, including human dignity. Chapter II has already considered the promotion of the common good in great detail. This Chapter will elaborate on the more specific issues that may be incorporated in concerns about the common good. It also considers concerns based on the perceived unnaturalness or immorality of ARTs and the promotion of the traditional family.

Part III will examine the protection afforded to the embryo as a limitation on the right to procreative autonomy. Chapter II has already noted the treatment of the unborn child and the embryo in vitro in Ireland. Part IV describes the impact of the conflicting rights and interests of the individuals making procreative decisions and other parties involved in the procreative process. This section includes consideration of the potential harm caused by the availability of ARTs to others, the desire to protect vulnerable parties against exploitation by others, and the paternalism of the state in seeking to protect us from ourselves and our own poor decisions. Part V looks at the promotion of the best interests of future children born through this technology. It adopts the position of the Irish Commission on Assisted Human Reproduction regarding the test and factors to be adopted in determining the best interests of the child in relation to ARTs.

It will be argued that there is a large amount of overlap between the different concerns outlined in this Chapter. The real motivation for restricting the right to procreative autonomy should be appreciated. There is often a circular rationale to some of these limitations. For

example, the "best interests of the child" is a factor often used in arguing that certain family forms should be promoted. Married heterosexual couples are thought to be the best parents for potential children because of the perceived stability, commitment and balanced gendered parenting that such a family form presents. The law's role in protecting vulnerable parties like surrogate mothers is also fuelled by a perception that surrogacy is inherently wrong and unnatural. The specific application of these matters in shaping the regulation of different ARTs will be examined in the chapters that follow in greater detail.

I. The Doctrine of Proportionality

In Irish law, the doctrine of proportionality occupies a clear role in reviewing the constitutionality of legislation that restricts fundamental rights.[3] The seminal statement concerning proportionality is provided by Costello J in *Heaney v Ireland*.[4] The court argued that

"[i]n considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society.... The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must-

a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
b) impair the right as little as possible, and

[3] N. Buckley, "Merging Principles of Public Law: Towards Proportionality in an Irish Context" (2004) 39 *Ir. Jur.* 161, at 161.
[4] [1994] 3 I.R. 593.

c) be such that their effects on rights are proportional to the objective".[5]

The High Court was applying the principles suggested by an earlier Supreme Court decision in *Cox v Ireland*.[6] The Supreme Court recognised that the State was entitled by its laws to impose onerous and far reaching penalties in respect of public order offences. However, in pursuing those objectives the State must, as far as practicable by its laws, protect the constitutional rights of the citizen.[7]

This proportionality test has been approved by the Irish courts on a number of occasions. In *Rock v Ireland*, Hamilton C.J recognised that the principle of proportionality was a well-established tenet of Irish constitutional law.[8] In *In Re Article 26 and the Matter of the Employment Equality Bill 1996*, the Supreme Court noted that while the objective of the impugned legislation was a laudable social policy, there was nothing inherent in the policy which rendered it necessary to have the remedy in the form proposed.[9] In *Whelan v The Minister for Justice*, Irvine J applied the proportionality test outlined above.[10] The learned judge argued that the key matters for the court were: consideration of the objective sought to be achieved by the legislature; how this provision infringed upon the constitutional rights of liberty, and whether or not the infringement was proportionate to the objectives of the legislation.[11]

In *In Re Article 26 and the Health (Amendment)(No. 2) Bill 2004,* the Supreme Court found the impugned legislation unconstitutional.[12] The court noted that the effect of the Bill was to abolish the property

---

[5] *Ibid*, at 607.
[6] [1992] 2 I.R. 503.
[7] *Ibid*, at 522-523.
[8] [1997] 3 I.R. 484, at 500.
[9] [1997] 2 I.R. 321, at 383.
[10] [2008] 2 I.R. 142. See also *McCann v Judge of Monaghan District Court* [2009] 4 I.R. 200.
[11] *Ibid*, at 166.
[12] [2005] 1 I.R. 105.

rights in question in their entirety without compensation.[13] The court emphasised that the Bill did not merely delimit such rights by law in the interests of the common good, as envisaged under Article 43.2.2 of the Constitution. In fact, there was no balancing of the competing constitutional rights at issue.[14]

The notion of proportionality is fundamental to the search for a fair balance between general community interests and the interests of the individual.[15] This thesis will use the constitutional test of proportionality in determining when community interests like the common good, or interests to protect others from harm may legitimately infringe the constitutional right to procreative autonomy. The Irish Constitution is well equipped to accommodate both the right to procreative autonomy of the individual, and the interests of the community as a whole. However, the proportionality test is only possible once the extent of the rights enjoyed by individuals, and the true rationales for the limiting measures are established.

II. The Protection of the Common Good

This thesis has championed the promotion of a liberal and individualistic right. Many would argue that the potential of this right should be limited by communitarian notions which protect the interests of the community as a whole. Legislative regulation of ARTs may contain limitations on the right to procreative autonomy based on the argument that it is in the interests of the common good. Chapter II has outlined the role of the common good as a limit to freedom and rights protection under the Constitution. The subsections that follow outline concerns that feed into the promotion of the common good.

---

[13] *Ibid*, at 182.
[14] *Ibid*.
[15] R. Clayton, "Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle" (2001) 5 *E.H.R.L.R.* 504, at 506.

The promotion of human dignity of all persons, the preservation of the traditional family and the unnaturalness or immorality of ARTs are prevalent concerns that can be incorporated within the promotion of the common good. The promotion of the common good is certainly an important goal of the state. It is suggested that values or concerns articulated under this general heading have to be probed to ensure that the notion of the common good is not used to promote untested popular opinions about morality and appropriate behaviour.

The Protection of Human Dignity

Chapter III promoted human dignity as the basis for supporting the existence of the right to procreative autonomy. It also noted that the need to respect dignity is also utilised to limit the right to procreative autonomy. Again, this concern is based on the need to protect general notions about the inherent equal value of all human life.[16] We respect persons because of their intrinsic worth, not because of the value they have in serving the interests of others. One does not have to be worthy to possess dignity. When we degrade human beings by violating their human rights, we treat them in a way that fails to respect their intrinsic worth.[17]

This definition of dignity is used in the French Bioethics Laws to limit the availability of ARTs and prohibit most uses of PGD, focusing on the intrinsic value of all humans - dignity as protection and constraint. Chapter III has argued that the Irish Constitution's promotion of dignity as a value accommodates both uses of dignity.

The role of human dignity in justifying limitations on freedom will be probed in Chapter X in relation to the permissibility of

---

[16] B. Klein Goldewijk, "From Seattle to Porto Alegre: Emergence of a New Focus on Dignity and the Implementation of Economic, Social and Cultural Rights", in B. Klein Goldewijk, A Contreras Baspineiro & P. Cesar Carbonari (eds.) *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (TCM Asser Press) 1, at 3.

[17] A.I. Melden. *Rights and Persons* (Berkley: University of California Press, 1977), at 189.

preimplantation genetic diagnosis. Screening to avoid illnesses or disabilities, or in order to ensure a child is of a certain gender, can arguably infringe the dignity of humanity as a whole. It demeans the intrinsic value of every human being. In Chapter V, it will be suggested that opposition to the sale of embryos or gametes and human cloning can be based on similar concerns.

The Protection of the Nuclear Family

Chapter III has already outlined the special position of the marital family under Articles 41 and 42 of the Constitution. The constitutional precedent on the importance of the marital family suggests that the right to procreative autonomy will be limited when it threatens the marital family. This thesis will question the promotion of marriage as the basis of good parenthood but accepts that the courts are unlikely to change their interpretation of Articles 41 and 42. This section sets out the related concern about the promotion of the nuclear or normal family. The de facto family is not recognised by the Constitution. However, Chapters VII and IX will suggest that promotion of "normal' nuclear families with male and female parental figures will be an underlying consideration for the courts. Biological and social connections to the child will be promoted according to the resulting family form.

The nuclear family form is a twentieth century concept engrained in the psyche of Western society.[18] This family form emerged after the Industrial Revolution and replaced the previously prominent extended family structure.[19] This 'institutionalisation' of the family denies its fluidity, dynamism and the reality of complex kinship networks. Dramatic changes have occurred in the composition and diversity of

[18] C. Siebel, "Defining Fatherhood: Emerging Case Law Reflections of Changing Societal Realities" (2003) 2 *Whittier J. of Child & Family Advocacy* 125, at 140.
[19] V. Bengtson, "The Burgess Award Lecture: Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds" (2001) 63 *Journal of Marriage & Family* 1, at 1.

families.[20] Increases in divorce rates, remarriages, single parent households, and common law heterosexual and same-sex relationships have complicated parental roles and family forms. The notion that there is a single homogenous family form ignores the diversity of reality. Judith Stacey describes the split of society's behaviour from its fundamental beliefs in the face of normative instability of family diversity.[21] Stacey draws a distinction between the families we live *with* and those we live *by*. She highlights that these "fabled families" we live by are not only more compelling than the "patchwork bonds of post-modern family life", but the nostalgia fostered by such symbolism also distorts an idea of stability, and simplicity, that never existed in these previous forms.[22]

In contemplating the unnaturalness of the creation of ART children and families, perhaps society and the courts are resorting to the "natural" in order to slot these conceptually challenging family forms within our current assumptions of parenthood and family. Radhika Rao suggests that ARTs are essentially conservative: instead of threatening traditional families, such technologies replicate them, allowing infertile individuals to create their own nuclear-like family.[23] Christine Overall similarly claims that conservatives support ARTs because it can accent the importance and maintenance of the conventional nuclear family and of heterosexuality and marriage as norms of adult sexual relationships.[24]

It is often suggested that the law embodies a vision of family as a "natural" entity that is recognised rather than constructed by the

---

[20] J. Teachman et al, "The Changing Demography of America's Families" (2000) 62 *Journal of Marriage & the Family* 1247.
[21] J. Stacey, "The Family Values Fable", in S. Coontz et al (eds.), *American Families- A Multicultural Reader* (New York: Routledge, 1999) 487, at 489.
[22] *Ibid.*
[23] R. Rao, "Assisted Reproductive Technology and the Threat to the Nuclear Family" (1996) 47 *Hastings L .J.* 951, at 952.
[24] C. Overall, *Ethics and Human Reproduction: A Feminist Analysis* (1987) (Boston: Allen & Unwin, 1987), at 7.

state.[25] The promotion of the traditional family form has been intentionally separated from the best interests of the child. Part V will outline how the Irish Constitution will hopefully begin to divorce the promotion of family rights from the best interests of the child, both in marital and non-marital families.

The Unnaturalness or Immorality of ARTs

The idea of a 60 year old mother to a new born often generates opposition on the basis that motherhood at this age is unnatural. The same reaction of repugnance is also evident in relation to surrogacy. Such arguments claim that it goes against nature for a mother to give away her child. Mothers are traditionally the biological and social constant in society, so the common perception is that any women who claims they are freely entering into a surrogacy agreement must be exploited or unable to provide free consent. It is quite foreseeable that reliance on the notion of the common good might influence state regulation and policy concerning matters like surrogacy or post-menopausal motherhood.[26]

All uses of ARTs are unnatural, but the rise in post-menopausal motherhood, same sex and multi-party parenting and the genetic testing and manipulation of embryos are potential outcomes of ARTs that may be perceived as "going against what nature intended". The prohibitions on human cloning and surrogacy in particular is influenced by such knee-jerk reactions. The unnaturalness of a cloned embryo with the same genetic traits as another human being arguably fuels general opposition to such procedures. Leon Kass argues, in relation to cloning, that repugnance in and of itself is sufficient to justify limitations of rights.[27]

---

[25] F. Olsen, "The Myth of State Intervention in the Family" (1985) 18 *U. Mich. J. L.* 835, at 846.
[26] D. Madden, *Medical Law in Ireland* (The Netherlands: Kluwer Law International, 2011), at 142.
[27] See L. Kass, "The Wisdom of Repugnance" (1997) 216 *New Republic* 17, at 17.

Uses of reproductive technologies which create unconventional family forms are often opposed.[28] Therefore, it is not only the procedures themselves which are unnatural, but the family forms they can create may be contrary to perceived notions of what a normal family or parents should look like. There are complex reasons motivating the use of such screening but it will be suggested that the challenge the use of such techniques poses to the traditional notion of unconditional parental love and care must be appreciated.

Such knee-jerk reactions to the uses of ARTs are rarely discussed. Surrogacy is opposed due to concerns based on the need to protect vulnerable women from commercial exploitation. The underlying gut reactions that suggest that it is not right for a mother to give away her child, or for three or four people to be parents of a child are rarely scrutinised. Such circumstances don't "look right". These fundamental reactions to the consequences of ARTs should also be appreciated, and their weight in shaping other limiting factors considered.

Walsh J in *McGee v Attorney General* argued that the question of whether the use of contraceptives by married couples within the marriage was contrary to the moral codes they professed to subscribe to, did not justify state intervention.[29] The Supreme Court in *Kennedy v Ireland* argued that the right to privacy could be limited by the requirements of the common good and is subject to the requirements of public order and morality.[30] The court did not provide any indications about the content of public morality. The problem with using the enforcement of morals as an aspect of the common good under the Constitution is that it is difficult to formulate a clear test for determining the definition of morality and the aspects

---

[28] C. Overall, *Human Reproduction: Principles, Practices and Policies* (Toronto: Oxford University Press, 1993), at 7.
[29] [1974] I.R. 284, at 312.
[30] [1987] I.R. 587, at 592. This position was approved by Quirke J in *Gray v Minister for Justice* [2007] 2 I.R. 654, at 667.

of morality that merit legal protection.[31] McGovern J in *M.R. v T.R* noted that different people have different ideas of morality, and that it would be difficult for the court to determine which moral position should be enforced.[32] McGovern J argued that the duty of the courts was to implement and apply the law, not morality.[33]

The claim that certain uses of ARTs may be limited because they are wrong cannot be sustained without further examination of why the practice if wrong. It is suggested that repugnance to certain uses or consequences of ARTs may be indicative of more tangible and justified reasons for limiting such activities. Human cloning should be prohibited because it is arguably contrary to the promotion of human dignity. Postmenopausal motherhood should be carefully policed in the light of the need to promote the best interests of the child. In order to balance the promotion of an individual right and the common good, it is suggested that notions of public morality or unnaturalness be probed and the underlying rationales for the use of such notions outlined. The State should have to show a pressing and substantial concern that must be of such sufficient importance to justify overriding a constitutional right.[34]

III. Respect for the Potential Life of the Embryo

Chapter II has outlined the treatment of the embryo in vitro, and the right to life of the unborn under the Constitution to date. It argues that the potential life of the embryo is something that the Constitution values. It was considered under Chapter II as it is suggested that the promotion of the value of potential human life is part of the philosophical framework of the Constitution.

---

[31] N. Cox, "The Failure of 'Rights Talk' in the Field of Bioethics: The European Convention on Human Rights and Biomedicine", in M. Junker Kenny (ed.), *Designing Life? Genetics, Procreation and Ethics* (Aldershot: Ashgate, 1999) 23, at 40.
[32] [2006] I.E.H.C. 359, at 22-23.
[33] *Ibid*, at 23.
[34] *Supra* n. 26, at 144.

In other jurisdictions, the failure to recognise the right to life of the foetus does not lead to a clear consensus on the status of the embryo.[35] A brief examination of the positions of other jurisdictions shows the difficulty experienced by all jurisdictions in attempting to afford respect to the embryo. In the United Kingdom, the Warnock Committee recommended that the embryo should be afforded some protection in law.[36] The majority of the Committee suggested that this protection would not prevent research on embryos.[37] The Warnock Committee suggested that proper respect should be afforded to the embryo, but did not elaborate on what this meant.

The United States Supreme Court has not considered directly the status of the embryo.[38] The Supreme Court in *Roe v Wade* noted that the "unborn have never been recognised in the law as persons in the whole sense".[39] Louisiana affords legal rights to the embryo. The state legislature deems that embryos "are 'persons' entitled to all the usual protections of any juridical person".[40] New Mexico also enacted

---

[35] For comprehensive comparative analysis of the legal status of the foetus, see J. Seymour, *Childbirth and the Law* (Oxford: Oxford University Press, 2000), at 135-170, and A. Alghrani & M. Brazier, "What is it? Re-positioning the Foetus in the Context of Research" (2011) 70 *C.L.J.* 51.

[36] Department of Health and Social Security, *Report of the Committee of Inquiry Into Human Fertilisation and Embryology* (Cmnd 9314) (London: The Stationery Office, 1984), at para. [11.17].

[37] *Ibid*, at para. [11.18].

[38] For detailed account of the status of the embryo in vitro and foetus in U.S. law, see T. Stoltzfus Jost, "Rights of Embryo and Foetus in Private Law" (2002) 50 *Am. J. Comp. L.* 633.

[39] 410 U.S. 113 (1973), at 162. Some commentators suggest that the position of human life beginning at conception is problematic in light of the limited protection afforded to the foetus in *Roe v Wade* (see J. Lambert, "Developing a Legal Framework for Resolving Disputes Between "Adoptive Parents" of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors" (2008) 49 *B.C.L. Rev.* 529, at 537). The court in *Roe v Wade* also specifically declined to decide when life began (see assessment of the implications of *Roe v Wade* for the status of embryos in M. Wurmbrand, "Frozen Embryos: Moral, Social, and Legal Implications" (1986) 59 *S. Cal. L. Rev.* 1079, at 1092).

[40] LA. Rev. Stat. Ann 9:123 (1991).

legislation in 2008 to a similar effect.[41] Other states like Montana and Colorado specifically rejected a legislative definition that defined human life as beginning at the moment of conception.[42]

The Tennessee courts in *Davis v Davis* considered a property, personhood and intermediate approach to determining the status of the embryo. The Tennessee Supreme Court took the middle-ground position on the status of embryos in light of this uncertainty.[43] The appellant abandoned the argument that the embryos had a right to be born before the Supreme Court.[44] The court considered the ethical standards of the American Fertilisation Society on the status of the embryo.[45] The Report of the Ethics Committee of the American Fertility Society outlined the intermediate position, which held that the human embryo deserves greater respect than human tissue, but not the respect afforded to human persons.[46] The Committee was of the view that the embryo should not be treated as a person because it had not developed the features of personhood, and may never realise its biological potential.[47] In outlining what constituted special respect, the Report suggests that decision-making authority regarding the embryos should be maintained by the gamete provider.[48] It also suggested that there was an obligation on those treating the embryos not to hurt or injure offspring who might be born after transfer.[49] In light of these comments, the Supreme Court held that the embryos were not persons or property, but occupied this interim category because of their potential. This interim position has also been adopted by the Arizona Court of Appeal in *Jeter v Mayo Clinic Arizona*.[50]

---

[41] See A.M. Baiman, "Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?" (2009) 16 *Wm. & Mary J. Women & L.* 133, at 140.
[42] *Ibid*, at 141.
[43] 842 S. W. 2d 588 (1992), at 590.
[44] *Ibid*, at 594.
[45] *Ibid*, at 596.
[46] *Ibid*.
[47] *Ibid*.
[48] *Ibid*.
[49] *Ibid*.
[50] 121 P. 3d 1256 (2005).

Article 2(2)(1) of the German Basic Law provides that the life which is developing in the womb of the mother is an independent legal value which enjoys the protection of the constitution. The German Basic Law does not expressly consider the status of the embryo in vitro. The Embryo Protection Act 1990 prohibits a number of activities in relation to embryos, in order to promote the inviolability of human dignity and human life. The French Bioethics Laws of 1994[51] affirms that the law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life. The vague wording of these provisions guarantee respect for the embryo without affording it with any definitive legal status.[52]

The initial decision of the European Court of Human Rights in *Evans v United Kingdom* considered whether Article 2 of the Convention protected frozen embryos.[53] However, it reiterated the position of the Grand Chamber in *Vo v France*,[54] that in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation afforded to member states.[55] The Grand Chamber in *Evans v United Kingdom* briefly considered the legal status of frozen embryos.[56] The applicant did not pursue her complaint under Article 2, and the Grand Chamber approved of the initial Chamber's finding that the embryos in question did not have the right to life within the meaning of Article 2.[57] This brief analysis shows the difficulties faced by other jurisdictions in considering this matter, and also highlights the popularity of the notion of potentiality as the middle ground of

---

[51] Law no. 94–653 of 29 July 1994 on the Respect of the Human Body.
[52] S. Reineke, "New Reproductive and Genetic Technologies and Women's Rights in Contemporary France" (2008) 1 *International Journal of Feminist Approaches to Bioethics* 92, at 103.
[53] (2006) 43 E.H.R.R. 21.
[54] (2005) 40 E.H.R.R. 12.
[55] *Supra* n. 53, at para. [46].
[56] (2008) 46 E.H.R.R. 34.
[57] *Ibid*, at para. [56].

respect which deems that the embryos are neither property nor person.

It is suggested that the embryo in vitro is distinct from the foetus. In this regard this thesis supports the position of the Supreme Court in *Roche*. However, drawing on the spirit of the Constitution and its recognition of the value of potential life it will be argued that there should be limitations on what can be done with and to embryos. It argues that the underlying sentiment of Articles 40.3 and 40.3.3 to avoid the destruction of potential human life should be promoted where possible. This will effect future policies concerning the freezing of embryos, the requirement to donate embryos and the need to avoid destruction where possible.

The Distinction between the Embryo and the Foetus

The argument has been made by a number of commentators that there is no clear moment of fertilisation which gives rise to rights and interests of the embryo.[58] Differentiation of the different parts of the embryos, and the possibility of twinning take place in the first two weeks after fertilisation.[59] There is some debate as to whether the possibility of twinning should be seen as an exception in the development of the embryo. The gradual and continuous nature of embryonic development makes it arbitrary to identify a single point or stage at which the entity becomes human.[60] When the sperm and the eggs unite this creates a distinct genetic entity. The cells which develop later through differentiation are different cells, produced by the self-replicating power of the original genotype.[61] Norman Ford

---

[58] See R. Edwards, *Life Before Birth: Reflections on the Embryo Debate* (London: Hutchinson Press, 1989), at 52.
[59] D. DeGrazia, *Human Identity and Bioethics* (Cambridge: Cambridge University Press, 2005), at 251.
[60] D. Wood, *The Human Embryo: Its Nature and Abuse: A Guide for Christians* (Edinburgh: Handsel Press, 2007), at 5.
[61] B. Johnstone, "The Moral Status of the Embryo: Two Viewpoints", in W. Walters & P. Singer (eds.), *Test-tube Babies: A Guide to Moral Questions, Present Techniques and Future Possibilities* (Melbourne: Oxford University Press, 1982) 49, at 53.

provides detailed philosophical and medical analysis of the development of the zygote and embryo from fertilisation to implantation.[62] Ford argues that the human individual begins with the appearance of the primitive streak and not before, but notes that this position is not certain and opposing views cannot be definitively rejected on the matter.[63]

If we argue that there is a physical continuity of the embryo, as it develops into a foetus and is eventually born, then not only is the destruction of the embryo seriously wrong, the destruction of gametes is also morally wrong.[64] In preventing implantation, we are halting the development of an entity that might go on to become a sentient being, and then a conscious human being.[65] Some commentators would suggest that determining that the embryo acquires a moral or legal status at implantation draws an arbitrary determination about the nature and properties of the embryo at this point.[66] It has been argued that there is a continuum from conception to birth that cannot be arbitrarily compartmentalised.[67] Professor Gerry Whyte has questioned the lack of protection afforded to the embryo because it is outside the uterus. He suggests that the physical location of the embryo is not determinative, as the inherent dignity of the embryo is the same irrespective of where it is situated.[68] It must be recognised

---

[62] See N. Ford, *The Prenatal Person: Ethics from Conception to Birth* (Oxford: Blackwell Publishing, 2002) (see especially chapter 5 at 55-74), and N. Ford, *When Did I Begin? Conception of the Human Individual in History, Philosophy and Science* (Cambridge: Cambridge University Press, 1988). Other arguments regard the personhood of the embryo as a question of determining the personal consciousness (see J. Crosby, "The Personhood of the Human Embryo" (1993) 18 *J. Med. & Phil.* 399).
[63] *Ibid*, at 182.
[64] B. Steinbock, "Respect for Human Embryos", in Paul Lauritzen (ed.), *Cloning and the Future of Human Embryo Research* (Oxford: Oxford University Press, 2001) 21, at 27.
[65] R. Green, *The Human Embryo Research Debates: Bioethics in the Vortex of Controversy* (Oxford: Oxford University Press, 2001), at 43.
[66] M. Junker- Kenny, "Embryos In Vitro, Personhood, and Rights", in M. Junker-Kenny (ed) *Designing Life? Genetics, Procreation and Ethics* (Aldershot: Ashgate, 1999) 103, at 131.
[67] G. Whyte, "The Moral Status of the Embryo" (2006) 12 *M.L.J.I.* 77, 81.
[68] *Ibid.*

that something new comes into existence at fertilisation, a new entity with a unique genetic identity.[69]

The embryo in vitro will not develop into a human being unless it is placed in the uterus. It is argued that it is therefore not the same as a foetus which is continuously developing into a future human being. It has also been suggested that the fact that something will become X is not a good enough reason for treating it now a if it were in fact X.[70] This thesis argues that the embryo is distinct from a foetus and an unborn child. The embryo is not on a continuous path of development from creation to birth as a human being when it is in vitro. Embryos have the potential to be human beings but this does not given them the rights or status of an actual person.[71] The argument of the Supreme Court concerning the distinction between the foetus and the embryo in vitro is correct. However, the assumption that this position negates all value of the embryo is arguably inconsistent with the value afforded to potential life.

Embryos and the Value of Potential Life

The Commission on Assisted Human Reproduction has argued that the embryo should not be attract legal protection until placed in the human body, at which stage it should attract the same level of protection as the embryo formed in vivo.[72] The Commission took great care in outlining the many different views on the status of the embryo, and arguments regarding the point in development where the

---

[69] L. Kass, "The Meaning of Life in the Laboratory", in K.D. Alpern (ed.), *The Ethics of Reproductive Technology* (New York: Oxford University Press, 1992) 88, at 92.

[70] J. Harris, *The Value of Life: An Introduction to Medical Ethics* (New York: Routledge, 1985), at 11.

[71] B. Steinbock, "The Morality of Killing Human Embryos" (2006) 34 *J. L. Med. & Ethics* 26, at 29. Mary Anne Warren argues that a foetus's resemblance to a person and its potential does not provide a basis for the claim that it has a right to life (see M. Warren, "On the Moral and Legal Status of Abortion" (1973) 57 *The Monist* 43, at 60). This argument cannot be pursue in the context of the Irish Constitution which expressly protects the right to life of the foetus, and implicitly protects the potentiality of the embryo.

[72] Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (Department of Health, 2005), at 34.

embryo attracts protection. This thesis supports the suggestion that the embryo only enjoys protection under Article 40.3.3 once it is implanted. However, it will be maintained that potential of the embryo should be afforded respect under the Constitution.

The Irish Commission on Assisted Human Reproduction noted the argument of the European Society for Human Reproduction and Embryology Task Force on Ethics and Law that the embryo is owed respect as a symbol of future human life.[73] The Task Force also noted that the embryo cannot reach its potential to become a foetus and a child unless and until it is transferred into a uterus, and argued that there is a case to be made for treating the embryo differently before and after implantation.[74]

As the embryo is distinct from the foetus it is incorrect to say that the embryo enjoys the right to life under Article 40.3 as in the right to be implanted into the uterus. However, its potential to become a distinct human being should enjoy some respect. The case law considered in Chapter II shows that the primary focus of Article 40.3.3 and Article 40.3 is the foetus. We have also noted the Supreme Court's suggestions in *Roche* that they could look to the Constitution in a future case to determine the protection afforded to the embryo, and that the failure to regulate ARTs and the fate of embryos was contrary to the spirit of the Constitution. The argument can be made that this jurisprudence and the background to Article 40.3.3 shows that while the direct concern was the protection of the foetus, such jurisprudence and constitutional change was motivated by recognition of the fundamental value of potential life.

It would be inconsistent with the Constitution to argue that the embryo once implanted enjoys the right life but before implantation is not valued at all. If embryos are potential life, and the protection of

---

[73] *Ibid*, at 55.
[74] *Ibid*.

such potentiality is an important constitutional value, then practices like donating embryos for use by third parties, or limiting the amount of embryos that can be frozen, could accommodate the rights of the genetically related parents and the value of the embryo.

The focus on the fact that the embryo in vitro constitutes potential life and it is this potential life that should be protected is consistent with the principles of the Constitution and promotes the real concern underlying debate on the status of the embryo, the distinct genetic make-up of the embryo and the potential of the embryo to develop into a human being if implanted.

IV. The Conflicting Interests and Rights of Different Parties

The conflicting personal rights and interests of individuals involved in the procreative process will often serve to limit a particular individual's rights. This section covers four related concerns. In the first instance, direct clashes between the respective rights to procreative autonomy of two or more individuals will result in some limitation to certain individuals' rights. Secondly, the state's desire to prevent harm to others may limit the right to procreative autonomy of the individual. Thirdly, the state will protect those it deems vulnerable or open to exploitation through certain uses of ARTs. Fourthly, the state may want to protect us from our own bad choices.

a) Directly conflicting Rights to Procreative Autonomy

Chapter VII will examine instances where parties disagree over the fate of genetically related frozen embryos. It may be assumed that this conflict would lead to balancing of the interests of all parties. However, it will be argued that the rights of those seeking to avoid parenthood usually prevails, with little weight afforded to the rights of those seeking to use frozen embryos.

Chapter IX outlines the role of rights in the recognition of parenthood arising from the use of reproductive technologies. Again, the different rights of individuals competing for recognition as parent of a child born using ARTs are weighed in determining parenthood. Like Chapter VII, it is maintained that policy considerations determine the respective weight afforded to the rights of different parties. The protection of certain family forms, the need to ensure a child has parents of different genders, and the importance of biological parenthood shape the weight afforded to the different rights involved. The limitation of the rights of person A to respect the rights of person B is caused by the prioritisation of one right over another, or the prioritisation of a general interest over the right of another.

The notion that certain rights are more important than others is not novel. In *D.P.P. v Shaw*, the Supreme Court accepted that there was a hierarchy of constitutional rights., and that the right which ranks higher must prevail when a conflict arises between different rights.[75] The case concerns the clash of the right to life of the missing girl, and the right of the accused to liberty and a fair trial. The conflicting rights in ARTs situations are not so clearly prioritised. Griffin J in *Shaw* argued that where a mutually harmonious interpretation of fundamental rights under the Constitution was not possible, that the priority of the conflicting rights must be examined both as between themselves and in relation to the general welfare of the society.[76] Chapters VI and IX will highlight that the prioritisation of one set of rights over another is determined by the prominence of privacy as the narrow basis of the right to procreative autonomy, and in the latter case by general concerns about suitable family forms that should be promoted by society.

[75] [1982] I.R. 1, at 63.
[76] *Ibid*, at 56.

b) The Avoidance of Harm to Others

The idea of preventing harm to others and the protection of vulnerable individuals against exploitation are related concepts. The prevention of harm is also linked to notions like the best interests of future children, and the law's desire to prevent individuals from making poor decisions about their own future. John Stuart Mill in *On Liberty* claimed that the state had no legitimate authority to restrict the actions of an individual except when those actions produce harm to others. Mill stated that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant".[77] Mill supported this limited power of society by suggesting that society may only proceed against genuine harms, and not against other forms of social discomfort.[78] In *Crowley v Ireland*, O'Higgins C.J. argued that the exercise of rights without regard to the rights of others and without regard to the harm done to others would constitute an abuse and not the exercise of a right given by the Constitution.[79]

The notion of harm to other will operate in Chapter IX concerning the right of parents to screen embryos for different genetic traits, and to create saviour siblings to help cure an existing child suffering from a genetic condition. It should also be recognised that any limitation of the right to procreative autonomy due to the harm principle will cause harm to another party. Like the analysis of the direct conflict between two competing rights to procreative autonomy, the decision about which harm should be avoided is based on considerations other than the harm per se.

---

[77] J.S. Mill, *On Liberty* 1859 (reprinted edition) (London: Penguin Books, 1987), at 68.
[78] F. Schauer, "On the Relation Between Chapters One and Two of John Stuart Mill's On Liberty" (2011) *Capital U. L. Rev.* 571, at 574.
[79] [1980] I.R. 102, at 125.

c) Protection of Vulnerable Parties Against Exploitation

Chapters VIII and IX will outline general legislative opposition to practices like surrogacy. One of the main reasons for opposition to this is that surrogates are thought to be exploited and need protection. Kant's second practical categorical imperative requires that we "[s]o act as to use *humanity*, both in your own person and in the person of every other, always *at the same time* as an end, never *simply* as a means".[80] Kant's famous conception of dignity is often summarised as promoting the status of individuals as ends in themselves, rather than as means toward some extraneous ends.[81] The second categorical imperative is interpreted as advancing autonomy only where this respects the human dignity of others as well as the individual in question.[82]

There is a certain amount debate about whether Kant is claiming that it is always wrong to treat another as a means, or saying that although one should not merely or exclusively treat a persons as a means.[83] The Kantian interpretations of autonomy and the second categorical imperative will be examined in greater detail in Chapters VIII and IX concerning surrogacy and the freedom to enter into contracts regarding ARTs. The examination of these concerns in light of the recognition of a right to procreative autonomy will probe the claim that such restrictions are based on the protection of the vulnerable. This thesis will not necessarily oppose all of these restrictions, but will demand clarity about the concerns really governing these common legislative positions. The promotion of fundamental rights including equality guarantees and the value of dignity in constitutional jurisprudence would oppose any exploitation or

---

[80] I. Kant, *Groundwork of the Metaphysics of Morals* (translated by H.J. Paton) (New York: Harper & Row Publishers, 1982), at 429 (emphasis added).
[81] E. De Armond, "A Dearth of Remedies" (2008) 113 *Penn. State L. Rev.* 1, at 23.
[82] *Ibid*, at 65.
[83] H.E. Jones, *Kant's Principles of Personality* (London: The University of Wisconsin Press, 1971), at 6.

commodification of the individual in the interests of the rights of another.

d) Protection from Ourselves and our Poor Choices

Chapter VIII will consider the potential to exercise autonomy to our future detriment. A purely libertarian application of the right to procreative autonomy is promoted when we permit individuals to make their own decisions about future use of gametes, future control over embryos, and potential parental rights and obligations in relation to future children. Under this view, government must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's.[84]

However, there are many instances where the state will protect us from using our rights to our detriment. There are many examples in contract law where contracts are not valid for public policy reasons. The refusal to enforce contracts concerning surrogacy or the future disposition of embryos can be justified from a number of points of view. The principle of legal paternalism justifies state coercion to protect individuals from self-inflicted harm, or to guide them towards their own good.[85] While we may object to the state acting in loco parentis for all its citizens, the law and society has traditionally recognised that a person's own good can be a valid reason for coercion.[86]

The Constitution recognises that the rights of the family under Article 41 and 42 are inalienable and imprescriptible. Costello J in *Murray v Ireland* argued that it should not be implied that fundamental human rights that are not expressly described as inalienable or

---

[84] R. Dworkin, *Taking Rights Seriously* (London: Duckworth Publishing, 1997), at 272-273.
[85] J. Feinberg, *Rights, Justice and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), at 110.
[86] *Ibid.*

imprescriptible lacked these qualities.[87] The notion of inalienable rights may be used by the Irish courts in refusing to enforce ART contracts.[88]

It could be argued that a right to procreative autonomy cannot be promoted unless certain inalienable aspects of the right are recognised. It could also be argued that the freedom be curtailed in the interest of protection of the decision-maker themselves. Unfortunately, the standard practice of all jurisdictions considered is to query the validity of the consent provided when an agreement concerning surrogacy or embryo disposition is made. Feinberg argues that when there is a strong presumption that no normal person would voluntarily choose or consent to a certain kind of conduct, then that should be a proper ground for detaining the person until the voluntary character of his choice can be established.[89] Feinberg distinguishes between hard and soft paternalism.[90] Hard paternalism is necessary to protect competent adults against their fully voluntary choices. Soft paternalism holds that the states has the right to prevent self-regarding harmful conduct only when that conduct is substantially non-voluntary. The focus on the lack of consent means that such laws can be non-paternalistically justified.[91]

A right to procreative autonomy purely based on notions of privacy and freedom would seem to oppose state intervention in such intimate matters on the basis that the state knows best (or better than the individual in question). Restrictions may be in the interest of a class of persons collectively, so that the immediate interest of each individual may be ignored in the interests of the collective judgment

---

[87] [1985] I.R. 532, at 539.
[88] It should be noted that the unenumerated rights of the unmarried mother are not inalienable. This may diminish the use of such an argument concerning the enforceability of surrogacy agreements.
[89] *Supra* n. 85, at 118.
[90] J. Feinberg, *Harm to Self: The Moral Limits of the Criminal Law* (vol. 3) (New York: Oxford University Press, 1986), at 12.
[91] R. Ameson, "Mill versus Paternalism" (1980) 90 *Ethics* 470, at 472.

of the community.[92] There is therefore a link between paternalism and the common good. There is also a link between notions of preventing us from doing harm to ourselves, concerns for protection of vulnerable parties, protection against exploitation, and indeed the promotion of the common. The task for this thesis is to determine the true reasons for limiting the right to procreative autonomy. In all cases of paternalistic legislation there must be a heavy and clear burden of proof placed on the authorities to demonstrate the exact nature of the harmful effects or beneficial consequences to be avoided or achieved, and the probability of their occurrence.[93]

V. The Best Interests of the Child

Parenthood involves responsibilities and duties as well as individual rights. The welfare of future children is an important concern. The values informing the best interests standard as a limitation to the use or legal implications of technologies must be scrutinised in balancing the rights of potential parents and the well-being of children. The uncertainty surrounding the notion of the best interests of the child is well documented in academic commentary.[94] The indeterminate nature of terms like "welfare" or the "best interests of the child" is not tempered by the inclusion of legislative guidelines or checklists of factors.[95] The standard is vulnerable to arbitrary decision-making, where such malleable concepts are open to subjective manipulation.[96] The vague nature of the concept means it can be open to abuse by the

---

[92] G. Dworkin, "Paternalism", in J. Feinberg & H. Gross (eds.), *Philosophy of Law* (California: Dickenson Publishing, 1975) 174, at 177.
[93] G. Dworkin, "Paternalism" (1972) 56 *The Monist* 64, at 83.
[94] R. Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 *Law & Contemporary Problems* 226, at 229. See also H. Reece, "Paramountcy Principle: Consensus or Construct" (1996) *Current Legal Problems* 267.
[95] A. Bainham, *Children- The Modern Law* (3rd ed.) (Bristol: Jordan Publishing, 2005), at 42.
[96] A. Appell & A. Boyer, "Parental rights v Best Interests of the Child: A False Dichotomy in the Context of Adoption" (1995) 2 *Duke J. Gender L. & Pol'y* 63, at 66.

courts and parents who use the notion to further their own ends.[97] Brennan J in the Australian High Court noted that in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision maker.[98]

The notion of the best interests of the child or the welfare of the child operates in both domestic and international law in relation to cases concerning the upbringing of children. Article 3(1) of the Convention on the Rights of the Child mandates that the best interests of the child shall be a primary consideration.

In Ireland, section 3 of the Guardianship of Infants Act 1964 mandates that courts must have regard to the welfare of the child in considering an application relating to guardianship, custody or the upbringing of the child, or to the administration of property belonging to the child. Section 3 states that the welfare of the child is the "first and paramount consideration".[99] The Children's Rights Referendum in November is also motivated by concern to ensure the protection of the best interests of the child in the Irish Constitution.[100] It recognises that the best interests or welfare of the child may not always be protected by simply promoting the rights of the family, including the marital family.

The Irish Commission on Assisted Human Reproduction provided a comprehensive analysis of the meaning and implications of a best interests of the child test in future regulation of ARTs.[101] The

---

[97] A. Charlow, "Awarding Custody: The Best Interests of the Child and Other Fictions" (1986) 5 *Yale L. & Pol'y Rev.* 267, at 267. See also J. Eekelaar, "Beyond the Welfare Principle " (2002) *C.F.L.Q.* 237.

[98] *Secretary, Department of Health and Community Services v J.W.B. & S.M.B.* [1992] 175 C.L.R. 218, at 270.

[99] For outline of the notion of welfare in Irish Law, see G. Shannon, *Child Law* (2nd ed) (Dublin: Roundhall, 2010), at 709-719.

[100] The Proposed new Article 42A.4.1 ensures that the best interests of the child should be the paramount consideration in any proceedings concerning the child (see Thirty First Amendment of the Constitution).

[101] *Supra* n. 72, at Appendix VIII. See also D. Madden, *Medicine, Ethics and the Law* (2nd ed) (Dublin: Bloomsbury Professional, 2011), at 138-141.

Commission recognised three different ways of evaluating welfare: the maximum welfare principle; the minimum threshold principle, and the reasonable welfare principle.[102] The maximum welfare principle maintains that one should not knowingly and intentionally bring a child into the world in less than ideal circumstances.[103] The Commission concluded that this would be an unrealistic undertaking and would exclude many individuals from procreation.[104] The Commission also criticised the minimum threshold principle as this standard took the view that the child should not be brought into the world only if it would have been better for that child never to have been born. The non-identity problem is often used to argue that concerns about best interests should not be used to prevent implantation because the future children would not exist at all but for this implantation.[105] The Commission suggested that the Irish courts would be unlikely to ever countenance this notion.[106]

The Commission seemed to support the reasonable welfare principle which does not aim to ensure that the child is perfectly happy, but ensures that the child is reasonably happy.[107] The test recognises that parents are not perfect. It would apply to render assisted human reproduction acceptable when the child conceived as a result of treatment will have a reasonably happy life.[108] The Commission argued that the interests of children born through assisted reproduction were psychosocial, medical, material and legal.[109] Protection of medical interests would require that the child needs to be exposed to no greater a quantum of risk than other offspring. Chapter V will consider how the physical best interest of the child justifies limits on the number of embryos that are implanted at one

---

[102] *Ibid*, at 118-119.
[103] *Ibid*, at 118.
[104] *Ibid.*
[105] I. Glenn Cohen, "Regulating Reproduction: The Problem with Best Interests" (2011) 96 *Minnesota L. Rev.* 423, at 446.
[106] *Supra* n. 72, at 119.
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*

time. This concern will also justify restricted access to ARTs for some post-menopausal mothers. Psychosocial interest would protect the needs of each individual to develop a sense of identity in combination with other prerequisites for personal security and stability.[110] This welfare test will be applied to questions of access to ARTs and the legal recognition of parenthood in Chapters VII and IX.

As the best interests standard is value based, its meaning derives from the cultural context of the society applying it.[111] Protection of the right to procreative autonomy demands that any concerns about the welfare of present or future children are thoroughly examined. The reason why the best interests of the child are not protected must be clearly established. Like other limitations of the right to procreative autonomy, the best interests of the child standard is influenced by underlying concerns about the unnaturalness of certain family forms or potential parents, and the desire to promote the nuclear family.

Welfare concerns for future children have masked prejudice against certain family forms or uses of technologies in other jurisdictions. Section 13(5) of the Human Fertilisation and Embryology Act 1990 originally stated that " [a] woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth". The 2004 Act introduced the notion of supportive parenting instead of the need for a father. The section was a response to preferences outlined in the Warnock Report about the perceived stability of two-parent family.[112] Surveys of U.K. clinics' implementation of section 13(5) show limited follow ups and

---

[110] *Ibid.*
[111] K. O'Halloran, *The Welfare of the Child: The Principle and the Law* (Aldershot: Ashgate, 1999), at 60.
[112] G. Douglas, "Assisted Reproduction and the Welfare of the Child" (1993) 5 *Current Legal Problems* 53, at 56.

background checks on potential patients. The German government, in intervening in the Grand Chamber hearing of *H. v Austria*, highlighted that it was an offence under section 1(1) of the Embryo Protection Act 1990 to place an egg inside a woman that was not produced by that woman.[113] The government argued that this prohibition protected the child's welfare by ensuring the unambiguous identity of the mother.[114]

The right to procreative autonomy can be curtailed by concerns about the best interests of future or present children. The notion of the best interests of the child is by its nature forward-looking. Standard custody disputes will always consider the child's future development and needs. The fact that the child in question does not yet exist does not mean that the concept is ill-equipped to deal with the considerations at hand. In light of the developments taking place regarding the best interests of the child under the Constitution, the best interests or welfare of the child should play an important role in the future regulation of ARTs.

VI. Conclusion

The key issue in many disputes concerning human rights is not the existence of a basic human right or its source, but rather the validity of the limitation imposed on its exercise.[115] This thesis argues that a fundamental appreciation of the right to procreative autonomy will force the state to clearly justify restrictions on this right. The right to procreative autonomy cannot be absolute. The interests and rights of other parties, and society, are closely linked to the exercise of this right. Knee-jerk or automatic reactions that certain family forms are wrong or that certain uses of embryos are immoral fail to afford protection to the right. More importantly, such assumptions avoid an

[113] *H. v Austria* [2012] 2 F.C.R. 291, at para. [69].
[114] *Ibid*, at para. [70].
[115] D. Costello, "Limiting Rights Constitutionally", in J. O'Reilly (ed.), *Human Rights and Constitutional Law* (Dublin: Round Hall Press, 1992) 177, at 177.

important analysis about the values shaping our regulation of ARTs. This Chapter has outlined the limitations which may restrict the right to procreative autonomy. The interaction of rights discourse and these limitations will uncover the real concerns and opinions fuelling currently legislative positions. This Chapter has highlighted the connections between different possible limitations. Protection of the right to procreative autonomy at the outset of any consideration of future legislation will force the courts to unravel these interconnected concerns. This is the least that the right to procreative autonomy deserves.

Chapter V: Basic Rights of Control over Gametes and Embryos

This Chapter argues that the best way of conceptualising the constitutional right to procreative autonomy in relation to basic uses of gametes and embryos is to argue for the recognition of property rights in gametes and embryos. These property rights are enjoyed by gamete providers or those who were donated embryos or gametes by third parties.[1] The notion of property rights based on the promotion of human dignity is controversial in this area. However, property rights can be shaped to promote the personal interests of gamete providers, and equally limited by the concerns of society and the state over certain potential uses of this material. The different limiting interests outlined in Chapter IV will operate to shape the scope of such rights. The use of property rights rather than the right to privacy enables a more honest discussion concerning the reasons why different rights to control the use of such genetic material may be limited.

This Chapter examines the extent of rights of control over gametes and embryos in relation to potential basic uses of this material. These are: the destruction of embryos and gametes; the freezing of embryos for future use; the sale of gametes and embryos; the cloning of embryos and their use in stem cell research, and multiple implantation of embryos into the womb.[2] Part I outlines how the constitutional right to procreative autonomy promotes property rights in gametes and embryos. Opposition to property rights is fuelled by the perceived risks of the commodification and degradation of this unique material. Part I outlines the notion of property rights that can accommodate both the individual and communitarian concerns encountered in this area. The simple suggestion that gamete providers and those genetically related to embryos enjoy property rights in such material

[1] Chapters VIII and IX consider the transferability of the rights based on biological connection to gametes and embryos.

[2] This Chapter will only consider instances where both progenitors agree on the future use of their embryos. Chapter VI will consider instances where couples disagree over the fate of genetically related embryos. The alienability of rights in gametes and embryos will be outlined in Chapter VIII.

only begins the discussion about the content of these rights. The notion of property rights already exists in relation to gametes and embryos but courts and legislatures are reluctant to expressly use this contentious notion. Part II will examine the limited role of property rights in body parts and gametes in the courts to date. While case law does suggest a slow and indirect recognition of property rights in gametes, a similar recognition of rights in embryos seems more problematic.

Part III considers the proper balance between the right to procreative autonomy and the protection of the potential life of the embryo under the Constitution. It does this by looking at whether embryos can be destroyed at the request of the progenitors. This thesis maintains that the embryo does not have a right to life under the Constitution in the sense of a right to be born irrespective of the wishes of the potential parents. However, the value of the embryo as a potential human being, should be promoted where possible. This Part will also ask if the right to procreative autonomy promotes a right to freeze embryos for potential future use. The permissibility of cryopreservation of embryos is linked to the consideration of the right to destroy embryos. The freezing of embryos affords couples the opportunity to change their minds and potentially ask for their embryos to be destroyed.

Part IV considers whether stem cell research is permissible, and the related question of whether embryos can be created solely for this purpose. The question of stem cell research may not directly concern the right to procreative autonomy, but is relevant in determining the permissible uses of embryos. Part V questions whether the right to procreative autonomy champions a right to sell one's gametes or embryos. It is argued that the weight of a dignity-based right to procreative autonomy is reduced in matters like the sale of embryos. This Part will examine justifications for limitation of such activities

in light of the potential commodification of the material and infringement of human dignity.

Part VI asks if there is a right to clone one's embryos. Opposition to cloning on the basis of general repugnance to the practice and concerns based on human dignity will be outlined. Part VII examines the right to implant multiple embryos in attempting to become pregnant. An unfettered property right in embryos would promote the idea that we can implant as many as we want at the one time. This thesis argues that concerns about the best interests of the future child would warrant limitations on the number of embryos that may be implanted.

I. The Right to Procreative Autonomy and Property Rights in Genetic Material

While parents have the right to control their children's lives, they do not own their children, and children are not property.[3] The equation of property rights with commodification fuels opposition to the categorisation of sperm or eggs as property.[4] Some of the greatest social advances of the modern era resulted from the refusal to characterise human beings (women, people held in slavery, or children) as property. The property approach to the issue at hand does not suggest that people should be treated by others as property, but only that they have the autonomy to treat their own parts as property, particularly their regenerative parts.[5] It has been argued that property does not speak to the significance of genetic links, or potential personhood inherent in our relationship with our gametes and

[3] B. Steinbock, "Sperm As Property", in J. Harris & S. Holm (eds.), *The Future of Human Reproduction- Ethics, Choice, and Regulation* (Oxford: Clarendon Press, 1998) 150, at 152.
[4] *Ibid*, 155.
[5] L.B. Andrews, "My Body, My Property" (1986) 16 *Hastings Center Report* 28, at 37.

embryos.[6] This thesis suggests that property rights are enjoyed by gamete providers *because of* the significance of genetic links and the important personal potential of gametes and embryos.

William Blackstone's conception of property was that it constituted absolute dominion over things. Blackstone noted that property was that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[7] The suggestion that property rights always ensure absolute control over the subject matter should be rejected. The presence of property rights does not exclude possible regulation of these rights by the state.[8] The Nuffield Report in the United Kingdom, which is considered below, noted that the conclusion that a user acquires property rights over removed tissue does not mean that the user can then do what they like with the tissue.[9] The Irish Constitution's protection of property rights in Article 40.3 and 43 similarly recognises that property rights are not absolute.

The cases considered in the following sections display a preference for alignment of property rights with personal rights, mirrroring medical law in general in this regard and the centrality of the notion of informed consent. A number of commentators have attempted to interject notions of personhood[10] or privacy rights[11] into property

---

[6] B. Bennett, "Posthumous Reproduction and the Meanings of Autonomy" (1999) 23 *Melb. U. L. Rev.* 286, at 298-9.

[7] W. Blackstone, *Commentaries on the Laws of England* (Vol. 1) (New York: W.E. Dean, 1849), at 100. Blackstone argued that the great regard for private property would not authorise a violation, even for the general good of the whole community.

[8] W. Boulier, "Sperm, Spleens, and other Valuables: The Need to Recognise Property Rights in Human Body Parts" (1995) 23 *Hofstra L. Rev.* 693, at 724.

[9] Nuffield Council on Bioethics, *Human Tissue: Ethical and Legal Issues* (London, April 1995), at para. [10.7]. The Canadian Law Reform Commission in 1992 also suggested that legal notion of limited property interests in human tissue may best serve to protect physical integrity, individual autonomy and fundamental values of personhood (Law Reform Commission of Canada, *Procurement and Transfer of Human Tissue and Organs* (Working Paper No 66, 1992)).

[10] Margaret Radin argues that certain property is connected to one's personhood and that property rights should be assessed according to their personal value. The closer something is to the human identity and self, the less accurately it can be considered

rights concerning the body. Hohfeld's conception of property as a bundle of rights and the limited protection of property under the Constitution provide an accurate and balanced framework for property rights in gametes and embryos. Hohfeld's conception of property was completely dephysicalised, and focused on the legal relations which were the elements of the legal concept of property.[12] The common usage or notion of property as a thing is at variance with its legal conception as rights.[13]

The bundle of rights thesis articulated by both Hohfeld and Honore suggests that ownership does not concern a legal relation between a person or a thing. It constitutes a series of rights one hold's against all others, each of whom has a correlative duty not to interfere with my ownership of the entity.[14] Honore developed the concept of full ownership which consisted of 11 incidents or rights of ownership.[15] A person did not need all of the incidents to have some form of ownership.[16] The most important feature of the Hohfeld-Honore model is that "none of the characterisitcs which define the full or liberal notion of ownership in modern legal systems [are] necessary to all varieties of ownership".[17]

---

property. (See M. Radin, "Market-Inalienability" (1987) 100 *Harv. L. Rev.* 1849, at 1903).

[11] See J. Inness, *Privacy, Intimacy and Isolation* (Oxford: Oxford University Press, 1992), and T. Scanlon, "Thomson on Privacy" (1975) 4(4) *Phil. & Pub. Affairs* 315.

[12] Andrew Grubb highlights these two separate notions of property in A. Grubb, "'I, Me, and Mine': Bodies, Parts and Property" (1998) 3 *Med. Law Int'l* 299, at 300-301.

[13] C.B. MacPherson, "The Meaning of Property" in C.B. MacPherson (ed.), *Property: Mainstream and Critical Positions* (London: University of Toronto Press, 1978) 1, at 2.

[14] J.E. Penner, "The 'Bundle of Rights': Picture of Property" (1995) 43 *UCLA L. Rev.* 711, at 712.

[15] Honore claims that ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity. See A.M. Honore, "Ownership", in A.G. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) 107, at 113.

[16] L.C. Becker, *Property Rights: Philosophical Foundations* (London: Routledge & Kegan Paul Ltd, 1980), at 19.

[17] E. Seeney, "Moore 10 Years Later- Still Trying to Fill the Gap: Creating A Personal Property Right in Genetic Material" (1998) 32 *New England L. Rev.* 1131, at 1151.

Penner argues that the bundle of rights approach is really an empty slogan that does not represent any clear thesis or set of propositions.[18] This loose and malleable definition provides no real help in applying the term property to something like body parts.[19] Penner's argument is correct. Support for the bundle of rights approach to property in relation to gametes and embryos itself offers little guidance on the content of these bundles of rights. The malleable definition of property under this approach is advantageous in relation to property rights in gametes and embryos it can accommodate the different concerns raised by different uses of this material. This approach provides the framework for a detailed debate on certain uses of genetic material.[20]

Property Rights in the Irish Constitution

Article 43.1.1 provides that the "State acknowledges that man, in virtue of his rational being, has the natural rights, antecedent to positive law, to the private ownership of external goods". Article 43.1.2 affords a guarantee not to abolish the right to private ownership or the general right to transfer, bequeath, and inherit property. Article 43.2 recognises that the exercise of these rights ought to be regulated by the principles of social justice. Article 43.2.2 provides that the State may delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good. Article 40.3 also protects property rights. Article 40.3 commits the State to "protect as best it may from unjust attack and, in the case of injustice done, vindicate the ... property rights of every citizen".[21]

---

[18] *Supra* n.14, at 714.

[19] *Ibid*, at 721.

[20] Stephen Munzer has argued for something like the bundle of rights approach in relation to the body by separating "body rights" into personal rights and property rights (see S. Munzer, *A Theory of Property* (Cambridge, Cambridge University Press, 1990), at 37; and S. Munzer, "The Special Case of Property Rights in Umbilical Cord Blood for Transplantation" (1999) 51 *Rutgers L. Rev.* 493).

[21] For a comprehensive outlines of property rights under the Constitution and the relevant case law discussed in this section, see G. Hogan & G. Whyte, *J.M. Kelly:*

There are a number of problems with relying on these property rights provisions to advance a property right based on the right to procreative autonomy under the Constitution. The wording of the provisions does not seem capable of protecting a property right in the body. However, the principles underlying these protections should inform property rights in genetic material, and indeed provide the limitations necessary to avoid the degradation of human gametes or embryos.

The reference in Article 43.1 to "external goods", in contrast to "goods of the body" and "goods of the soul" has to be highlighted in appreciating the intended subject matter of the protection.[22] The notion of "external goods" is consistent with Aquinas's notion of external goods, which saw such goods as external things for the benefit of human persons, and that the institutions and forms of their use were shaped by this general purpose.[23] Kenny J in *Central Dublin Development Association v Attorney General* contrasted the Irish and English language versions of Article 43.1.1.[24] Kenny J preferred the Irish wording of the provision[25] which provided for "a natural right to [one's] own private sphere of worldly wealth".[26] The Irish courts have not exhaustively listed what the term 'property' means. They have recognised that the constitutional guarantee applies to intangible rights as well as land and moveable property.[27] The interpretation of

---

The Irish Constitution (4th ed.) (Dublin: Butterworths, 2004), at chapter 7.7; and J. Casey, *Constitutional Law in Ireland* (3rd ed.) (Dublin: Round Hall Sweet & Maxwell, 2000), at chapter 18.

[22] B. Walsh, "The Judicial Power, Justice and the Constitution of Ireland", in D. Curtin & D. O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Honourable Mr. Justice T.F. O'Higgins* (Dublin: Butterworths, 1992) 145, at 148.

[23] P. Riordan, "Property Rights and Property Duties" (1988) 77 *Studies* 84, at 85. Riordan questions the overall influence of Aquinas's writings on property rights under the Constitution.

[24] [1975] 108 I.L.T.R. 69.

[25] "de cheart nádúrtha... maoin shaolta a bheith aig dá chuid féin go priobháideach".

[26] *Supra* n.24, at 82.

[27] In *Re Article 26 and the Employment Equality Bill*, the Supreme Court noted that a right to carry on a business and earn a livelihood was a property rights ([1996] 2 I.R. 321, at 366). In *Phonographic Performance (Ireland) Ltd v Cody*, Keane J in

external goods as worldly wealth is not conducive to protecting genetic material inherently connected to the person. The wording of Article 43.1 may not support a constitutional property right to gametes and embryos as such subject matter is not external to the person, but inherently connected thereto. Kenny J did support the notion of property as a bundle of rights rather than ownership. Kenny J argued that the wording of Article 43.1.1 was misleading as there is no known legal right of ownership. Rather, there is a bundle of rights which, for brevity, is called ownership.[28]

The notion of private ownership being regulated by principles of social justice under Article 43.2 again shows an economic notion of property, inherently connected with Article 45. Article 43, in conjunction with Article 45, provides a constitutional guarantee of private ownership that recognised the social aspects of private property, but left the detailed elaboration and enforcement of such aspects to the legislature.[29]

The relationship between the protection of property under Article 40.3 and 43 was the subject of much debate in both case law and academic commentary.[30] O'Higgins C.J. in *Blake v Attorney General* clarified the relationship by stating that "Article 43 prohibits the abolition of private property as an institution, but at the same time permits, in particular circumstances, the regulation of the exercise of

---

the High Court accepted that a right not to have one's artistic creations stolen or plagiarised was a right of private property within the meaning of Article 40.3 and 43 ([1998] 4 I.R. 504, at 511).

[28] *Ibid*, at 83.

[29] R. Walsh, "Private Property Rights in the Drafting of the Irish Constitution" (2011) 33 *D.U.L.J.* 86, at 87-88.

[30] For detailed consideration of this relationship, see R. Keane, "Property in the Constitution and the Courts", in B. Farrell (ed.), *De Valera's Constitution and Ours* (Dublin: Gill & McMillan, 1988) 137. The Constitution Review Group argued that while a lot of the uncertainty about the relationship of Article 40.3 and 43 was clarified in case law, the provisions should be redrafted in order to clarify the extent of the state's powers to regulate, control or even extinguish property rights (Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996), at 343).

that right".[31] Article 43 was therefore said to be directed to the State, while Article 40.3 dealt with the citizen's right to a particular item of property.[32] The courts have considered limitations based on promotion of social justice and the common good under Article 43 as influencing the question of whether the property right under Article 40.3 has been unjustly attacked.[33]

The protection of property rights under Article 43 and 40.3 has been criticised for the courts' usual recognition of limitations based on the exigencies of the common good or social justice.[34] This limited protection of personal property rights provides both an obstacle and an opportunity for property rights based on the right to procreative autonomy. The tendency of the courts to defer to the legislature on matters of social justice and the common good may reduce the weight of the argument that property rights in gametes and embryos exist. On the other hand, the courts' consideration of social justice and the common good highlight that the constitutional notion of property is not absolute, and can be governed and limited by communitarian interests.[35] The courts in the past deferred to the Oireachtas and its determinations of whether limitations to property rights were in the common good.[36] However, O'Byrne J in the Supreme Court decision of *Buckley & Others (Sinn Fein) v Attorney General* rejected the suggestion that questions concerning permissible limitations of

---

[31] [1982] I.R. 117, at 135.
[32] *Ibid.*
[33] *P.M.P.S. v Attorney General* [1983] I.R. 355, and *Dreher v Irish Land Commission* [1984] I.L.R.M. 94
[34] D. O'Donnell, "Property Rights in the Irish Constitution: Rights for Rich People, or a Pillar of Free Society?", in O. Doyle & E. Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 412, at 412.
[35] Andre van der Walt has argued that the Irish Constitution situates itself somewhere between liberalism and communitarianism in is protection of property (see A. van der Walt, "The Protection of Private Property Under the Irish Constitution: A Comparative and Theoretical Analysis", in O. Doyle and E. Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 398, at 401.
[36] See *Pigs Marketing Board v Donnelly (Dublin) Ltd.* [1939] I.R. 413, at 422; and *Fisher v Irish Land Commission* [1948] I.R. 3, at 14 (the position adopted by Gavin Duffy J in the High court was approved by the Supreme Court on appeal).

property rights were purely for the legislature to determine.[37] The Constitution did not expressly remove the power of judicial scrutiny of such limitations.[38]

As the property rights in this thesis are based on the right to procreative autonomy which in turn is based on the value of dignity, the importance of the very notion that a property rights exists in relation to such material must be appreciated. The purpose of this overview of property rights philosophy is to highlight that a dignity-based property rights approach to genetic material and embryos does not reduce their inherent significance. Property rights offer a strong statement of protection, a right to control and exclude subject to justified interference by the state.[39] A property based approach can, and should, accommodate communitarian concerns like expolitaiton, commodification and degradation of the special nature of the material under consideration. The individual determinations concerning certain uses, rather than the very fact property discourse is utilised, are the important subject matter of this debate.

II. Case Law Concerning Property Rights in the Body and Gametes

One of the earliest authorities for the no-property rule in corpses was *Haynes's Case*.[40] A number of commentators have questioned the soundness of early cases like *Haynes's* and *Handysides's* as authority for the no-property in the body rule.[41] In *Haynes's* case, the court noted that the corpse did not have property rights in the sheets.

---

[37] [1950] I.R. 67, at 82. For detailed consideration of this case, see D. Barrington, "Private Property Under the Irish Constitution" (1973) 8 *Ir. Jur.* 1.
[38] *Ibid.*
[39] C. Reich, "The New Property" (1964) 73 *Yale L. J.* 733, at 733.
[40] (1614) 12 Co. Rep.113: 77 E.R. 1389.
[41] Roger Magnusson notes that judicial support for the rule was confined to obiter dicta in such cases. He also argues that the no property rule itself arose from inadequate reporting and a misreading of the early cases. See R. Magnusson, "Proprietary rights in Human Tissue", in N. Palmer & E. McKendrick, *Interests in Goods* (2nd ed) (London: LLP, 1998) 25, at 30.

William Haynes was indicted for the larceny of winding sheets used in the burial of three men and a woman. The question for the court was in whom should the property be laid in the indictment.[42] This statement was arguably misunderstood by later commentators and courts[43] as meaning that a corpse itself is not capable of being property.[44] Paul Matthews correctly argues that the court meant that the corpse was not capable of owning the sheets, rather than that the dead body was not property.[45]

The no property rule has been recently affirmed in the recent English cases of *R. v Kelly*,[46] and *Re Organ Retention Group*.[47] In the English Court of Appeal in *R. v Kelly*, Rose L.J. held that although neither a corpse nor parts of a corpse were themselves capable of being property protected by rights, the parts of a corpse could be "property" for the purposes of the Theft Act. The court noted that the common law no-property rule had been upheld for the last 150 years, and argued that any change of this principle should come from Parliament in light of its continued judicial application.[48] The court used the *Doodeward v Spence*[49] work or skill exception in holding that the body parts had acquired different attributes by virtue of the application of skill used in the different dissection and preservation techniques.[50] Rose L.J. did argue that human body parts may be deemed to be capable of being property at common law in future cases.[51]

---

[42] See P. Matthews, "Whose Body? People As Property" (1983) *Current Legal Problems* 193, at 197-198 for extensive consideration of the facts surrounding this case and criticism of its interpretation by later courts and commentators.
[43] See *R v Sharpe* (1857) Dears & Bell 160, and *Foster v Dodd* (1867) L.R. 3 Q.B. 67.
[44] R. Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Oxford: Hart Publishing, 2009), at 26.
[45] *Supra* n. 42, at 198.
[46] [1999] Q.B. 621.
[47] [2005] Q.B. 506. For some background to the circumstances leading up to this case, see M. Brazier, "Retained Organs: Ethics and Humanity" (2002) *Legal Studies* 550.
[48] *Supra* n. 46, at 630.
[49] (1908) 6 C.L.R. 406.
[50] *Supra* n. 46, at 631.
[51] *Ibid.*

In *Re Organ Retention Group*, the claimants were all parents of deceased children on whom post mortems had been conducted in order to establish their cause of death. It was alleged by the claimants that the organs of the children had been removed and disposed of without their consent as was required by the Human Tissue Act 1961. The court found that the claimants did not have a right to possession of the organs by virtue of their duty to bury the deceased children. Gage J held that there was no property in the body of a deceased person, citing *R v. Kelly* as evidence of the recent application of the rule. Gage J did not consider Rose L.J.'s comments about body parts.[52]

In *Dobson v North Tyneside Health Authority*, the court held that a brain that was removed during a post mortem examination did not constitute property.[53] In *R v Bentham*, the House of Lords held that as a person's hand or finger were not separate and distinct from him but were part of himself.[54] Lord Bingham held that one cannot possess something that is not separate and distinct from oneself.[55] The no-property rule is firmly based on a conception of property as a thing rather than rights to control the subject matter in question.

The Irish courts have not considered the question of property rights in the body or body parts.[56] The courts considered a number of cases the retention of organs from the post-mortems carried out on children. Cases like *O'Connor v Lenihan*[57] and *Devlin v The National Maternity Hospital*[58] concerned nervous shock actions by parents of deceased children. The courts did not examine the question of whether property rights existed in the body or body parts. Dr. Deirdre

---

[52] *Supra* n. 47, at para. [135].
[53] [1997] 1 W.L.R. 596, at 601.
[54] [2005] 1 W.L.R. 1057.
[55] *Ibid*, at para. [8].
[56] See D. Madden, *Medicine, Ethics and the Law* (2nd ed.) (Dublin: Bloomsbury Professional, 2011), at 431-432.
[57] [2005] I.E.H.C. 176.
[58] [2007] I.E.S.C. 50.

Madden's report to the Department of Health in 2006 concerning the retention of organs from the post-mortems of children argues that the use of concepts of property and ownership were not appropriate in relation to the body of a deceased child.[59]

There are some cases in the United States which suggest that human blood may be classified as a product.[60] The case of *Miles Laboratories Inc. Cutler Laboratories Division v Doe* accepted in theory that blood could be treated as a product for the purpose of applying strict product liability.[61] The Australian Law Reform Commission stated in 1977 that common law principles relating to negligence and the law and ethics governing professional behaviour appeared to be adequate to regulate human tissue donations and transplants, without considering the role of property in this matter.[62] The Australian state courts have also approved of the no-property rule.[63] The Victorian case of *Leeburn v Derndorfer* concerned the legal status of ashes.[64] The Supreme Court used the *Doodeward* exception to argue that the application of work and skill used to create the ashes meant that ownership of the ashes could pass by sale, or gift, or otherwise.[65] However, the court did note that as the remains were that of a human being they should be treated with appropriate respect and reverence.[66]

In Canada, the Royal Commission on Civil Liability and Compensation for Personal Injury in 1978 recommended that human blood and organs should be regarded as 'products' and authorities

---

[59] D. Madden, *Report of Dr. Deirdre Madden on Post Mortem Practice and Procedures: Presented to Mary Harney T.D.* (Dublin: Stationery Office, 2006), at 118.
[60] See K. Stern, 'Strict Liability and the Supply of Donated Gametes" (1994) 2 *Medical L. Rev.* 261.
[61] (1989) 556 A. 2d 1107 (Md. CA).
[62] Law Reform Commission of Australia, *Human Tissue Transplants* (1977) (Report no 7), at 82.
[63] See *Burrows v Cramley* [2002] W.A.S.C. 47 (WA); *Re Gray* [2001] 2 Qd. R. 35; *A.W. v C.W.* [2002] N.S.W.S.C. 301
[64] [2004] V.S.C. 172.
[65] *Ibid*, at para. [27].
[66] *Ibid.*

responsible for distributing them as their 'producers'. The Nuffield Council on Bioethics noted that English law was silent on the issue of whether a person can claim a property right in tissue which has been removed.[67] The Council suggested, after reviewing different options open to it, that they should properly proceed on the basis of a consent given to the procedure which resulted in the removal, or its absence, rather than a claim in property.[68] The United Kingdom's Human Fertilisation and Embryology Act 1990 and the Human Tissue Act 2004 also use consent as the key notion governing the use of human tissue.[69] The source of this control over bodily material's is not outlined. This case law shows that courts in many different jurisdictions are uncomfortable with the notion of property rights in the body.

Property Rights in Procreative Material

The Californian cases of *Moore v. Regents of the University of California*[70] and *Hecht v Superior Court*[71] and the case of *Hall v Fertility Institute of New Orleans*[72] consider the presence of property rights in procreative material. In the *Moore* case, John Moore underwent treatment for hairy-cell leukemia at the UCLA Medical Center. The plaintiff's condition necessitated the removal of his spleen. The plaintiff was unaware that his spleen was promptly taken to his doctor's research lab, and that the doctor began research involving various cells. Moore attempted to characterise the invasion

---

[67] *Supra* n. 9, at para. [9.1]. For summary of the Nuffield Report, see A. Grubb, "The Nuffield Council Report on Human Tissue" (1995) 3 *Medical L. Rev.* 235.
[68] *Ibid*, at para. [9.15].
[69] See D. Price, 'The Human Tissue Act 2004" (2005) 68 *Modern L. Rev.* 798; J. Zimmern, "Consent and Autonomy in the Human Tissue Act 2004" (2007) 18 *Kings L.J.* 313, and K. Liddell & A. Hall, "Beyond Bristol and Alder Hey: The Future Regulation of Human Tissue" (2005) 13 *Medical L. Rev.* 170 for consideration of the stringent consent requirements concerning the use of cells, tissues or organs of deceased persons.
[70] 51 Cal. 3d 120, 793 P. 2d 479, 271 Cal. Rptr. 146 (1990). For some detailed analysis of the Californian Supreme Court findings see A. Grubb (ed.), *Medical Law* (3rd ed) (London: Butterworths, 2000), at 1790-1801; and G. Dworkin & I. Kennedy, "Human Tissue: Rights in the Body and its Parts" (1993) 1 *Medical L. Rev.* 29.
[71] 16 Cal.App. 4th 836, 20 Cal. Rptr. 2d 275 (1993).
[72] 647 SO 2d 1348 (La App 4th Cir 1994).

of his rights as a conversion- a tort that protects against interference with possessory and ownership interests in personal property.[73]

The Californian Court of Appeals found that the plaintiff retained a property interest in his cells. The court concluded that "[a] patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress."[74] The California Supreme Court reversed the decision, holding that Mr. Moore did not retain a property interest in his cells and could only state a claim for breach of informed consent. The majority focused on the effect of such a successful claim on research methods. The imposition of a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research, would, according to the majority, affect important medical research for all of society.[75]

The Supreme Court majority suggested that it was not necessary "to force the round pegs of 'privacy' and 'dignity' into the square hole of 'property' in order to protect the patient, since the fiduciary-duty and informed-consent theories protected these interests directly by requiring full disclosure.[76] The Supreme Court also suggested that the patented cell line and the products derived therefrom could not be Moore's property, because the patented line was both factually and legally distinct from the cells taken from Moore's body, given that the subject matter at issue was the product of invention.[77] One has to ask where the need for informed consent arises from, if not the recognition that the patient has rights of control over their body, and its parts.

---

[73] *Supra* n. 70, at 134.
[74] *Ibid*, at 139-140.
[75] *Ibid*, at 135.
[76] *Ibid* at 140. See also J. Long Collins, "*Hecht v Superior Court*: Recognising A Property Right in Reproductive Material" (1995) 33 *U. Louisville J. Fam. L.* 662, at 665.
[77] *Ibid*, at 141.

Justice Mosk's dissenting opinion in this case illustrates the potential of property rights to promote dignity, autonomy and the sanctity of the human body. The learned judge noted that the concepts of property and ownership were extemely broad and abstract.[78] Property did not refer directly to a material object, but often concerned a "bundle of rights" that may be exercised in relation to the object in question.[79] Justice Mosk noted that the same bundle of rights did not attach to all forms of property, so while any limitation diminshed the bundle of rights attached, what remained was still a legally protectable property interest.[80] The learned judge noted that

> "for a variety of policy reasons, the law limits or even forbids the exercise of certain rights over certain forms of property... Owners of various forms of personal property.. may be subject to restrictions on the time, place, and manner of their use... Finally, some types of personal property may be sold but not given away, while others may be given away but not sold, and still others may neither be given away nor sold."[81]

While the Californian statute limited the rights of Mr. Moore in the cell line, Justice Mosk argued that a property interest still remained. The learned judge contended that patients must be granted a property right in their own tissues if they were to maintain sufficient control over their bodies and themselves to accord with the requirements of human dignity and the sanctity of the body.[82] Justice Mosk claimed that the majority's decision to reject Moore's property right actually undermined the ethical and moral values inhering in the human body

---

[78] *Ibid*, at 165. See R. Gold, "Owning Our Bodies: An Examination of Property Law and Biotechnology" (1995) 32 *San Diego L. Rev.* 1167, for comprehensive analysis of this judgment

[79] *Ibid.*

[80] *Ibid.*

[81] *Ibid*, at 165-166.

[82] *Ibid*, at 174. Justice Mosk was quoting the argument of Mary Danforth (see M. Danforth, "Cells, Sales, and Royalties: The Patient's Right to a Portion of the Profits" (1985) 6 *Yale L. & Pol'y Rev.* 179, at 190).

and human biological materials.[83] This judgment shows how property rights in procreative material can be a tool for promoting the dignity of the person. It illutrates the importance of the notion of property rights, even when limited. This Chapter argues that the bundle of rights approach, which recognises that certain rights or controls over the subject matter of property rights may be limited, is the correct way to utilise property rights in this area.

In *Hecht*,[84] William Kane donated 15 vials of his sperm to a Californian sperm bank before committing suicide in 1991. Kane's agreement with the sperm bank authorised the release of the vials to his girlfriend, Deborah Hecht. Mr. Kane also recorded his desire for Ms. Hecht to have his baby posthumously in his will and a separate letter. Mr Kane's children and ex-wife challenged this bequeth on the basis that sperm could not be transferred regardless of a donor's explicit instructions. The trial court ordered destruction of the sperm.[85] The Court of Appeal of California held that sperm was property, and therefore could be bequethed by will.[86] It ordered that the case be remanded to the trial court to decide the Mr. Kane's actual intention regarding the disposition of the sperm. The court concluded that at the time of the decedent's death he had "an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction".[87]

The *Hecht* court distinguished the case at hand from *Moore* by suggesting that the presence of the agreement with the sperm bank and the will constituted evidence that the decedent intended and

---

[83] *Ibid*, at 173.
[84] For comprehensive commentary on this case, see A. Corvalan, "Fatherhood After Death: Legal and Ethical Analysis of Posthumous Reproduction" (1997) 7 *Alb. L .J. Sci .& Tech.* 33, and D.A. Rameden, "Frozen Semen as Property in *Hecht v Superior Court*: One Step Forward, Two Steps Backward" (1994) 62 *U.M.K.C. L. Rev.* 377.
[85] Superior Court of Los Angeles County No. BP012006.
[86] 16 Cal. App.4th 836, 20 Cal.Rptr.2d 275 (1993).
[87] *Ibid*, at 849. The court found that this interest was sufficient to constitute "property" within the meaning of Probate Code section 62.

expected that he would retain control over the sperm following its deposit.[88] The court, relying on the Supreme Court of Tennessee's decision in *Davis v Davis*,[89] found that "sperm which is stored by its provider *with the intent* that it be used for artificial insemination is .. unlike other human tissue because it is 'gametic material' that can be used for reproduction".[90] The Court of Appeal went on to claim that the value of sperm lied in its potential to create a child after fertilisation, growth, and birth.[91] In March 1994 the probate court ruled that under a division of property agreement signed by the parties after Mr. Kane's death, Ms. Hecht was entitled to at least three of the fifteen vials of sperm.

A number of criticisms have been levelled at this judgment. The Court of Appeal avoided any consideration of what actually constituted 'property' by relying on section 62 of the California Probate Code which defined property as "anything that may be the subject of ownership and includes both real and personal property and any interests therein."[92] Perhaps more importantly, James Bailey correctly criticises the circularity of the court's decision. The court based its judgment on Kane's decision making authority in relation to the sperm, but failed to discuss the source of this authority.[93] The *Hecht* court is indecisive in its analysis of the status of the sperm. While the court ruled that sperm was property, it also alluded to the interim status of preembryos supported by *Davis*, thus suggesting that sperm is something greater than property but less than life.[94] It must be noted that the treatment of the sperm as property was the only way

---

[88] *Ibid*, at 846.
[89] 842 S.W.2d 588 (Tenn. 1992), at 597.
[90] *Ibid*, at 850, the court citing *Davis v Davis* (emphasis added).
[91] *Ibid.*
[92] J. Bailey, "An Analytical Framework for Resolving Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance" (1998) 47 *De Paul L. Rev.* 747, at 749.
[93] *Ibid.*
[94] J. Long Collins, "*Hecht v Superior Court*: Recognising A Property Right in Reproductive Material" (1995) 33 *U. Louisville J. Fam. L.* 662, at 669.

that the probate court had jusrisdiction and could order the disposition of the sperm at issue.[95]

In the *Hall* case, Mary Alice Hall sought a declaration that her deceased son's frozen semen constituted succession property. The decedent's partner challenged this claim and alleged ownership under a formal written donation inter vivos executed by the decedent. [96] The Fourth Circuit focused on whether Mr. Hall was fully competent and operating on his own volition when he exeuted the act of donation. The court seemed to recognise the deceased's dispositional authority over his semen when it stated that "[i]f it is shown at trial that the decedent was competent and not under undue influence at the time the act was passed, the frozen semen is St. John's property, and she has full rights to its disposition".[97] This judicial approach is similar to that in *Hecht*, in that both courts were insisting on the establishment of clear intent as a precondition to the indirect recognition of gametes as property.[98]

In the French case of *Paraplaix v CECOS*,[99] Alain Paraplaix was diagnosed with testicular cancer. Before chemotherapy he deposited sperm with the CECOS with no instructions concerning its use. Alain married Corinne two days before his death. When he died, Corinne and his parents asked the CECOS for the sperm sample. The court's opinion ignored the inheritance, property and policy issues and instead focused on whether it was the decedent's intent for his sperm to be use by his wife after his death.[100]

---

[95] *Ibid*, at 671.
[96] For analysis of case see K. Venturos Lono, "From Cradle to Tomb: Estate Planning Considerations of the New Procreation" (1996) 57 *La. L. Rev.* 27, at 40.
[97] *Supra* n. 72, at 1351.
[98] C.M. Jordan Jr & C.J. Price, "First *Moore*, Then *Hecht*: Isn't it Time We Recognise a Property Interest in Tissues, Cells and Gametes?" (2002) 37 *Real Prop. Prob. & Tr. J.* 151, at 183.
[99] Judgment of 1 August 1984, Trib. gr. Inst. Creteil 16-17 September 1984.
[100] S. Gilbert, Fatherhood from the Grave: An Analysis of Post-mortem Insemination" (1993) 22 *Hofstra L. Rev.* 521, at 558.

The French court refused to characterise human sperm as movable, inheritable property under French law. The court viewed sperm as "the seed of life… tied to the fundamental liberty of a human being to conceive or not to conceive", the fate of which "must be decided by the person from it is drawn". [101] The Tribunal de Grand Instance de Creteil found that the basic value of liberty excludes sperm from being subject to the legal regime for inheriting goods.[102] The sole issue for the court was the intention of the donor. It found that the testimony of his widow and parents outlined his unequivocal intent that his sperm be used by his widow in order to have a genetically related child.[103] The special nature of this reproductive material forced the court to find an intermediate status for the sperm- somewhere between a piece of inheritable property and actual life.[104] Like the U.S. cases, the basis for promoting intnetion as the determining factor is not outlined. Again, notions of consent and intention are promoted instead of property rights because of the negative connotations of property rights discourse in this area.

The English case of *Yearworth v North Bristol NHS Trust*[105] concerned claimants who had stored their semen with a local hospital before undergoing chemotherapy. The semen was not frozen properly, which caused the semen to thaw. The semen was therefore no longer viable. The claimants argued that they had suffered mental distress due to the failure of the defendant to take reasonable care of their samples. The trial judge was of the opinion that the damage to the samples did not constitute personal injury to the claimants unless it could be proven that there was more than an even chance that a

---

[101] See A. Corvalan, "Fatherhood After Death: Legal and Ethical Analysis of Posthumous Reproduction" (1997) 7 *Alb. L. J. Sci. & Tech.* 335, at 341.
[102] D.J. Jones, "Artificial Procreation, Societal Preconceptions: Legal Insight from France" (1988) 36 *Am. J. Comp. L.* 525, at 528.
[103] A. Kamoroski, "After Woodward v Commissioner of Social Services: Where Do Posthumously Conceived Children Stand in the Line of Descent?" (2002) 11 *B. Y. U. Pub. Int. L. J.* 297, at 304.
[104] G.A. Katz, "Paraplaix v CECOS: Protecting Intent in Reproductive Technology" (1998) 11 *Harv. J. L. & Tech.* 683, at 688-9.
[105] [2010] Q.B. 1. For comprehensive outline of the facts and implications of this decision see N. Priaulx, "Rethinking Reproductive Injury" [2009] *Fam. L.* 1161.

child would have been conceived through the lost sperm. The learned judge also held that the sperm was not the claimant's property.

The English Court of Appeal noted that in order to claim in negligence for loss caused by reason of loss or damage to property, the claimant must have had either legal ownership or a possessory title to the property concerned at the time when the loss or damage occurred.[106] Therefore, the court had to consider whether the claimants had property rights in their semen, and if so whether the Human Fertilisation and Embryology Act 1990 curtailed this right. The trust argued that the law afforded special treatment to the living human body and human corpses for centuries, and therefore the law did not recognise that a substance generated by the body was capable of being owned.[107]

The Court of Appeal noted that the common law has always held that the living human body is incapable of being owned.[108] The court held that developments in medical science now required a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body.[109] The court seemed to be drawing a distinction between sperm as a product of the body and non- product body parts like arms or legs.[110] The Court of Appeal based its opinion within the principle of ownership outlined in the *Doodeward* exception.[111] However, the court did appreciate the suggestion made by Rose LJ in *R v. Kelly* that the common law

---

[106] *Ibid*, at para. [25], the court quoting Lord Brandon in *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] A.C. 785.
[107] *Ibid*, at para. [29].
[108] *Ibid*, at para. [30]. The Court noted the suggestion in *R v Bentham* [2005] 1 W.L.R. 1057 that a person does not even possess his body or any part of it.
[109] *Ibid*, at para. [45].
[110] R. Nwabueze, "Death of the 'No-Property' Rule for Sperm Samples" (2010) 21 *Kings L. J.* 561, at 566. For a similar assessment of the *Yearworth* decision, see C. Hawkes, "Property Interests in Body Parts: *Yearworth v North Bristol NHS Trust*" (2010) 73 *Modern L. Rev.* 130, at 134.
[111] *Supra* n. 105, at para. [45].

position regarding property in the body and body parts needed to be re-examined in light of more recent developments in technology.[112]

The Court of Appeal examined the *Hecht* decision but held that a finding of ownership of stored sperm for the purpose of directing its use following death was a step beyond what the court had to consider in the case at hand.[113] Lord Judge C.J. for the court held that the male claimants had ownership of the sperm which they ejaculated. The court noted that the sole object of their ejaculation was that, in certain events, it might later be used for their benefit. While the Human Fertilisation and Embryology Act may have eroded these rights, this did not derogate from their ownership.[114] The court argued that the Act itself recognised a fundamental feature of ownership, namely that at any time they can require the destruction of the sperm.[115]

It has been suggested that the *Yearworth* decision is the predictable next step in "the slow creep of the property paradigm".[116] However, Lord Judge CJ did not offer a detailed outline of the implications or extent of property rights in the sperm. Lord Judge stated that the concept of ownership was no more than a convenient global description of different collections of rights held by persons over physical and other things.[117] Again, as the previous cases have illustrated, there is a reluctance to treat procreative material as property, or to afford property rights to progenitors. While the case represented a departure from the previous common law position on the issue of property rights in this area, the importance of the law of bailment and the duties that the bailor-bailee relationship imposed on the clinic in the Court of Appeal's judgment should be underlined.[118]

---

[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid*, at para. [45].
[115] *Ibid.*
[116] S. Harman & G. Laurie, "*Yearworth v North Bristol NHS Trust*: Property, Principles, Precedents and Paradigms" (2010) 69 *C.L.J.* 476, at 483.
[117] *Supra* n. 105, at para. [28].
[118] See M. Quigley, "Property: The Future of Human Tissue?" (2009) 17 *Med. L. Rev.* 457, at 464.

However, bailment arises where one person possesses something by agreement with the owner.[119] The relationship is created because the men in *Yearworth* had legal control over their sperm and agreed to the Trust's possession of the sperm. The court's reliance on the law of bailment may make yearworth distinguishable from future cases, but the underlying premise that the sperm providers had rights of control in the first instance should help further the argument for property rights in gametes.

The Australian courts have also recently consider the question of property rights in semen.[120] In *Bazley v Wesley Monash IVF Pty*,[121] the Queensland Supreme Court considered whether stored semen constituted property for the purposes of the Queensland Succession Act 1981. The court considered the Yearworth decision, and highlighted the importance of the recognition of rights of property in the bailor which entitled the bailor or his representatives to call for the property's return.[122] The court concluded that the semen must be property at both common law and as a matter of common sense.[123] The court held that the relationship between the clinic and the deceased was one of bailor and bailee for reward because, as long as the fee was paid the clinic agreed to store the semen.[124] The bailor retained the right of ownership and could request return of the semen.

In *Jocelyn Edwards, Re the estate of the late Mark Edwards*,[125] the Supreme Court of New South Wales noted the English Court of Appeal's willingness in *Yearworth* to move beyond the work and skill exception to the no-property rule which was first articulated in

---

[119] R. Smith, *Property Law: Cases and Materials* (5th ed.) (Harlow: Pearson Education Ltd., 2012), at 55.
[120] See L. Skene, "Proprietary Interests in Human Bodily Material: *Yearworth*, Recent Australian Cases on Stored Semen and Their Implications" (2012) 20 *Med. L. Rev.* 227 for consideration of this recent case law.
[121] [2010] Q.S.C. 118.
[122] *Ibid*, at para. [30].
[123] *Ibid*, at para. [33].
[124] *Ibid*.
[125] [2011] N.S.W.S.C. 478.

Doodeward v Spence. The New South Wales court did not depart from the *Doodeward* exception in determining that the deceased's wife had an entitlement to possession of the deceased's sperm.[126] The court highlighted that it was merely determining the question of possession, and not property rights, in the action. It expressed concern about the potential for the semen to be used for assisted reproduction if full property rights were enjoyed by the deceased's wife.[127] The basis for the property right in the semen in the case is not clearly established by the court.[128] There was no bailment in the semen as Mr. Edwards had died before the semen was removed.

One can conclude that the basis for the ability to enter into contracts in relation to sperm and the primacy of intention in the case law is not considered. How could the plaintiffs in *Yearworth* enter into agreements with the local trust if they did not have the right to control the fate of their material? The focus on the intention of the sperm donor in cases like *Hecht* again must be based on the fundamental position that individuals have a right to decide what happens to their gametes, they have a right to control them. While the courts are slow or reluctant to use the language of property rights, they are employing the essence of property rights in determining these cases. It is suggested that the constitutional right to procreative autonomy should support a more open approach to property rights in gametes.

III. Property Rights in the Embryo and the Promotion of the Potential Life of the Embryo

Any future legislation on ARTs and its implementation has to decide what rights or value to afford the embryo in vitro. John Robertson correctly argues that the abstract concept of respect must eventually confront the concrete situations in which the real content of the notion

---

[126] *Ibid*, at para. [84].
[127] *Ibid*, at para. [24].
[128] *Supra* n. 120, at 237.

of special respect must be outlined.[129] It is difficult to rationalise the destruction of something for which one claims to have profound respect.[130] This section considers the practical application of the right to procreative autonomy and the notion that respect be afforded to the potential life of the embryo.

The debate about whether one should be deemed to have property rights in embryos is misguided for two reasons. In the first instance, this Chapter has already highlighted the distinction between something being property and having property rights in certain subject matter. The term 'property' merely designates the point of dispositional control over the object or matter in question. The scope of that control is a separate matter and will depend upon what bundle of dispositional rights exist with regard to the embryo.[131] Secondly, there is a mistaken assumption in opposition to property rights in the embryo that the courts have not already treated progenitors as having property rights in their embryos.

The Supreme Court in *Roche* considered the contract between the parties in determining that if consent to the use of the embryos in the event of divorce was provided. Such an analysis assumes that the couple had the right to control the embryos and enter into such contracts. The Tennessee Supreme Court in *Davis v Davis* noted that the couple did have an interest in the nature of ownership in the embryos, to the extent that they had decision-making authority concerning the disposition of the embryos.[132] Legislative consent requirements like those under the Human Fertilisation and Embryology Act 1990 are also based on the underlying assumption that the progenitors enjoy fundamental rights of controls in relation to their embryos. There is an implicit recognition of these rights of

---

[129] J. Robertson, "In the Beginning: The Legal Status of Early Embryos" (1990) 76 *Va. L. Rev* 437, at 448.
[130] D. Callahan, "The Puzzle of Profound Respect" (1995) 25 *Hastings Center Report* 39, at 39-40
[131] J. Robertson, "Posthumous Reproduction" (1994) 69 *Ind L. J.* 1027, at 1038.
[132] *Supra* n. 89, at 597.

control in these instances, coupled with a reluctance to classify such rights as property rights in the embryo. The focus on consent and control over the fate of embryos is based on the genetic or legal relationship to the embryo, and can be accurately termed as property rights in the embryo. The categorisation that individuals jointly possess property rights in embryos should not be the contentious issues, the focus should rather be on the content of these rights.

The Right of the Embryo to be Implanted

Chapter IV has suggested that the Constitution would afford respect to the embryo as potential human life. The spirit of Article 40.3.3 and its jurisprudence suggests that the embryo's distinct genetic identity should be afforded some recognition. This consideration would support the implantation of embryos and avoid their destruction where possible. The first, and possibly primary, matter is whether the embryo should be implanted contrary to the wishes of those genetically related to the embryo. It is suggested that embryo does not have right to life in the sense of a right to be implanted. In balancing the value of the embryo and the right to procreative autonomy of the potential parents, the weight of the latter would ensure that implantation cannot be forced.

The notion of the state forcing the implantation of genetically related embryos represents an obvious intrusion into the private life and bodily integrity of such potential parents. A right to life of the embryo might demand such action. The difference between the positive and negative connotations of such a right are important. A right to life of the embryo would require the state to ensure that the gestational mother does not seek an abortion in another jurisdiction. The right of the foetus is generally perceived as a negative right, the right not to be harmed, unless the life of the mother is at risk. Denham J in *Roche* noted that if the embryos were unborn for the purposes of Article 40.3.3, the State would have to intervene to facilitate their implantation. The learned judge argued that such a duty of the state to

intervene would be inconsistent with the rights of the family under the Constitution.[133] Chapter VI will criticise the prioritisation of freedom from interference in civil society so it is suggested that one should consider the weight of the right to procreative autonomy in general. The removal of any ability to change one's mind, and the implications of such a position should be underlined. The implantation of the embryos would force the progenitors to abort the embryos in another jurisdiction or continue with the pregnancy and become parents. The concern of the state in requiring implantation is to avoid the destruction of the embryos, Implantation into a third party who would like to use the embryos could more effectively guarantee the promotion of the potential life of the embryo.

An argument can be made that the state is not forcing implantation on the progenitors as they already agreed to implantation when they created the embryos. Such a suggestion ties in with Chapter VIII's discussion about binding oneself into the future. The fact that the embryos in question were created and stored illustrates consent to future use. Chapter VIII will criticise the use of notions like informed consent or inalienable rights to invalidate any such agreement. It would be attractive to question whether such couples did agree to implantation. It is arguably more accurate to suggest that there is a right to change one's mind in light of the fundamental implications of the implantation of the embryos. The decision to become a parent is the core aspect of the right to procreative autonomy. The importance of this core freedom should be protected by the state as the invasive nature of such parenthood violates bodily integrity and the right to procreative autonomy.

It is suggested that there are two more attractive options for the state in regulating basic controls over embryos that involve less intrusion. In the first instance, donation to a third party can promote the wishes

[133] [2009] 2 I.R. 321, at 372.

of the progenitors and the respect for the potential life of the embryo. Alternatively, a prohibition on freezing embryos would remove the opportunity for the progenitors to change their minds. These options will be considered in turn in light of the right to procreative autonomy.

Donation of the Embryos to Third Parties

The 6th edition of the Medical Council Guidelines in 2004 provided that any fertilised ovum must be used for normal implantation and must not be deliberately destroyed. The Guidelines also state that "if couples have validly decided they do not wish to make use of their own fertilised ova, the potential for voluntary donation to other recipients may be considered.[134] The 2009 edition does not mention the requirement to avoid deliberate destruction of the embryo or the possibility of donation. The Commission on Assisted Human Reproduction argued that the donation of the embryos to third parties was subject to the informed consent of the embryo providers.[135] Respect for the potential of the embryo could be promoted by the donation of embryos to other parties who wish to implant them. If the progenitors are happy to consent to this then both interests are protected. If the couple does not want to consent to donation then the weight of the right to procreative autonomy and respect for the potential of the embryo should be considered.

Donation against the wishes of those genetically related to the embryos negates the importance of biological connectedness. Legal mechanisms would ensure that the genetic parents are not the legal parents of the child. Parents may hold a more fundamental opposition to the use of 'their' embryos. The notion of potentiality of the embryo

---

[134] Medical Council, *A Guide to Ethical Conduct and Behaviour* (6th ed.) (2004), at para. [24.5]. See also D. Madden, "Article 40.3.3 and Assisted Human Reproduction in Ireland", in J. Schweppe (ed.), *The Unborn Child, Article 40.3.3 and Abortion in Ireland- Twenty Five Years of Protection?* (Dublin: Liffey Press, 2008) 303, at 305.

[135] Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (Department of Health, 2005), at 16-17.

can be divided into the potential of the embryo to be a future human being and the separate potential from the point of view of the progenitors, that the embryo has the potential to be their genetic child. The embryo, if implanted and safely developed in utero, will become not only a human being, but a child of the progenitor. The emotional, genetic and personal connection of the parent to this potential child is something distinct from the potential of the embryo to be a human life. The creation of children against the wishes of the progenitors is something the courts are reluctant to sanction. It is therefore suggested that the potentiality of the embryo that is actually respected in this sense is the potentiality of the embryo to be someone's child.

Research on progenitors' conceptualisation of their embryos shows that couples with unused embryos find the disposition decision an emotionally one.[136] Couples who initially indicate intention to relinquish unused embryos to another couple frequently change their mind when faced with the reality of making a disposition decision.[137] The key to this decision making was their kinship relationship with their embryo, rather than ideological or religious perceptions concerning the status of the embryo.[138] Studies from the U.S. suggest that a great majority prefer to discard of embryos. Feelings in relation to unused embryos were often connected to the existence of a child conceived through earlier use of IVF.[139] The existence of a genetic brother or sister to children already born was an important factor for may couples. In other instances, decisions are often determined by the decision that the progenitors do not want to make. The couples do not want to destroy the embryos so they donate them.[140] Qualitative

---

[136] E. Blyth, L. Frith, M. Paul & R. Berger, "Embryo relinquishment for Family Building: How Should if be Conceptualised?" (2011) 25 *I. J. L. Pol'y F.* 260, at 266.
[137] *Ibid.*
[138] *Ibid*, at 281.
[139] S. de Lacey, "Parent Identity and 'Virtual' Children: Why Patients Discard rather than Donate Unused Embryos" (2005) 20 *Human Reproduction* 1661, at 1662.
[140] See S. de Lacey, "Decisions for the Fate of Frozen Embryos: Fresh Insights into Patients' Thinking and their Rationales for Donating or Discarding Embryos" (2007) 22 *Human Reproduction* 1751.

studies report that patients agonise over the decision about what to do with frozen embryos, with many inclined towards perpetual freezing.[141]

Julian Savulescu argues that it is wrong not to donate one's spare embryos to other couples or individuals. Savulescu argues that an intermediate position which affords respect to the rights of progenitors and the value of the embryo would be to have an opt out regime, where progenitors have to voice strong objections as to why their unused embryos should not be donated.[142] The argument can be made that parenthood should not be genetically defined, so therefore genetic connection to embryos is not something that should be used to promote the idea of a special connection between the embryos and progenitors.[143] While this argument can be made in theory, the empirical studies above show the multitude of feelings that genetic connection to embryos can cause.

A comprehensive study of Canadian clinics shows that a substantial number of couples in Canada did not return for their embryos.[144] The Commission on Assisted Reproduction similarly recognised the need to deal with abandoned embryos.[145] The question of whether abandoned embryos could be donated would be determined by whether the abandonment occurred because the couple has children using other embryos and did not need or value the remaining embryos, or whether abandonment was due to a reluctance to destroy or use the embryos in question.

---

[141] A. Drapkin Lyerly, S. Nakagawa & M. Kuppermann, "Decisional Conflict and the Disposition of Frozen Embryos: Implications for Informed Consent" (2011) 26 *Human Reproduction* 646, at 646.
[142] J. Savulescu, "The Public Interest in Embryos", in J. Gunning & H. Szoke (eds.), *The Regulation of Assisted Reproductive Technology* (Aldershot: Ashgate, 2003) 191, at 193.
[143] G. Fuscaldo, "Stored Embryos and The Value of Genetic Ties", in J. Gunning & H. Szoke (eds.), *The Regulation of Assisted Reproductive Technology* (Aldershot: Ashgate, 2003) 177, at 178.
[144] See C. Newton, J. Fisher, V. Feyles, F. Tekpetey, L. Hughes & D. Isacsson, "Change in Patient Preferences in the Disposal of Cryopreserved Embryos" (2007) 27 *Human Reproduction* 3124.
[145] *Supra* n. 135, at 17.

The disadvantage to an opt-out donation regime is that it may diminish the voluntariness of a couples' consent to donation. It is suggested that any fundamental psychological aversion to donation will prompt objections from the couple. An opt-out approach to donation can promote both interests. It appreciates the right to procreative autonomy of the couple and affords respect to the potential of the embryo. However, if the couple have strong psychological objections to donation of the embryos then the weight of these objections could prevail. It will be suggested that in such instances the embryos could be used for research rather than destroyed. This position will be outlined in Part IV. The most effective way of promoting respect for the potential of the embryo and avoiding these difficult situations would be to prohibit the creation and freezing of excess embryos.

A Prohibition on Freezing- Avoiding the Issue?

The Embryo Protection Act 1990 avoids the difficult decisions outlined above by banning the freezing or storage of embryos. Section 1(1)(4) stipulates that a maximum of three embryos can be created and that all embryos have to be implanted in the uterus.[146] This thesis has already noted that abortion is legal in Germany under strict conditions. The position under the 1990 Act therefore is generated by a discomfort with destroying embryos, rather than the desire to promote human life. The legal permissibility of abortion means that the development and birth of the embryo is not guaranteed in law. Similarly, in Italy cryopreservation of embryos is only permitted in exceptional circumstances, where for example unforeseeable health conditions of the mother make implantation impossible.[147] The prohibition on freezing encourages the multiple

[146] For a more detailed discussion of this see J. Robertson, "Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics" (2004) 43 *Colum. J. Trans. L.* 189, at 225-226.

[147] See A. Boggio, "Italy enacts New law on Medically Assisted Reproduction" (2005) 20 *Human Reproduction* 1153, at 1154.

implantation of embryos, discussed later in this Chapter. This endangers the welfare of future children born through implantation of the embryos.

The Commission on Assisted Reproduction noted the advantages to freezing embryos in order to ensure that couples has the best change of a successful rate.[148] The cryopreservation of embryos means that individuals do have to go through the need for superovulation or ovum retrieval. The Commission advised that appropriate guidelines be put in place regarding the freezing of excess human embryos.[149] Careful regulation of the number of embryos that can be created and frozen could avoid many instances of destruction of embryos. The freedom of the couple is limited by such regulations, but arguably the extent of infringement of the right is outweighed by concern to afford tangible respect to the potential of the embryo. Such policy could determine the number of embryos to be frozen based on the health and personal circumstances of the couple. The option of freezing eggs as opposed to embryos could also be considered.

There are no clear, or arguably right, answers to these difficult questions. While prohibitions or limitations on freezing would avoid many of the scenarios outlined above, it is suggested that the progenitors retain the right to refuse to donate the embryos. The state can promote donation but cannot force donation. The only option left in this instance is to donate the embryos for stem cell research.[150] The following section will argue that if donation for implantation is not possible then donation for stem cell research should be mandated.

---

[148] *Supra* n. 135, at 16.
[149] *Ibid.*
[150] See Ethics Committee of American Society of Reproductive Medicine, "Donating Spare Embryos for Stem Cell Research" (2009) 91 *Fertility & Sterility* 667.

IV. Stem Cell Research

The permissibility of stem cell research does not directly concern the right to procreative autonomy. However it is useful to consider the constitutional permissibility of such research in light of the value afforded to potential life. In order to obtain embryonic stem cells, scientists must destroy a living human embryo by placing an extraction device into the embryo's inner cell mass to remove the cells.[151] Stem cells can be extracted at any point in human development. Embryonic stem cells can divide and expand their numbers in vitro. They are also less specialised that adult stem cells, and can differentiate into many different types of tissue.[152] At the heart of the regulation of embryonic stem cell research is a difficult balancing of the advantages of such technologies with the notion of purposefully creating embryos for destruction.

In the United States, public funding for human embryonic stem cell research and therapeutic cloning was prohibited under the Bush administration.[153] President Obama reversed this limitation in 2009.[154] Private stem cell research is largely unregulated.[155] The Warnock Committee determined that embryonic experimentation was ethically acceptable up until the appearance of a primitive streak. This

---

[151] K. Belew, "Stem Cell Division: Abortion Law and Its Influence on the Adoption of Radically Different Embryonic Stem Cell Legislation in the United States, the United Kingdom and Germany" (2004) 39 *Texas Intl L. J.* 479, at 480.

[152] A. D'Andrea, "Federalising Bioethics- Science and Technology Revolutionise Our Lives, But Memory, Tradition and Myth Frame our Response" (2005) 83 *Texas L. Rev.* 1663, at 1667-68.

[153] See J. Childress, "An Ethical Defense of Federal Funding for Human Embryonic Stem Cell Research" (2001) 2 *Yale J. Health Policy L. & Ethics* 157. For background to the legal regulation of stem cell research, see K. Doody, "Moral, Ethical, and Legal Controversy Surrounding Pluripotent Stem Cell Research" (2002) 48 *Loyola L. Rev.* 267

[154] L. Skene, "Recent Developments in Stem Cell Research: Social, Ethical and Legal Issues for the Future" (2010) 17 *Ind. J. Global Leg. Stud.* 211, at 211. For an outline of policies in the U.S. regarding embryonic stem cell research, see J. Schechter, "Promoting Human Embryonic Stem Cell Research: A Comparison of Policies in the United States and the United Kingdom and Factors Encouraging Advancement" (2010) 45 *Texas Intl. L. J.* 603.

[155] M. Burchell, "America's Struggle to Develop Stem Cell Research and Therapeutic Cloning: Are The Politics Getting in the Way of Hope?" (2004) 32 *Syracuse J. Int'l L. & Comm.* 133, at 133.

was said to occur on approximately the 14th day of development.[156] The Committee narrowly held that it should be ethically permissible to create embryos solely for research purposes in the U.K..[157] The Human Fertilisation and Embryology (Research Purposes) Regulations 2001 now mandate that embryonic research can be conducted for additional purposes like increasing the knowledge about the development of embryos, and increasing knowledge about serious disease or enable any such knowledge to be applied in developing treatments for serious disease. The House of Commons Science and Technology Committee review of the 1990 Act in 2004/2005 considered that the "gradualist approach" of the Warnock Committee regarding the treatment of the embryo had provided a firm foundation for the legislation, and represented the most ethically sound and pragmatic solution to the issue of embryo research.[158]

A distinction is usually drawn between research on embryos deliberately created for research, and research on those that are a by-product of medically assisted reproduction.[159] The Irish Council for Bioethics argued that the proposal to carry out research on supernumerary embryos does not suggest that embryos should be destroyed merely for research purposes.[160] The Council argued that embryos produced in the context of infertility treatment should be attributed moral value rather than full moral status and they should,

---

[156] Department of Health and Social Security, *Report of the Committee of Inquiry Into Human Fertilisation and Embryology* (Cmnd 9314) (London: The Stationery Office, 1984), at para. [11.30].
[157] *Ibid*, at para. [9] (dissenting opinions)(page 93).
[158] D. Gomez, "The Special Status of the Human Embryo in the Regulation of Assisted Conception and Research in the United Kingdom" (2011) 17 *M. L. J. I.* 6, at 8.
[159] M. Ryan, "Creating Embryos for Research: On Weighing Symbolic Costs", in Paul Lauritzen (ed.), *Cloning and the Future of Human Embryo Research* (Oxford: Oxford University Press, 2001) 50, at 51.
[160] Irish Council for Bioethics, *Ethical, Scientific and Legal Issues Concerning Stem Cell Research* (2008), at 43. For an outline of the issues concerning stem cell research in Ireland, see C. Staunton, "Issues Concerning Embryonic Stem Cell Research in Ireland" (2012) *M. L. J. I.* 38.

therefore, be treated with a level of respect that is commensurate with this value.[161]

The Council argued that the moral value of human embryos that will otherwise remain frozen or be destroyed needs to be balanced against the moral value of human welfare, which is likely to increase with advances in medical science that ameliorate quality of life.[162] The Council considered that while accepting the value of human life demands that we hold significant respect for embryos, it also demands that we consider our obligations to care for humankind more generally.[163] The Council supported the carefully regulated use of supernumerary IVF embryos, that are otherwise destined to be destroyed, for the purpose of embryonic stem cell research aimed at alleviating human suffering. The Council claimed that the intention with which embryos are produced were important when it came to assessing ethical acceptability.[164] The Council did not think that the creation of embryos specifically for research was currently unjustified. However, it was not necessary when supernumerary embryos existed.[165] The Commission on Assisted Human Reproduction also supported the use of surplus embryos for stem cell research under stringent conditions.[166] The Commission recommended that the creation of embryos purely for research should be prohibited.[167]

In Australia, the Prohibition of Human Cloning Act 2002 and the Research Involving Human Embryos Act 2002 regulated the use of excess embryos creation for reproduction purposes. The Acts prohibited the creation of embryos for any reason other than assisted reproduction. A review of the legislation in 2005 suggested that the

---

[161] *Ibid*, at 44.
[162] *Ibid*.
[163] *Ibid*.
[164] *Ibid*, at 47.
[165] *Ibid*, at 54.
[166] *Supra* n. 135, at 58.
[167] *Ibid*.

higher the potential benefits of an activity, the greater the need for ethical objections to be of a high level and widely accepted in order to prevent that activity.[168] While the Committee noted some disagreement about the moral status of pre-implantation embryos, it held that such embryos were entities of some social and ethical significance because of their association with the start of life. The Committee therefore recommended that the prohibition on the creation of an embryo for any purpose apart from ART treatment should continue.[169] It did recommend that fresh embryos deemed medically unsuitable for implantation, and embryos deemed unsuitable following preimplantation genetic diagnosis should be used.[170] The 2006 Amendment permits human somatic cell nuclear transfer to create human embryo clones for research, but continues to prohibit reproductive cloning.[171] The 2010 Guidelines of the Canadian Institutes of Health Research stipulate that embryos cannot be created for research purposes.[172] The embryos used must have been originally created for reproductive purposes.

The limited instances under which research may be carried out on embryos in France also illustrate a respect for the potentiality of embryos.[173] Law No. 2004-800 in 2004 put in place a system of exemptions providing for research on embryos in exceptional

---

[168] Legislation Review Committee, *Legislation Review of the Prohibition of Human Cloning Act 2002 and the Research Involving Human Embryos Act 2002* (Lockhart Review) (December 2005), at xiv. Available online at: http://pandora.nla.gov.au/pan/63190/20060912000/www.lockhartreview.com.au/_files/Legislation%20Review%20Reports%20Full%20Doc-19Dec05.pdf (accessed 27th June 2012).

[169] *Ibid*, at xv. The Committee did support making the creation of hybrid embryos legally permissible.

[170] *Ibid*, at xxiii.

[171] For more detailed background to the Lockhart Review and the 2006 Amendment, see O. Harvey, "Regulating Stem Cell Research and Human Cloning in an Australian Context: The Lockhart Review" (2008) 27 *New Genetics & Society* 33.

[172] Canadian Institutes of Health Research, *Updated Guidelines for Human Pluripotent Stem Cell Research* (June 2010), guideline 4.0.

[173] See Decree no. 2006-126, February 2006 relating to research on embryos and embryonic cells, and Article L. 2151-1 of the Public Health Regulations (prohibits the creation of embryos by human cloning for research purposes).

circumstances and under very strict conditions.[174] In 2011, France passed another law on bioethics (Law No. 2011- 814, July 7 2011), which maintained the prohibition on research in principle but provided for certain exemptions. It provides that only embryos that were conceived in vitro as part of medically assisted reproduction could be used, and that couples had to provide informed consent to the use of the embryos for research after the options of donating the embryos or destroying them were outlined.[175]

The German position on stem cell research is interesting in light of stringent requirements of the Embryo Protection Act 1990. Section 2(1) of the German 1990 Act provides that anyone who disposes of or uses for a purpose not serving its preservation, a human embryo created outside the body, will be punished with possible imprisonment or a fine. The Act is clearly based on the value judgment that the embryo be given the natural chance to develop into a human being and be born.[176] It restricted embryo research to instances where the embryo was not harmed and where a clinical pregnancy remained possible after the research.[177] The limitations on embryo research and general legal restrictions have forced many Germans to travel to other countries in order to receive treatment.[178] The underlying concern with limited use of embryo is surely in recognition that embryos are a unique entity, which cannot be divorced from the protection afforded to human dignity and life under the Basic Law.[179]

---

[174] Law No. 2004-800, 6th August 2004.
[175] See D. Berthiau, "Law, Bioethics and Practice in France: Forging a New Legislative Pact" (2012) 1 *Med. Health Care Phil. (Online First)* (April 2012)
[176] C. Stack, "Embryonic Stem Cell Research According to German and European Law" (2005) 7 *German Law Journal* 625, at 641.
[177] H. M. Beier & J. O. Beckman, "Implications and Consequences of the German Embryo Protection Act" (1991) 6(4) *Human Reproduction* 607, at 607.
[178] See F. Shenfield, J. de Mouzon, G. Pennings et al, "Cross Border Reproductive Care in Six Countries" (2010) 25 (6) *Human Reproduction* 1361, at 1363.
[179] Section 1 of the Stem Cell Act 2003 considered below expressly recognises the state's obligation to protect the right to life and right to human dignity, and the freedom for research.

In November 2001, a report to the German Parliament came to the conclusion that lowering the standards of protection for embryonic life cannot be justified, and it recommended a prohibition on the generation of embryonic stem cells from human embryos in Germany.[180] A second report from the National Ethics Advisory Council advised the federal government that an in-principle ban on the import of embryonic stem cells with restricted exceptions should be adopted.[181] The Stem Cell Act 2003 prohibits the importation into and the use of future embryonic stem cells. However, it permits the importation and use of stem cells that are already created.[182] In 2008, the Bundestag reaffirmed this position and moved the cut-off date for stem cells that could be imported and use to 2007.[183] The extension in the cut-off date was prompted by the fact that the original 2002 cut-off date had lead to a ban on stem cell research in practice, due to the poor quality of the samples dating back before 2002.[184] This position is correctly open to criticism for creating a double standard, where the German legislature will not permit the creation of embryos for stem cell research or the creation of surplus embryos, but will import those created in other jurisdictions and enjoy the benefits of the research.[185]

This outline of the common position in all jurisdictions shows support for embryonic stem cell research in relation to embryos created for human reproduction, but not for the purposeful creation of embryos for research. Dan Brock criticises the so-called "nothing is lost" principle informing the policy of using excess ART embryos for stem cell research. Such a position suggests that these embryos are going to be destroyed anyway, so nothing is lost by using them for

---

[180] T. Heinemann & L. Honnefelder, "Principles of Ethical Decision Making Regarding Embryonic Stem Cell Research in Germany" (2002) 6 *Bioethics* 530, at 533.
[181] *Ibid.*
[182] Gesetz zur Sicherstellung des Embryonenschutzes im Zusammenhang mit Einfuhr und Verwendung menschlicher embryonaler Stammzellen.
[183] Bundestag Printed Papers BT16/7981 (11th April 2008).
[184] J. Taupitz, "The German Stem Cell Act" (2010) 11 *German L. J.* 1373, at 1385.
[185] *Ibid*, at 1380-81.

research.[186] Brock argues that such a position could justify the killing of a person who would die very soon.[187] By contrast, Louis Guenin argues that society has a collective duty of use donated embryos for humanitarian ends when they have been barred from implantation.[188]

The potential value of the embryo and the medical advantages arising from this research will have to weighed up by the legislature in formulating policy on stem cell research. It is suggested that the requirement that unused embryos be donated to stem cell research will afford some respect to the potential of the embryo as it avoids the deliberate creation of more embryos specifically for research. However, one has to recognise that this still results in the destruction of the unused embryos. The policies outlined above to limit the amount of embryos that can be frozen and to encourage donation to third parties are also motivated by the concern that the potential of the embryo be afforded respect.

V. Sale of Gametes and Embryos

Most states permit the destruction of embryos but do not permit the sale of embryos. For example, section 21(2) of the Australian Prohibition of Human Cloning for Reproduction Act 2002 makes it an offence to intentionally receive or offer to receive valuable consideration from another peroson for the supply of a human egg, human sperm or a human embryo. Section 2 of the German Embryo Protection Act 1990 prohibits the sale and purchase of embryos, and any use of the embryos except for the purpose of inducing pregnancy.[189] However, in certain states in the United States,

---

[186] D. Brock, "Creating Embryos for Use in Stem Cell Research" (2010) 38 *J. L. Med. & Ethics* 229, at 232.
[187] *Ibid.*
[188] L. Guenin, *The Morality of Embryo Use* (Cambridge: Cambridge University Press, 2008), at 3.
[189] See also section 7 of Assisted Human Reproduction Act 2004 (Canada), and section 13 Human Assisted Reproductive Technology Act 2004 (New Zealand).

payment for gametes is permitted.[190] The Ethics Committee of the American Society for Reproductive Medicine has suggested that financial compensation of women donating oocytes was justified.[191] The Committee did note that high payments could lead to some donors concealing relevant medical information concerning their health.[192] The Committee also distinguished between compensation based on an assessment of time and inconvenience suffered by the donor, and payment for the gametes themselves.[193]

The Irish Council for Bioethics argued in 2005 that financial inducement could prevent donors who are economically vulnerable from giving a consent that is truly voluntary.[194] It recommended that the human body and its parts should not give rise to financial gain. The Commission on Assisted Human Reproduction also recommended that donors should not be paid, as such financial inducements would commercialise reproduction and could nullify voluntary informed consent.[195]

It is suggested that a prohibition on selling gametes and embryos should be supported in this jurisdiction. This prohibition is justified in light of weight of the right to procreative autonomy engaged in relation to the ability to sell one's embryos or gametes. The justifications for the limitations on this freedom include the promotion of human dignity and the potential of the embryo.

---

[190] Some states like Louisiana and Virginia prohibit the sale of fertilised ovum or fertilised eggs (see S. Terman, "Marketing Motherhood: Rights and Responsibilities of Egg Donors in ART Agreements" (2008) 3 *Nw. J. L. Soc. Pol'y* 167). See also K. Baum, "Golden Eggs: Towards the Rational Regulation of Oocyte Donation" (2001) *B.Y. U. L. Rev.* 107.

[191] Ethics Committee of the American Society of Reproductive Medicine, "Financial Compensation of Oocyte Donors" (2007) 88 *Fertility & Sterility* 306, at 306.

[192] *Ibid.*

[193] *Ibid.*

[194] Irish Council for Bioethics, *Human Biological Material: Recommendations for Collection, Use and Storage in Research* (2005), at 61-62.

[195] *Supra* n. 135, at 46.

Before considering the concerns which may limit the ability to sell gametes, one must consider the extent to which the right to procreative autonomy protects the right to sell one's gametes and the impact of restrictions on the right to sell one's genetic material. The natural assumption that property rights come from a traditional notion of property as meaning exclusive control has already been criticised in this Chapter. Property rights in gametes derive from the promotion of the right to procreative autonomy. The ability to sell one's gametes or embryos is not fundamentally connected to the promotion of self-determination and dignity. The right to procreative autonomy promotes control in determining who can use the material, when it can be used and for what purposes. In balancing the right against the possible limitations, it cannot be argued that the ability to sell one's gametes goes to the heart of one's dignity or self-identity. Therefore, the weight of the right is different from basic questions about implantation of the embryo.

It is submitted that in balancing the extent of the right to procreative autonomy against concerns based on infringement of human dignity. The commodification of gametes leads to a diminished view of the value of such gametes. It would lead to situations like in California and New York where egg brokerage firms would exist.[196] The arguments from the Irish Commission and Ethics Committee of the American Society for Reproductive Medicine about the pressure that the commercialisation of gamete and embryo transfer would place on donors, and the ends they may go to ensure the sale of this material are relevant criteria. There are arguably more fundamental concerns with the practice of selling gametes and embryos.

The permissibility of selling gametes leads to opposition from something connected with, but more fundamental than, commodification. Commodification itself arguably does diminish the

[196] K. Karsjens, "Boutique Egg Donations: A New Form of Racism and Patriarchy" (2002) 5 *De Paul J. Health Care L.* 57, at 65.

intimate and personal aspects of reproduction.[197] It can be argued that a system for buying and selling body parts could transform the attitudes that human beings have towards themselves and other.[198] The commercialisation of both gametes and embryos is also contrary to the protection of human dignity, the inherent equality and value of every human being. Kant's claim that the value of the person is not contingent on their usefulness to others should inform the notion of dignity of all human beings, or Kant also distinguished between dignity and price. Price is a value in exchange: a thing has a price if we can put something else in its place as an equivalent.[199] Dignity or worthiness is that which is "beyond price".[200]

Putting a price on gametes or embryos may be demeaning at a basic level. However, the more fundamental problem with placing a price on embryos or gametes is the calculation of the price. The U.S. Ivy League schools are often targeted by those looking for egg donors willing to pay high prices for "smart" babies. The price of gametes and embryos could possibly vary depending on the intellectual ability or physical attributes of the gamete provider. The notion that parents would value certain children more than others strikes at the heart of basic principles of human dignity.[201] Chapter X will make a similar argument regarding the use of preimplantation genetic diagnosis to screen for disabilities, gender and other characteristics. The state has an interest in prohibiting an activity that discourages pluralism and the basic value of every human being, irrespective of their attributes.

---

[197] R. Rao, "Coercion, Commercialisation and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research" (2006) 21 *Berkeley Tech. L. J.* 1055

[198] S. Munzer, "Kant and Property Rights in Body Parts" (1993) 6 *Can. J. L. & Jurisprudence* 319, at 328.

[199] I. Kant, *Groundwork of the Metaphysics of Morals* (translated by H.J. Paton) (New York: Harper & Row Publishers, 1982), at 102.

[200] S. M. Shell, "Kant's Concept of Human Dignity as a Resource for Bioethics", in President's Council on Bioethics, *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (Washington D.C., March 2008), at 334.

[201] S. Taub. "The Human Egg as "Gift of Life": its Price is on the Rise" (2000) 2 *A.M.A. Journal of Ethics- Virtual Mentor*, available at: http://virtualmentor.ama-assn.org/2000/12/ebyt1-0012.html (accessed 18th July 2012).

VI. Human Cloning

There are two different types of cloning: therapeutic cloning and reproductive cloning. The cloning technique is the same in both instances. Therapeutic cloning clones a person's cells to the blastocyst stage with no intent to transfer the cloned cells and resulting embryo to the uterus, as would occur with reproductive cloning. Reproductive cloning clones a person's cells with the intent of placing the resulting embryo in the uterus in order to bring about the birth of a child with that genome.[202] Embryonic cloning produces a finite number of identical offspring, each having the same genome as the original embryo.[203]

Cloning does offer some tangible advantages, both to individuals seeking to use ARTs and in relations to advancements in the treatment of certain diseases. Therapeutic cloning may in time offer the possibility of cloning organs, and avoid the potential for organ rejection.[204] Reproductive cloning could represent an opportunity for same sex couples or single individuals to have genetically related children, and to reduce the need for third parties.[205] The cloning of embryos created by IVF or GIFT could avoid the necessity of future invasive and expensive egg retrievals from women.[206]

Human cloning is prohibited in all jurisdictions considered in this thesis.[207] The European Convention on Human Rights and

---

[202] J. Robertson, "Two Models of Human Cloning" (1999) 27 *Hofstra L. Rev.* 609, at 611.
[203] J. Daar, "The Prospect of Human Cloning: Improving Nature or Dooming the Species?" (2003) 33 *Seton Hall L. Rev.* 511, at 513.
[204] L. Neal, "Organ Donation, Therapeutic Cloning and Laws of the States" (2012) 26 *Syracuse Sci. & Tech. L. Rep.* 80, at 81.
[205] See E. Aloni, "Cloning and the LGBT Family: Cautious Optimism" (2011) 35 *N.Y.U. Rev. L. & Soc. Change* 1.
[206] E. Price Foley, "The Constitutional Implications of Human Cloning" (2000) 42 *Arizona L. Rev.* 647, at 656.
[207] Section 5(1)(a) of the Canadian Human Reproduction Act 2004 also prohibits the creation of a human clone. For background to this provision, see F. Baylis, "Canada Bans Human Cloning " (2004) 34 *Hastings Center Report* 5. The Australian Prohibition of Human Cloning for Reproduction Act 2002 makes it an offence to place a human embryo clone in the human body, as does the New Zealand Human Assisted Reproductive Technology Act 2004.

Biomedicine 1997 prohibits human cloning in one of its additional protocols. Ireland is not a signatory due its concerns about the status of the embryo under the Convention. The Charter of Fundamental Rights, which is part of the Treaty of Lisbon, prohibits reproductive cloning. The United Nations has issued a non-binding UN Declaration on Human Cloning in 2005 calling for a ban on all forms of human cloning contrary to human dignity. France bans both reproductive and therapeutic cloning.[208] Its legislation deems that human cloning was a "crime against the human species".[209]

The Human Fertilisation and Embryology 1990 Act did not expressly prohibit cloning. The Human Reproductive Cloning Act 2001 makes it a criminal offence to engage or attempt reproductive cloning. Section 1(1) made it an offence to "place in a woman a human embryo which has been created otherwise than by fertilisation". The Human Fertilisation and Embryology Regulations in 2001 permits human cloning for medical research purposes up until their fourteenth day. The United Kingdom is one of the first jurisdictions to approve of therapeutic cloning and ban reproductive cloning. The 2001 Act strictly regulates therapeutic research, and limits research on cloned embryos that are older than fourteen days.[210]

Cloning is not regulated at a federal level in the United States. Federal funding of research does not fund cloning.[211] The states that have regulated cloning all ban reproductive cloning. The Ethics Committee of the American Society for Reproductive Medicine concluded that as long as the safety of reproductive somatic cell nuclear transfer is uncertain, ethical issues have been insufficiently

---

[208] Bioethics Law No. 2004-800. See also Article L 2163-1 Code de la Sante Publique.
[209] See B. Spurgeon, "France bans Reproductive and Therapeutic Cloning" (2004) 329 *B.M.J.* 130.
[210] E. Luk, "The United Kingdom and Germany: Differing Views on Therapeutic Cloning and How the Belgian Resolution Brings them Together" (2006) 10 *Mich. St. U. J. Med. & L.* 523, at 526.
[211] J. Johnson & E. Williams, *Human Cloning: CRS Report for Congress* (2006), at 6.

explored, and infertile couples have alternatives for conception, the use of reproductive cloning by medical professionals does not meet standards of ethical acceptability.[212]

In Ireland the Human Reproduction Bill in 2003 contained only 2 sections which prohibited human cloning. The 2009 Medical Council guidelines introduce a prohibition on human reproductive cloning.[213] The Commission on Assisted Reproduction recommended that reproductive cloning be prohibited.[214] The Commission did argue that therapeutic cloning should be permitted under regulation.[215] The Commission focused on the potential of such technology to generate particular tissue for the treatment of specific diseases. The cloned embryonic stem cells would be genetically identical to the host and would not generate an immune response following transplantation.[216]

John Robertson's libertarian examination of human cloning criticises appeals to human dignity, without specification of the content of this notion, as a compelling justification for overriding procreative liberty.[217] An argument may also be made that cloning may cause psychological harm to future children who may not view themselves as separate and distinct from their DNA source. Timothy Caulfield argues that dignity based concerns about cloning are really concerned with the alleged compromise in the cloned person's autonomy, and that dignity obscures the real issues driving opposition to cloning.[218] This argument is usually countered by the suggestion that the child

---

[212] Ethics Committee of the American Society for Reproductive Medicine, "Human Somatic Cell Nuclear Transfer" (2000) 74(5) *Fertility & Sterility* 873, at 878.
[213] Medical Council, *Guide to Professional Conducts and Ethics for Registered Medical Practitioners* (7th ed.) (2009), at para. [20.4]. See A. A. Sheikh, "The Latest Medical Council Guidelines: New and Improved" (2010) *M.L.J.I.* 62.
[214] *Supra* n. 135, at 60.
[215] *Ibid*, at 62.
[216] *Ibid.*
[217] J. Robertson, "Liberty, Identity and Human Cloning" (1997) 76 *Texas L. Rev.* 1371, at 1410.
[218] T. Caulfield, "Human Cloning Laws, Human Dignity and the Poverty of the Policy Making debate" (2003) *BioMedCentral Medical Ethics* 3, at 3. See a similar argument in D. Bimbacher, "Human Cloning and Human Dignity" (2005) 10 *Reproductive BioMedicine Online* 50, at 54

would not be born at all in such instances, a claim that the primacy of the harm limitation is based on the suggestion that the child would be better off if they were not born.[219] There is a likelihood that the first few attempts to clone a live human will cause harm to that individual.[220] Cloning also raises fears that embryos will be commodified, and progenitors exploited in order to further the technology.

Mary Warnock argues that there are some barriers in science that should not be passed. What marks out these barriers is often a sense of outrage, or a feeling that to permit some practice would be indecent or part of the collapse of civilisation.[221] Opposition to cloning is fundamentally grounded in repugnance at the idea of cloning driven by a sense that cloning is unnatural.[222] Some argue that the knee-jerk condemnations stem for fear or ignorance of the potential of cloning.[223]

This repugnance in itself is insufficient to justify a complete prohibition on cloning. Any limitation of the ability to clone embryos needs to be precisely identified and justified.[224] Just as an unfettered promotion of individual rights may lead to a slippery slope into eugenic practices for example, unchallenged opposition to technologies like cloning will lead down another slippery slope where majority interests limit the rights of minorities based on what is perceived to be natural or right. Such an approach could spill into other matters like access questions for same sex couples or the legal

---

[219] L. Kass, "The Wisdom of Repugnance", in L. Kass & J. Wilson, *The Ethics of Human Cloning* (Washington: AEI Press, 1998) 3, at 32.
[220] R. Taylor, "The Fear of Drawing the Line at Cloning" (2003) 9 *B. U. J. Sci. & Tech. L.* 379, at 400.
[221] M. Warnock, "Do Human Cells have Rights?" (1987) 1 *Bioethics* 1, at 8. See also J. Harris, "Cloning and Human Dignity" (1998) 7 *Cambridge Quarterly of Healthcare Ethics* 163
[222] S. Goldberg, "Cloning Matters: How *Lawrence v Texas* Protects Therapeutic Research" (2004) 4 *Yale J. Health Pol'y & Ethics* 306, at 307.
[223] G. Pence, *Who's Afraid of Human Cloning?* (Lanham: Rowman & Littlefield, 1998), at 2.
[224] J. Wilson, "The Paradox of Cloning", in L. Kass & J. Wilson, *The Ethics of Human Cloning* (Washington: AEI Press, 1998) 61, at 61.

recognition of a third parent in a child's life because that would promote unnatural looking families.

The strongest argument for prohibiting reproductive cloning comes from the French legislation which notes again that cloning is a crime against the human species. It is suggested that the underlying premise in this position is that cloning and genetic essentialism threatens the core value of human dignity. Debate about Kant's notion of dignity in relation to human cloning usually focuses on the question of treating cloned embryos as a means rather than ends in themselves.[225] This thesis has argued that the constitutional notion of dignity promotes the unique and intrinsic worth of all human beings. Equality and non-discrimination legislation is based on the recognition that while persons be have different traits or backgrounds, the fundamental equal value of every human being should not be compromised. While the replication of DNA genes does offer some scientific advantages, the Irish Constitution's promotion of dignity, equality and value of human life are values that outweigh the advantages of cloning. Cloning threatens the distinct individuality of human persons. The Irish Commission on Assisted Reproduction recognised this in noting that at the core of human dignity is the idea that every human being has an intrinsic value, that human life is beyond price.[226] While the danger of commodification can infringe dignity, the move away from embracing the unknown potential of each human being is more troubling.

VII. Multiple Implantation of Embryos

The infamous circumstances surrounding the birth of Nadya Suleman's octuplets in 2009 raised questions about the permissibility

[225] See J. Harris, "'Goodbye Dolly?' The Ethics of Human Cloning" (1997) 23 *J. Med. Ethics* 353, at 354-355, and A. Kahn, "Cloning, Dignity and Ethical Revisionism" (1997) 388 *Nature* 320, at 320.
[226] *Supra* n. 135, at 60.

of multiple implantation of embryos.[227] In this case six embryos were implanted, two of which twinned, resulting in the birth of the octuplets in January 2009. The promotion of the right to procreative autonomy, and property rights in embryos, lead to the suggestion that potential parents should decide how many embryos to implant at one time. It will be suggested that the state has an interest in limiting the number of embryos that can be implanted, based on the promotion of the best interests and well-being of the future children born from the implantation of these embryos.

The increased use of ARTs and higher maternal age at conception have been attributed to the rise in the rate of multiple births in the past decade.[228] It has been standard practice in a number of jurisdictions to implant two or three embryos at a time to guarantee a successful pregnancy. The United States Centre for Disease Control estimated that 30-35 % of all birth related to the use of ARTs are multiple births.[229] The use of hormone therapy, ovulation induction and ovarian stimulation also increase the number of eggs produced in each menstrual cycle.[230] The Human Fertilisation and Embryology Authority's 2002 Annual Report noted that 43% of births through the use of ARTs were multiple births. Gestation periods dramatically decrease with the number of fetuses carried. Multiple births often lead to premature births and low birth weights of the resulting babies. A Report of the U.K.'s Expert Group on Multiple Births after IVF in 2006 noted that most of the health problems of twins can be

---

[227] Two of the embryos twinned in the uterus leading to the birth of eight children. For background to this story, see BBC News, "Octuplets' Mum wanted Huge Family", available at <http://news.bbc.co.uk/2/hi/7873890.stm> (accessed 1st September 2011).

[228] Assisted Reproduction Canada, "Prevention of Multiple Births Associated with Infertility Treatments: A Canadian Framework", available online at: http://www.ahrc-pac.gc.ca/v2/pubs/framework.mult_births_cadre_naiss_mult_eng.php (accessed 26th June 2012).

[229] United States Department of Health- Centre for Disease Control and Prevention, *Assisted Reproductive Technology Report: National Summary* (2007)

[230] T. Glennon, "Choosing One: Resolving the Epidemic of Multiples in Assisted Reproduction" (2010) 55 *Villanova L. Rev.* 147, at 153. See American Society of Reproductive Medicine, *Practice Committee Report: Multiple Pregnancy Associated with Infertility Treatment* (November 2000).

explained by their frequent prematurity and their lower gestational weight.[231] Twins are usually delivered at 35 weeks, with triplets usually delivered at 33 weeks.[232] Twins have a death rate four times higher than singletons, with triplets having a rate six times higher than singletons.[233] The incidence of cerebral palsy also increases with an increasing number of fetuses.[234]

The Human Fertilisation and Embryology Authority has argued that the only way the proportion of singleton births after IVF can be increased is by only transferring one embryo to those women who are most likely to conceive- and are therefore also most at the risk of conceiving twins.[235] The Human Fertilisation and Embryology Authority introduced a two-embryo policy in August 2001. The 8th edition of the Human Fertilisation Embryology Authority's Code of Practice reiterates the position of the 6th and 7th editions in holding that a maximum of two embryos could be transferred to women under the age of 40 with no exceptions, and a maximum of three transferable to women aged 40 and over.[236] The Human Fertilisation and Embryology Authority has set a long-term goal of a maximum multiple birth rate of 10% for each U.K. clinic.[237]

---

[231] P. Braude, *One Child at a Time: Reducing Multiple Births after IVF: Report of the Expert Group on Multiple Births after IVF* (October 2006), at para. [5.1].
[232] N. Elster, "Less is More: The Risks of Multiple Births" (2000) 74(4) *Fertility & Sterility* 617, at 618.
[233] A. Sutcliffe & C. Derom, "Follow-up of Twins: Health, Behaviour, Speech, Language Outcomes and Implications for Parents" (2006) 82 *Early Human Development* 379, at 380
[234] C. Strong, "Too Many Twins, Triplets, Quadruplets, and So On: A Call for New Priorities" (2003) 31 *J. L. Med. & Ethics* 272, at 274.
[235] Human Fertilisation and Embryology Authority, *The Best Possible Start to Life: A Consultation Document on Multiple Births After IVF* (April 2007), at 2.
[236] Guidelines 7.4 and 7.5, Human Fertilisation and Embryology Authority, *Code of Practice- 8th Edition* (2009) (revised in April 2012).
[237] A. Stockage, "Regulation Multiple Birth Pregnancies: Comparing the United Kingdom's Comprehensive Regulatory Scheme with the United States' Progressive Intimate Decision-Making Approach" (2010) 18 *Mich. St. J. Int'l L.* 559, at 572.

The Fertility Society of Australia guidelines require all centres to minimise the incidence of multiple births following IVF.[238] The Australian approach advocates a voluntary shift to single embryo transfer.[239] There is no legislation enforcing these guidelines. In Australia, generally only one or two embryos are transferred.[240] The Fertility Society of Australia's 2010 Code of Practice recommended that no more than one embryo or oocyte is transferred in the first treatment cycle if the woman is under 35 years. The Society also stated that no more than two embryos or oocytes should be transferred in any one treatment cycle in a woman under 40.[241]

The American Society of Reproductive Medicine (ASRM) issued guidelines in 1999 advising that two embryos be implanted for good prognosis patients, and no more than 5 for poor prognosis patients. The factors affecting the favorability of the prognosis include the quality of the embryos created, the success or failure of past IVF, and the availability of excess embryos for cryopreservation.[242] U.S. clinics are not legally bound to follow these guidelines, but they may be audited or risk their membership with the association if the guidelines are not adhered to. The authors of the ASRM guidelines did not follow the clear approach of the Human Fertilisation and Embryology Authority, as they wanted the scope to individualise treatment plans for patients based on their own unique circumstances.[243] These guidelines were revised in 2007 in order to

---

[238] Fertility Society of Australia- Reproductive Technology Accreditation Committee, *Code of Practice for Assisted Reproductive Technology Units* (October 2010). Available online at: http://www.fertilitysociety.com.au/rtac/ (accessed 26th June 2012) .

[239] See G. Chamber, P. Illingworth & E. Sullivan. "Assisted Reproductive Technology: Public Funding and the Voluntary Shift to Single Embryo Transfer in Australia" (2011) 195(1) *Medical Journal of Australia* 594.

[240] Monash IVF, "Multiple Births and IVF in Australia" (November 2006).

[241] *Supra* n. 238, at 11.

[242] S. Sivinski, "Putting Too Many (Fertilised) Eggs in One Basket: Methods of Reducing Multifetal Pregnancies in the United States" (2010) 88 *Texas L. Rev.* 897, at 898.

[243] The Practice Committee of the Society of Assisted Reproductive Technology and American Society of Reproductive Medicine, "Guidelines on the Number of Embryos Transferred" (2004) 82(3) *Fertility & Sterility* 773, at 773. See also A. Ouellette, A. Caplan, K. Carroll et al, "Lessons Across the Pond: Assisted

reduce the number of multiple pregnancies. The guidelines were clearer on the recommended number of embryos that should be in light of the age of the mother and other conditions determining the favorability of pregnancy.[244]

Section 1(1)(2) of the German Embryo Protection Act outlines that the maximum number of eggs to be transferred in one cycle is three.[245] The ban on freezing embryos is actually resulting in higher rates of multiple births in Germany.[246] The desire to avoid the destruction of embryos is prioritised ahead of the well-being of the child. The 2004 Italian legislation also mandates that a maximum of three eggs can be fertilised and forbids the cryopreservation of remaining embryos.[247] The Irish Commission on Assisted Human Reproduction recommended that appropriate guidelines should be put in place regarding the number of embryos to be transferred.[248] The Commission noted the risks involved in multiple births, and suggested that it was medically questionable to transfer more than three embryos to the uterus at any one time.[249]

A review of the regulation of the number of embryos implanted shows a consensus on the need to limit the number in the interests of the health of future children. While the weight of the right to

---

Reproductive Technology in the United Kingdom and the United States" (2005) 31 *Am. J. L. & Med.* 419.

[244] The Practice Committee of the Society of Assisted Reproductive Technology and American Society of Reproductive Medicine, "Guidelines on the Number of Embryos Transferred" (2009) 92(5) *Fertility & Sterility* 1518, at 1518.

[245] The Italian law on assisted reproductive technologies (Law 40 of 2004) similarly requires the implantation of all embryos created with a maximum of three at a time (see J. Robertson, "Protecting Embryos and Burdening Women: Assisted Reproduction in Italy" (2004) 19 *Human Reproduction* 1693, at 1693-4).

[246] See A. Borkenhagen, E. Brahler, H. Kentenich & M. Beutel, "Attitudes of German Infertile Couples Towards Multiple Births and Elective Embryo Transfer" (2007) 22(11) *Human Reproduction* 2833, at 2886. See also M. Ludwig, B. Schopper et al, "Experience with the Elective Transfer of Two Embryos under the Conditions of the German Embryo Protection Law" (2000) 15(2) *Human Reproduction* 319.

[247] Article 14 of Law 40/2004. See V. Fineschi, M. Neri & E. Turillazzi, "The new Italian Law on Assisted Reproduction Technology" (2005) 31 *J. Med. Ethics* 536, at 539.

[248] *Supra* n. 135, at 15.

[249] *Ibid.*

procreative autonomy is extensive in relation to the decision to implant any of the embryos, the infringement of this right is much less in the regulation of the number of embryos implanted. While the freedom to choose the number is curtailed, it is done so in order for parents to responsibly ensure the well-being of their future children

The need to promote the physical well-being of the future children is a permissible limitation on the freedom of parents to choose to implant a number of embryos at once. The potential physical harm to the child justifies state regulation of this. A best interests of the future child approach would raise the argument that the individuals interests of potential parents should be superseded by the need to ensure the health and safe birth weight of newborn babies.[250] Any future policy in Ireland should be able to take into account individual considerations like the quality of the embryos and the circumstances of the patient in determining the appropriate number of embryos to be implanted. The promotion of the physical well-being of the future children should be valued ahead of the unfettered freedom to implant multiple embryos.

VIII. Conclusion

The idea of property rights in the body, gametes and embryos does not come down to the single issue of owning or not owning.[251] The recognition of property rights in the body begins the difficult balance that takes places in questions of control over gametes and embryos. Bunreacht na hÉireann provides the framework and tools for an honest debate regarding the extent of the right to procreative autonomy in basic controls over the fate of gametes and embryos. The Constitution's recognition of the values of dignity and self-

---

[250] See M. Goodwin, "Prosecuting the Womb" (2008) 76 *Geo. Wash. L. Rev.* 1657, at 1661.
[251] B. Bjorkman & S. Hansson, "Bodily Rights and Property Rights" (2006) 32 *J. Med. Ethics* 209, at 212.

determination, the value of potential human life, the common good, and proportionality in limiting constitutional rights all shape debates concerning rights to destroy, sell, or freeze embryos and gametes.

One cannot pick and chose the parts of the Constitution that promote reproductive freedom and ignore other values that may limit that freedom. The value of potential life under the Constitution should be recognised. This value must be weighed against the right to procreative autonomy. This Chapter has tried to outline practical application of the balance between these competing interests. The right to procreative autonomy cannot be segregated from these ethical considerations, and will have to yield to concerns about the promotion of the common good where appropriate. These questions and scenarios present difficult choices for any legislature, and for society as a whole. There are arguments that justify different positions to those taken in this Chapter. However, in balancing the importance of the right to procreative autonomy against the limitations on this right, this thesis tries to examine the real impact of these conflicting interests.

Chapter VI: Custody Disputes over Frozen Embryos: The Right to be a Parent and the Right not to be A Parent

This chapter examines the positive and negative aspects of the right to procreative autonomy by considering the treatment of the right in custody disputes over genetically related frozen embryos. Such cases personify the clash between the right to be a parent, and the right to avoid parenthood. It will be suggested that the use of rights language in these disputes may both promote and prevent an honest examination of the interests of all relevant parties. This is due to the usual grounding of the right to procreative autonomy in privacy rights. The promotion of a dignity-based, rather than privacy-based, right to procreative autonomy under Irish law will place equal emphasis on each of the conflicting rights. The current approach in most jurisdictions is to promote the rights of the party seeking to avoid parenthood. The constitutional value of the embryo as potential life, as outlined in Chapter IV, will also be a factor in determining the outcome of these cases under Irish law.

Part I will consider the Irish High Court decision in *M.R. v T.R.*[1] which did not consider the role of the notion of a right to procreative autonomy in determining such disputes at all. Part II will examine the respective decisions of the English courts and the European Court of Human Rights in *Evans* v. *Amicus Healthcare Ltd*,[2] and *Evans* v. *United Kingdom*[3] in relation to the right to procreative autonomy under the Human Fertilisation and Embryology Act 1990 ("the 1990 Act") and Article 8 of the European Convention on Human Rights. These judgments illustrate a prioritisation of negative freedom, the freedom not to be interfered with.

---

[1] [2006] I.E.H.C. 359.
[2] [2004] 2 W.L.R. 713 (HC); [2005] Fam. 1 (CA) [hereinafter *Evans*].
[3] (2006) 43 E.H.R.R. 21 (Initial Chamber); (2008) 46 E.H.R.R. 34 (Grand Chamber).

Part III examines the Canadian case of *C.C. v C.W.*[4] which is unique in that it supported the claim of the party seeking to use the embryos. This case highlights the problem with an approach that ignores the interests of the party seeking to avoid parenthood. Here the courts used a flawed notion of property rights to determine the case. Part IV examines the interpretations of procreative autonomy in U.S. case law concerning frozen embryos. The U.S. approach seems more balanced that that of Canada or the United Kingdom as it recognises the interests of both parties when determining such disputes. However, in practice, the right of the party seeking to avoid procreation normally prevails. The constitutional right to procreative autonomy advocated in this thesis would change the balance between competing interests in such cases in two ways. In the first instance, the focus on dignity rather than privacy will move the right away from its naturally negative non-interference foundations. Secondly, respect for the potential of the embryos would be a factor taken into account by the courts and / or legislature. The outcome of future cases following this balancing of competing interests may differ in some instances to the usual outcome in this area. The primary advantage of this approach is that it will illustrate the equal importance of the positive right, and force honest examination of the weight of both rights.

In this regard, Part V will query the distinctions and assumptions determining the balance between the rights to become, and not to become, a parent.[5] Part VI argues that reconsideration of the foundations of the right to procreative autonomy in dignity provides a more complete account of this complex clash between different rights. This section will also consider the role of the potential of the embryo as a factor determining these disputes. It is not suggested that a dignity-based assessment provides clarity to courts as to whose rights are prioritised when such disputes arise. Such an approach

[4] [2005] A.B.Q.B. 290.

[5] For an outline of the right not to procreate, see E. Sutherland, "Is There a Right not to Procreate?", in S. McLean (ed.), *First Do No Harm: Law, Ethics, and Healthcare* (Aldershot: Ashgate, 2006) 319.

does, however, lead to a greater appreciation of the similar importance of both rights, something that privacy based autonomy rights fails to afford. Certainty is arguably impossible when such fundamental and opposing interests are under consideration.

I. The Absence of Individual Rights Discourse in Irish Law

The *Roche* decisions in the High Court and Supreme Court focused on the possible constitutional rights of the embryo rather than the rights of the couple in relation to those embryos. McGovern J in the High Court decision of *M.R. v T.R.* made some comments in relation to the rights of the progenitors that warrant further examination. In a concluding paragraph marked "Other Issues", McGovern J asked if the potential mother had any recourse to Article 41 of the Constitution in her attempts to implant the embryos.[6] The High Court interpreted *McGee v Attorney General*[7] as affording a right to a married couple to privacy and a right of autonomy in making decisions regarding their family.[8] McGovern J held that because the embryos were not "unborn" within the meaning of Article 40.3.3 of the Constitution, the question of rights under Article 41 of the Constitution did not arise.[9]

The High Court seems to be suggesting that Article 41 is only applicable if the embryos have a right to life under the Constitution. The Article 41 argument is rejected because the rights of procreative autonomy as interpreted in *McGee* are thought to apply only to a married couple *and* their children. This position ignores the context of *McGee*, which considered the constitutionality of a ban on the sale of contraceptives in relation to a married couple who already had a number of children, and wanted to avoid future pregnancies. The parties in *Roche* were also married (but going through a divorce),

---

[6] *Supra* n. 1, at 24.
[7] [1974] I.R. 284.
[8] *Supra* n. 1, at 24
[9] *Ibid.*

they had two children already and disagreed about the fate of their frozen embryos. The focus of the court solely on the status of the embryo in determining the applicability of Article 41 is arguably not correct. It would be more accurate to argue that *McGee* could be distinguished on the basis that it involved a married couple who were not separating, and, more importantly, it involved a couple who agreed that they wanted to use contraception. A martial right to privacy would therefore protect the joint decision of both parties in relation to procreation. It cannot accommodate conflicting opinions within a marriage. An individual right to procreative autonomy can accurately engage with the conflict at the heart of these cases.

The focus of the court on whether Mr. Roche agreed to the use of the embryos by his wife does implicitly show support for the contemporaneous consent model advocated by the English courts in *Evans*. The High Court and Supreme Court focus on the husband's consent but fail to simultaneously question whether Mrs. Roche consented to the destruction of the embryos in the event that the parties disagreed about the future use of the embryos. While McGovern J's brief discussion of Article 41 ignores any aspect of the individual right to procreative autonomy, the implicit argument coming from the focus of both courts' decisions is that implantation should only occur on the wishes of both parties, that embryos should not be used in instances where one party does not want to be a parent. The limited treatment of the rights of the individuals was overshadowed by the difficult questions concerning the status of the embryo. The constitutional rights supported in this thesis would have equipped the courts to examine the true conflict at the heart of the dispute

II. *Evans* v *United Kingdom*- The Negative Right to Avoid Parenthood

The *Evans* jurisprudence in the English and European courts clearly illustrates the current primacy of the rights of the party seeking to avoid parenthood. The applicant before the European Court of Human Rights, Natalie Evans, and her fiancé, Howard Johnston, began attending a fertility treatment clinic in 2001. Cancerous tumors were discovered in the applicant's ovaries at this time. A cycle of IVF treatment proved successful and eleven eggs were harvested before her ovaries were removed. Ms. Evans raised the possibility of freezing her eggs as opposed to freezing fertilised embryos. Mr. Johnston reassured her that they were not going to split up and that he wanted to be the father of her children.[10] The couple consented under the Human Fertilisation and Embryology Act 1990 to the creation, storage and use of the embryos in question. The relationship broke down in 2002, and Howard Johnston withdrew his consent to any further use of the embryos. Ms. Evans sought an injunction requiring the restoration of Mr. Johnston's consent to their use. Paragraph 6(3) of Schedule 3 of the 1990 Act permitted no exception to the required consent of both parties to the "use" of the embryos. The key question for the court was whether the requirement of "treatment together", found throughout the 1990 Act, demanded mutual consent beyond creation of the embryos, and up to their implantation.

Both Wall J in the High Court,[11] and the Court of Appeal[12] held that the clear policy of the 1990 Act was to ensure the continuing consent of both parties from the commencement of treatment up to the point of implantation of the embryos. It was suggested that any waiver of this principle would be contrary to the wishes of Parliament. Wall J accepted that the twin pillars of the 1990 Act were effective consent

[10] Ms. Evans's estoppel arguments were rejected in the English courts.
[11] *Supra* n. 2, at 746 (HC).
[12] [2005] Fam 1, at paras. [10-13] (CA).

to treatment and the interests of the unborn child.[13] The learned judge held that as section 28(3) of the 1990 Act made it clear that the critical moment that determined whether the couple was treated together was the moment of transfer into the womb, Schedule 3 contained the same requirement. The court recognised that Ms. Evans' right to respect for private life under Article 8(1) of the European Convention was interfered with, but held that this interference was justified under Article 8(2).[14] The clear or bright line rule under the 1990 Act was said to protect the procreative autonomy of all parties, in affording each a veto over treatment.[15] Thorpe and Sedley L.JJ. in the Court of Appeal strictly interpreted the requirement of mutual consent in the interests of clarity and certainty.[16] Arden L.J. agreed with the interpretation of "treatment together", as meaning treatment up to implantation. The learned judge recognised the importance of procreative freedom, but noted that the embryos in question were not Ms. Evans' alone.[17]

The Grand Chamber of the European Court of Human Rights, like the initial Chamber, rejected the applicant's argument that the 1990 Act violated her right to respect for private life under Article 8. Both chambers held that "private life" under Article 8(1) encompassed aspects of an individual's physical and social identity. This was said to include the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world.[18] The right to respect for private life was said to include the right to respect for both the decisions to become, and not to become, a parent.[19] The question for both chambers was the

---

[13] *Supra* n. 2, at 768 (HC).
[14] *Ibid*, at 755 (HC).
[15] *Ibid*, at 769 (HC).
[16] *Supra* n. 2, at para. [37] (CA). Thorpe and Sedley L.J.J. were guided by the the decision of *In Re R (A Child) (IVF: Paternity of Child)* [2003] Fam 129, which construed the Act as requiring mutual consent at implantation (*supra* n. 12, at para. [38] (CA)).
[17] *Ibid*, at para. [90] (CA).
[18] *Supra* n. 3, at para. [57]. The Grand Chamber majority made the same observation (*supra* n. 2, at para. [71]).
[19] *Ibid*.

balance between the competing rights of Natalie Evans and Howard Johnston. The applicant recognised that the state enjoyed a certain margin of appreciation in deciding whether or not it was in the public interest to legislate in the field of artificial conception.[20] It was argued on behalf of the applicant that the rules of consent in the 1990 Act, permitting no exception in hard cases like the one at issue, were unfair and disproportionate.

Both Chamber majorities claimed that the applicant's rights placed positive rather than negative obligations on the state.[21] It was suggested that this categorisation was not important, as in both instances a fair balance had to be struck between the competing interests. The majority decisions afforded a wide margin of appreciation to the United Kingdom, due to the sensitivity of the matter and the lack of European consensus on the issue.[22] The Grand Chamber claimed that the central question under Article 8 was not whether different legislation would have struck a fairer balance, but whether, in striking the *balance* at the point at which it did, Parliament exceeded its margin of appreciation.[23]

The court's consideration of the conflicting nature of the each parties' rights illustrates the inadequacy of the overall decision to uphold the absolute bright-line rule in the 1990 Act. The initial Chamber held that the rights of male donors and their female partners must be treated equally for the purposes of Article 8.[24] However, the 1990 Act and the decisions of both chambers would suggest that certain rights may be afforded less protection. The Grand Chamber noted the English Court of Appeal's difficulty with comparing the effect on Mr. Johnston of being forced to become the father of the applicant's child, and the effect on the applicant of being denied the chance to have

---

[20] *Ibid*, at para. [50] (initial Chamber).
[21] *Ibid*, at para. [64] (GC).
[22] *Supra*, n. 3, at para. [62]. See the same position in the Grand Chamber (*supra* n. 3, at para. [69]).
[23] *Ibid*, at para. [68] (initial Chamber).
[24] *Ibid*, at para. [66].

genetically-related offspring.[25] The majority felt this difficulty was also reflected in the range of views expressed by two panels in the *Nachmani* decision of Israeli Supreme Court[26] and in United States case law.[27] The Court continuously noted the need for fair balance yet upheld a one-sided rule. The Grand Chamber held that respect for human dignity and free will, as well as a desire to ensure equality between the parties to IVF treatment, informed the legislation's absolute veto over future use.[28] One must question the approach of the Grand Chamber which recognises the irreconcilability of these two rights but solely protects the rights of Howard Johnston.

Judges Traja and Mijovic dissented in the initial Chamber decision. While recognising the right not to be forced to procreate, the minority held that the applicant's right to have a child through IVF was also worthy of protection. The absolute power of the party opposing procreation to withdraw consent was found to strip the other party of all autonomy over their genetic material.[29] It was suggested that "a legislative scheme which negate[d] the very core of the applicant's right [was] unacceptable under the Convention".[30] The dissenting opinion in the Grand Chamber held that the applicant's right to decide to become a genetically related parent weighed heavier than Mr. Johnston's right not to become a parent in the present case.[31] The minority opposed the *absolute* nature of the bright line rule, noting that the majority's approach eradicated the applicant's ability to have genetically related children.[32] The learned judges acknowledged that states had a wide margin of appreciation when enacting legislation

---

[25] *Ibid*, at para. [73]. It is interesting to use the term interests instead of rights.
[26] A.H. 2401/95, *Nachmani* v. *Nachmani*, 50(4) P.D. 661 (Supreme Court decision).
[27] *Supra* n. 3, at para. [80] (GC).
[28] *Ibid*, at para. [90].
[29] *Supra* n. 3 , at para [O-I2] (initial Chamber).
[30] *Ibid*, at para. [O-I3].
[31] See dissenting opinion of Judges Turmen, Tsatsa-Nikolovska, Spielmann and Ziemele (*supra* n. 3, at para. [O-I1-15]). The minority held that the question of international consensus was important in assessing the different *means* of protecting such rights, but the result should always be that these rights, one way or another, are protected.
[32] *Ibid*.

governing the use of IVF. However, the minority held that the margin of appreciation should not prevent the court from exercising its control, in particular in ensuring a fair balance between all competing interests at the domestic level.[33] A comprehensive rights analysis demands that such margins be scrutinised and the rationale for domestic legislation clearly considered.

The Human Fertilisation and Embryology Act 2008 has removed the section 15(3) reference to the child's need for a father, in light of the Civil Partnership Act 2004. However, the bright line rule in Schedule 3, as interpreted by the English courts in *Evans*, remains. The Department of Health's review of the 1990 Act in 2006 rejected any possible change in the requirement of both consents up to implantation.[34] The report claimed the government would not change the law on this point in order to clearly favour the rights of one party over the other. This statement denies the fact that the current position as interpreted by the English courts and the European Court of Human Rights clearly favours the rights of the party opposing procreation.

A right to procreative autonomy based on dignity would not automatically prioritise the negative right not to become a parent, which is the natural extension of the right to privacy, the right to be free from interference. Dignity as the basis of the constitutional right to procreative autonomy will appreciate the interests of both parties in these situations. In this way, such bright line positions that automatically protect one party over the other would not be permissible.

---

[33] *Ibid*, at para. [O-I12]. For further analysis on the margin of appreciation, see P. Mahoney, "Marvelous Richness of Diversity or Invidious Cultural Relativism?" (1998) 19 *H.R.L.J.* 1; M. Hutchinson, "The Margin of Appreciation in the European Court of Human Rights" (1999) 48 *I.C.L.Q.* 638, and C. Ovey, "The Margin of Appreciation and Article 8 of the Convention" (1998) 19 *H.R.L.J.* 10.

[34] *Review of the Human Fertilisation and Embryology Act- Proposals for Revised Legislation (including establishment of the Regulatory Authority for Tissue and Embryos)* presented to Parliament by the Secretary of State for Health (December 2006), at para. [2.26].

III. *C.C. v A.W.*- From One Extreme in the U.K. to the Other in Canada

In Canada, the case of *C.C. v A.W.* from Alberta concerned custody and access rights of a sperm donor in relation to his genetic offspring, as well as the rights of an intended mother to four frozen embryos in storage.[35] The sperm donor was the former boyfriend of the mother and donated sperm to her in 1998 in order to help C.C. become pregnant. C.C. gave birth to twins using some of the resulting embryos.[36]

The primary focus of Sanderman J's judgment in the Alberta Court of Queen's Bench was on the access and custody rights of the twins born already rather than custody or rights over the frozen embryos. The court's determination that A.W. was a sperm donor is important in appreciating the precedential value of this case. However, the case illustrates the difficulty with automatically prioritising the rights of the party seek to use the embryos. A.W. refused to consent to the release of the embryos to C.C. as he did not want her to use them in another attempt to become pregnant. The court recognised that this position was understandable in light of the problems experienced by the donor in relation to custody and access of the children already born using the embryos.[37] However, the court held that although A.W. provided the sperm as an unqualified gift to his friend C.C. there was no relationship of interdependence between the parties. Sanderman J held that the embryos remained the property of C.C., which could be used as she saw fit. In light of the arguments made in Chapter V regarding the utility of dignity based property rights in embryos, a number of criticisms should be made regarding this decision.

---

[35] [2005] A.B.Q.B. 290.
[36] *Ibid*, at paras. [1-2].
[37] *Ibid*, at para. [19].

The court equates property rights in the embryos with absolute dominion or control over their use. Such a finding is again based on the categorisation of A.W. as a sperm donor. The notion of property rights advocated in this thesis would not afford such unfettered control to one gamete provider. In contrast to other cases considered in this Chapter, this decision not only promotes the interest of the party seeking to use the embryos, it completely rejects the suggestion that the objecting party has any rights or interests in relation to the embryos. While the court's focus on the fact that the sperm was donated as a gift may differentiate the case at hand and cases like *Evans* or *Davis*, the court ignores the fact that C.C. successfully sought child support for the two children already born from this 'gift' from A.W.[38] The court also ignores the possible psychological effect on A.W. of the birth of any other genetically related children. This impact could not be avoided in light of the custody and access rights of A.W. in relation to the twins. A.W. was not a detached sperm donor with no obligations or access to the children.

The argument has been recently made by a number of commentators that the U.S. balancing test should be modified to consider factors other than biological connection to the embryos. This could negate the prioritisation of the right not to procreate.[39] Ellen Waldman has argued that the social notion of parenthood, and especially fatherhood, negates the assumption that a biological tie to an embryo precipitates strong psychological ties.[40] Waldman argues that parental attachment is not biologically rooted, but rather based on variables like relationship with the other parent and residential proximity.[41] This assertion however diminishes the right to procreative autonomy

---

[38] *Ibid*, at para. [7].
[39] J. Lambert, "Developing a Legal Framework for Resolving Disputes Between "Adoptive Parents" of Frozen Embryos A Comparison to Resolutions of Divorce Disputes Between Progenitors" (2008) 49 *B. C. L. Rev.* 529, at 567.
[40] E. Waldman, "The Parent Trap: Uncovering the Myth of 'Coerced Parenthood' in Frozen Embryo Disputes" (2004) 53 *Am. U. L. Rev.* 1021, at 1027.
[41] *Ibid*, at 1041. See also A. Upchurch, "The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process" (2005) 33 *Fla. St. U. L. Rev.* 395, at 413.

of the person seeking to avoid the right to procreation, the same way that the current approach neglects the rights of the party seeking to utilise the embryos in order to become parent. It is therefore suggested that consideration of the true meaning of freedom, and the real basis of the right to procreative autonomy will enhance appreciation of the conflicting parties' interests. While it should again be noted that the custody of the frozen embryos was only considered in a few paragraphs at the end of the judgment, this case shows that protecting the wishes of the party seeking to use the embryos without regard to the rights of the party seeking the avoid procreation is problematic. It is suggested that the right to procreative autonomy based on dignity permits greater understanding of the complex rights at issue.

IV. U.S. Case Law- Empty Lip Service to a Balanced Approach?

U.S. case law initially seems to offer a more balanced approach to these disputes than the 1990 Act. However, the true extent of this flexibility must be investigated. As noted in earlier chapters, the right to procreative autonomy in U.S. constitutional law is primarily an extension of the right to privacy. The sole reliance on this right as the foundation for the right to procreative autonomy has tilted any practical balance in favour of the party seeking to avoid procreation.[42]

The main decision concerning the disposition of embryos in these circumstances is *Davis v. Davis*.[43] In this case, Mary Sue Davis initially wanted to implant the respective embryos herself, while her

---

[42] For comprehensive analysis of the different approaches of U.S. states to this matter, see K. Lyon, "Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce" (2000) 21 *Whittier L. Rev.* 695; K. La Gatta, "The Frozen Embryo Debate Heats Up: A Call for Federal Regulation and Legislation" (2002) *4 Fla. Coastal L. J.* 99; and K. Poste Gunnison, "Poaching the Eggs: Courts and the Custody Battles over Frozen Embryos" (2006) 8 *J. L. & Fam. Studies* 275.

[43] 842 S.W. 2d 588 (1992) (Tenn.). For detailed discussion of the case see J. Carow, "*Davis v Davis*: An Inconsistent Excpetion to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology" (1994) 43 *De Paul L. Rev.* 523.

husband, Junior, did not want to parent his former wife's child. The Supreme Court of Tennessee found that there was no agreement between the parties in relation to the embryos in the event of divorce. The court noted that the right to procreative autonomy was composed of two rights of equal significance- the right to procreate and the right to avoid procreation.[44]

The court outlined a three part test in determining the fate of the preembryos.[45] In the first instance, the court must honour the preferences of the progenitors. The second consideration provides that if the wishes of the parties are unclear or conflicting, then the court should give effect to any prior agreement of the parties. Finally, if there is no relevant agreement, the court must balance the relative interests of both parties. The court considered that the interests of the party wishing to avoid procreation should normally prevail. This position was based on the assumption that the other party had a reasonable possibility of achieving parenthood by means other than the use of the preembryos in question.[46] The Tennessee Supreme Court expressly stated that this approach did not contemplate the creation of an automatic veto.[47]

By the time the case was heard by the Tennessee Supreme Court, Mary Sue no longer wanted to implant the preembryos. She wanted to donate the preembryos to other infertile couples. This change in circumstances denied the court the opportunity of weighing the "closer" interests of a party opposed to procreation with those of an

---

[44] *Ibid*, at 601.
[45] *Ibid*, at 604. There is a questionable medical distinction between preembryos and embryos. Medical experts in the *Davis* decision outlined conflicting opinions about whether the four – eight cell entities should be termed preembryos or embryos (*ibid*, at 593). The term preembryo is also used in commentary to denote a fertilised egg or zygote that has not yet been implanted into a woman's uterus (see M. Zizzi, "The Preembryo Prenup: A Proposed Pennsylvania Statute Adopting A Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos" (2012) 21 *Widener L. J.* 391).
[46] *Ibid.*
[47] *Ibid.*

individual seeking to use the preembryos themselves.[48] The court suggested that "there [could] be no easy answer to the question" at issue.[49] It preferred to weigh the interests of each party in order to resolve the matter in a fair and responsible manner.[50] The court suggested that as a default rule, the scale should be tipped in favour of the party wishing to avoid procreation.[51]

In *Kass v. Kass*,[52] Maureen Kass wanted to use the preembryos herself, while her estranged husband, Steven, opposed this. It is interesting to note the difference of opinion within the intermediate appellate division concerning the appropriate balancing test between the opposing rights.[53] The plurality of the court found the pre-existing agreement in question sufficiently clear and therefore enforceable.[54] The concurring opinion disagreed with the proposed balancing test in *Davis*.[55] They considered that an objecting party in a frozen embryo dispute should have an automatic veto over a party wishing to use the embryos in a post marital attempt to become pregnant, save in the most exceptional circumstances.[56] Justice Miller in his dissenting opinion favoured the use of a fact-sensitive analysis in supplementing the relevant balancing test.[57] The Court of Appeals decided the case on the executed agreement between the parties, which required the disposal of the preembryos in the event that the parties disagreed as to the fate of the preembryos. The court did not consider the contrasting tests advocated by the intermediate appellate court.[58]

---

[48] *Ibid*, at 603-604.
[49] *Ibid*, at 591.
[50] *Ibid*.
[51] P. Walter, "His, Hers, or Theirs- Custody, Control and Contracts: Allocating Decisional Authority over Frozen Embryos" (1999) 29 *Seton Hall L. Rev.* 937, at 956.
[52] 696 N.E. 2d 174 (1998) (N.Y.).
[53] 663 N.Y.S. 2d 581 (1997), at 586.
[54] *Ibid*, at 587.
[55] *Ibid*, at 592.
[56] *Ibid*.
[57] *Ibid*, at 594.
[58] J.L. Medenwald, "A 'Frozen exception' for the Frozen Embryo: The *Davis* 'Reasonable Alternatives Exception'" (2001) *Ind. L. J.* 507, at 511.

In *A.Z. v. B.Z.*, the Massachusetts Supreme Court refused to grant an order that would force one party to become a parent against his or her will.[59] The court felt it contrary to public policy to compel a party to unwillingly procreate.[60] *A.Z.* therefore seems to oppose the creation of an exception where no other reasonable alternative is available to the party. However, the case of *A.Z.* may be distinguishable on its own facts. Here the party claiming a right to procreate already had two genetically related children.[61] The court focused on the enforceability of the contract on the basis of a public policy against forcing parties into marital or family relationships.[62] The court cited *Davis* and *Kass*, and while it expressly stated it was not approving these authorities,[63] it did not expressly disapprove of the balancing test in *Davis*. The court did not consider any authorities that suggest the existence of such rights.

The New Jersey Superior Court in *J.B. v. M.B.* stated that the wishes of a party wishing to avoid parenthood should "ordinarily prevail".[64] The court did not offer detailed argument for its prioritisation of the rights of the party wishing to avoid procreation.[65] Judge D'Annunzio balanced the wife's right not to become a parent against the husband's right to procreate. He held that "recognition and enforcement of the wife's right would not seriously impair the husband's right to procreate".[66] This claim was based on the recognition that while the husband's right to procreate using the wife's eggs was terminated, he still had the capacity to father children. The Supreme Court of New Jersey expressly supported the

---

[59] 25 N.E. 2d 1051 (Mass. 2000), at 1059.
[60] See D. Steinberg, "Divergent Conception: Procreational Rights and Disputes over the Fate of Frozen Embryos" (1998) 7 *B.U. Public Interest L. J.* 315.
[61] S. Kaplan, "From A to Z: An Analysis of Massachusetts' Approach to the Enforceability of Cryopreserved Pre-Embryo Dispositional Agreements" (2001) *B.U.L.R.* 1093, at 1115.
[62] *Supra* n. 59, at 1058.
[63] *Ibid*, at 1056.
[64] 783 A. 2d 707 (N.J. 2001), at 719.
[65] M. Stasser, "You Take the Embryos But I Get the House (And the Business):Recent Trends in Awards Involving Embryos Upon Divorce" (2009) 57 *Buff. L. Rev.* 1159, at 1200.
[66] *Supra* n. 64, at 717.

test of the Tennessee Supreme Court in *Davis*.[67] Five out of the seven judges did not consider what their decision would be in the event that the party wishing to procreate had no other physiological means of doing so.[68] The court did not outline how the infertility of a party would weigh in the balancing of interests.[69] However, Judges Verniero and Zazzali, in a separate concurring opinion, indicated that in such a situation the wishes of the party seeking to procreate ought to prevail.[70] They did not consider that adoption should be construed as an alternative to procreation.

More recent state decisions like *Roman v Roman*[71] in Texas, *Litowitz v Litowitz*[72] in Washington, and *Dahl v Angle*[73] in Oregon focus on the enforceability of disposition agreements entered into before IVF or on divorce. Chapter VIII will consider these cases in greater detail, but it should be noted that disposition agreements are usually enforced when the agreements in question support the wishes of the party seeking to avoid procreation.

One must question the utility of the exception to the general rule that the wishes of the party seeking to avoid procreation should prevail.[74] The *Davis* court did not declare that such a situation would automatically tip the scale in favour of the party desiring parenthood, rather that countervailing circumstances would be considered by the court.[75] The courts' consideration of other reasonable means of

---

[67] *Ibid*, at 716.
[68] *Ibid*, at 720.
[69] L. Makar, "Procreational Autonomy as a Fundamental Attribute of the Privacy Rights- Where the Right to Procreate and the Right not to Procreate are in Direct Conflict over the Disposition of Frozen Embryos, ordinarily, the Party Wishing to Avoid Procreation Should Prevail" (2002) 12 *Seton Hall Const. L. J.* 681, at 708.
[70] *Supra* n. 64, at 720.
[71] 193 S.W. 3d 40 (2006). See also A. Walker, "His, Hers or Ours? Who Has the Right to Determine the Disposition of Frozen Embryos after Separation or Divorce?" (2008) 16 *Buff. Women's L. J.* 39.
[72] 48 P. 3d 261 (Wash 2002).
[73] 194 P. 3d 834 (2008).
[74] J. Mariguano Dehmel, "To Have or not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?" (1995) 27 *Conn. L. Rev.* 1377, at 1403.
[75] *Supra* n. 43, at 604.

becoming a parent have been suggested to include all genetic and non-biological alternatives. For example, John Robertson has argued that if woman has reasonable opportunity to attempt IVF again with a new partner, they should not be awarded custody over embryos.[76] The U.S. approach to these disputes seems more balanced than the equivalent regulation in the U.K.. The test attempts to appreciate the interests of both parties, rather than automatically determining that the withdrawal of consent to treatment together is definitive. However, a party seeking to promote the right to procreate has never been successful. One could argue that this is the result of the weak factual circumstances before the courts. On the other hand, it must be recognised that the U.S. jurisprudence is informed by similar public policy considerations and constructions of the liberties of both parties. These influences will be considered in the subsequent sections.

V. The Unequal Equality inherent in the Prioritisation of Negative Freedom

Individuals who claim they have a right not to procreate and a right not to be forced to become parents consider that allowing the other progenitor to procreate will deprive them of control over a highly significant interest.[77] Many would argue that to force someone into genetic parenthood would violate a vital individual freedom.[78] However, it also must be noted that the alternative denial or deprivation of the ability to reproduce prevents individuals experiencing something central to human identity and dignity.[79]

---

[76] J. Robertson, "Prior Agreements for Disposition of Frozen Embryos" (1990) 51 *Ohio St. L.J.* 407, at 419.
[77] A. Reichmann Schiff, "Arising from the Dead: Challenges of Posthumous Procreation" (1997) 75 *N. C. L. Rev.* 901, at 942.
[78] M. Lagod & P. Martin, "The Human Pre-embryo, the Progenitors and the State: Toward a Dynamic Theory of Status, Rights and Research Policy" (1990) 5 *High Tech. L.J.* 257, at 257.
[79] J. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press, 1994), at 24.

The purpose of this section is to examine the conceptions of autonomy and liberty considered in these cases in an attempt to highlight the justifications for prioritising the right not to procreate. Jeremy Waldron asks if distinctions between different liberties arise because different liberties engage different values, so that it is not liberty per se that is really important but rather these different values.[80] The framing of the right not to procreate as a negative right against state interference, and the value placed on such a construction, will be examined. The prioritisation of negative liberty or the freedom from interference by others is the true rationale for the primacy of the right not to procreate in frozen embryo disputes.

Some neutral suggestions for dealing with these disputes still revert back to the primacy to the right to avoid parenthood. For example, Lee and Susan Silver suggest that the right to procreate and the right not to procreate cannot be held to be equal in every circumstance. Rather, in the case of frozen embryos, a court should consider which party has a constitutional right that, once lost, can never be regained.[81] They claim that this will always be true for the party who wants to exercise his or her constitutional right not to procreate.[82] This test suggests that it is only where the competing rights or interests are irrevocable, as in when the individual seeking to use embryos has no other means of becoming a parent, that the right to procreate prevails. Silver and Silver suggest that, in such a situation, a party opposing procreation on financial grounds could simply be converted to the status of sperm or egg donor.[83] However, they go on to suggest that if a party holds philosophical or psychological objections to parenthood, then simple conversion of status is not the answer. This position suggests that even where both rights are irrevocable, the right of the party opposing procreation would prevail.

---

[80] J. Waldron, "Autonomy and Perfectionism in Raz's *Morality of Freedom*" (1989) 62 *S. Cal. L. Rev.* 1097, at 1103-04.
[81] L. Silver & S. Silver, "Confused Heritage and the Absurdity of Genetic Ownership" (1998) 11 *Harv. J L. & Tech.* 593, at 614.
[82] *Ibid.*
[83] *Ibid*, at 615.

Carl Coleman also claims we must start with the premise that decisions about the disposition of frozen embryos belong to the couple that created the embryo, with each partner entitled to an equal say in how the embryos should be disposed. Coleman claims that the primacy of mutual consent is a better approach than giving one partner greater decision-making rights.[84] However, this claim ignores the fact that the requirement of mutual consent and the veto power of a party opposing procreation do afford one party greater decision-making powers. Coleman focuses on the undesirable consequences and "burdens" of forcing an individual to become parent.[85] The interests of those seeking to become parent are also considered. However, Coleman suggests that because the embryos are the products of the couple's shared procreative activity, any decision to use them should be the result of the couple's mutual consent.[86] Again, this analysis is circular and ignores the ultimate result of adherence to such a test- the primacy of the right not to procreate.

Chapter III questioned the focus on privacy as the foundation for the right to procreative autonomy. The right to privacy, the right specifically invoked by both parties in *Evans* under Article 8, was initially perceived as a negative right, the right to be free from governmental interference with intimate associations.[87] The European Court of Human Rights has recognised that the right to respect for private life imposes both negative and positive obligations.[88] The Chamber and Grand Chamber in *Evans* held that the applicant's claim invoked positive obligations of the state under Article 8.

---

[84] C. Coleman, "Procreative Liberty and Contemporary Choice: An Inalienable Rights Approach to Frozen Embryo Disputes" (1999) 84 *Minn. L. Rev.* 56, at 81.
[85] *Ibid*, at 84.
[86] *Ibid*, at 83.
[87] R. Rao, "Reconceiving Privacy: Relationships and Reproductive Technology" (1998) 45 *U.C.L.A. L. Rev.* 1077, at 1078.
[88] See A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).

Western society views the essential function of rights as the protection a sphere of individual liberty from *interference*, particularly by the state and its agents.[89] William Edmundson recognises that if autonomous choice presupposes an ability to act according to the choice one has made, respecting autonomy means forbidding interference with action.[90] The right to privacy has been developed from the fundamental claim that one has a right to be left alone. Classic individualism argues that each individual is autonomous and independent, equal to all other individuals, and free from all other individuals. In John Locke's libertarian vision, for example, the function of civil society is to maintain a purely negative relationship between individual members of society.[91] Each individual has a negative right to be left alone in order to pursue his or her own self-interests- against all others. Friedrich Hayek similarly argued that freedom in general was "the state in which a man is not subject to coercion by the arbitrary will of another or others".[92] It is natural for a right based on privacy and the primacy of negative conceptions of liberty to find being forced into parenthood a greater infringement than being forced not to be parent.

Isaiah Berlin articulated the classic distinction between positive and negative liberty. The distinction is useful because it serves not to differentiate between "freedom from" and "freedom to", but outlines their inherent connection. It challenges categorisations delineating these two freedoms. A negative liberty was initially defined as the area within which a person is "left to do… what he is able to do… without interference by other persons".[93] Berlin subsequently

---

[89] W. Edmundson, "What is Interference?" in W. Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004) 161, at 162.
[90] *Ibid*, at 166.
[91] P. Pettit, *Judging Justice: An Introduction to Contemporary Political Philosophy* (London: Routledge & Kegan Paul, 1980), at 75.
[92] F. A. Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1960), at 11.
[93] I. Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (London: Oxford University Press, 1969) 118, at 121-22. For detailed analysis of these different concepts of liberty, see H. Spector, *Autonomy and Rights: The Moral Foundations of Liberalism* (Oxford: Clarendon Press, 1992), chapter 1.

redefined negative freedom as the absence of human obstacles to one's actual or potential choices.[94] Berlin claimed that the absence of such freedom was due to the closing of doors or the failure to open them.

Positive liberty, according to Berlin, involves answering the question what, or who, is the source of control or interference, that can determine someone to do, or to be, one thing rather that the other. A proponent of positive liberty wants his or her life and decisions to depend on himself, not on external forces.[95] The positive sense of the word liberty was thought to derive from the wish of the individual to be his own master.[96] Those adhering to the concept of "negative" freedom hold that only the *presence* of something can render a person unfree. Commentators considering to the concept of "positive" freedom hold that the *absence* of something may render a person unfree[97]. This distinction has been continuously made in relation to frozen embryos cases. It is questionable whether one can easily outline when it is the absence or the presence of something that is denying freedom. Berlin himself has suggested that the freedom which consists in being one's own master, and the freedom which consists in not being prevented from choosing a course of action by others, may, on the face of it, be no more than negative and positive ways of saying the same thing.[98] However, Berlin noted that the historical development of the freedoms does not recognise their inherent connectedness.

---

[94] C. Taylor, "What's Wrong with Negative Liberty", in D. Miller (ed.), *Liberty* (Oxford: Oxford University Press, 1991) 141, at 143.
[95] W. Parent, "Some Recent Work on the Concept of Liberty" (1974) 11 *American Philosophical Quarterly* 149, at 149.
[96] I. Berlin, "Two Concepts of Liberty", in D. Miller (ed.), *Liberty* (Oxford: Oxford University Press, 1991) 33, at 43.
[97] G. MacCallum, "Negative and Positive Freedom" (1967) 76 *Philosophical Quarterly* 312, at 320 (emphasis in the original). See also M. Sellers, "Republicanism, Liberalism, and the Law" (1998) 86 *Ky. L. J.* 1, at 12.
[98] H. Hardy, *Liberty: Incorporating Four Essays on Liberty* (Oxford: Oxford University Press, 2002), at 178-179.

Richard Fallon also attempts to distinguish between two conceptions of autonomy: descriptive and ascriptive autonomy.[99] Descriptive autonomy examines the impact of external causal factors on individual liberty, while ascriptive autonomy considers each person's sovereignty over his or her moral choices. Fallon claims that theorists often equate autonomy with a descriptive conception of negative liberty, which equates autonomy simply with the freedom from such interferences as coercion, manipulation, or temporary distortion of judgment.[100] However, ascriptive autonomy is also capable of both negative and positive libertarian interpretations.[101] This analysis is useful because it again highlights the arbitrariness of the distinction between both freedoms. It also underlines the complexity and interdependence of these concepts. The distinction between negative and positive freedom ignores the fact that both aspects are required to give a complete notion of liberty or freedom. Rights have developed beyond mere protection against government interference, to tools for enabling individuals to control their own lives.[102] Any account of freedom has to incorporate both of these aspects.

Human rights have traditionally been considered to focus on protecting individuals' freedom against state interference.[103] While the notion of positive duties and rights against the states, and the development the idea that rights horizontally apply against non-state parties have broadened the ambit of human rights, the negative foundations of human rights must be appreciated for the present discussion. Jeremy Waldron argues that liberty defined in a purely negative way seems odd and empty and suggests we value the

---

[99] R. Fallon, "The Two Senses of Autonomy" (1994) 46 *Stan. L. Rev.* 875, at 876.
[100] *Ibid*, at 881.
[101] *Ibid*, at 891.
[102] K. Moller, "Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights" (2009) 24 *O. J. L. S.* 757, at 758.
[103] For in-depth analysis of the negative and positive conceptions of human rights, see S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008).

absence of obstacles without valuing what may positively exist.[104] For Raz, people are autonomous only if they had a variety of options available to them and their life became as it is through their own choices.[105]

The importance of freedom from interference or being forced into a life-changing role like parenthood is rooted in a negative conception of autonomy and liberty and the primacy of individualism. It is impossible to exclusively classify certain autonomies as negative or positive. Traditional categorisations in specific instances can be turned on their heads. Thus, for example, one could frame the autonomy claimed by applicants like Natalie Evans as negative rather than positive. Such applicants could claim a right not to be interfered with or forced into not becoming a parent. One could assert a right to freedom from interference by others into their decisions surrounding their embryos. Similarly, one could frame the autonomy claimed by individuals opposing procreation as positive rather than negative. It is arguable that such individuals are exercising their freedom to be childless, to live their lives without the need to look after dependents, the freedom to live life uncurtailed by the interests of children.

Distinctions are made between civil and political rights and socio-economic rights on a similar basis. Social and economic rights are said to be *positive rights*, in that they require state intervention and great expenditure to ensure their fulfillment.[106] Civil and political rights are said to negative, as they require non-interference of states into citizens' affairs. The policy or "programmatic" character of socio-economic rights supposedly prevented them from being

---

[104] J. Waldron, "Autonomy and Perfectionism in Raz's Morality of Freedom" (1989) 62 *S. Cal. L. Rev.* 1097, at 1104.
[105] J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press ,1986), at 204.
[106] G. Hogan, "Judicial Review and Socio-economic Rights" in J. Sarkin & W. Binchy (eds.), *Human Rights, the Citizen and the State- South African and Irish Approaches* (Dublin, Round Hall Sweet and Maxwell, 2001) 1, at 8.

justiciable.[107]. However, rights are not easily 'pigeon-holed' into these arbitrary categories.[108] Civil and political rights can be both positive and negative, and their realisation can demand large state spending. The European Convention on Human Rights has many provisions that require state expenditure. The right to free legal aid when charged with a criminal offence.[109] the duty to hold free and periodic elections under Art. 3, in Protocol 1 and the European Court of Human Rights' decision in *Airey v Ireland*,[110] regarding free legal assistance in civil litigation are examples of positive civil and political rights.[111] The Court in *Airey* concluded that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation, "[that] there is no water-tight division separating that sphere from the field covered by the Convention".[112] The prohibition against torture, inhuman and degrading treatment obliges states to provide places of detention that conform to international standards.[113] It is therefore misleading to claim that civil and political rights require only state non-interference or that the scope of civil and political rights is much clearer than that of socio-economic rights.[114]

---

[107] L. Betten, "The Protection of Fundamental Social Rights in the European Union-Discussion Paper", in L. Betten & D. MacDevitt, *The Protection of Fundamental Social Rights in the European Unio*n (The Hague: Kluwer Law International, 1996) 3, at 15.

[108] P. Alston & J. Weiler, "An 'Ever Closer Union' in need of a Human Rights Policy" (1998) 9 *E.L.J.* 658, at 679.

[109] See Article 6(3)(c).

[110] (1979-80) 2 E.H.R.R. 305, at para. [24].

[111] See I. Hare, "Social Rights as Fundamental Human Rights" in B. Hepple (ed.), *Social and Labour Rights in a Global Context* (Cambridge: Cambridge University Press, 2002) 153, at 160.

[112] *Supra* n. 110, at para. [26].

[113] P. Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Aldershot: Darmouth Publishing Co., 1996), at 55. Paul Hunt also notes U.S. jurisprudence, which recognises that civil and political rights are not cost-free. See *Hamilton v. Lowe*, 328 F. Supp 1182 (ED Ark 1971).

[114] E. Christiansen, "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court" (2007) 38 *Colum. Hum. Rts. L. Rev.* 321, at 347.

Just as this distinction between positive and negative rights is difficult to make, so also is the distinction between positive and negative liberty. However, the right not to procreate is traditionally framed as a negative liberty and is prioritised on this basis. The aim of this analysis has been to highlight the complexity of autonomy and challenge the general assumption that the right not to procreate must take precedence over the right to procreate.

The prioritisation of negative liberty or the freedom from interference by others is the true rationale for the primacy of the right not to procreate in frozen embryo disputes. Patricia Martin and Martin Lagod suggest that if couples cannot agree on the disposition of embryos, the only solution is for the embryos to be destroyed,[115] in light of the gross infringement to autonomy rights caused by forced parenthood. They note that this result may favour the choice which allows a pre-embryo to be lost, but claim that this is the nature of the decision making process when natural reproduction is assisted by invitro fertilisation.[116]

VI. The Dignity-Based Right to Procreative Autonomy (and Equality)

The freedoms to choose one's own way of life and live according to one's most deeply held beliefs, are at the heart of procreative choice.[117] The decision whether to bear a child, the timing of childbearing, and the means of avoiding or promoting pregnancy are examples of reproductive freedoms which are central to personal autonomy.[118]

---

[115] *Supra* n. 78, at 290.
[116] *Ibid*, at 291.
[117] J. Harris, "Rights and Reproductive Choice", in J. Harris & S. Holm (eds), *The Future of Human Reproduction* (Oxford: Clarendon Press, 1988) 5, at 35.
[118] N. Gertner, "Interference with Reproductive Choice", in S. Cohen & N. Taub (eds.), *Reproductive Laws for the 1990s: Contemporary Issues in Biomedicine, Ethics and Society* (Clifton: Humana Press, 1989) 307, at 307.

This thesis has underlined the importance of moving beyond an empty freedom-focused approach to the right to procreative autonomy. The human dignity of both parties in such cases are at stake. A privacy or freedom based approach will instinctively focus on the perceived interference of state intervention in forcing parenthood. This aversion to forced parenthood arguably forms the basis of reproductive rights in relation to abortion and contraception. Again, Chapter III's arguments for a reassessment of the foundations and treatment of the right to procreative autonomy demand that the equal human dignity of both parties is appreciated.

A focus on the inherent dignity and personhood of each party involved, informed by a recognition of the danger of adhering to a narrow conception of freedom, appreciates the complex rights at issue in these instances. Many writers argue that the balance should be tilted towards women who wish to use embryos, given their greater role in IVF. It can be suggested that, because of women's limited supply of eggs and declining fertility over time, the custody of frozen embryos following divorce is often more important to women than to men.[119] Consideration of the impact of dignity prevents any development which ignores the importance of the embryo to the party seeking to avoid procreation.

The notions of agency, self-determination, autonomy, the intrinsic equality and value of all human beings were outlined as the core notions informing constitutional dignity discourse. Any argument that one right *automatically* supersedes the other is avoided by this approach. It admittedly does not possess the certainty and clarity of the general preference in favour of the right to avoid parenthood outlined above. There are arguably no winners in these types of disputes, but perhaps more importantly there should be no clear

[119] See M. Boatman, "Bringing Up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes After Divorce" (2008) 37 *U. Balt. L. Rev* 285, at 287.

answers to these disputes, as such answers ignore the difficulty of the questions posed by such cases in the first place.

It is therefore suggested that if the Irish courts adopt the right to procreative autonomy as the starting point of this analysis, the equal dignity of both parties must be recognised. In *Tuohy v Courtney*, Finlay C.J. noted that the role of the court, in balancing competing rights, was not to impose their view of the correct or desirable balance in substitution for the view of the legislature.[120] The courts had to determine from an objective stance whether the balance contained in the impugned legislation was so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.[121] The Supreme Court in *In Re Article 26 and the Health (Amendment)(No. 2) Bill 2004* found the Bill in question to be unconstitutional as it did not delimit the property rights in question, but rather abolished them in their entirety without any compensation.[122] Any attempt to completely disregard one aspect of the right to procreative autonomy would be sanctioned by the courts. The courts do defer to the legislature on the factors determining this balance.

It is then a matter of considering the facts of the case at hand to determine whose wishes shall prevail. It is arguably naive to assume that such starting point will remove any generic assumptions that forcing parenthood is worse that denying parenthood. However, it is suggested that changing the initial position of courts or legislatures will demand a serious discussion of all interests and rights, and justification for the prioritisation of one right over the other. Reliance on the right to procreative autonomy should not always change the outcome, but it should change and colour debate on the treatment of conflicting rights in such instances.

---

[120] [1994] 3 I.R. 1, at 47.
[121] *Ibid.*
[122] [2005] 1 I.R. 105, at 182.

Respect for the Potential of the Embryo and other Factors

This thesis has argued that the embryo should be valued under the Constitution as potential life. It has suggested that this value would lead to the state avoiding the destruction of embryos where possible. It promotes implantation or donation to third parties where possible. Chapter V also noted that the weight of the right to procreative autonomy in these cases would prohibit forced parenthood where both parties opposed implantation.

Respect for the potential of the embryo should be one of the factors taken into account in these disputes. The danger with considering this factors is that it risks overshadowing the more fundamental balance of opposing rights in these cases. The psychological impact of being forced to become parent would also be weighed in this regard. The court may also have to take into consideration that donation for use by a third party may be impossible as both parties would object to it. The party opposing implantation from the outset may oppose donation as a genetically related child is still created. The party seeking to use the embryos may find it difficult to cope with their child existing and living with another couple, when they were not permitted to use the embryo themselves.

The presence of existing children in the relationship and the chances that the party seeking to use the embryos could become a parent by other means will also be factors taken into account. This disadvantage of a case by case approach is that is creates uncertainty. Certainty cannot be prioritised ahead of the protection of fundamental rights. Bright line rules in relation to custody disputes over embryos are ill-equipped to engage with the difficult balance that the right to procreative autonomy requires.

VII. Conclusion

Hard cases not only make bad law, they evoke tensions between values and rights that may never be resolved to anyone's satisfaction.[123] The *Evans* approach of promoting clarity, certainty and the prevailing right of one party over another fails to engage with the true questions asked by these situations. For the *Evans* courts and the 1990 Act, the presence of an unwanted child infringes rights and human dignity more than the denial of the wanted child. The Irish courts have yet to really engage with this clash of interests and right. The issues in disputes surrounding the disposition of frozen embryos and conflicting rights to procreative autonomy are complex and unique. It is only in appreciating this that we can truly grapple with the challenges that reproductive technologies pose to our rights to decide to become, or not to become, parent, and the rights of others. This thesis argues that the potential of the embryo should be taken into account as a factor in favour of implantation. It has cautioned against the status of the embryo taking away focus from the related but distinct examination of the conflicting rights at issue.

---

[123] J. Rosoff, "'Hard Cases' and Reproductive Rights", in S. Cohen & N. Taub (eds.), *Reproductive Laws for the 1990s: Contemporary Issues in Biomedicine, Ethics and Society* (Clifton: Humana Press, 1989) 237, at 237.

Chapter VII: Rights of Access to Treatment

"Being a fit and proper parent is not about slotting into a social or sexual template".[1]

This chapter will examine the extent to which the right to procreative autonomy includes a right to access ARTs in order to become a parent. It will be suggested that a prima facie right to access ARTs is enjoyed by all individuals or couples irrespective of relationship status, gender, sexuality, financial circumstances or even age. The notion of a right to access in this context is defined as the right or opportunity to benefit from something. Therefore, the right to access ARTs means the right to the opportunity to benefit from these technologies. It does not translate into the automatic right to become a parent. Consideration of the welfare of the future child will determine if the prima facie right to access will materialise into actual access to these technologies.

This thesis argues that the right to procreative autonomy is a right enjoyed by all individuals. One of the core notions informing human dignity is the intrinsic equality and worth of every human being. The state does have an interest in preventing certain parties from accessing technologies if it is established that this is not in the best interests of future children. These considerations should limit the right, rather than presumptively prevent recognition that certain parties can use ARTs in the first place. Protection of the common good and the current interpretation of the separation of powers between the judiciary and the legislature may be used to limit any social and economic right to funding for ARTs. Factors like marital status or sexuality do not strengthen or weaken the weight of this right, but rather are factors which may determine whether the use of ARTs is in the child's best interests. Examining such factors at this

[1] T. Dower, "Redefining Family: Should Lesbians Have Access to Assisted Reproduction?" (2001) 25 *Melb. U.L. Rev.* 466, at 476.

later stage will promote a more open scrutiny of the rationale for limiting the right.

Part I notes that recent debate concerning access questions is firmly grounded in equality and discrimination law. Married couples enjoy access to ARTs. Other couples or individuals argue that they are discriminated against if they too cannot gain access to these technologies. The argument from an equality perspective is that unmarried couples or individuals should not be discriminated against on the basis of marital status. This is arguably a futile argument in Ireland in light of the constitutional protection afforded to the marital family. The European Court of Human Rights also recently recognised the special nature of marriage in determining whether discrimination on the basis of martial status was permissible. This thesis argues that a dignity-based right to procreative autonomy can promote access more effectively.

Part II examines the treatment of the rights of single persons and unmarried couples seeking access to ARTs or to adopt a child. Part III will consider the availability of ARTs to same sex couples. Part IV will look at how the age of a woman can be a factor in determining access to treatment. Part V examines the possible right to have treatment paid for or funded by the state, a socio-economic right to access ARTs.

The Irish Commission on Assisted Human Reproduction recommended that where there is objective evidence of a risk of harm to any child that may be conceived through the use of ARTs, there should be a presumption against treatment.[2] The Commission suggested there were two separate aspects to welfare considerations. In the first instance, the safety of any procedure used to bring the child into existence should be considered from the perspective of the

[2] Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (Department of Health, 2005), at 42.

child. Secondly, the Commission argued that the environment into which a child would be born should be suitable from the point of view of the physical, psychological and socio-emotional development of the child, particularly in formative years.[3] The Commission also expressed concern that restrictions on access should be based on evidence-based ethical justifications.[4] The factors outlined by the Commission concerning the best interests of the child will be applied in this Chapter in relation to the different concerns at issue. Such concerns will be distinguished from untested restrictions based on unjustified prejudice against family forms that do not mirror the nuclear marital family.

Infertility and ARTs – Some Basic Definitions

The medical definition of infertility is the failure to conceive following twelve months of unprotected intercourse.[5] There are those who are infertile because of their sexuality or relationship status. The different definitions of infertility will be considered in this chapter. In vitro fertilisation (IVF) means fertilisation in the laboratory. It is often used where there is damage to a woman's fallopian tubes.[6] Hormones are given to stimulate ovulation and then the eggs are harvested and fertilised with sperm in vitro (in the lab).[7] ICSI is a technology used to treat male infertility. One sperm is injected

---

[3] *Ibid.*
[4] *Ibid.*
[5] L. Heffner, *Human Reproduction at a Glance* (Oxford: Blackwell Science, 2001), at 82. For a straightforward guide to infertility, see P. Wardle & D. Cahill, *Understanding Infertility* (Poole: Family Doctor Publications, 2005). For discussion of the medical risks associated with ARTs and regulation thereof, see K. Lynn Macintosh, "Brave New Eugenics: Regulating Assisted Reproductive Technologies in the Name of Better Babies" (2010) *U. Ill. J. L. & Tech. Pol'y* 257.
[6] See W. Ledger et al (eds), *The Fallopian Tube in Infertility and IVF Practice* (Cambridge: Cambridge University Press, 2010) for detailed medical accounts of these procedures.
[7] See D. King, *Human Reproduction: Some Common Genetic Terms* (Essex: Opran Publications, 2003).

directly into a mature egg. This technique typically results in a 50-70% fertilisation rate.[8]

Intra-uterine insemination (IUI) is a treatment where concentrated sperm is introduced into the uterus using a fine straw which is passed through the cervix at the time of ovulation.[9] Gamete intra-fallopian transfer (GIFT) is where eggs are collected in the same way as IVF and then transferred into one of the fallopian tubes together with some sperm during a laparoscopy.[10] Zygote intra-fallopian transfer (ZIFT) is where the zygote (one-cell embryo) is transferred into the fallopian tube.[11]

I. The Limited Utility of Arguments Against Discrimination on the Basis of Martial Status

The Irish Medical Council Guidelines in 1994 limited the availability of ARTs to married couples.[12] More recent guidelines have not included this limitation. The 2004 and 2009 Guidelines do not mention marital status when discussing assisted reproduction and IVF.[13] The Commission on Assisted Reproduction's survey of practitioners suggested that most would not discriminate between married couples, and unmarried couples in a long-term relationship. 53% of respondents also stated that they would offer services to single persons, and one in seven would offer treatment to same sex couples.[14]

---

[8] J. D. Gordon et al., *Obstetrics, Gynaecology and Infertility: Handbook for Clinicians* (6th ed.) (Arlington: Scrub Hill Press, 2007), at 535.
[9] M. Davis et a.l, *Infertility* (Oxford: Oxford University Press, 2009), at 219.
[10] *Ibid*, at 217.
[11] *Ibid*, at 222.
[12] The Medical Council, *A Guide to Ethical Conduct and Behaviour and to Fitness to Practice- Fourth Edition* (1994), Section E para. [40.01].
[13] The Medical Council, *A Guide to Ethical Conduct and Behaviour- Sixth Edition* (2004), section F, at 35-36, and The Medical Council, *Guide to Professional Conduct and Ethics for Registered Medical Practitioners- Seventh Edition* (2009), section 20, at 20-21.
[14] *Supra* n.2, at 33.

The current approach to questions of access centres on equality issues rather than a separate dignity-based right. It is argued that there is a difference between having a right to access and a right not to be discriminated against on the basis of marital status. If we start with a dignity-based right the intrinsic equality of every individual is assumed. An argument based on non-discrimination on the basis of marital status demands examination of whether different groups should be treated differently. Arguments based on the promotion of this notion of equality will suggest that unmarried and same sex couples and single individuals enjoy the same right of access as married couples enjoy in relation to ARTs. This in turn leads to scrutiny of whether unmarried or same sex couples, or single persons are the same as married couples, or not so different as to warrant different treatment. However, comparing the family form to the martial family is a separate and flawed inquiry. It presumes that the best interests of the child can only be promoted by a family form that mirrors the nuclear family, instead of asking whether the potential family form actually causes potential harm to the child.

The principles of non-discrimination and formal equality promote treating those in a similar position in the same way, and those who are different in a different way.[15] Notions like equality and non-discrimination are complex, with many different meanings and suggestions. This chapter focuses on the basic notion of formal equality, the idea of treating equals equally. Discrimination can also be defined as a morally unjustifiable as opposed to justifiable differentiation.[16] The idea of proportionate equality, that one treats equals equally and unequals unequally, is central to Western

---

[15] For analysis of notions of equality and non-discrimination see R. Dworkin, "What is Equality? Part 1: Equality of Welfare" (1981) 10(3) *Philosophy & Public Affairs* 185; R. Dixon, "Equality- The Elusive Value" (1979) *Wash U. L Q.* 5; T. Nagal, "The Meaning of Equality" (1979) *Wash U. L.Q.* 25; N. Bamforth, "Conceptions of Anti-Discrimination Law" (2004) 24 *O.J.L.S.* 693; and M. Connolly (ed.), *Discrimination Law* (London: Sweet & Maxwell, 2006).

[16] H. Fenwick, *Civil Liberties and Human Rights* (4th ed.) (Abingdon: Routledge-Cavendish, 2007), at 1469.

thought.[17] The key concern under discrimination law is determining when parties are sufficiently similar to qualify for equal treatment.[18]

Article 40.1's protection of equality is based on the same premise. Chapter III has already recognised that the Constitution does not treat de facto families the same as marital families. The simple fact of marriage means that Article 41 and 42 supports the decisions of the married family on the basis that this institution makes such families different and more special than other families. Any argument that the rights of married couples should be extended to other family forms will be of limited utility. The European Court of Human Rights in *Gas & Dubois v France* considered the argument that French law discriminated against same sex couples, as it did not permit unmarried couples to jointly adopt children.[19] The Court recognised that marriage conferred a special status on those who entered into it.[20] It held that the applicants' legal situation could not be said to be compatible to that of married couples when it came to adoption by a second parent.[21] It seems that the institution of marriage is worthy of preferential treatment in jurisdictions outside of Ireland.

The danger of advocating equal treatment between married couples and other family forms is that it asks the wrong questions. What is the difference between a married couple and an unmarried heterosexual or same sex couple, or between a married couple and a single person? Inequality derives from the establishment of norms and corresponding evaluations of persons into generic groups.[22] While the developments in jurisdictions like Australia and European Court of Human Rights jurisprudence indirectly promote the right to access ARTs, they fail to appreciate the individuality of the right itself and

---

[17] O. Doyle, *Constitutional Equality Law* (Dublin: Thomson Roundhall, 2004), at 3.
[18] B. Hepple, *Equality: The New Legal Framework* (Oxford: Hart Publishing, 2011), at 18.
[19] Application 25951/ 07 (15th March 2012).
[20] *Ibid*, at para. [68].
[21] *Ibid.*
[22] P. Freund, "The Philosophy of Equality" (1979) *Wash. U. L Q.* 11, at 13.

the fact it is equally possessed by all. Instead the attention is fixed on determining whether there is unjustifiable discrimination based on relationship status or sexuality.

A two step approach initially recognises that the inherent dignity of every human being mandates that they have a prima facie right to access such technology. It then considers possible restrictions on actual access based on concerns about the best interests of the future child. It is suggested that such an approach will also afford greater protection to future children as it avoids automatic and untested assumptions that certain family forms always promote the best interests of the child. The Commission on Assisted Human Reproduction recommended that services should be available without discrimination on the grounds of gender, marital status or sexual orientation subject to the consideration of the best interests of any child that may be born using this technology.[23]

There is a lot of merit in the argument that presumptions of welfare based on marital status are something to be abolished, not emulated for other types of families under the banner of equality.[24] If there is any real benefit on the facts for the child being raised by the parents in a more stable relationship, then this can be encompassed within the welfare test.[25] In order to promote the right to procreative autonomy and the general right to access ARTs, a presumption in favour of the person seeking access is advocated. This presumption can be rebutted if the welfare of future children would warrant this. The purpose of the presumption is to combat generic assumptions, evident in this Chapter, that parents who do not comply with the standard married heterosexual model should not gain access to IVF. In practice, the presumption should force a deeper scrutiny about why a single

[23] *Supra* n.2, at 34. The Commission recommended that any relevant legislation on ARTs should reflect the principles of the Equal Status Acts 2004-2008.
[24] M. Harding, "A Softening of the Marital Family Paradigm?" in B. Atkin (ed.), *The International Survey of Family Law 2012 Edition* (Bristol: Jordan Publishing, 2012) 151, at 165.
[25] *Ibid.*

woman, an older person or an unmarried couples should be denied access.

II. Relationship Status: Unmarried Couples and Single Persons

This section considers current restrictions on unmarried couples and single women to accessing ARTs on the basis of their relationship status. It outlines developments in different jurisdictions regarding eligibility for adoption and access to ARTs. In particular, it examines the extent to which rights discourse has influenced such reform. One can distinguish between the use of ARTs and adoption, as the latter concerns the termination of parental rights and the recognition of a new parent.[26] In both instances the welfare of the child, future or present, will be the factor shaping eligibility criteria.

a) Unmarried Couples' Access to Adoption and ARTs

It was reported in the media in 2008 that a fertility clinic in Galway would not provide access to its services to unmarried couples. One of the doctors in the clinic suggested that the idea was to promote and recognise the legal commitment made by couples who are in for the long haul. This position was based on the argument that married couples are more likely to stay together, and that children do better when their parents are married.[27]

As already noted the Constitution protects the family based on marriage under Articles 41 and 42. The Constitution does not directly define what it means by family, but has been defined by the courts as meaning only the family based on marriage.[28] Walsh J in the Supreme Court in *The State (Nicolaou) v An Bord Uchtala* said that "the family referred to in [Article 41] is the family which is founded on the

---

[26] R. Storrow, "The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard of Gatekeeping in Infertility Clinics" (2007) *28 Cardozo L. Rev.* 2283, at 2294.

[27] Daniel McConnell, "Fertility clinic will only treat married couples" (The Independent) (16 November 2008).

[28] *G. v An Bord Uchtala* [1980] I.R. 532, and *Murray v Ireland* [1985] I.R. 532.

institution of marriage".[29] Article 41 and its obligation to safeguard the family permit the state to positively discriminate in favour of the marital family.[30] The recent Supreme Court decision in *McD. v L.*[31] has reiterated that the Irish Constitution does not recognise the de facto family. The *Baby Ann* decision[32] also illustrates both the strength of the protection afforded to marital family and the questionable assumption that all married couples marry for the same reasons and have the same expected degree of stability.

The 2010 reform of Irish adoption law has extended the list of those eligible to adopt. The Adoption Act 2010 has repealed the 1952-1988 adoption legislation and created a new adoption framework. The 2010 Act creates an arbitrary distinction between married couples and single persons on the one hand, and unmarried heterosexual or same sex couples on the other. Section 11(1)(a) of the Adoption Act 1952 explicitly provided that, where an applicant is not the mother or natural father or a relative of the child, an adoption order shall not be made unless the applicants are a married couple who are living together. Section 11(2) also provided that except in the case of a married couple, an adoption order could not be made for the adoption of a child by more than one party. Section 10(2) of the 1991 Act afforded discretion to the Adoption Board to make adoptions in favour of single persons, where the particular circumstances of the case rendered this desirable. Section 10(3) stated that an adoption order should not be made for the adoption of a child by more than one person, where the persons in question were not married.

The Law Society's Law Reform Committee recommended removal of the prohibition on adoption by unmarried couples in its 2000

---

[29] [1966] IR 567, at 643. For recent consideration of the modern application of this interpretation of "family", see R. Keane, "The Constitution and the Family: The Case for a New Approach", in O. Doyle & E. Carolan (eds), *The Irish Constitution: Governance and Values* (Dublin: Thomson Roundhall, 2008), at 347-356.
[30] For analysis of this point see G. Whyte & G. Hogan, *J.M. Kelly The Irish Constitution* (4th ed), at 1837-1838. See the case of *O'B v S* as an example of this.
[31] [2010] 2 I.R. 199.
[32] [2006] 4 I.R. 374.

review of adoption law in Ireland.[33] Section 33(1) of the 2010 Act outlines those persons that are eligible to adopt.[34] Section 33(1)(a) permits adoption by a single person, but only where the Adoption Authority is satisfied that "*in the particular circumstances* of the case, the adoption is desirable".[35] The Act does not permit adoption by a couple in a non-marital relationship, whether same sex or heterosexual.[36] Similarly, German adoption law expressly provides that only married couples can jointly adopt.[37] Section 1741(2) of the Civil Code provides that a person who is not married may adopt a child only alone.

A division therefore clearly exists in Irish adoption law between married couples who can adopt, single persons who can adopt in particular circumstances, and unmarried couples who cannot adopt at all. This distinction is based on the assumption that married couples are the most stable and desirable parents for a child. An non-discrimination on marital status analysis fails to openly challenge the assumptions which form the basis of this position. The presumptive right to access would force direct engagement with any opinions about the parenting skills of unmarried couples that influence the current difference in treatment.

The House of the Lords in the *P* case considered the on adoption by unmarried couples under Article 9 of the Adoption (Northern Ireland) Order 1987.[38] The court held that the state was entitled to take the

---

[33] Law Society Law Reform Committee, *Adoption Law- A Case for Reform* (August 2000), at 58. Available online at http://www.lawsociety.ie/Documents/Law_reports/adoption.pdf (accessed 18th February 2011).

[34] For background to the legislation see: G. Shannon, *Child Law* (2nd ed) (Dublin: Roundhall, 2010), at 445-447; and G. Shannon, "Editorial" (2010) 13 *I.J.F.L.* 57.

[35] Emphasis added.

[36] *Supra* n. 34, at 474.

[37] Section 1741(2) Burgerliches Gesetzbuch (German Civil Code).

[38] *In Re P (Adoption: Unmarried Couple)* [2009] 1 A.C. 173. This position that was not found in the corresponding legislation in other parts of the United Kingdom (See section 50 Adoption and Children Act 2002, and section 27 Adoption and Children (Scotland) Act 2007. For examination of this legislative change see U.

view that it was generally better for children to be brought up by parents who were married to each other rather than by those who were not. However, the court held that this reasonable generalisation could not be raised into an irrebutable presumption that no unmarried couple could make suitable adoptive parents.[39]

The Northern Ireland government had argued that statistics showed that married couples, who had entered into a legal commitment with each other, tended to have more stable relationships than unmarried couples.[40] Lord Hoffmann agreed that a general recognition of the importance of stability for the child and the presence of stability in the marital family was permissible. However, the learned judge rejected the imposition of an absolute bright line rule that automatically excluded all other couples from the process with any assessment of their individual qualities and capabilities. Lord Hoffmann held that a bright line rule could not be justified on the basis of the needs of administrative convenience or legal certainty.[41]

The House of Lords argued that consideration of the best interests of the child required a case by case assessment of the suitability of prospective parents be carried out. If the best interests of the child was found in a particular case to be adoption by an unmarried couple, then there was no basis for denying that child the opportunity to be adopted because the absolute exclusion of unmarried couples was in the best interests of the community as a whole.[42] Lord Hoffmann suggested that the fact a couple declined to marry when they could do so was a factor to be considered when assessing the likely stability of the couple's relationship.[43] However, this factor could not be elevated

---

Kilkelly, "In Re P: adoption, discrimination and the best interests of the child" (2010) *C.F.L.Q.* 115).

[39] *Ibid*, at para. [18]. This clear difference in treatment on the basis of martial status was also subsequently rejected by the Northern Ireland Courts in *Re Morrison's Application for Judicial Review* [2010] N.I.Q.B. 51.

[40] *Ibid*, at para. [12] (per Lord Hoffmann)

[41] *Ibid*, at para. [16].

[42] *Ibid*.

[43] *Ibid*, at para. [18].

to an irrebutable presumption of unsuitability in all instances.[44] The right to procreative autonomy advocated in this thesis would support this position as it does not simply equate best interests considerations with marital status. The eligibility of unmarried couples to adopt was considered again by the Northern Ireland High Court in *The Northern Ireland Human Rights Commission Application* in relation to a couple in a civil partnership.[45] The court argued, on light of *Re P*, that the difference in treatment on the basis of marital status was not justified.[46]

England and Wales reformed its adoption law under the Adoption and Children Act 2002.[47] The Act implements the recommendations of a 2000 government White Paper on Adoption.[48] One of the central proposals of the report was to ensure that the best interests of the child was a paramount consideration in adoption proceedings. The White Paper did not consider the question of eligibility of prospective adopters. The 2002 Act provides that adoption orders can be made in favour of single persons and both married and unmarried couples. Under the Adoption Act 1976 single persons and married couples could adopt. The 2002 Act adds unmarried couples to this list. This development can be contrasted with a 1992 Review that spoke about the fact that unmarried parents do not have the same legal obligations to each other as married couples have.[49] Similarly, a 1993 White Paper on adoption emphasised that adoption by single people should be exceptional, and endorsed the general preference of authorities and

---

[44] *Ibid.*
[45] [2012] N.I.Q.B. 77.
[46] *Ibid*, at para. [75].
[47] Baroness Hale's judgment in the *P* decision provides a comprehensive outline of developments in adoption law in England leading up to the 2002 Act (*ibid*, paras. [85-95]). For more background to the 2002 Act see N. Lowe & G. Douglas, *Bromley's Family Law* (10th ed) (Oxford: Oxford University Press, 2007), at 817-819; and S. Harris-Short & J. Mills, *Family Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2007), at 999-1004.
[48] Department of Health, *Adoption: A New Approach- A White Paper* (cm 5017, December 2000).
[49] Department of Health and Welsh Office, *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group- A Consultation Document* (Department of Health and Welsh Office, 1992), at paras. [26.10-26.11].

agencies for adoption by married couples.[50] Sections 50 and 51 of the 2002 Act set out the rules in relation to eligibility which seem to distinguish between adoption by a couple and adoption by a single person.[51]

Some U.S. states like Oklahoma, Colorado and Mississippi prohibit joint adoption by unmarried couples. In Utah, an amendment to the Utah Code concerning state adoption in 2000 provided that the legislature specifically finds that it is not in a child's best interests to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage in Utah.[52] The statute prefers legally married couples as prospective adopters.[53] The amendment went on to note that this section did not limit or prohibit the placement of a child with a single adult.[54] This approach is very similar to that in the Irish 2010 Act. It may be based on a well-meaning desire to have a stable and certain family unit for the adopted child from the outset. This automatic determination of stability is not questioned.

Most jurisdictions considered in this thesis permit opposite sex unmarried couples access to ARTs. France and Germany have the most conservative laws on ARTs of the jurisdictions considered. In France, under the 1994 Law on Bioethics, married couples or unmarried couples living together for two years can access ARTs.[55] Germany does not regulate access to ARTs under the Embryo Protection Act 1990.

---

[50] Department of Health, *Adoption: The Future (White Paper)* (cm 2288)(1993), at paras. [4.38-4.40].
[51] A. Bainham, *Children: The Modern Law* (3rd ed.) (Bristol: Jordan Publishing, 2005), at 275. A couple is defined in the legislation as a married couple, or two people (whether of different sexes or the same sex) living as partners in an enduring family relationship (see section 144(4)(a) and (b) of the 2002 Act).
[52] House Bill 103 amended Utah Annotated Code 78-30-9 of the state adoption law. See S. Clark, "Married Persons Favoured as Adoptive Parents: The Utah Perspective" (2003) 5 *J. L. & Fam. Stud.* 203, at 213-14.
[53] S. Clark, "Utah Prefers Married Couples" (2006) 18 *St. Thomas L. Rev.* 215.
[54] *Ibid.*
[55] ART. L 152-2. This law will be considered in greater detail in the following section on access rights of single women.

A presumptive right to access ARTs would require greater and clearer discussion on the part of regulatory authorities as to why unmarried couples could not use IVF, or other such technologies. Can we presume from the very fact of marriage that a couple will not divorce at some future point? Are unmarried couples thought to be less committed to their family, or an unstable family unit to such an extent that they can not promote the welfare of children? The discrepancies in the treatment of single parents and unmarried couples in Irish adoption law seem to suggest this.

b) Single Persons- Access to Adoption and ARTs

All Australian states and territories, with the exception of South Australia, permit single persons to adopt.[56] However, some have certain limitations built into the statute which suggest that single person adoption is not the most desirable option for a child.[57] The assumptions about the quality of parenting in such families are not clearly articulated.

Recent cases and legislative reform regarding access to ARTs by single women and same sex couples in different Australian states illustrate the arguments made in the previous section against over reliance on anti-discrimination principles, at the expense of a wider rights analysis. Victoria was the first Australian state to enact legislation concerning the regulation of ARTs in 1984, and again in 1995. In *McBain v Victoria*, Sundberg J rendered the Infertility Treatment Act 1995 inoperative to the extent that it restricted assisted

---

[56] See section 16 Adoption Act 1993 (ACT); section 26 Adoption Act 2000 (NSW). Section 12(3) of the Adoption Act 1988 in South Australia does permit second parent adoption, an adoption order in favour of one person where that person has cohabited with a birth parent or adoptive parent of the child in a marital relationship of at least five years, or where the court is satisfied that there are special circumstances justifying the making of the order (section 12(3)(1)(a) & (b) Adoption Act 1988 (SA)).

[57] Section 14 of the Adoption of Children Act in Northern Territory also suggests that adoption by a single person is limited to instances where the child is under the guardianship of the State and exceptional circumstances exist that make adoption by one person desirable.

reproductive technology to married and heterosexual de facto couples.[58] Section 8(1) of the 1995 Act required the provider of infertility treatment to treat a single woman less favourably than a married woman or a woman in a de facto relationship. The court found that section 8 was inconsistent with section 22 of the Sex Discrimination Act 1984, and was therefore inoperative to that extent.[59]

The then Australian Prime Minister, John Howard, voiced strong opposition to the decision, focusing on the right of the child to the care and affection of both a mother and a father.[60] It may seem that *McBain* marked an important development in the right of single women to access ARTs. The interpretation of the decision by the Victorian Infertility Treatment Authority has largely curtailed the possible effect of the decision. The Authority adopted the advice of Gavan Griffith QC regarding the implications of *McBain*, and concluded that only medically infertile single women or lesbian couples may access ARTs in Victoria.[61] In adopting this approach, Gavan Griffith QC and the Authority have underlined the significance of the application of section 8(3) of the 1995 Act, which discusses the question of whether the woman is likely to become pregnant from an oocyte produced by her other than by a treatment procedure, or that a genetic abnormality or disease might be transmitted to a person born as a result of the pregnancy.[62]

This interpretation has been criticised as continuing to discriminate on the basis of marital status, because an unmarried woman who is not clinically infertile cannot obtain such services because she cannot

---

[58] [2000] F.C.A. 1009.
[59] *Ibid*, at para. [19].
[60] Available at: www.pm.gov.au/news/interviews351.htm (1 August 2000).
[61] Gavan Griffith QC, "In the Matter of the Infertility Treatment Act 1995 and Sex Discrimination Act 1984, Section 22 (Opinion for the Infertility Treatment Authority)" (Melbourne, 4 August 2000), at para. [4]. Available at http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/7S726/upload_binary/7S7262.pdf (accessed 18th March 2011).
[62] Section 8(3)(a) and (b) (*ibid*, at para. [11]).

be said to be unlikely to become pregnant from her own oocyte without treatment, as she could engage in unprotected sex with a fertile man and become pregnant.[63] The Irish Medical Council Guidelines in 2004 stated that techniques like IVF should only be used after thorough investigation has failed to reveal a treatable cause for infertility.[64] This seems to be based on a medical definition of infertility similar to that in *McBain*. The 2009 Edition's wording has changed. It now requires that IVF should only be used after thorough investigation has shown that no other treatment is likely to be effective.[65] This change in language would accommodate single persons and same sex couples.

The Victorian Law Reform Commission considered possible reform of the 1995 Act and eligibility criteria for ARTs in 2007.[66] The Commission noted that the 1995 Act was not amended to reflect the decision in *McBain*, but suggested that it should have been.[67] It recommended that the requirement that a woman who undergoes treatment procedures must be married or living with a man in a de facto relationship should be removed.[68] The Commission found that the marital status requirement applied before *McBain* was both inconsistent with the principle of non-discrimination and did not bear a relationship to the health and well-being of children.[69] The Assisted Reproductive Treatment Act 2008, in effect since January 2010 in Victoria, affords lesbian couples and single women equal access to

---

[63] For criticism of this position see K. Walker, "The Bishops, The Doctor, His Patient and the Attorney-General: The Conclusion of the McBain Litigation" (2002) 30 *Federal L. Rev.* 507, at 531-533. See also B. Bennett, "Reproductive Technology, Public Policy and Single Motherhood" (2000) 22 *Sydney L. Rev* 625.
[64] Medical Council, *A Guide to Ethical Conduct and Behaviour* (6th ed.) (2004), at para. [24.5].
[65] Medical Council, *Guide to Professional Conducts and Ethics for Registered Medical Practitioners* (7th ed.) (2009), at para. [20.1].
[66] Victoria Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (March 2007), available at www.lawreform.vic.gov.au (accessed 11th February 2011). The Report also considered the feasibility of changes to eligibility criteria in respect of the Adoption Act 1984.
[67] *Ibid*, at 7 and 52-53.
[68] *Ibid*, at 10.
[69] *Ibid*, at 67.

fertility services without the need to prove "medical infertility".[70] Section 10 outlines the persons who may undergo treatment procedures, and provides that the woman must be unlikely to become pregnant other than by a treatment procedure, or is unlikely to be able to carry a pregnancy or give birth to a child without a treatment procedure.[71]

The New South Wales Assisted Reproductive Technology Act 2007, which commenced in 2010, does not outline any eligibility requirements for treatment. The Act followed the recommendation of New South Wales Department of Health that eligibility criteria should not be imposed on women seeking treatment.[72] The Department of Health argued that the law does not impose restrictions upon individuals in the general community who wanted to become parents. It also claimed that individuals had a fundamental right to be able to have children and form families that they chose.[73]

Pearce v South Australian Health Commission sanctioned the availability of ARTs to single women and lesbian couples in South Australia.[74] The Supreme Court of South Australia held that section 13(3) of the Reproductive Technology Act 1988, which prevented single women from accessing treatment, resulted in the less favourable treatment of persons with a different marital status.[75] This outline of Australian case law shows detailed consideration of non-discrimination principles in determining the permissibility of restrictions on access to IVF and other technologies. The attention

---

[70] For detailed consideration of the implications of the 2008 Act, see Rainbow Families Council, *An Information Kit for Same-sex Couples and Single People in Victoria* (October 2010), available at www.rainbowfamilies.org.au/media/pdfs/Rainbow%20families%20andthe%20law%20info%20kit%20October%202010%20web.pdf. (accessed 14th February 2011).
[71] Section 10(2)(a) Assisted Reproductive Treatment Act 2008.
[72] New South Wales Department of Health, *Consultation Draft: Assisted Reproductive Technology Bill 2003* (New South Wales), available at: http://www.legislation.nsw.gov.au/exposure/archive/b03-015-d12infog.pdf (accessed 24th February 2011).
[73] *Ibid*, at para. [4.3].
[74] (1996) 66 S.A.S.R. 486.
[75] *Ibid*, at 491 (per Williams J).

afforded to this detracts from the stronger claim of a right to access based on human dignity. Concerns about the best interests of future children are solely promoted by reference to the marital two-parent family.

The question about a need for a father figure or a second parent in the child's life has been the subject of much debate in the United Kingdom. The Warnock Report noted the common belief at the time that the interests of the child dictated that it should be born into a home where there was a long, stable heterosexual relationship and that, therefore, the deliberate creation of a child for a woman who was not a partner in such a relationship was morally wrong.[76] The Committee concluded that as a general rule it was better for children to be born into a two-parent family, with both a father and mother, although it recognised that it was impossible to predict with any certainty how lasting such a relationship would be.[77] The Committee was reluctant to draw up comprehensive criteria that would be sensitive to the circumstances of every case.[78]

The parliamentary debates surrounding this question in the 1990 Act show that a primary legislative concern was to ensure that children were born into quasi-marital units.[79] When the Bill was presented to Parliament in 1989 it contained no provision relating to the qualification for treatment based on status or welfare.[80] It was only when the matter was raised in the second reading and Committee stage of the House of Lords that an amendment to restrict the provision of services to married couples was tabled. The amendment

---

[76] Department of Health and Social Security, *Report of the Committee of Inquiry Into Human Fertilisation and Embryology* (Cmnd 9314) (London: The Stationery Office, 1984), at para. [2.9].
[77] *Ibid*, at para. [2.11].
[78] *Ibid*, at para. [2.13].
[79] J. McCandless & S. Sheldon, " 'No Father Required?' The Welfare Assessment in the Human Fertilisation and Embryology Act 2008" (2010) 18(3) *Fem. Leg. Stud.* 201, at 205.
[80] G. Douglas, "Assisted Reproduction and the Welfare of the Child" (1993) 5 *Current Legal Problems* 53, at 57.

made it an offence to provide treatment services to unmarried people, but was narrowly defeated by 61 votes to 60.[81] The debate in the House of Lords offered differing views on the role of marriage and the traditional family form in determining who should access ARTs. The Lord Chancellor, Lord Mackay argued that the Act should not interfere with the importance attached to family values.[82] However, Lord Ennals argued that the question of whether a couple was married was "hardly relevant to the quality of parenthood".[83] The desire to restrict treatment to heterosexual couples continued to feature when the Bill entered the House of Commons.[84] It was suggested that a child born as a result of a technique such as artificial insemination will obviously have the benefit of a mother, but should also have the benefit of a father.[85]

The Lord Chancellor, in seeking to add section 13(5), claimed that "among the factors that clinicians should take into account will be the material circumstances in which the child is likely to be brought up and also the stability and love which he or she is likely to enjoy. Such stability is clearly linked to the material position of the woman and in particular whether a husband or long-term partner can play a full role in providing the child with a permanent family setting in the fullest sense of that term, including financial provision".[86]

Section 13(5) of the 1990 Act provided that:

---

[81] H.L. Debates vol. 515 6th February 1990, col. 787. See R.G. Lee & D. Morgan, *Human Fertilisation and Embryology: regulating the Reproductive Revolution* (London: Blackstone Press Ltd, 2001), at 160.
[82] House of Lords, Official Report, 6th February 1990, col. 800.
[83] *Ibid*, at col. 789.
[84] The final shape of section 13(5) was determined at the Report stage, when David Wilshire MP moved an amendment to include in the concept of welfare, and not to marital status or sexual background (HC Debates vol. 174, 21st June 1990, col. 1021).
[85] For example, see the statements of Mrs Ann Winterton (HC Debates vol 174, 21st June 1990, col 1021). Mrs. Winterton argued that single women who present themselves for treatment should not be allowed to be inseminated unless they are prepared to bring forward a man who will stand as a social father (HC Debates vol. 174, 21st June 1990, col. 1022).
[86] Lord Chancellor, Official Report, House of Lords vol. 516, 6 March 1990, col. 1098.

> "A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth".

The 1990 Act clearly did not prohibit access to ARTs by unmarried couples as section 28 provided for legal recognition of parenthood arising from the use of licensed treatment services in instances where the parties were not married. While the Act does not deny access to single women, it does highlight the special attention that should be afforded to the absence of a father figure when having regard to the welfare of the future child.[87] It limited treatment to those that society perceived to be worthy parents.[88]

The Department of Health, in reviewing the 1990 Act in 2006, suggested that the reference to the need for a father should be removed from the legislation.[89] The Department supported the retention of the need to consider the welfare of the child in general, but suggested that the need for a father requirement was forcing many women to enter private arrangements rather than use the licensed treatment services.[90]

The Joint Committee on the Human Tissue and Embryos (Draft) Bill in 2007 found that a loving, supportive family network was more important for a child's development than the gender of the second parent.[91] The Committee recommended that section 13(5) should be retained but in an amended form which would require that the "need

---

[87] For debate on the impact of section 13(5) before the 2008 amendment, see E. Sutherland, "'Man not Included'- Single Women, Female Couples and Procreative Freedom on the United Kingdom" (2003) 15 *C.F.L.Q* 155.
[88] *Supra* n. 80, at 55.
[89] Department of Health, *Review of the Human Fertilisation and Embryology Act: Proposals for Revised Legislation* (Including establishment of the Regulatory Authority for Tissue and Embryos) (December 2006), at para. [2.26].
[90] *Ibid.*
[91] Joint Committee on the Human Tissue and Embryos (Draft) Bill, *Human Tissue and Embryos (Draft) Bill, Volume I: Report* (1 August 2007), at para. [242].

for a second parent" should be taken into account.[92] The Committee noted that in making this suggestion they did not seek to discriminate against single women seeking treatment and they recommended that in such circumstances the requirement to consider the need of a child for a second parent should not be a bar to treatment.[93]

The most controversial amendment in the 2008 Act was the removal of the "need for a father" requirement in the 1990 Act, and its substitution with the requirement that clinicians consider the child's need for "supportive parenting".[94] Like developments in Australia, the changes to the 1990 Act are fuelled by the suggestion that different family forms can perform the same functions as the heterosexual family. The need for a father is replaced with a need for a second parent. It is based on the contention that same sex couples are not so different from opposite sex couples as to be denied access to treatment. Single women can avail of treatment, but always after a recognition that it may be better if a second parent is present. Consideration of the right to access based on respect for human dignity would change the focus from whether a single woman or unmarried couple qualifies, to the question of what factors mean they do not qualify. It is only through this approach that one really appreciates the importance of these decisions and opportunities to realise such an intimate wish as to become a parent,. More importantly, concerns about the best interests of the child can be clearly articulated outside of generic statements that assume without question that the stability of the marital or two-parent model promotes the welfare of the child without fail.

In France, the bioethics laws passed in July 1994 by the French National Assembly stated that only infertile, heterosexual couples of

---

[92] *Ibid*, at para. [243].
[93] *Ibid*.
[94] *Supra* n. 79, at 202. For greater consideration of the removal of this phrase, see D. McGrattan, "No Need for a Father: The Human Fertilisation and Embryology Act" (2009) 12 *I.J.F.L.* 33.

procreative age can use IVF or other reproductive technologies. Article L. 152-2 provides that assisted reproductive technology responds to a couple's wish to become parents. It goes on to note that ARTs surmount medically diagnosed pathological infertility. It also states that the man and the woman who form the couple must be married or living together for at least two years. The law clearly restricts access to single persons and same sex couples. The CCNE (National Consultative Ethics Committee) in France reviewed the 1994 Law in 1998. It noted that the "conditions of access to medically assisted reproduction are based on a choice made by society to the effect that the interests of the unborn child are best served by being born and growing up in a family made up of a heterosexual couple".[95] The CCNE concluded that there should be no modification to the conditions of access to reproductive technologies.[96]

In the United States, IVF is not uniformly regulated by the states so there is a lack of consistent policies regarding the accessibility of IVF to single women, or same sex or unmarried couples.[97] Many states indirectly regulate access through their legislation concerning insurance cover for ARTs. Physicians also act as gatekeepers in deciding who can receive treatment.[98] Some physicians and clinics have policies that deny insemination or other services to single women on the basis that the most legitimate indicator for using ARTs is a male spouse's infertility.[99] The reference solely to married couples in determinations of parenthood under the Uniform Parentage Act 1973 was removed in 2000, with the new provisions permitting

---

[95] CCNE, *Re-Examination of the Law on Bioethics* (No 60- June 25, 1998), available at http://www.ccne-ethnique.fr/docs/en/avis060.pdf (accessed 8th March 2010).

[96] For greater consideration of the background to French Law and the review by the CCNE in 1998, see N. Ball, "The Re-emergence of Enlightenment Ideas in the 1994 French Bioethics Debates" (2000) 50 *Duke L. J.* 545, at 547.

[97] See D. Davis, "The Puzzle of IVF" (2006) 6 *Hous. J. Health L. & Pol'y* 275.

[98] C. De Lair, "Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women" (2000) 4 *De Paul J. Health Care L.* 147, at 150.

[99] J. Lezin, "Misconceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and their Use of Known Donors" (2003) 14 *Hastings Women's L. J.* 185, at 195.

single women to become the sole parents of the children born to them through the use of artificial insemination.[100]

The discourse in all jurisdictions and commentary above surrounds the question of whether unmarried couples or single women are so different from married couples as to warrant different treatment when determining who is eligible to access these technologies. The Irish courts and legislature have the opportunity to promote the right to procreative autonomy and simultaneously afford greater attention to the best interests of the child in each particular case. A presumptive right to procreative autonomy may lead to the same outcome in cases or legislative reform as the anti-discrimination approach. Nonetheless, it promotes transparent assessments of any reservations to single parents or unmarried parents, which in turn promotes the dignity-based right to procreative autonomy. The Commission on Assisted Human Reproduction argued that the true determining factors for a child's well-being did not coincide with and are not (mainly) determined by the sexual orientation, number of parents or genetic relatedness of the potential parents to their children.[101] It suggested that if we have the welfare of the child in mind, we ought to select the characteristics and conditions which have a proven influence on the well-being and happiness of children, not just ideologically or religiously based features.[102] Some studies have found that children with two biological parents have higher standards of living, and those who experience co-operative co-parenting are emotionally closer to both parents.[103] A dignity-based approach to procreative autonomy advocates that such concrete practical concerns

---

[100] R. Storrow, "Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction" (2006) 39 *U.C. Davis L. Rev.* 305, at 310.
[101] *Supra* n. 2, at 119.
[102] *Ibid.*
[103] P. Amato, "The Impact of Family Formation Change on the Cognitive Social, and Emotional Well-Being of the Next Generation" (2005) 15(2) *The Future of Children* 75, at 75. For a survey of sociological literature highlighting the complementarity of parenting from different genders and its benefits for the child, see D. Byrd, "Gender Complementarity and Child-Rearing: When Tradition and Science Agree" (2004) 6 *J. L. & Fam. Studies* 213.

should determine access to treatment rather than relationship status per se.

III. Sexuality: Does (or Should) Gender Matter?

The availability of same sex adoption or access by same sex couples to ARTs is linked to the recognition afforded to same sex relationships through creating registration regimes or allowing marriage. In jurisdictions like the Netherlands, Spain or Massachusetts where same sex marriage rather than registered or civil partnership is recognised, such couples enjoy the same access rights as heterosexual married couples.[104] Therefore, the recognition of the adult relationship and the form of recognition is tied up to the validity of same sex adoption. The danger with grouping developments regarding adoption and ART with recognition of same sex relationships brings back the focus to the question of discrimination based on marital status. This analysis detracts from the real questions regarding the right to access and the extent to which the welfare of any future child would limit this right.[105]

The Australian federal government in 2007 sought to introduce the Family Law (Same Sex Adoption) Bill that would amend the federal Family Law Act 1975 to indicate that same sex couple adoptions in other countries would not be recognised in Australia.[106] The Bill did not pass before a general election was called.

---

[104] See L. Kohm, M. Lindsey & W. Catoe, "An International Examination of Same Sex Parent Adoption" (2007) 5 *Regent J. Intl. L.* 237 for discussion of the link between equivocation of same sex marriage with heterosexual marriage and its impact on the permissibility of same sex adoption.

[105] See M. Saez, "Same Sex Marriage, Same Sex Cohabitation, and Same Sex Families Around the World: Why 'Same' is So Different" (2011) 19 *Am. U. J. Gender Soc. Poly & L.* 1 as an example of the debate generated by this approach.

[106] The Australian, "Prime Minister to Fight States on Gay Adoptions" (2 August 2007), available at: http://www.theaustralian.com.au/news/nation/pm-to-fight-states-on-gayadoptions/story-e6frg6nf-1111114092906 (accessed 30th March 2011).

In the case of *J.M. v Q.F.G. & G.K.*, the Queensland Court of Appeal upheld an Anti-Discrimination Tribunal decision that a women who was in a long-term lesbian relationship was not directly discriminated against under the Anti Discrimination Act 1991 when doctors would not provide fertility treatment, here artificial insemination, to her.[107] The Court of Appeal decision reversed the decision of the Supreme Court on appeal from the Tribunal, which found that the reason J.M. was not treated was that she was not medically infertile. J.M.'s complaint was regarding discrimination on the basis of sexual activity as opposed to marital status.

The Queensland Court of Appeal expressly noted that it was interpreting various sections of anti-discrimination legislation, and not deciding whether lesbian couples should be able to access reproductive technologies in Queensland. The court found that the reason why the failure to allow J.M. access to ARTs was not discriminatory was because the refusal was not due to her lesbian relationship or sexuality, but due to her failure to comply with the definition of "infertility" stated by the clinic.[108] Davies JA in the Court of Appeal held that the reason why J.M. did not comply with the clinic's definition of infertility was due to her sexuality. The Court emphasised that it was the failure to come with the definition of infertility outlined by the clinic, and not J.M.'s sexuality that was the reason for refusal. One can question the distinction between these positions.

In *Potter v Korn*, the British Columbia Supreme Court considered whether a doctor discriminated against a lesbian couple by refusing to provide fertility treatment to them.[109] The court affirmed the decision

---

[107] [1998] Q.C.A. 228. For more recent analysis of regulation of ARTs in Queensland see M. Smith, "Revising Old Ground in Light of New Dilemma: The Need for Queensland to Reconsider the Regulation of Assisted Reproductive Technologies" (2007) *QUT. L.J. & J.* 24.
[108] For detailed consideration of this decision see A. Stuhmcke, "Limiting Access to Assisted Reproduction: *J.M. v Q.F.G.*" (2002) 16 *A.J.F.L.* 245.
[109] (1996) 134 D.L.R. (4th) 437.

of the British Columbia human rights tribunal in finding that the doctor discriminated against the respondents contrary to section 3 of the Human Rights Act.[110] In *Re K. and B.*,[111] the Ontario Superior Court found that adoption legislation (Child and Family Services Act 1990) infringed section 15 of the Charter by failing to allow joint same sex adoption. The court read the term spouse to include same sex couples.

The European Court of Human Rights seems to have changed its stance on discrimination on the basis of sexuality in relation to eligibility for adoption in recent years. The Court in *Frette v France* considered French authorities' rejection of a homosexual man's application, which was allegedly based on the man's sexual orientation.[112] The applicant argued that the decision, taken in a legal system which permitted the adoption of a child by a single, unmarried adoptive parent, was tantamount to ruling out any possibility of adoption for a category of persons defined according to their sexual orientation without taking any account of their individual personal qualities for bringing up children.[113] However, the Court majority noted that a difference in treatment was only discriminatory for the purposes of Article 14 of the Convention if it had no "objective and reasonable justification" which pursued a legitimate aim and was not proportional to the aim to be realised.[114] The majority held that the decisions of the authorities pursued the legitimate aim of protecting the health and rights of the children who could be involved in the adoption process. The Court then focused on the margin of appreciation afforded to Member States in this area in light of the sensitive nature of the issues under consideration and the lack of international consensus on the matter.[115]

---

[110] *Ibid*, at para. [65].
[111] (1995) 125 D.L.R. (4th) 653,
[112] (2004) 38 E.H.R.R. 21.
[113] *Ibid*, at para. [26].
[114] *Ibid*, at para. [34].
[115] *Ibid*, at paras. [38-41].

In the later decision of *E.B. v France*,[116] the European Court departed from its position in *Frette*, but stopped short of overruling its previous decision. In this case the applicant's request to adopt a child was refused on the grounds that her partner was not committed to the adoption and because of the lack of possible male role models for the child. The 10-7 majority held that there was a violation of Article 14 in conjunction with Article 8. The majority noted that the lack of a maternal or paternal figure in the prospective household of the child was a relevant factor in determining the suitability of the applicants. However, the court argued that such circumstances had to be considered on a case by case basis. The Court underlined the need to prevent the automatic rejection of all applications by homosexuals to adopt.

French authority experts noted that the applicant's lifestyle meant that the child would not enjoy a family life where the family image revolved around a parental couple that would automatically safeguard the child's stable and well-adjusted development.[117] The particular facts of this case raises questions about the precedential value of the decision and indeed the merits of the decision itself. It is arguable that the key objection by the authorities was not the absence, but rather the presence in the household of a partner who clearly did not wish to take on a parental role.[118] This was surely a factor to be considered irrespective of the gender of the applicant's partner. Ian Curry Sumner has argued that the majority, in reaching its decision and attempting to ensure that sexual orientation is not tolerated as a ground for refusal to adopt, have failed to adhere to the very essence of adoption legislation, namely that the best interests of the child should always be taken into account.[119] The fact that the applicant's homosexuality featured to such an extent in the reasoning of the

[116] (2008) 47 E.H.R.R. 21.
[117] *Ibid*, at para. [10].
[118] A. Bainham, "Homosexual Adoption" (2008) 67 *C.L.J.* 479, at 480.
[119] I. Curry-Sumner, "*E.B. v France*: a missed opportunity" (2009) *C.F.L.Q.* 356.

domestic authorities was significant.[120] While the Court recognised the significance of the lack of a parental referent as a factor to be taken into account by the authorities, it questioned the excessive reference to this matter when single person adoption was permitted in France.

Germany has provided for registered life partnerships (Eingetragene Lebenspartnerschaft- Registered Partnership) for same sex couples since 2001. The 2001 Act did not provide any adoption rights to same sex couples. The Act was amended in 2004 to permit same sex couples adopt, but only in relation to second parent adoption. Section 9(7) of the Registered Partnership Act, amended by the Registered Partnership Reform Act, provided that a person may adopt the biological child of his or her registered partner. It does not permit joint adoption of a child like a married couple can.[121] Single person adoption is permitted by one party to the registered partnership.

Same sex adoption is permissible in most states in the United States. As noted above, the availability of adoption to same sex couples is linked to each individual state's recognition of same sex adult relationships.[122] Vermont[123] and Massachusetts[124] were the first states in 1993 to allow adoption by same sex parents. The court rulings in these states that prompted this reform were again based on the suggestion that discrimination on the basis of sexual orientation was not justified.[125] Other states expressly prohibited or restricted same

---

[120] *Supra* n. 116, at para. [85].
[121] Section 1742 of the German Civil Code only provides for simultaneous adoption by a married couple.
[122] See D. Bowen, "The Parent Trap: Differential Familial Power in Same Sex Families" (2008) 15 *William & Mary J. Women & L.* 1, at 5.
[123] *In the Adoptions of B.L.V.B. & E.L.V.B.* (1003) 628 A. 2d 1271.
[124] See Massachusetts Supreme Judicial Court ruling in *Adoption of Tammy* (1993) 619 N. E. 2d 315.
[125] For analysis of these early developments, see A. Galatis, "Can We Have a Happy 'Family'? Adoption by Same Sex Parents in Massachusetts" (2001) 6 *Suffolk J. Trial and App. Advocacy* 7. For analysis of similar legislative reform in New Hampshire, Connecticut and judicial reform in New Jersey and Illinois, see V. Lavely, "The Path to Recognition of Same Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption" (2007) 55 *U.C.L.A. L. Rev.* 247.

sex couples from adopting.[126] Florida prohibited same sex couples from adoption through statute.[127] However, the District Court of Appeal in 2010 found that there was no rational basis for the different treatment of homosexual couples in light of any legitimate government objective in prohibiting same sex adoption.[128] The court noted that a homosexual parent was permitted to foster children, and that there was no suggestion that homosexual persons were unfit parents.[129] In a similar development, the Supreme Court of Arkansas recently found that its prohibition on any individual cohabiting outside of marriage from adopting infringed the fundamental right to privacy.[130] It held that individual assessments by the relevant authorities and courts would be an effective, but less restrictive, means of addressing issues like relationship instability or abuse that may represent a risk to the child.[131] Part II also noted amendments to legislation in Utah which impose restrictions on all unmarried couples from adopting.[132]

The American Ethics Committee of the American Society for Reproductive Medicine has argued that neither concerns about welfare of children nor the desire to promote marriage justify denying reproductive services to unmarried individuals or couples, including

---

[126] See M. Ritter, "Adoption By Same Sex Couples: Public Policy Issues in Texas Law and Practice" (2010) 15 *Texas J. C- L. & C.- R.* 235 for discussion of state of law in Kentucky, Ohio, Nebraska and Wisconsin where courts had prohibited same sex couples from the second parent adoption mechanism.

[127] Fla. Stat. Ann § 63.042(3) (West 2005). See also C. Mabry, "Opening Another Exit From Child Welfare for Special Needs Children- Why Some Gay Men and Lesbians Should Have the Privilege to Adopt Children in Florida" (2006) 18 *St. Thomas L. Rev 269* for the questionable argument that some gay couples could be permitted to adopt special needs children.

[128] *Florida Department of Children & Families v In Re Matter of Adoption of XXG & NRG* (2010) 45 So. 3d 79.

[129] *Ibid*, at 85-86.

[130] Ark. Code Ann. § 9-8-301-3. For discussion of the prohibition on all unmarried couples from adoption in Arkansas, see L. Wardle, "Comparative Perspectives on Adoption of Children by Cohabiting, Non-Marital Couples and Partners" (2010) 63 *Arkansas L. Rev.* 31.

[131] Judgment of the Supreme Court of Arkansas (2011) W.L. 1319217.

[132] Utah Code Ann. § 78-30-9(3).

those who are gay and lesbian.[133] The Committee noted that while reproduction traditionally has been regarded as an aspect of marriage, single persons and homosexuals in having and rearing offspring.[134] The Committee noted that all but 4 states permitted single person and gay and lesbian couples to adopt.

It is interesting to note that the debate leading up to the Civil Partnership Act was primarily focused on the legal recognition and regulation of the adult relationships of same sex couples and cohabitation of unmarried couples. The Act does not deal with questions of parenthood arising from these relationships. The approach has to be contrasted with the United Kingdom which afforded equal rights to same sex couples to qualify for adoption, before any legal mechanism for the recognition of their adult relationship was enacted. In the wake of *McD. v L.*[135] in Ireland, the right to procreative autonomy would permit lesbian couples access to ARTs. The case concerned legal recognition of parenthood arising from a sperm donation agreement. Future legislation and interpretation consistent with the approach advocated in this Chapter would permit access as long as the welfare of the child was promoted. The Commission on Assisted Reproduction recognised that research did not show that children of lesbian couples or single women were disadvantaged by their family form.[136]

A lot of sociological studies in the United States have considered the quality of same sex parenting, and asked if children are effected by the fact that their parents are the same gender.[137] Research suggests

---

[133] The Ethics Committee of the American Society for Reproductive Medicine, "Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons" (2009) 92(4) *Fertility & Sterility* 1190, at 1190.
[134] *Ibid*, at 1191.
[135] [2010] 2 I.R. 199.
[136] *Supra* n. 2, at 119.
[137] See P. Amato & Mary Casey Jacob, "Providing Fertility Services to Lesbian Couples: The Lesbian Baby Boom" (2004) 2 *Sexuality, Reproduction and Menopause* 83, J. Pennington & T. Knight, "Through the Lens of Hetero-Normative Assumptions: Re-thinking Attitudes Towards Gay Parenting" (2011) 13(1) *Culture, Health & Sexuality* 59, and F. Tasker, "Same-Sex Parenting and Child

that the development of children of lesbian or gay parents is not compromised in any significant respect relative to that among children of heterosexual parents in comparable circumstances.[138] Another study followed a sample of children raised in fatherless families from birth or early infancy to adolescence. The study found that children's social and emotional development was not negatively affected by the absence of a father, although boys in father-absent families showed more feminine but no less masculine characteristics of gender role behaviour.[139] Different psychological studies support findings that lesbian and gay parents do not produce inferior, nor particularly different, kinds of children than do other parents. [140] The American Psychological Association, in a comprehensive review of studies on lesbian and gay parenting in 2005, concluded that there was no empirical foundation for the suggestion that lesbian and gay adults were not fit parents.[141] It should be noted that this study, and other commentators, have questioned the accuracy of many studies on same sex parenting in light of the small samples used, the control groups used to compare data and the focus on middle-class, well-educated lesbian families in a lot of studies to date.[142] A presumptive right to access respects the inherent dignity and value of such couples

---

Development: Reviewing the Contribution of Parental Gender" (2010) 72 *Journal of Marriage & Family* 35.

[138] C. Patterson, "Children of Lesbian and Gay Parents (Review)" (1992) 63 *Child Development* 1025. See also K. Vanfraussen, I. Ponjaert-Kristoffersen & A. Brewaeys, "Family Functioning in Lesbian Families created by donor Insemination" (2003) 73 *Am. J. Orthopsychiatry* 78-90.

[139] F. MacCallum & S. Golombok, "Children Raised in Fatherless Families from Infancy: A Follow Up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence" (2004) 45(8) *Journal of Child Psychology & Psychiatry* 1407-1419.

[140] J. Stacey. "Gay and Lesbian Families: Queer Like Us", in J. Skolnick & A. Skolnick (eds.), *Family in Transition* (15th ed.) (Boston: Pearson/ Allyn & Bacon Publishers, 2009) 480, at 491.

[141] American Psychological Association, *Lesbian and Gay Parenting* (Washington: American Psychological Association, 2005), at 7. See also M. Rosenfield, "Nontraditional Families and Childhood Progress Through School" (2010) 47 *Demography* 755, where the author noted that 45 empirical studies to date had all found that children were not statistically disadvantaged for being raised by gay or lesbian parents. Rosenfield conducted a larger study which found that these children were making normal progress through school.

[142] *Ibid*, at 6. For similar criticisms of most studies to date, see P. Amato, "The Well-Being of Children with Gay and Lesbian Parents" (2012) 41 *Social Science Research* 771-774.

and requires honest assessment of any limitations based on the welfare of the child.

IV. Age: Restrictions on Post-Menopausal Motherhood

One of the most controversial questions concerning access to ARTs is the possible use of such technologies by post-menopausal women in their 50s and 60s to become mothers. Famous examples like Adriana Iliescu in Romania who gave birth at the age of 66 in 2005,[143] or Omkari Panwar in India who gave birth to twins in 2008 when she was 70, have generated much debate about this use of ARTs.[144] This thesis will balance the prima facie right to procreative autonomy of such mothers with concerns based on the best interests of future children born to such mothers. It cautions against instinctive objections to this use of ARTs simply on the basis that this use is unnatural.

Recent developments in reproductive technologies have enabled the introduction of oocytes into the uterus of menopausal and post-menopausal women. The success of oocyte donation is higher than IVF or GIFT even though those receiving the oocytes are older. According to medical studies, the uterus retains its receptivity to embryo implantation beyond the age of natural menopause as long as sufficient doses of oestrogen and progesterone are administered. The success of the procedure is not influenced by age.[145] There is little case law or legislation on this matter. It is widely recognised by the medical profession and commentators that the use of ARTs when women have experienced premature menopause in their thirties

---

[143] See D. Cutas, "Post-Menopausal Motherhood: Immoral, Illegal? A Case Study" (2007) 21(8) *Bioethics* 458.

[144] For more examples of post menopausal birth see M. Reynolds, "How Old is Too Old? The Need for Federal Regulation Imposing a Maximum Age Limit on Women Seeking Infertility Treatments" (2010) 7 *Ind. Health L. Rev.* 277, at 277-278.

[145] V.H. Eisenberg & J.G. Schenker, "Pregnancy in the Older Woman: Scientific and Ethical Aspects" (1997) 56 *Intl. Journal of Gynaecology & Obstetrics* 163, at 163.

receives medical and public support.[146] Therefore, many objections to post-menopausal motherhood do not necessarily come from the unnaturalness of the technology itself, but rather the unnaturalness of a woman in her fifties, sixties or even seventies becoming a mother. The objection to the use of the technologies is based on a consequentialist objection of risks to prospective children born to such mothers.[147]

In the United Kingdom, the Human Fertilisation and Embryology Acts do not place express age limits on who may use ARTs. The Human Fertilisation and Embryology Authority has noted that while a woman's age is an important factor affecting the outcome of treatment when the woman uses her own eggs, age is not as significant when the patient is receiving donor eggs.[148] The Authority has also suggested that gametes from women over 35 years and from men over 55 years could be used for their own treatment or the treatment of their partner.[149]

The NHS has issued guidelines that suggest free IVF treatment should not be provided to women over 39 years.[150] The English High Court has held that an upper age limit of 35 imposed by a local

---

[146] F. Fisher & A. Sommerville, "To Everything there is a Season? Are there Medical Grounds for Refusing Fertility Treatment to Older Women?", in J. Harris & S. Holm (eds.), *The Future of Human Reproduction: Ethics, Choice and Regulation* (Oxford: Oxford University Press, 1998) 203, at 211.

[147] G. De Wert, "The Post-Menopause: Playground for Reproductive Technology? Some Ethical Reflections", in J. Harris & S. Holm (eds.), *The Future of Human Reproduction: Ethics, Choice and Regulation* (Oxford: Oxford University Press, 1998) 221, at 224.

[148] Human Fertilisation and Embryology Authority, *Third Annual Report 1994*, at 41. Available at http://www.hfea.gov.uk/docs/Annual_Report_3rd_1994.pdf (accessed 5th February 2011).

[149] Human Fertilisation and Embryology Authority, *HFEA Code of Practice* (2nd Edition), at para. [3.34].

[150] See National Institute for Clinical Excellence, *Fertility: Assessment and Treatment for People with Fertility Problems* (Clinical Guidance 11)(February 2004), at para. [11.2] where is it suggested that the optimal age range for IVF treatment is 23-39 years, available at http://www.nice.org.uk/nicemedia/pdf/CG011niceguideline.pdf (accessed 5th February 2011). The guidelines suggest that three cycles of IVF should be available to women within this age bracket. For consideration of these NHS guidelines, see J.R. McMillan, "NICE, the Draft Fertility Guideline and Dodging the Big Question" (2003) 29 (6) *J. Med. Ethics* 313.

Health Authority, in order to ration treatment within their budget to women upon whom it was likely to have the greatest benefit, was permissible.[151] Auld J in the High Court was concerned with judicial review of the decision of the Health Authority and Secretary of State and not with the question of age limits per se. Therefore, the case is of limited precedential value when considering the permissibility of post menopausal motherhood.

The Canadian Royal Commission in 1993 criticised the use of egg donation to expand the human reproductive lifespan because it is normal for older women to be infertile. The Commission recommended that IVF treatment should not be offered to women who have experienced menopause at the usual age.[152] Therefore the Commission seems open to the use of IVF and oocyte donation where a woman had gone through menopause earlier than the 'normal' age. As already noted, the 2004 Act does not consider questions of who can have access at all. It is common practice among clinics to limit treatment between 35-50 years. The only mention of age in the Act concerns the question of gametes obtained from minors.[153] The birth of twin boy to Ranjit Hayer in Calgary in 2009 when she was 60 years old threw the issue of post-menopausal motherhood into the media spotlight.[154]

The French Bioethics Law requires that the couple undergoing treatment must be of "normal reproductive age".[155] It does not

---

[151] *R. v Sheffield Health Authority, ex parte Seale* (1994) 25 B.M.L.R. 1. For analysis of this decision see S. Elliston & A. Britton, "Is Infertility an Illness?" (1994) *N.L.J.* 1552, and Case Commentary, "Infertility Treatment- Access and Judicial Review" (1996) *Medical L. Rev.* 326.

[152] P. Baird, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies* (Volume 1) (Government of Canada Publications, 1993), at 516.

[153] Section 9 of the Assisted Human Reproduction Act prohibits the use of sperm or ovum from anyone under the age of 18 unless it is retrieved for storage with the view to future use by the gamete provider themselves.

[154] CBC News, "60 Year Old Calgary Mother Welcomes Twins" (5th February 2009).

[155] Article L. 152-2, Law No. 94-654 of 29th July 1994 on the Donation and Use of Elements and Products of the Human Body, Medically Assisted Procreation, and

provide any more detail on what the definition of "normal reproductive age" means, and whether the age for men and women is the same. It should be noted that IVF is not refunded by the Social Security (Social Health Service) after the age of 43 for the woman.[156] The Netherlands also provides for a maximum age limit for the recipients of treatment.[157]

The Irish Adoption Act 2010 provides that the Adoption Authority shall not make an adoption order or recognise an inter-country adoption unless it is satisfied that the applicant satisfies, or married applicants satisfy a number of considerations. Section 34(b) requires the that the applicant(s) be:

" of good moral character, in good health and of an age so that he or she has a reasonable expectation of being capable throughout the child's childhood of:

i) fulfilling his or her parental duties in respect of the child;
ii) promoting and supporting the child's development and well-being;
iii) safeguarding and supporting the child's welfare;
iv) providing the necessary health, social, educational and other interventions for the child...."

A report on behalf of the Department of Health commissioned in 1999 on assessment procedures in inter-country adoption recommended a lower age limit of 25 years and an upper age limit "of not more than 42 years" for the older applicants at the time of placement, mirroring the age profile of birth mothers at the time.[158]

Prenatal Diagnosis (Journal Officiel de la Republique Francoise, Lois et Decrets, 20 July 1994, No. 175, p 11060-11068). For background to the Law see J. Michaud, "French Laws on Bioethics" (1995) 2 *Eur. J. Health L.* 55, and A. Dorozynski, "France Battles out Bioethics Bill" (1994) 308 *B.M.J.* 291.

[156] J. McGregor and F. Dreifuss-Netter, "France and the United States: The Legal and Ethical Differences an Assisted Reproductive Technologies" (2007) 26 *Med. & L.* 117, at 122.

[157] G. Pennings, "Reproductive Tourism as Moral Pluralism in Motion" (2002) 28(6) *J. Med. Ethics* 337, at 338.

[158] V. O'Brien & V. Richardson, *Towards a Standardised Framework for Intercountry Adoption Assessment Procedures: A Study of Assessment Procedures*

The report suggested that the adopted child should not be exposed to a special situation to any extent greater than that of the adoption itself.

The Irish Commission on Assisted Human Reproduction also proposed that any future legislation might prescribe an upper age limit beyond which individuals would not be entitled to avail of ARTs.[159] The Commission was of the opinion that this limit protected the interest of the child that there parents would be alive in their maturity, as well as being in society's interest in protecting the health of its citizens.[160] The Commission looked to the Human Fertilisation and Embryology Authority's Code of Practice regarding the factors that provided a stable and supportive environment for a child.[161] The age of prospective parents and their likely ability to look after children in the future was a relevant factor in this regard.[162]

There is little debate in case law, legislative reform or academic commentary about possible age limits for potential fathers. Men can naturally become biological fathers later in life. A recent U.K. parliamentary report on NHS IVF provision noted that while some Primary Care Trusts limited IVF to women below 35 years, only a small number placed restrictions on a male partner's age.[163] It should be appreciated that the concerns regarding the health of the child due to the age of the mother are warranted when the potential mother must carry the child to term, concerns that are absent regarding the father.

---

in Intercountry Adoption (Dublin: The Stationery Office, 1999), at paras. [7.5.3.1]-[7.5.3.2]. It should be noted that the Law Reform Commission did not recommend or consider the need for any such age limit (or any other eligibility criteria) in its report of inter-country adoption (Law Reform Commission, *Report on the Implementation of the Hague convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1998* (LRC 58-1998)).

[159] *Supra* n. 2, at 26.

[160] *Ibid.*

[161] *Ibid*, at 120.

[162] *Ibid.*

[163] The common limit was 54 years of age (All Party Parliamentary Group on Infertility, *Holding Back the British IVF Revolution? A Report into NHS IVF Provision in the UK Today* (June 2011), at para. [4.3]).

Studies have suggested that women between 35 and 45 should usually have safe pregnancies.[164] However, the same study suggested that the rate of pregnancy complications like pregnancy-induced hypertension are higher among women over 50.[165] Another study of pregnant women over 50 conducted at the Assisted Reproductive Technology Program of the University of Southern California between 1991 and 2001, suggested that there was no definite medical reason for excluding women over 50 from attempting pregnancy on the basis of age alone.[166] The study does suggest that there is an increased risk in gestational diabetes and pregnancy-associated hypertension in this age group.[167]

A retrospective study of all deliveries by women over 50 years in the United States between 1997-1999 has suggested that there is a greater risk of fetal morbidity and mortality than women between 40 and 49 years old.[168] The study also recognised that preterm or low weight births are more common among mothers over 50.[169] While advancing maternal age is a risk factor for fetal death, developments in maternal health and obstetrical practice have resulted on a decline in complications in recent decades.[170] Legitimate risks to the physical well-being of future children should limit the ability of post-menopausal women to access technologies, as it would for any candidate accessing ARTs. An assessment based on the age and

---

[164] L. Heffner, "Advanced Maternal Age- How Old is Too Old?" (2004) 351 *The New England Journal of Medicine* 1927, at 1928.
[165] *Ibid.*
[166] R. Paulson et al, "Pregnancy in the Sixth Decade of Life: Obstetrical outcomes of Women of Advanced Reproductive Age"(2002) 288(18) *Journal of the American Medical Association* 2320, at 2323.
[167] *Ibid*, at 2322.
[168] H. Salihu, N. Shumpert, M. Slat, R. Kirby & G. Alexander, "Childbearing Beyond Maternal Age of 50 and Fetal Outcomes in the United States" (2003) 102 *Obstetrics & Gynaecology* 1006, at 1006.
[169] *Ibid.*
[170] R. Fretts, J. Schmittdiel, F. McLean, R. Usher & M. Golman, "Increased Maternal Age and the Risk of Fetal Death" (1995) 333(15) *The New England Journal of Medicine* 953, at 957.

health of the intending mother and the risks to the child would determine the permissibility of using ARTs in each individual case.

The age of the woman will also be relevant in considering the emotional and psychological welfare of the future child. The question of whether the potential mother will live long enough to raise her child is recognised in the 2010 Act outlined above. The same consideration is relevant here and could act to limit access to ARTs depending on the age and health of the mother, and the larger family that the child will be born into. All of these matters are a question of degree depending on the circumstances of each case. In the case of post-menopausal motherhood, the interests of potential children may warrant limitation of this right. The weight of the limitation will vary between a 40-year old and a 60-year old seeking treatment. Above all, the right would ensure a more detailed discussion of sometimes obvious, but rarely articulated, objections to permitting access to older women.

V. A Right to Free or Funded Treatment- A Social and Economic Right to Access ARTs?

This Part considers whether the right to procreative autonomy includes a right to free or funded access to ARTs. It should be appreciated at the outset that the availability of free or funded treatment is linked to other access questions like age limits and the need to establish medical infertility, with authorities like the NHS placing age limits on those who may qualify for free treatment.

The question of a right to free treatment has been directly considered in Canada. Some provinces in Canada do offer funded access to treatment. The Canadian Royal Commission on New Reproductive Technologies in 1993 recommended that the provinces fund IVF as a treatment for women with fertility problems due to blocked fallopian tubes, as well as other causes of infertility like endometriosis. Ontario

publicly funded IVF from 1985 to 1994, when funding was restricted to treatment for completely blocked fallopian tubes, in line with the Commission's recommendations.[171] The Ontario Medical Association and the Ontario Ministry of Health amended the Ontario Health Insurance Plan fee schedule to cover IVF for women under 40 years where both fallopian tubes are blocked.

The Ontario Expert Panel on Infertility and Adoption has recommended that Ontario should fund assisted reproduction services in order to reduce multiple births.[172] The Panel argued that the high cost of treatment was forcing patients to transfer a number of embryos at each time, and suggested that the cost of funding treatment was less than the cost of multiple births that were more likely to be born pre-term and require expensive care at birth.[173] The Panel argued that treatment should be available to women under 42 years as there was a higher rate of possible successful pregnancy.[174] The Quebec government launched a plan to pay for fertility treatments of citizens in 2010.[175] The plan covers three stimulated cycles of IVF and one-by-one implantation of each embryo for as many times as there are embryos.[176] Manitoba provides for a tax credit system, which reimburses 40 per cent of IVF and other procedure costs up to $8000.

---

[171] J. Nisker, "Socially Based Discrimination Against Clinically Appropriate Care" (2009) 181 (10) *Canadian Medical Association Journal*

[172] Expert Panel on Infertility and Adoption, *Raising Expectations* (August 2009), at 9.

[173] *Ibid*, at 111-112.

[174] *Ibid*, at 115.

[175] See Act Respecting Clinical and Research Activities relating to Assisted Procreation 2009, Regulation on Clinical Activities related to Assisted Procreation and Regulation modifying the Regulation respecting the Application of the Health Insurance Act 2010.

[176] See Quebec Department of Health, "Assisted Procreation", available at: http://www.mss.gouv.qc.ca/en/sujets/santepub/assisted-procreation.php (accessed 3rd August 2011). See also CTV News, 'Quebec Women to get Free Fertility Treatments" (13th July 2010), available at: http://www.ctv.ca/servlet/ArticleNews/print/CTVNews/20100713/quebec-fertility-treatment (accessed 3rd August 2011).

In *Cameron and Smith v Nova Scotia*, the Nova Scotia Supreme Court considered whether the plaintiff had a right to receive reimbursement for fertility treatments (ICSI treatment) received in another province.[177] The plaintiffs claimed that the refusal of the Nova Scotia Health Care Insurance Program to cover the cost of their fertility treatment infringed their Charter rights.[178] They argued that the refusal by the Province to provide them with hospital insurance coverage for their treatment was a breach of their s. 15(1) Charter rights, as it discriminated against them because of their physical disability.[179] The case centred on whether the fertility treatment in Nova Scotia, or out of province, was "medically necessary" or "medically required" for the purpose of health insurance legislation, and therefore covered by health insurance.[180] The Nova Scotia Court of Appeal found that while IVF could be considered a medically necessary treatment, the restriction of insurance was justified under section 1 of the Charter in recognition of the need to budget resource allocation.[181] The Supreme Court noted medical opinion that IVF and ICSI were not medically necessary or medically required.[182] The plaintiffs claimed that the denial of health insurance cover constituted discrimination on the grounds of disability (infertility).[183] Kennedy C.J. held that the non-funding of IVF and ICSI was based on the nature of the treatment being sought, rather than the personal characteristics of infertile people.[184] The court concluded that there

---

[177] [1999] N.S.J. No. 33 (leave to appeal to the Supreme Court of Canada was refused, see [1999] S.C.C.A. No. 531. For comprehensive analysis of this judgment, see K. Dewhirst, "A Comment on *Cameron and Smith v Nova Scotia (A.G.),* the Minister of Health, the Department of Health and the Administrator, Insured Professional Services" (1999) 8 *Dal. J. Leg. Studies* 160.
[178] *Ibid*, at paras. [17-18].
[179] *Ibid*, at para. [23].
[180] *Ibid*, at paras. [69-78].
[181] [1999] N.S.J. 297 (CA), at para. [84]. See also C. Washenfelder, "Regulating a Revolution: the Extent of Reproductive Rights in Canada" (2004) 12 *Health L. Rev.* 44, at 48-49.
[182] *Supra* n. 190, at paras. [82-91].
[183] *Ibid*, at para. [144].
[184] *Ibid*, at para. [149].

was no discrimination against the plaintiffs, and therefore no breach of section 15 of the Charter.[185]

Certain primary care trusts within the NHS in the U.K. provide for three free cycles of treatment. The availability of these treatment varies between trusts and is subject to long waiting lists.[186] As noted in Part IV these trusts impose different eligibility criteria, especially regarding the age of the woman seeking treatment. Reproductive treatment from private clinics in Australia is covered by Medicare.[187] Most of the cost of treatment will be eligible for Medicare rebate, and are not means tested.[188]

Two concerns or limitations arise in relation to the socio-economic right to procreative autonomy. The first concern is the justiciability of a socio-economic right to funded treatment in Ireland. The second problem is whether the financial position of prospective parents, and their inability to pay for treatment, should limit the availability of ARTs in order to promote the best interests of the child. The problem of justiciability of socio-economic rights in Irish law will limit this aspect of the right. It may also be argued that the best interests of the child may warrant curtailment of the right.

It is beyond the scope of this thesis to consider the justiciability of socio-economic rights in any great depth. Social and economic rights are often better recognised at an international rather than a national

---

[185] *Ibid*, at para. [153].
[186] All Party Parliamentary Group on Infertility, *Holding Back the British IVF Revolution? A Report into NHS IVF Provision in the UK Today* (June 2011).
[187] People are eligible for Medicare in Australia as long as they hold Australian citizenship or have been issued with a permanent visa. For further information on Medicare, see Department of Human Services website, available at http://www.medicareaustralia.gov.au (accessed 3rd August 2011)
[188] For information on Medicare cover according to treatment providers, see IVF Australia, "Medicare Q&A", available at http://www.ivf.com.au/ivf-treatment-costs/medicare-q-and-a.aspx> (accessed 3rd August 2011); and Monash IVF, Cost of IVF Treatment in Victoria", available at http://www.monashivf.com/Costs/Victoria-Costs.aspx (accessed 3rd August 2011).

level.[189] Unlike civil and political rights, social and economic rights are usually not translated in a meaningful way into national laws.[190] Certain assumptions concerning the actual *existence* of social rights suggest that social rights are not human rights at all, rather policies or programmes for future realisation.[191]

Distinctions are made between civil and political rights and socio-economic rights on two main bases. In the first instance, social and economic rights are said to be *positive rights*, in that they require state activity and expenditure to ensure their fulfilment.[192] Civil and political rights are negative as they *only* require non-interference of states into citizens' affairs. Rights cannot clearly be sectioned into these arbitrary categories or display often artificial characteristics.[193] Civil and political rights can be both positive and negative, and their realisation can demand large state spending. It is unduly simplistic to adhere to the arbitrary categorisation of rights which denies their interdependency and nuances.[194] Secondly, social and economic rights are deemed to be non-justiciable. Civil and political rights are perceived to be easily applicable for courts, while social and

---

[189] For a recent and comprehensive analysis of the domestic treatment of social rights in a number of jurisdictions, see P. O'Connell, "The Death of Socio-Economic Rights" (2011) 74 *Modern L. Rev.* 532.

[190] R. Robertson, "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realising Economic, Social and Cultural Rights" (1994) 16 *H.R.Q.* 693.

[191] E.W. Vierdag, "The Legal Nature of Rights Granted by the International Covenant on Economic, Social and Cultural Rights" (1978) 9 *Netherlands J. I.L.* 103, and J. Kenner, "Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility", in T. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights- A Legal Perspective* (Oxford: Hart Publishing, 2003) 1, at 3.

[192] Cranston argued that as rights impose correlative duties and one cannot have an obligation that is impossible to meet, social and economic rights are only "utopian aspirations" (M. Cranston, *What are Human Rights?* (London: The Bodley Head, 1973), at 68). See also C. Fabre, *Social Rights under the Constitution: Government and the Decent Life* (Oxford: Clarendon Press, 2000), chapter 2, regarding the complementary nature of positive and negative rights.

[193] P. Alston & J. Weiler, "An 'Ever Closer Union' in need of a Human Rights Policy" (1998) 9 *E.L.J.* 658, at 679.

[194] H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980).

economic rights are of a political nature.[195] Matters of state expenditures are primarily for the legislature rather than the judiciary to determine.

South Africa,[196] India,[197] Canada,[198] and Argentina[199] provide some examples of jurisdictions that have found that socio-economic rights can be legally enforced by the courts. The South African courts have used the notion of dignity to advance the case for socio-economic rights. Article 45 of the Irish Constitution lists a number of directive principles of social policy. Article 45 provides, however, that these principles of social policy are intended for the general guidance of the Oireachtas and "are not cognisable by any Court under the provisions of the Constitution." [200]The non-justiciability of social and economic rights has been addressed by the Irish courts in recent years in decisions like *Sinnott v Minister for Education*[201] and *T.D. v Minister for Education.*[202] In these cases the separation of powers doctrine was used by the courts to maintain that state expenditure was a matter for the Oireachtas to determine, it was not the place of the judiciary to outline how public money is allocated.[203] The Supreme Court in both

---

[195] A. Eide, "Economic, Social and Cultural Rights as Human Rights", in A. Eide et al. (eds.), *Economic, Social and Cultural Rights* (2nd ed.) (The Hague: Kluwer Law International, 2001) 9, at 10. For a comprehensive comparative analysis of the justiciability of socio-economic rights, see M. Langford, "The Justiciability of Social Rights: From Practice to Theory", in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 3-45.

[196] See *Soobramoney v Minister of Health,KwaZulu-Natal*, (1998) 1 S.A. 765, and *Government of the Republic of South Africa v Grootboom* (2000) 11 B.C.L.R. 1169.

[197] *Mehta v State of Tamil Nadu* (1996) B.H.R.C.

[198] *Eldridge v British Columbia* [1997] 3 S.C.R. 624, where the court found that the right to equality included a right to interpretative assistance for deaf patients when in health care facilities. See also P. Macklem, "Social Rights in Canada", in D. Barak-Erez & A. M. Gross (eds.), *Exploring Social Rights: Between Theory and Practice* (Oxford: Hart Publishing, 2007) 213-242.

[199] *Campodonico de Beviacqua, Ana Carina v Ministerio de Salud y Banco de Drogas Neoplasicas* (24 October 2000), where the Argentine Supreme Court found that the right to health protected the right of a child to continued medication.

[200] For detailed analysis of the content and basis of social rights in the Irish Constitution, see G. Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Dublin: Institute of Public Administration, 2002), at 43-57.

[201] [2001] 2 I.R. 241.

[202] [2001] 4 I.R. 545.

[203] For discussion of socio-economic rights in Ireland see: A. Nolan, "The Separation of Powers Doctrine vs. Socio-Economic Rights", in M. Langford (ed.),

instances articulated narrow versions of the separation of powers in finding that the legislature had the sole power to decide such matters.[204]

While the actual realisation of a socio-economic right to access ARTs is unlikely, the right to procreative autonomy articulated herein may force change in judicial opinion on the matter. The second concern about the actual financial circumstances of the intended parents could legitimately limit any right to access ARTs because of the best interests of the future child. It may be unpopular to suggest that the state of one's bank account should be a factor in determining access to treatment. This thesis maintains that this concern goes to the question of the best interest of the child more than gender or relationship status of intended parents. While the state cannot and should not mandate that only the wealthy can have children, some form of financial stability in a family is in the best interests of the child. Section 34(c) of the Irish Adoption Act 2010 stipulates that the Authority ensure the applicant(s) have adequate financial means to support the child.

VI. Conclusion

The Commission on Assisted Human Reproduction argued that there was a vast difference between deciding not to treat a person after having investigated their circumstances and concluding that the child would be at risk of harm, and ruling out a group of people on the basis of a subjective view of normality.[205] This thesis suggests that the different reasons for curtailing access based on sexuality, marital status or whether one is in a relationship in the first instance are not

---

Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (Cambridge: Cambridge University Press, 2008), at 295-319.

[204] See G. Whyte, "The Role of the Supreme Court in Our Democracy: A Response to Mr Justice Hardiman" (2006) 28 *D.U.L.J.* 1 for criticism of the Supreme Court's position.

[205] *Supra* n.2, at 121.

clearly articulated in case law, legislation or commentary. It has argued that the age of the mother may limit the availability of ARTs, but this would be determined on a case by case basis. It has also noted the constitutional problems with socio-economic rights in Ireland.

We limit the availability of technology because certain parents do not fit the ideal family form, without clearly stating what it is about such different parents that make them unfit. If the Irish courts and legislature focus on the right to procreative autonomy and the best interests of the child in each case then access questions will be comprehensively and fairly dealt with in the future.

Chapter VIII: The Right to Procreative Autonomy and Freedom of Contract

This chapter considers the extent to which the constitutional right to procreative autonomy includes a right to enter into legally enforceable contracts relating to the use of ARTs. The most contentious aspect of a right to enter into these contracts is the question of whether one retains the right to change one's mind after such contracts are formed. It is suggested that the constitutional right to procreative autonomy includes the prima facie right to have one's decisions regarding the use of gametes or one's own body respected. The recognition of this right will force consideration of the limitations that will oppose the enforceability of these agreements.

This Chapter argues that the real limitations to the right to bind oneself into the future are rarely articulated in the jurisdictions considered. It criticises the abuse of the notions like lack of informed consent and undue influence as ways of justifying interventions through the promotion, rather than limitation, of freedom. The constitutional balance of individual and communitarian interests provides an opportunity for this jurisdiction to openly engage with the real issues fuelling the reluctance to enforce such agreements. There are two related factors beyond consideration of freedom itself, that may justify invalidation of these contracts. Paternalistic concerns about protecting us from our own bad choices may be used to justify intervention. Rights should protect the *right* choices, not the wrong ones. The right to choose and shape one's future is protected on the assumption that every person is best positioned to decide what is best for them. When individuals enter such disadvantageous agreements and later come to their senses and realise they do not want to give up 'their child', or be forced to become a parent, the law will protect this change of mind.

The state will not find every agreement unenforceable when we change our minds or have entered into a contract that is not beneficial because of this change of mind. Therefore, there has to be something more than pure paternalism encouraging opposition to surrogacy. It is suggested that fundamental opposition to surrogacy agreements is based on the contention that it is unnatural for a woman to give away her child before the child is born. In this way paternalistic concerns about protecting women who do not realise what it will be like to give the child away, and opposition based on the fact that surrogacy is wrong or natural really lead to the refusal to enforce surrogacy agreements.

Chapter IV has noted that there needs to be clear consideration of the reasons why the right to procreative autonomy should be limited. It calls for knee-jerk or gut reactions about the "wrongness" of a practice to be probed and developed before they will justify limitations of the right. It is suggested that the promotion of the right to procreative autonomy will not lead to enforceability of such agreements, but it will force open discussion about attitudes to surrogacy and motherhood in particular. It will not accept limitations on contractual freedom based on quality of consent alone. It will also highlight the fundamental concerns outlined in Chapter VI about the perceived difference between forcing someone to be a parent and preventing someone from becoming a parent in relation to the enforceability of embryo disposition contracts.

Part I of this chapter argues that the prima facie right to enter enforceable contracts and to have one's decisions respected is protected under the right to procreative autonomy. The Irish courts have recognised the rights to self-determination and to make important personal decisions. The problem with contracts will come from two related concerns. The first concern is when a party changes their mind and no longer wants to be bound by their previous decision. The second related concern is where the original agreement

was deemed to be contrary to public policy. Part II contrasts the general position regarding sperm donation agreements in other jurisdictions with the general reluctance to enforce surrogacy agreements.

Part III surveys case law surrounding the enforceability of embryo disposition agreements, and notes that enforcement of such contracts depends on the implications of the agreement rather than concerns about informed consent or clarity of the agreement. Part IV outlines how communitarian concerns about the promotion of 'wrong" choices are disguised in notions of freedom. The notion that certain rights are inalienable, and therefore cannot be waived or relinquished by the right-holder is often used to avoid contracts. This is a notion expressly used in the Constitution in relation to the rights of the marital family. It also outlines concerns about the quality of consent in these agreements. In reality, both mechanisms are liberal ways of describing well meaning, and perhaps warranted, interference on the part of the state.

Part V will describe a number of instances in family law where the courts will promote the welfare and present interests of a party ahead of past agreements. Opposition to such protections of autonomy emanate from a desire not to enforce bad decisions, rather than the quality of autonomy itself. The Constitution's promotion of communitarian values like the common good and the dignity of humanity can openly be used in this regard to balance individualistic concerns for the promotion of freedom for freedom's sake. It will argue that the desire for paternalistic intervention is fuelled by the underlying position that surrogacy is unnatural and inherently wrong. Part VI will argue that surrogacy or sperm donation agreements should have some legal effect in relation to the other parties that entered the agreement. The rights of those who entered agreements with the surrogate are often sidelined in this debate. The right to procreative autonomy of these individuals will demand that some

recognition be afforded to the role of commissioning parents in creating the child. It will be argued that such contracts should be used as written evidence in order to afford such parties standing in determinations of legal parenthood. This argument regarding the recognition of parenthood is outlined in Chapter IX.

I. Freedom of Contract and the Right to Procreative Autonomy

The general approach of the chapters in this thesis is to begin with a claim that the umbrella constitutional right to procreative autonomy includes a specific right. It then examines the extent to which such a right is promoted or curtailed in different jurisdictions, and the different ethical concerns underpinning such limitations of the right, or even refusal to recognise the right in the first instance. The structure of this chapter differs. Common debate and argument in case law and commentary claims that the right to enter into enforceable contracts regarding future parenthood or uses of genetic material does not, and cannot, exist. The general argument is that contemporaneous freedom should be preserved. This Chapter will conclude that the state is justified in refusing to enforce surrogacy contracts because no 'mother' can give up their child before they are born. One could argue that in reality this is an argument for a contemporaneous right to make decisions about one's embryos or future children, that there is always a right to change one's mind. There are two reasons why this Chapter initially recognises a right to make decisions that will bind us in the future. In the first instance, it is a basic proposition of contract law that we have the autonomy to shape our own lives and are in the best position to know what we want to do with our gametes or embryos, or our bodies. This Part will outline how the Irish courts have recognised our right to waive constitutional rights or our right to refuse medical treatment. We can make decisions that are not in our best interests. Following on from this point, we are forced to consider whether the subject matter of the agreement or the contents of the agreement are contrary to public

policy. In this regard, an examination of the reasons behind such a stance is required. If one begins with the assertion that the right to procreative autonomy only permits contemporaneous decisions and allows us to change our minds this important discussion does not occur. The rationale for the suggestion that such rights are inalienable is not considered.

Respect for any right to control one's genetic material or third party embryos or gametes seems to demand protection of one's individual wishes regarding the use or destruction of such material. The right to procreative autonomy or liberty includes the right to make decisions regarding the fate of one's genetic material. Those who argue for a right to enter into preconception agreements suggest that in a world where we are all putatively equal we should be able to reach our own bargains and define our own lives.[1] The U.S. Supreme Court in *Planned Parenthood v Casey* suggested that "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life".[2] Freedom of contract is said to grant individuals a sphere of influence in which they can act freely.[3] If society denies its citizens the opportunity to exercise moral freedom or pretends that people are incapable of making such choices, it contradicts our human dignity in a profound way.[4] John Robertson argues that there is a price to be paid for freedom- that in gaining freedom at Time A to control what happens at Time B, one loses the freedom at Time B to avoid costlessly the prior commitment.[5]

---

[1] J. Dolgin, "Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate" (1990) 38 *Buff. L. Rev* 515, at 518.
[2] 505 U.S. 833 (1992), at 851.
[3] J. Munyan, "Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions" (2003) 26 *Suffolk U. L. Rev.* 717, at 731.
[4] W. Binchy, "Autonomy, Commitment and Marriage", in O. Doyle & W. Binchy (eds.), *Committed Relationships and the Law* (Dublin: Four Courts Press, 2007) 159, at 164. This point is raised in relation to an argument for lifelong marriage, but the sentiment regarding autonomy and the promotion of dignity is pertinent for the current discussion.
[5] J. Robertson, "Pre-commitment Strategies for Disposition of Frozen Embryos" (2001) 50 *Emory L. J.* 989, at 996.

The constitutional right of self-determination and autonomy was articulated by Denham J in *Re Ward of Court*. Denham J noted that decision making in relation to medical treatment is an aspect of the right to privacy; however, a component in the decision may relate to personal dignity.[6] The High Court in *Health Service Executive v X. (A Person of Unsound Mind not so Found)* recognised that a person has individual rights such as the exercise of free will, self-determination, freedom of choice, dignity and autonomy.[7] The High Court also recognised the right to self-determination at common law in *Fitzpatrick v K.*.[8] Once we are found to have capacity, we can refuse medical treatment, to the detriment of our welfare. While these cases did not concern questions of contract law they do illustrate that the Irish courts will respect decisions that do not benefit us.

The problem with the promotion of previous decisions occurs when one changes their minds after a contract has been entered into. A binding contract will always curtail future freedom. It is a basic principle of contract law that one cannot avoid contractual obligations when one change's their mind and no longer wants to be bound by the contract. When one enters a leasehold agreement or employment contract, one limits their ability to enter such contracts with other parties in the future. In such instances, we do not lament the freedom lost, but focus on the benefits gained by such contracts. There must be something about the subject matter of the contract or the consequences of the contract that warrant departure from these basic principles. It will be argued that a combination of these two factors will, and perhaps should, lead to the suggestion that such contracts should not be enforced.

---

[6] [1996] 2 I.R. 100, at 163.
[7] [2011] I.E.H.C. 326, at 2.
[8] [2008] I.E.H.C. 104. The High Court recognised individual rights including the right to be treated with human dignity, the right to self-determination, and the right to family life in *V.T.S. v Health Service Executive & Others* [2009] I.E.H.C. 106.

The right to procreative autonomy does protect the right to make decisions about the future use of genetic material. This position now forces a clear examination of the policy reasons why surrogacy contracts or dispositional agreements regarding frozen embryos should not be enforced. The following sections will examine how different jurisdictions promote or invalidate ART contracts, and the reasons provided for doing so.

II. The Enforceability of Sperm Donation and Surrogacy Agreements

a) Sperm Donation Agreements

The enforceability of sperm donation agreements has occupied at lot less judicial and academic time than surrogacy agreements. All of the jurisdictions considered provide for known or anonymous sperm donors, and once donation is made through a licensed clinic such persons do not have any parental rights in relation to the resulting children. Fatherhood has always been a more transient notion than motherhood, and the law has developed mechanisms for ensuring a child has *a* father, whether or not this person is biologically connected to the child. This section will begin by looking at some U.S. case law which illustrates the usual court response to sperm donors who change their minds. It also considers the Irish decision of *McD. v L.*. The willingness of the courts to uphold or take account of such agreements will be contrasted with the general approach of all jurisdictions in relation to surrogacy.

In *Steven S. v Deborah D.* the Californian court found that a semen donor was not the legal father of a child, despite the fact that the donor had a relationship with the birth mother. The court upheld Californian law which provided that semen donors were not the legal

fathers of resulting children.[9] The Court emphasised that the sperm had been provided through a licensed physician and therefore the statute applied.[10] In *C.M. v C.C.*, the New Jersey court found that a sperm donor who donated his sperm to an unmarried woman was the father of the resulting child.[11] The sperm donor had a relationship with the mother of the child, but the mother did not want to conceive the child via sexual intercourse before marriage.[12] There was no written agreement between the parties concerning parenthood. The court noted public policy which favoured a child to have a father as well as a mother.[13] At the time of the decision, New Jersey did not have any law regulating donor insemination.

In Kansas and Florida the state legislatures require a written agreement to overcome a statutory bar against the sperm provider's parental rights.[14] The Kansas Supreme Court in *In the Interest of K.M.H.* upheld the constitutionality of a statute which required a known sperm provider to enter into a written agreement with the child's mother or otherwise waive all future parental rights.[15] The court protected the mother's expectations and not the sperm donor's desire to be a father.[16] The Colorado Supreme Court in *In the Interest of R.C.* upheld a statute barring parental rights as it did not apply to sperm donors when there was an agreement that the donor would be the father of the child conceived.[17]

In *McD. v L.*, the High Court found that the sperm donation agreement was enforceable, but only to the extent that the rights and

---

[9] 127 Ca. App. 4th 319 (2005).
[10] *Ibid*, at 326.
[11] 152 N.J.Super. 160, 377 A.2d 821 (1977).
[12] *Ibid*, at 821.
[13] *Ibid*, at 824. See also J. Michael Nix, "You Only Donated Sperm" Using Intent to Uphold Paternity Agreements" (2009) 11 *J. L. & Fam. Stud.* 487, at 489.
[14] E. McDonald, 'Sperm Donor or Thwarted Father? How Written Agreement Statutes are Changing the Way Courts Resolve Legal Parentage Issues In Assisted Reproduction Cases" (2009) 47 *Fam. Ct. Rev.* 340, at 341.
[15] 169 P. 3d 1025 (2007).
[16] C. Adamson. "Assisted Reproductive Techniques: When is Sperm Donor a Dad?" (2009) 8 *Whittier J. Child & Fam. Advoc.* 279, at 279.
[17] 775 P. 2d 27 (1989).

the welfare of the child were not prejudiced.[18] Geoghegan J in the Supreme Court suggested that the question of whether the agreement had any legally binding effect was not relevant.[19] However, Geoghegan J claimed that the terms of the agreement were an important and relevant factor to be taken into account.[20] It was suggested that an advance agreement was prima facie beneficial.[21] The learned judge also stated that it was one thing to enter into an agreement in the cold light of day to be a sperm donor, and another suddenly to realise that a child of your own has been born.[22]

Murray C.J. was of the opinion that the agreement was unenforceable but was relevant as a factual background to those issues.[23] Murray C.J. also appreciated that a person in the position of McD could foreseeably change their mind after the birth of the child, and experience strong feelings of parental empathy towards the child.[24] Fennelly J suggested that the agreement would only be enforceable to the extent that the child's welfare was protected.[25] Denham J held that the agreement was only relevant insofar as it shows the intent of the parties at the time.[26] Again, Denham J highlighted that the best interests of the child was the paramount consideration. Denham J held that an agreement may assist the court, but such an agreement may not per se exclude the father.[27]

Chapter IX will outline how the recognition of the legal parenthood of sperm donors depends on the presence or absence of another father figure in the child's life rather than any respect for the biological

---

[18] [2008] I.E.H.C 96, at 34-35.
[19] [2010] 2 I.R. 199, at 279.
[20] *Ibid*, at 284.
[21] *Ibid*, at 285.
[22] *Ibid*, at 288.
[23] *Ibid*, at 244.
[24] *Ibid*, at 305.
[25] *Ibid*, at 254.
[26] *Ibid*, at 266.
[27] *Ibid*, at 267.

connection of such parties to children. The fact that a known sperm donor changes their mind does not have the same effect on contractual validity as the change of mind of a surrogate.[28] The failure of the Irish courts to promote the constitutional rights of unmarried fathers may perpetuate the same approach in Ireland to sperm donation agreements, especially if another father figure is present. Chapter IX will challenge the underlying presumptions about the different between fatherhood and motherhood that fuel this difference in attitude to sperm donation agreements.

b) The International Treatment of Surrogacy Agreements

Countless cases, legislation, and academic commentaries on the general issue of surrogacy begin and end with a survey of feminist writings on issues of commodification, exploitation, baby-selling as personified in the infamous *Baby M* decision. One will then end up concluding that Mary Beth Whitehead represents the oppression of poorer women everywhere, and a patriarchal society exploited her working class background and poor education. Alternatively, she is portrayed as the confused villain of the piece who denied the worthy Elizabeth Stern (the perfect educated woman who dearly wanted to be a mother and would have never dreamed of giving Baby M up if she was fertile like Mary Beth) the title of Baby M's mother. Thereafter, calls will be made for a complete ban on surrogacy, a ban on commercial surrogacy or the failsafe of cure-all legislation to deal with this area. This synopsis does not mean to suggest the questions like exploitation and commodification are not relevant or important concerns which may circumscribe a right to make decisions about one's future. However fundamental assumptions about the unnaturalness of surrogacy and society's discomfort with contract motherhood have to be questioned and highlighted. It is suggested that a rights based starting point challenges these assumptions.

---

[28] For an argument that surrogacy and sperm donation are the same, see S. Gersz, "The Contract in Surrogate Motherhood: A Review of the Issues" (1984) 12 *L. Med. & Health Care* 107, at 108.

The Irish Commission on Assisted Human Reproductions did not consider the question of enforceability of surrogacy agreements. It focused instead on possible determinations of parenthood arising from this arrangement in future legislation. In the United Kingdom, the Warnock Committee on the regulation of assisted human reproduction was divided on the correct regulatory approach to surrogacy in the United Kingdom. The resulting legislation and the regulation of surrogacy is piecemeal and incomplete. Dame Mary Warnock has recently admitted that her strong abhorrence of surrogacy lead to her being "too emotional, not to say irrational" on the subject.[29] The Inquiry recommended that the criminal law should prevent the creation of both profit and non-profit agencies, which could recruit women to act as surrogates.[30] The Warnock Committee also rejected the validity or enforceability of surrogacy contracts.[31] Most importantly, the Warnock majority expressly rejected any regulation or licensing of surrogacy services. Regulation of surrogacy was interpreted as a state blessing of the practice, and would encourage further agreements of this kind.[32] The aim of this position was to discourage surrogacy.[33]

Section 6 of the Assisted Human Reproduction Act 2004 in Canada prohibits only commercial surrogacy. The Act does not state whether surrogacy contracts are enforceable, or how legal parenthood is determined in these instances.[34] The Quebec Civil Code states that

---

[29] M. Warnock, *Nature and Morality: Reflections of a Philosopher in Public Life* (London: Continuum, 2003), at 103.
[30] Department of Health and Social Security, *Report of the Committee of Inquiry Into Human Fertilisation and Embryology* (Cmnd 9314) (London: The Stationery Office, 1984), at para. [8.18].
[31] *Ibid*, at para. [8.19].
[32] *Ibid*, at para. [8.18]
[33] M. Brazier et al, *Surrogacy: Review for Health Ministers of Current Arrangements for Payment and Regulation Consultation Paper* (London: Department of Health, 1997), at para. [2.11].
[34] For a brief overview of the regulation of surrogacy in Canada, see D. Reilly, "Surrogate Pregnancy: A Guide for Canadian Prenatal Health Care Providers" (2007) 176 (4) *C.M.A.J.* 483.

such agreements are void.[35] In Australia[36] the states and territories have individually prohibited commercial surrogacy.[37] Some states like Queensland and Tasmania had up until recently also prohibited altruistic surrogacy. The Queensland Surrogacy Parenthood Act 1988 prohibits all forms of surrogacy. Under the Surrogacy Act 2010, it is no longer unlawful for parties to enter altruistic surrogacy agreements.[38] However, section 15(1) of the Act states that surrogacy arrangements are not enforceable, while section 17 provides that the birth mother of a child is still presumed to be the legal mother of that child.

The Surrogacy Contracts Act 1993 in Tasmania expressly prohibited commercial surrogacy, but was silent on the question of altruistic surrogacy. The Surrogacy Bill 2011, which was recently approved by the Upper House of Tasmania's Legislative Council, decriminalises altruistic surrogacy in Tasmania, and provides a legal mechanism for the transfer of legal parentage of children born through such arrangements.[39] Like its Queensland equivalent, section 8(1) of the Bill provides that a surrogacy arrangement is not enforceable.

---

[35] Section 54I, Filiation of Children Born of Assisted Procreation (1991) RSQ. c C-I-1.

[36] For a comprehensive analysis of the regulation of surrogacy contracts in Australia, see A. Burpee, "Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy" (2009) 37 *Ga. J. Int'l. & Comp.* 305, and K. Hammarberg, L. Johnson & T. Petrillo, "Gamete and Emryo Donation and Surrogacy in Australia: The Social Context and Regulatory Framework" (2011) 4(4) *International Journal of Family Studies* 176.

[37] See Assisted Reproductive Technology Act 2007 (amended by Surrogacy Act 2010) (NSW) and Surrogacy Act 2010 (Queensland).

[38] For background to this legislative reform, see C. Brown, "The Queensland Investigation into the Decriminalisation of Altruistic Surrogacy" (2008) 29(2) *Queensland Lawyer* 78; and C. Brown, L. Willmott & B. White, "Surrogacy in Queensland: Should Altruism be a Crime?" (2008) 20 *Bond L. Rev.* 1.

[39] The Bill was subject to a number of amendments between 2011 and 2012. For background to the amendments to the original 2010 Bill, see Legislative Council Government Administration Committee 'A', *Inquiry into Surrogacy Bill 2011 and Surrogacy (Consequential Amendments) Bill 2011* (No. 41 of 2011) (Parliament of Tasmania).

Most countries in continental Europe prohibit surrogacy.[40] In Germany, section 1(1)(7) of the Embryo Protection Act 1990 criminalises the use of artificial insemination for the purpose of surrogacy.[41] France prohibited both commercial and non- commercial surrogacy under its Law on Bioethics in 1994.[42] Surrogacy was and is perceived as infringing on the human dignity of the person and often the product of exploitation of women.[43] The Cour de Cassation in the case of *Procureur General v Madame X* held that all surrogacy agreements, whether paid or altruistic, were illegal as they involved a disposal of the human body which was not authorised by law, and contrary to public policy.[44] The strict approach of France, Germany and other European jurisdictions has led to reproductive tourism whereby couples are travelling to the United States or India where surrogacy is permitted.[45] India is quite unique in permitting commercial surrogacy under a 2002 Supreme Court ruling, which has lead to the country becoming very popular for reproductive tourism from both Australia and Europe.[46]

---

[40] For a brief outline of the legislative approaches of many continental European countries, as well as Japan, Russia and China, see A. Nakash & J. Herdman, "Surrogacy" (2007) 27(3) *Journal of Obstetrics & Gynaecology* 246, at 247-249.

[41] Section 1(3)(2) provides that the surrogate and intending parents will not be punished under the Act.

[42] Law No. 94-653 of July 29 1994 concerns the need for respect for the human body, and Law No. 94-654 of July 29, 1994 concerns regulation of the donation and use of products of the human body, and medically assisted procreation. For greater detail on the developments that led to the 1994 Law, see S. Reineke, "New Reproductive Technologies and Women's Rights in Contemporary France" (2008) 1 *Intl. J. of Feminist Approaches to Bioethics* 91, at 95-102. A recent decision from the French Court of Cassation, has reiterated French opposition to the practice of surrogacy (see Arret n° 370 du 6 avril 2011 (10-19.053) (Cour de cassation - Première chambre civile).

[43] J. McGregor & F. Dreifuss-Netter, "France and the United States: The Legal and Ethical Differences in Assisted Reproductive Technologies" (2007) 26 *Med. & L.* 117, at 121. See also M. Alcantara, "Surrogacy in Japan: Legal Implications for Parentage and Citizenship" (2010) 48 *Fam. Ct. Rev.* 417.

[44] Cass. Ass. Pleniere, 31 May 1991, J. 417. For greater examination of this case and the approach to surrogacy before the 1994 Law, see E. Steiner, "Surrogacy Agreements in French Law" (1992) 41 *I.C.L.Q.* 866, at 867-868.

[45] For more discussion of surrogacy tourism see F. Merlet, "Regulatory Framework in Assisted Reproductive Technologies, Relevance and Main Issues" (2009) 47 (5) *Folia Histchemica Et Cytobiologica* 59.

[46] See S. Chandra, "Surrogacy and India", available at: <http://ssrn.com/abstract=1762401> (accessed 30th June 2011).

The various states in the United States offer a spectrum of approaches in relation to the legal enforceability of surrogacy agreements.[47] Some states like Arizona,[48] North Dakota,[49] and Indiana[50] prohibit all forms of surrogacy, while other states like Kentucky,[51] Michigan,[52] and Louisiana[53] only prohibit commercial surrogacy. A small number of states carefully regulate when surrogacy agreements will be enforceable. States like Florida,[54] New Hampshire[55] and Virginia[56] permit surrogacy but demand that one of the intended parents have a genetic link to the child born through the arrangement.[57]

c) A Pattern in U.S. Surrogacy Cases?

The U.S, courts have been willing to find surrogacy agreements enforceable where the surrogate does not challenge the validity of the agreement. In *Cassidy v Williams*, the Superior Court of Connecticut held that a gestational surrogacy agreement was valid, unenforceable and irrevocable.[58] Here the plaintiffs were a same sex couple that had use an ova from an anonymous donor. Similarly, in the early case of *Syrkowski v Appleyard*, the Michigan court focused on the question of

---

[47] For an overview of the different approaches to the enforceability of surrogacy contracts in the United States, see R. Rao, "Surrogacy Law in the United States: The Outcome of Ambivalence", in R. Cook et al (eds.), *Surrogate Motherhood: International Perspectives* (Oxford: Hart Publishing, 2003) 23; K. Tuininga, "The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law" (2008) 41 *Creighton L. Rev.* 185; K. Drabiak et al, "Ethics, Law and Commercial Surrogacy: A Call for Uniformity" (2007) 35 *J. L. Med. & Ethics* 300, and A. Plant, "With A Little Help from My Friends: The Intersection of the Gestational Carrier Surrogacy Agreements, Legislative Inaction and Medical Advancement" (2003) 54 *Ala. L. Rev* 639.

[48] Ariz. Rev. Stat. Ann. § 25-218 (1981). See also C. Spivack, "The Law of Surrogate Motherhood in the United States" (2010) 58 *American J. Comp. L.* 97, at 101.

[49] N.D. Cent. Code § 14-18-05 (1991).

[50] Ind. Code Ann § 31-8-2-1 (West Supp 1991).

[51] Ky. Rev. Stat. Ann. § 199.590(3) (1991).

[52] Michigan criminalises commercial surrogacy (Mich. Comp. Laws Ann. § 722.859(2) (1991)).

[53] La. Rev. Stat. Ann. § 9.2713 (1991).

[54] J. Ciccarelli & J. Ciccarelli, "The Legal Aspects of Parental Rights in Assisted Reproductive Technology" (2005) 61 *Journal of Social Issues* 127, at 133.

[55] N.H. Rev. Stat. Ann. § 168-B (Equity Supp. 1991).

[56] Va. Code Ann. § 20-160 (Michie Supp. 1991).

[57] R. MacKenzie, "Beyond Genetic and Gestational Dualities: Surrogacy Agreements, Legal Parenthood and Choice in Family Formation", in K. Horsey & H. Biggs (eds.), *Human Fertilisation and Embryology: Reproducing Regulation* (Abingdon: Routledge-Cavendish, 2007) 181, at 199-200.

[58] (2008) W.L. 2930591 (Conn Super 2008).

paternity following on from a surrogacy agreement, where the surrogate mother supported the enforcement of the agreement.[59] The court did not consider whether surrogacy agreements were against public policy, arguably because the surrogate was not contesting the validity of the contract.[60]

The courts are more reluctant to enforce these agreements if the surrogate changes her mind in the interim period. Therefore the agreements are revocable at the instance of the surrogate. In the case of *Mary Doe v John Doe*, the court did not directly consider the enforceability of the surrogacy agreement in this case.[61] The surrogate had filed for a writ of habeus corpus seeking custody and sole guardianship of the child at the centre of the dispute. This application had followed the surrogate's agreement to voluntarily surrender custody of the child to the intended parents, the respondents in the case.[62] The question of the validity of the agreement was not part of the appeal. The court did note that the initial agreement before the court to terminate parental rights did not effect a termination of the petitioner's parental rights, and that any termination of rights had to be determined to be in the best interests of the child.[63] In the case of *R.R. v M.H.*, the Supreme Judicial Court of Massachusetts held that a surrogate mother's consent to custody could not be recognised until it was given four days after the birth of the child.[64] The court focused on adoption legislation in finding that a mother should have time after a child's birth to reflect on her wishes concerning the child.[65] The court expressed concern about compensated surrogacy agreements, as women who are under financial pressure may permit her body to be used and her child given away.[66] Similarly, the Supreme Court of Kentucky held that surrogacy contracts were voidable, that the

---

[59] 333 N.W. 2d 90 (Mich App 1983), at 93-94.
[60] *Ibid*, at 93.
[61] 717 A 2d 706 (Conn. 1998).
[62] For more detail on the background of this case see *ibid*, at 707.
[63] *Ibid*, at 713.
[64] 689 N.E. 2d 790 (Mass, 1998), at 791-2.
[65] *Ibid*, at 796.
[66] *Ibid*.

surrogate who changes her mind before going through with her contractual obligation stands in the same legal position as a woman who conceives without the benefit of contractual obligations.[67]

In the famous decision of *Baby M*, the Supreme Court of New Jersey held that there was no offence to the law when a woman voluntarily and without payment agrees to act as a surrogate mother, provided that she is not subject to a binding agreement to surrender her child.[68] The court concluded that the agreement was invalid as it conflicted directly with legislation concerning adoption, and violated public policy.[69] The court, in noting the strict consent requirements in adoption legislation, held that these strict prerequisites to irrevocability were a recognition of the serious consequences that flow from such consents; the termination of parental rights and the permanent separation of the parent from the child.[70] The court was mindful that legislature had limited the circumstances under which such consent is irrevocable due to these consequences.[71] The court was also concerned that preconception agreements did not consider the best interests of the child, which was the paramount consideration for the courts under adoption legislation.[72]

---

[67] *Surrogate Parenting Associates v Commonwealth of Kentucky, ex rel Armstrong* 704 S.W. 2d 209, at 213 (Ky, 1986). It should be noted that legislative reform has since overruled this decision in Kentucky- Ky. Rev. Stat. Ann. 199.590(4) (Michie 1995).

[68] *In the Matter of Baby M*, 537 A. 2d 1227, 109 N.J. 396, at 411 (N.J., 1988). For analysis of the trial court decision on Baby M where the court found the contract to be legally enforceable see S. Jackson, "The Baby M Decision: Specific Performance of a Contract for Specifically Manufactured Goods" (1987) 11 *S. Ill. U.L.J.* 1339, and W. Harris & J. Dalessio, "Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating 'Non-Traditional' Gestational Surrogacy" (2000) 31 *McGeorge L. Rev.* 673.

[69] *Ibid*, at 421.

[70] *Ibid*, at 432.

[71] *Ibid*.

[72] *Ibid*, at 435. The court was concerned that there was not inquiry into the fitness of the Sterns as custodial parents or adoptive parents, *ibid*, at 437.

d) Limitations based on Exploitation, Commodification and Promotion of Human Dignity

The enforceability of surrogacy contracts is often challenged on the basis that it commodifies and exploits women and children, or is a form of baby-selling.[73] The surrogate mother is thought to be exploited through the enticement of money or social expectations.[74] The practice is said to reduce the surrogate's value to just her womb.[75] The value of these women is said to be solely defined by the ability of their wombs to carry a foetus to term. The Warnock recommendations regarding surrogacy represented a moralistic, paternalistic position whereby a woman would not be allowed to use her uterus for financial profit.[76] However, the argument may be made that we already buy and sell parenthood when we engage in reproductive technologies or adoption. Doctors, lawyers and other professionals are paid for their services so why should the surrogate who provides an even more important service in the process not be equally compensated?[77]

Some would argue that surrogacy is not about the exploitation or commodification of women and children, but rather about mature, independent and rational human beings seeking to benefit one another.[78] It must be questioned whether the fact of pregnancy means

---

[73] For overview of these arguments see B. Williams- Jones, "Commercial Surrogacy and the Redefinition of Motherhood" (2002) 2 *Journal of Philosophy, Science & Law*, available online at: www.psljournal.com/archives/papers/comsur_williamsjones.cfm (accessed 22nd January 2011). See also D. Smith, "Wombs for Rent, Selves for Sale?" (1988) 4 *J. Contemp. Health L. & Pol'y* 23.

[74] K. Lieber, "Selling the Womb: can the Feminist Critique of Surrogacy Be Answered?" (1992) 68 *Ind. L. J.* 205, at 211.

[75] See F. Berys, "Interpreting a Rent-A-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Agreements Go Sour" (2006) 42 *Cal. W. L. Rev.* 321.

[76] M. Freeman, "Is Surrogacy Exploitative?", in S. McLean (ed.), *Legal Issues in Human Reproduction* (Aldershot: Dartmouth, 1990) 164, at 166.

[77] For greater consideration of this argument see M. Ertman, "What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification" (2003) 82 *N.C.L. Rev.* 1.

[78] C. Kerian, "Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?" (1997) 12 *Wis. Women's L.J.* 113, at 116.

a woman cannot make an autonomous decision.[79] The use of arguments like lack of informed consent or exploitation can suggest that the women are not able to make accurate decisions regarding child-bearing,[80] or more accurately giving away their children. It is arguable that such an attitude could disempower women.[81] One cannot assume that women who become surrogates have the same characteristics and backgrounds, or that they become surrogates for the same reasons. As it is unlikely that each surrogate possesses the same vulnerability, one has to question the limits of the exploitation or vulnerability arguments.[82]

Immanuel Kant's categorical imperative would suggest that surrogacy agreements should not be enforced as they treat women as a means rather than an end in themselves. Thomas Hill has correctly suggested that Kant's categorical imperative comprises of two parts, namely:

1) Act in such a way that you never treat humanity simply as a means; and
2) Act in such a way that you always treat humanity as an end.[83]

Hill argues that the requirement to act in such a way as to treat humanity as an end goes beyond the requirement to avoid treating humanity merely as a means.[84] The distinction between using someone's services and treating someone as a means has also been highlighted in discourse surrounding Kant's writings. It is generally argued that to treat someone as an end rather than a means does not mean that that person must share in one's ends for performing the task at hand. The suggestion again is that Kant is not saying that it is

---

[79] C. Shalev, *Birth Power: The Case for Surrogacy* (New Haven: Yale University Press, 1989), at 122.
[80] *Supra* n. 3, at 740.
[81] N. Miller Healy, "Beyond Surrogacy: Gestational Parenting Agreements under California Law" (1991) 1 *U.C.L.A. Women's L.J.* 89, at 109.
[82] K. Sirola, "Are You My Mother: Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania" (2006) 14 *Am U. J. Gender Soc Pol'y & L.* 131, at 159-160.
[83] T. Hill, *Dignity and Practical Reason in Kant's Moral Theory* (Ithaca: Cornell University Press, 1992), at 41.
[84] *Ibid*, at 42.

always wrong to treat a person as a means but that it is wrong only when he or she is treated merely or simply as such.[85]

The role of the Kant's categorical imperative will be considered in Chapter X in relation to the ability to create saviour siblings to help treat a child with a genetic condition. The argument in relation to the permissibility of this practice is often made that the future child is not merely a means, but will be an end in themselves, and will be loved by parents who clearly care deeply about the children they already have. Therefore, it is not the notion of using someone as a means *per se* that gives rise to objections to surrogacy, but rather the consequences of this arrangement. The creation of saviour siblings is at least partly using the future child as a means to save an existing child, but the law and society are comfortable with this practice because of the outcome or consequences - a child is treated and another child born into a loving family unit. Such fundamentally 'good' consequences do not arise from surrogacy agreements. The argument proposed in this thesis is that the categorical imperative itself cannot be the reason to find that surrogacy agreements are not enforceable. Concerns based on exploitation, consent or commodification should be considered, but do not automatically suffice to warrant the disregard of the stated wishes of parties. It is argued that it is a combined fundamental aversion to the unnaturalness of such agreements and a desire to protect individuals from making such poor choices that really fuels such reactions.

III. Contracts Regarding Frozen Embryos: A Result Orientated Approach

Chapter VI has already considered the role of the right to procreative autonomy in determining custody disputes concerning frozen embryos. Another aspect to these cases is the enforceability of

---

[85] H. Jones, *Kant's Principles of Personality* (London: The University of Wisconsin Press, 1971), at 28.

agreements entered into before IVF regarding the fate of embryos upon death or divorce. The U.S. cases concerning the disposition of frozen embryos have usually supported the use of contracts to determine custody disputes. The pattern that emerges from these cases is that the enforceability of such contracts has little to do with questions like informed consent or duress. It has much more to do with the consequences of enforcing the agreement in each particular case, and whether enforcing an agreement will lead to or avoid forced parenthood. The enforceability of such agreements depends on their content.[86]

The Tennessee court in *Davis v Davis*[87] and the New York Court of Appeals in *Kass v Kass*[88] both suggested that the enforcement of contracts was the best way to promote the reproductive liberty of the parties at issue.[89] The Tennessee Supreme Court's three part test in *Davis v Davis* held that the first consideration in these disputes should be whether an express agreement outlined the preferences of the progenitors. If such an agreement existed it should be enforced.[90] The New York Intermediate Appellate Court in *Kass* unanimously held on appeal that the court must look to see if the progenitors have made an expression of mutual intent which governed the disposition of the embryos.[91] The New York Court of Appeals held that it was important that the courts seek to honour the parties' expressions of choice, and that knowledge that advance agreements would be enforced underscored the seriousness and integrity of the consent process.[92] However, in a footnote in the *Kass* opinion the court noted that advance agreements might be unenforceable if they violate public

---

[86] For more detailed analysis on the use of contracts in this matter see N. Fleming, "Navigating the Slippery Slope of Frozen Embryo Disputes: the Case for A Contractual Approach" (2002) 75 *Temp. L. Rev.* 345.
[87] 842 S. W. 2d 588 (1992), at 598.
[88] 696 N.E. 2d 174 (1998), at 180.
[89] For comprehensive analysis of both cases, see W. Sieck, "In Vitro Fertilisation and the Right to Procreate: The Right to No" (1998) 147 *U. Pa. L. Rev.* 435.
[90] *Supra* n. 87, at 604.
[91] 663 N.Y.S. 2d 581 (1997), at 586.
[92] *Supra* n. 88, at 180.

policy or if significantly changed circumstances precluded enforcement.

In the case of *A.Z. v B.Z.*,[93] the Supreme Court of Massachusetts refused to enforce an agreement that provided that the wife would receive the embryos in the event of the separation of the couple. The court held that it was against public policy to compel a person to become a parent against that person's will, even if this outcome was previously agreed between the parties.[94] The court distinguished *Kass* and *Davis* on this basis, as it was the first reported case where the agreement at issue provided that the embryos were to go to one of the progenitors rather than be destroyed or donated for research.[95] The court held that there were ambiguities in the agreement which meant that it did not cover the circumstances at issue. However, Justice Cowin stated for the court that even if the agreement was clear on the matter, the court would not enforce an agreement that would compel one donor to become a parent against his or her will.[96] Therefore, while the court considered the form and substance of the agreement in depth, the true basis of the court's decision was grounded in public policy concerns rather than contract law.[97]

The New Jersey court in *J.B. v M.B.* also indicated that it would not enforce an agreement when one party to the agreement had changed their minds.[98] Like the *A.Z.* decision, the Supreme Court of New Jersey found that the contract at issue was not applicable to the case. It was narrowly interpreted to only covering the instance where the parties divorced as opposed to separated.[99] The court went on to hold that in any case the right of the party seeking to avoid procreation

---

[93] 725 N.E. 2d 1051 (2000).
[94] L. Bennett Moses, "Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilisation" (2005) 6 *Minn. J L. Sci. & Tech.* 505, at 613.
[95] *Supra* n. 93, at 1056.
[96] *Ibid*, at 1060.
[97] J. Daar, "Frozen Embryo Disputes Revisited: A Trilogy of Procreation-Avoidance Approaches" (2001) 29 J. *L. Medicine & Ethics* 197, at 199.
[98] 783 A. 2d 707 (2001).
[99] *Ibid*, at 714-715.

should normally prevail.[100] The message coming from these cases is that the courts will not permit parties to bind themselves into unwanted parenthood by a contract signed in different circumstances.[101]

The Supreme Court of Iowa in *In Re the Marriage of Witten* also held that it would be contrary to public policy to enforce an agreement regarding the fate of embryos when one of the parties had changed their minds.[102] The court adopted the position of the New Jersey court in *J.B.,* that the agreements entered into were binding and enforceable, subject to the right of either party to change his or her mind.[103] By contrast, the Court of Appeals in Texas in *Roman v Roman* recently held that a disposition agreement which provided that the embryos be discarded on the couples separating was valid and enforceable, even though the former wife had changed her mind and wanted to use the embryos.[104] The court echoed the sentiments of *Kass* and *Davis* in promoting the enforceability of voluntary agreements regarding the disposition of frozen embryos.[105]

In the Washington case of *Litowitz v Litowitz*, the court enforced an agreement that provided for the destruction of frozen eggs upon divorce when neither party wanted the embryos destroyed.[106] Here the wife wanted to transfer the embryos to a surrogate, while the husband wanted to donate them to another couple.[107] The court emphasised that the petitioner did not produce the eggs used to create the embryos, which lead to the conclusion that any rights enjoyed by

---

[100] *Ibid.*
[101] L. Makar, "Procreational Autonomy as a Fundamental Attribute of the Privacy Rights- Where the Right to Procreate and the Right not to Procreate are in Direct Conflict over the Disposition of Frozen Embryos, ordinarily, the Party Wishing to Avoid Procreation Should Prevail" (2002) 12 *Seton Hall Const. L. J.* 681, at 691.
[102] 672 N. W. 2d 768 (Iowa, 2003).
[103] *Ibid*, at 781-782.
[104] 193 S.W. 2d 40 (2006).
[105] *Ibid*, at 50.
[106] *Litowitz v Litowitz* 48 P. 3d 261 (Wash 2002).
[107] L. Bennett Moses, "Understanding Legal Response to Technological Change: The Example of In Vitro Fertilisation" (2005) 6 *Minn. J. L. Sci. & Tech* 505, at 614.

the petitioner were solely found in the contract.[108] The agreement provided that the matter would be submitted to court in the event of failure to reach mutual agreement.[109] The Washington Appellate Division noted that there was no agreement to enforce as the agreement concerned eggs rather than the embryos now under consideration.[110]

Both the High Court and Supreme Court in *Roche* considered the question of whether the couple had a contractual agreement concerning the fate of the embryos upon their divorce. The courts did consider the question of consent but seemed to prefer the principal of mutual contemporaneous consent and the doctrine of promissory estoppel.[111] It is suggested that any such agreement would be given a narrow interpretation. The courts considered whether Mr. Roche had consented to the use of the embryos, but did not consider whether Mrs. Roche had consented to the destruction of the embryos.

This assessment of the case law from the U.S. shows that the enforcement of contracts and respect for the wishes of the progenitors is dependent on the implications of the contract rather than questions of ambiguity of terms or the quality of consent provided. While *Davis* and *Kass* suggest that disposition contracts will be enforced, neither required a gamete donor to become a parent against their wishes.[112]

It is important to note that the enforceability of the agreement not only depends on whether one party changes their mind, but also what the change of mind means. If the agreement stipulates that embryos are to be donated to research, the change of mind of one party to use these themselves will not be accommodated by the courts. It is argued

---

[108] *Supra* n. 106, at 266.
[109] *Ibid*, at 270.
[110] *Litowitz v Litowitz* 10 P 3d 1086 (Wash App Div. 2000) (per Armstrong C.J.).
[111] A. Mulligan, "Frozen Embryo Disposition in Ireland after Roche v Roche" (2011) *Ir. Jur.* 202, at 210.
[112] S. Kaplan, "From A to Z: An Analysis of Massachusetts Approach to the Enforceability of Cryo-preserved Pre-Embryo Dispositional Agreements" (2001) 81 *B. U. L. R.* 1093, at 1101-1109.

that courts would not facilitate the change of mind of a person who agreed to the destruction of embryos in a prior agreement.[113] Society, and the law, does not want to promote the unnaturalness of surrogate motherhood, and it does not want to force people into parenthood.

IV. The Inalienability of Rights: Using Rights Language to Restrict Freedom

Concerns regarding informed consent, commodification or exploitation of the parties, the bargaining power of each party, and the ambiguity of the agreement are really tools to ensure contracts are not enforced because society and the law support the change of mind of one party after contract formation. It is maintained that such factors are important in contract formation, but their presumed absence in ART contracts depends on the consequences of the agreement rather than the actual lack of these criteria in contract formation. The cases in the following sections will show the importance of consent for the courts in instances where contracts or decisions are not beneficial to the person. Liberalism is used to curtail freedom and to avoid undesirable results without considering if, and why, the enforcement of certain contracts is undesirable in the first place. The notion that the certain rights are inalienable may also be used in this way to limit freedom.

Dan Brock argues that while autonomy is about making important choices for ourselves in our own lives and making decisions that are free from the influence of others, autonomy also involves a capacity to revise our life plans and conception of what is good for us.[114] Brock argues that we have a good reason to limit our use of commitments so as not to unduly restrict our future autonomy and

---

[113] See C. Coleman, "Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo" (1999) 84 *Minn. L. Rev.* 55, at 91. Coleman argues that such contracts should not be enforced when they force us to do something we do not want to do.

[114] D. Brock, "Pre-commitment in Bioethics: Some Theoretical Issues" (2003) 81 *Tex. L. Rev.* 1805, at 1815.

capacity to act on our revised values and life plans. Brock would argue that protection of autonomy justifies the ability to make commitments, but not pre-commitments.[115] We can make important decisions in the present, but not bind ourselves in the future. The claim that there is a distinction between pre-commitments and commitments can be used to justify non-enforcement of surrogacy agreements or embryo disposition agreements. Brock's argument can be used to are that most contracts can not bind us in the future. The author fails to clearly outline the rationale for this position.

An inalienable right cannot be waived or voided.[116] The inalienable rights theory is primarily a justification of an unconditional right to protection, arguably protection from ourselves.[117] The notion of an inalienable right mandates that a third party can not justifiably separate the possessor from their rights by a deliberate act, and more importantly, the possessor of the right cannot deliberately divest himself of the right in question.[118] The Constitution expressly recognises the notion of inalienable rights in Article 41. The courts have noted that the natural rights of the unmarried mothers are not inalienable. The Supreme Court in *The State (Nicolaou) v An Bord Uchtála* recognised that the unenumerated rights of the mother may be surrendered.[119] However, Walsh J in *G v An Bord Uchtála* argued that natural rights may be waived or surrendered by the persons who enjoy them provided such a waiver is not prohibited by natural law or positive law.[120] In both cases, the courts underlined the need to establish that the waiver or surrender was made with the full informed consent to the right holder.

---

[115] *Ibid*, at 1816.
[116] S. Brown, "Inalienable Rights" (1955) 64(2) *The Philosophical Review* 192, at 196. See also W. Frankena, 'Natural and Inalienable Rights" (1955) 64(2) *The Philosophical Review* 212.
[117] *Ibid*, at 211.
[118] D. Van De Veer, "Are Human Rights Alienable?" (1980) 37(2) *Philosophical Studies* 165, at 168.
[119] [1966] I.R. 567, at 644.
[120] [1980] I.R. 32, at 71.

Similarly, the Supreme Court in *Murphy v Stewart* recognised that a person could surrender a constitutional right.[121] Walsh J argued that this would have to be done on the basis of full knowledge and free consent. Again the argument that a surrogate does not surrender parental rights in the full knowledge of the consequences of that surrender before the child is born can be used by the courts to invalidate the surrender of rights. It is submitted that the Irish courts would find that a surrogate cannot consent to surrender of all parental rights in the resulting child before the child is born.

Robert Nozick has suggested that the notion of an inalienable right is a paternalistic attempt to prevent us from doing something we have no right to do because such an action is thought to be the wrong thing to do or could cause us harm, for example committing suicide.[122] Legal paternalism justifies state coercion to protect individuals from self inflicted harm or to guide them towards their own good.[123]

A number of commentators have tried to dissect the notion of inalienability to permit some individual autonomy, while retaining a residual right to change one's mind. Joel Feinberg, in arguing that a right to voluntary euthanasia existed, suggested that there were two senses of inalienability. The first is where the right is temporarily waived but a residual right is retained to change one's mind and nullify the transaction. In contrast, a right that is relinquished rather than waived is permanently and irrevocably lost.[124] Feinberg uses this distinction to suggest that the notion of an inalienable right to life prevents the relinquishment of the right but would permit a waiver of the right as a residual discretion is still provided for the right

---

[121] [1973] I.R. 97.
[122] R. Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell Publishing, 1975), at 58.
[123] J. Feinberg, "Legal Paternalism", in R. Sartorious (ed.), *Paternalism* (Minneapolis: University of Minnesota Press, 1984) 3, at 3.
[124] J. Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life" (1978) 7(2) *Phil. & Pub. Affairs* 93, at 113-114. For comprehensive analysis of Feinberg's argument, see T. McConnell, "The Nature and Basis of Inalienable Rights" (1984) 3(1) *Law & Philosophy* 25, at 33-39.

holder.[125] Applying this argument to surrogacy contracts or embryo disposition agreements, it may be argued that the waiver of parental rights or the right to control the embryos is permitted but the right to change one's mind is firmly protected. The distinction between waiver and relinquishment does not hold up to scrutiny, especially in the context of euthanasia. Again, this is an example of commentators clouding paternalism in the more acceptable language of liberalism. We waive rights but we retain a residual power, so the initial exercise of freedom is respected, and the right to change one's mind is also protected.

The very existence of the notion of inalienable rights suggests that certain rights are so fundamental to one's personhood and human dignity that even the individual himself or herself is without title to give them away, no matter what the consequences are.[126] A right which is inalienable cannot be separated from one's person or nature without destroying that person or nature.[127] Protection against paternalism is not a claim that the treatment is contrary to the subjects' best interests, but rather that they are deprived of their right to decide for themselves what their interests are, and how they are best served.[128]

Thomas Hobbes claims that a right can be transferred or renounced by a person only in consideration of some right reciprocally transferred to him or for some other good.[129] Hobbes therefore suggests that as the object of these voluntary acts is some good for the person themselves, so there are some rights that one cannot relinquish or transfer.[130] If one attempts to transfer or relinquish such rights, he

---

[125] *Ibid*, at 117.
[126] A. Kuflik, "The Utilitarian Logic of Inalienable Rights" (1986) 97 *Ethics* 75, at 75.
[127] G. Glenn, "Abortion and Inalienable Rights in Classical Liberalism" (1975) 20 *Am. J. Jurisprudence* 62, at 66.
[128] S. Benn, *A Theory of Freedom* (Cambridge: Cambridge University Press, 1988), at 11.
[129] T. Hobbes, *Leviathan* (Oxford: Oxford University Press, 2008), at 75.
[130] *Ibid.*

is not to be understood as if he meant it, or that it was his will; but that he was ignorant of how such words and actions were to be interpreted.[131] The courts should be cautious in using the notion of inalienable rights in relation to surrogacy without looking behind this claim in order to establish why the right in question is inalienable.

We can see two different bases for the notion of inalienable rights in this area: the idea that one cannot surrender parental rights until their child is born and they realise the implications of this surrender, and the idea that rights should be exercised in furtherance of a good, or for the goods, of the person. The question then becomes whether surrogacy agreements, or agreements regarding the use of frozen embryos, demand that the right to procreative autonomy is inalienable because it infringes the inherent dignity of the person party to the agreement, or because they are morally wrong, and whether one necessarily leads to the other.

V. Paternalism and the Unnaturalness of Surrogacy: When the State Knows Best

The debate regarding the enforceability of these agreements concerning parental rights and use of genetic material by other, is part of a wider debate about the appropriate role of freedom of contract in family law. Such concerns are also part of a wider movement towards the role of contract rather than status in family law.[132] It poses general questions about the appropriate sphere of private governance in such intimate matters, and state protection for those who are vulnerable by virtue of their personal circumstances.[133] Many of the U.S. cases considered above for example expressed concern about surrogacy contracts usurping the role of adoption legislation in terminating the

---

[131] *Ibid*, at 76.
[132] For greater discussion of this matter see S. Cretney, "The Family and the Law-Status or Contract?" (2003) 15 *C.F.L.Q.* 403.
[133] J. Carbone, "The Role of Contract Principles in Determining the Validity of Surrogacy Contracts" (1988) 28 *Santa Clara L. Rev.* 581, at 582.

parental rights and/ or affording legal rights to different parties. It is a reasonable concern that these contracts fail to bestow as much emphasis on the concerns of the best interests of the child as adoption procedures in most jurisdictions provide.

The enforceability of pre nuptial agreements or contracts not to divorce[134] depends on whether the state is willing to bind someone to an agreement made at an earlier point in time when it was thought that the marriage would not dissolve.[135] The arguments against the enforceability of such agreements would centre on the question of whether a party to such an agreement provided informed consent to the agreement. Can a man or woman on the eve of their wedding consciously agree to the terms under which a marriage will dissolve and opt out of the jurisdiction's ancillary relief laws which are in place in order to protect parties on marital breakdown? In the recent U.K. Supreme Court decision of *Granatino v Radmacher*, the court held that the old rule preventing the enforceability of pre-nuptial agreements was outdated.[136] The majority noted that weight should be afforded to a nuptial agreement due to respect of individual autonomy.[137] While the court recognised the importance of protecting autonomy, it also noted that it reserved the right to overrule the agreement in ancillary relief proceedings.[138] Similarly, contracts in relation to future parenthood challenge the idea that parenthood is a status we acquire through biological connection or marriage, not by contract. Concerns that such contracts do not respect the best interests of the child must not be ignored. However, the question is whether such concerns mandate that all surrogacy agreements should be void and unenforceable.

---

[134] See E. Scott & R. Scott, "Marriage as Relational Contract" (1998) 84 *Va. L. Rev.* 1225.
[135] For detailed discussion of pre-nuptial agreements in Irish Law, see R. Aylward, *Pre-Nuptial Agreements* (Dublin: Thomson Roundhall, 2006).
[136] *Granatino v Radmacher* [2010] 3 W.L.R. 1367, at para. [52]. For discussion of the Supreme Court decision see C. Barton, "'In Stoke-on-Trent, My Lord, They Speak of Little Else': Radmacher v Granatino" [2011] *Fam. L.* 67.
[137] *Ibid*, at para. [78].
[138] *Ibid*, at para. [74].

Consideration of the enforceability of surrogacy contracts from the starting point that the ability to make decisions about parenthood is a fundamental part of a right to procreative autonomy should permit an open discussion of these issue. It questions whether there should be a blanket ban on the enforceability of surrogacy agreements or whether a case by case approach should be adopted.

We afford rights to young adults to consent to medical treatment on the basis that affording such rights respects their autonomy. However, a number of jurisdictions have had to grapple with instances where young people decide to refuse treatment that is in their best interests.[139] There is a tendency in such instances to determine that the minor's capacity to decide does not exist in the first place in order to use the welfare principles rather than a rights analysis when determining if treatment should be provided.

The English courts have narrowly interpreted *Gillick*[140] competence when teenagers wish to refuse treatment that is in their best medical interests. For example, *Re R.* concerned a 15 year old teenager's refusal to take drugs for her psychiatric condition.[141] There was some debate about R's mental state in refusing the drugs, but both her social worker and a consultant child psychiatrist found her to be rational and lucid in making this decision. The court found that R was not *Gillick* competent, and that it was in her best interests to receive the recommended drug treatment. In *Re W*, the Court of Appeal rejected the argument that section 8 of the Family Law Reform Act 1969 provided a person over 16 years with absolute autonomy in

[139] The Law Reform Commission's recent report on capacity of minors relating to medical treatment includes an excellent comparative analysis of case law and legislation in different jurisdictions. Law Reform Commission, *Children and the Law: Medical Treatment* (LRC 103-2011) (July 2011), at 56-88.
[140] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 A.C. 112.
[141] *Re R (A Minor) (Wardship: Consent to Treatment)* [1991] 4 All E.R. 177.

medical decision.[142] This case concerned the refusal of treatment by a 16 year old girl suffering from anorexia nervosa. The Court of Appeal, like in *Re R*, noted that a parent may also provide a concurrent consent to treatment in the case of a Gillick- competent child. Balcombe L.J. held that the court must ascertain the wishes of the child, and approach the decision with a strong predilection to give effect to those wishes, since this will often be in the child's best interests. Balcombe L.J. continued by arguing that where, in the court's view, the decision was not in the best interests of the child, such wishes may be overridden.[143]

Gillian Douglas has correctly suggested that such decisions illustrate judicial discomfort with the precious right to make mistakes.[144] It is easy to find that teenagers are not competent and disregard their wishes, rather than accept that the court's paternalism is overriding wrongly exercised autonomy. The Law Reform Commission's recent report on decision-making of minors regarding medical treatment noted that the recent *Axon*[145] decision in England signalled a renewed focus on the autonomy of children.[146] However, it has to be appreciated that the promotion of the minor's wishes rather than her mother's parental rights in this case was also perceived to be in her best interests.[147]

The Canadian courts have adopted a similar position. In *Children's Aid Society of Metropolitan Toronto v K*,[148] the Ontario Family Court supported a 12 year old girl's decision not to consent to a blood transfusion on religious grounds. However, this decision was not

---

[142] *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 4 All E.R. 627.
[143] For comprehensive analysis of both cases, see M. Freeman "Rethinking Gillick" (2005) 13 *Intl J. Children's Rights* 201.
[144] G. Douglas, "The Retreat from *Gillick*" (1992) 55 *Mod. L. Rev.* 569, at 573.
[145] *R (Axon) v Secretary of State for Health* [2006] 1 F.C.R. 175.
[146] Supra n. 139, at para. [2.83].
[147] For background to this decision and its implications in light of *Gillick*, see R. Taylor, "Reversing the Retreat from *Gillick*? *R (Axon) v Secretary of State for Health*" (2007) 19 *C.F.L.Q.* 81.
[148] (1985) 48 R.F.L. (2d) 164.

solely based on respect for the patient's autonomy, but also on the small likelihood that the treatment would benefit the child, as well as the doctor's view that the transfusion would not be effective.[149] The Supreme Court of Canada considered a case from Manitoba where a 14 year old girl who refused a blood transfusion under any circumstances in an advance directive before admission into hospital.[150] Under the Manitoba Child and Family Services Act child welfare authorities could apply to court for the authorisation of treatment when the child in question is 16 years old or older and refuses to consent to treatment.[151]

A similar reluctance to bind people to their detriment is found in the marriage law of most jurisdictions which provide for divorce. While common marital vows require couples to promise to stay married until death do us part, most countries provide for divorce in recognition that people should not be forced to stay married when relationships break down. The state recognises, that even though we enter the institution of marriage and assume responsibilities and commitments in relation to the other person, we should be able to exit the marriage if this is desired at some future point. Divorce regimes, unlike nullity, are not based on any suggestion that individuals did not know what they were doing in getting married, but rather on the fact that the parties no longer want to be bound by the contract.

The cases on the right to self-determination in Ireland at the beginning of this Chapter mostly concerned the right to refuse medical treatment. It is submitted that if such patients changed their minds and asked for the treatment the hospitals and courts would not hold them to their previous decisions or probe the quality of their consent to the same degree. It is natural for the state to want to protect us and our well-being. The whole fundamental rights regime of the

---

[149] M. Bailey. "Limits on Autonomy", in B. Atkin (ed), *The International Survey of Family Law 2010 Edition* (Bristol: Jordan Publishing, 2010) 95, at 104.
[150] *A.C. v Manitoba (Director of Child and Family Services)* [2009] 2 S.C.R. 181.
[151] Section 25(3)(b)(i) Child and Family Services Act.

Constitution is created on this basis that fundamental rights promote our welfare. Paternalism should not be automatically condemned without consideration of the reason why the state intervenes into the matter in question.

The Perceived Unnaturalness of Surrogacy

It is argued that the true opposition to surrogacy agreements in particular is based on an opinion the it is unnatural and contrary to our perceptions of motherhood.[152] While the law has always recognised that fatherhood is a transient notion and open to uncertainty, the legal mother of a child is always perceived to be clear and certain. The birth mother is the legal mother of a child.[153] Therefore, few would argue that surrogacy is simply the female equivalent of artificial insemination and therefore should be treated accordingly.[154] The notion of a woman carrying a foetus to term and failing to bond with the child during pregnancy or to feel a special love for the child at birth contradicts the 'natural' or 'normal' notion of what it means to be a mother.[155] The law is equipped to deal with the notion that a biological father may not be the legal father of a child. We are comfortable with the detached notion of providing sperm without major concerns about commodification or exploitation.

The discomfort regarding the surrogate's decision is evident in the jurisdictions that do find such contracts enforceable. States like Florida, New Hampshire, Virginia and Nevada all have detailed regulations in statutes about the form of surrogacy contract and the conditions under which such contracts are found to be enforceable.

---

[152] See L. Purdy, *Reproducing Persons: Issues in Feminist Bioethics* (New York: Cornell University Press, 1996), at 201.

[153] Chapter IX argues that the right to procreative autonomy challenges this position.

[154] For such an argument, see S. Gersz, 'The Contract in Surrogate Motherhood: A Review of the Issues" (1984) 12 *L. Med. & Health Care* 107, at 108.

[155] For development of this point see J Ciccarelli & L. Beckman, "Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy" (2005) 61 *J. Soc. Issues* 21, at 23.

The Virginian court-approved model mandates that the surrogate already has given birth to a child, and that the surrogate be married.[156] The New Hampshire model also requires that the surrogate must be over 21 and have one child.[157] While such requirements are arguably inserted in order to ensure the surrogate understands the implications and consequences of their decision, there is an implied assertion that a person would not usually give up a child if they had already experienced child birth. The Florida statute allows a surrogate to change their mind up to 48 hours after the birth of the child, affording the surrogate every opportunity to change their minds.[158] Similarly, the ABA Model Act on Assisted Reproductive Technologies suggested that any gestational carrier must be at least 21 and have given birth to at least one child.[159]

The *Baby Ann* Supreme Court decision in 2006 sparked great controversy about the failure of the Irish Constitution to protect children's rights.[160] The implications of the public reaction to the decision was that if the child's rights were protected here then the rights of the natural married parents would be trumped by the right of Baby Ann to stay with her intended adopters. Baby Ann did enjoy constitutional rights both as a member of a marital family and unenumerated individual rights. The real controversy in the case was arguably the idea that an unmarried couple could sign all the consents to the adoption and then change their minds before the adoption was finalised. The unnaturalness of this decision to give one's child up for

---

[156] Va. Code Ann. § 20-160(B)(6).
[157] N.H. Rev. Stat. Ann. § 168-B: 17(I) & (IV).
[158] J. Zuckerman, "Extreme Makeover- Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements" (2008) 32 *Nova L. Rev* 661, at 668.
[159] See section 702.1. For greater discussion of the ABA Model Act see C. Metteer Lorillard, "Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Agreements" (2010) 16 *Cardozo J.L. & Gender* 237.
[160] *N and Others v Health Services Executive* [2006] 4 I.R. 374. For discussion of this case see L. Byrne, "The Parental Right to be Make 'Mistakes' and Irish Constitutional Reform", in C. Lind, H. Keating & J. Bridgeman (eds.), *Taking Responsibility, Law and the Changing Family* (Surrey: Ashgate Publishing, 2011) 239.

adoption and to engage with the process in its entirety lead many to feel that Baby Ann should have remained with her intended adopters.

Motherhood has always been a biological and social constant, with the social perception of mothers as the primary care giver. Mothers rather than fathers must juggle their career around their children's care. The law has accepted that biological may play no role in their children's lives, and that different men may come into a child's life to fill this role. Society, through its rules regarding the validity of surrogacy agreements, are happy to facilitate a woman who has finally come to her senses in deciding that she cannot got through with a surrogacy contract. Concerns about exploitation or the lack of informed consent are the tools to get her out of this contract, but the primary rationale for such an interpretation of these contracts in the sense that it is unnatural or immoral.

Adoption law usually requires that the natural mother consent to both the placement of the child for adoption, and then the adoption itself. The legislation therefore provides the parent with the counselling to inform them of the implications of their decision, and the time to change their mind. However, once the adoption order is made the natural mother cannot change her mind at a future point and seek to restore parental rights.

All of these examples can be placed within an inalienable rights framework. Under such a description our autonomy or freedom is not infringed or overridden by the state, we are simply exercising the residual right to change one's mind that we all possess. It is suggested that alienability in these instances is dependent on the naturalness or correctness of the decision. The right to marry and divorce is inalienable because the state realises that our relationship may change in the future and we need to be provided with an exit from this promise. The right to access to well thought out ancillary relief provisions is inalienable because when entering a pre-nuptial we are

not in the right frame of mind to clearly think through all the rights we are forfeiting. When one agrees to become a surrogate, one does so without realising what it feels like to be a mother, because if we knew what that felt like we would not give up our child. Therefore the law provides us with the protection we need when we come to our senses.

It is suggested that public policy concerns will probably limit our ability to enter into contracts regarding surrogacy. The importance of legal motherhood would mandate that any surrender of the natural rights of the mother are surrendered by the mother after the child is born rather than during pregnancy. The Supreme Court's decision in *McD. v L.* suggests support for the notion that it would be natural for the surrogate to change their minds once the child is born. This entire discussion about the unnaturalness of surrogacy is predicated on the assumption that the surrogate should be recognised as the mother of the resulting child, and should have exclusive legal rights in relation to this child. Chapter IX will suggest that the circumstances surrounding the impregnation of the surrogate and the creation of the child would negate this stance.

VI. The Right to Procreative Autonomy of other Contractual Parties

John Robertson argues that one of the main reasons for presumptively enforcing preconception agreements for rearing is procreative liberty.[161] He argues that enforcing preconception agreements is necessary in order to give the intended parents, as well as donors and surrogates, the certainty they need to go forward with the collaborative enterprise.[162] Robertson focuses on the investment and reliance of the couple in the agreement with a surrogate and argues

[161] J. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press, 1994), at 126.
[162] *Ibid.*

that this warrants the enforcement of the agreement. While this Chapter primarily focuses on the contractual freedom of the surrogate or sperm donor, its recommendations concerning the implications of such contracts are motivated by a recognition of the human dignity of other parties involved in these agreements.

The problem with Robertson's assertion that contracts should be promoted is that it focuses solely on the rights of the commissioning parents. It is suggested that surrogacy or sperm donation agreements should be permissible forms of evidence regarding the role of the commissioning parents in initiating the process that led to the use of one's sperm or the use of a surrogate to carry the child and possibly provide a genetic contribution. The background to the creation of a child is usually irrelevant in determining legal parenthood. Chapter IX will suggest that the right to procreative autonomy of such intentional parents should be promoted by the recognition of their important contribution in creating the child. In relation to the validity of the contract it is assumed that such contracts either extinguish parental rights or have no legal effect at all. It is suggested that the contract could afford intentional parents with clear evidence of their role in the pregnancy. The Supreme Court in *McD* recognised that the sperm donation was relevant to the extent that it displayed the intention of the parties at the time. A similar approach in relation to surrogacy contracts would not enforce the contract but allow it to afford some protection to the parties who entered into the agreement with the surrogate in the first instance. Chapter IX will develop this notion of intentional parenthood in relation to the recognition of legal parenthood.

VII. Conclusion

Atiyah argues that one of the reasons for the decline in importance of freedom of contract is that in certain situations, an individual's

freedom of choice is subordinated to other majority interests.[163] The value of freedom of contract has been circumscribed by the privileging of individual rights.[164] It could be argued that in order to protect the dignity and capabilities of such persons we limit freedom because the state knows best. Rights are promoted as long as they are used to further our well-being and welfare. When we use rights for the wrong purpose, the state will be there to protect us from our bad decisions.

It is the journey that this right takes us on rather than the result of this journey that is important, it forces us to probe often unchallenged assumptions about motherhood, fatherhood and decisions to become parents. The application of the right to procreative autonomy to this question forces the realisation that we ignore such agreements because of the perceived implications of the agreement rather than quality of consent. The state, in refusing to enforce agreements when we change our mind, is denying one freedom to promote another, but not for freedom's sake.

The rights considered in this thesis usually promote the interests and well-being of the right holders. It is good that same sex couples can access ARTs, it is good that we respect the rights of both parties in disputes over frozen embryos, it is good that the state recognises the parental rights of parties connected to a child born as a result of using ARTs. The state holds that it is not good to hold someone, usually to their detriment, to an agreement made in the past. The underlying assumption is that it is not 'right' to force a 'mother' to give up her child because of a surrogacy agreement entered into before she realised what it felt like to hold her child. It is not 'right' to force a

---

[163] P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979), at 726. For greater consideration of this point, see K.L. McCaw, "Freedom of Contract Versus the Anti-Discrimination Principle: A Critical Look at the Tension Between Contractual Freedom and Anti-Discrimination Provisions" (1996) 7 *Seton Hall Const. L.J.* 195.

[164] A. Seligman, "Individualism and Principle: its Emergence, Institutionalisation and Contradictions" (1997) 72 *Ind. L. J.* 503, at 513.

husband to become a father when he has divorced from his wife because he agreed to give frozen embryos to his wife on relationship breakdown. Geoghegan J's suggestion that that it is one thing to enter into an agreement before the child is conceived and another to suddenly realise that a child of yours has been born shows the thinking that informs the general approach to such contracts.

The whole opposition to surrogacy agreements is based on the assumption that the surrogate is the mother of the child, and that gestational connection to the child is the most important connection to a child. The following Chapter will question this suggestion and outlines the fragmentation of legal parenthood in light of ARTs.

Chapter IX: The Right to Be Legally Recognised as a Parent of ART Children

This Chapter suggests that the right to procreative autonomy could promote a new way of determining parenthood in relation to non-marital families in Irish law. This chapter argues that the right to procreative autonomy protects a prima facie right to legal recognition of one's role in a child's creation, a right to be recognised as one of the legal parents of a child. One does not usually speak of a right to be recognised as a parent, one usually is or is not a legal parent of a child. This aspect of the right to procreative autonomy has the potential to enhance the limited rights of unmarried fathers in Irish law by recognising the importance of biological connection. It also may force the recognition of de facto families and multi-party parenthood in Irish law. The constitutional right to procreative autonomy has the ability to impact Irish family law beyond the regulation of ARTs.

This thesis argues that actual legal recognition of an individual as a parent of a child will depend on whether it is in the child's best interests. While support for a right to be recognised as the legal parent seems an adult-centred suggestion, in practice this assessment of legal parenthood will require a more honest examination of the best interests of the child at the centre of a dispute. The current approach to recognition of parenthood in the jurisdictions considered is incoherent and fact-dependent. Courts and legislatures are subconsciously shaping families based on untested assumptions about what a normal family should look like.

Part I explains why the right to procreative autonomy includes a right to be legally recognised as a parent. It also considers the legal presumptions concerning parenthood, in order to highlight that

biology has not always dictated legal parenthood. Part II outlines Irish case law on the recognition of legal parenthood and parental rights. Parts III, IV and V then outline the importance of gestational, genetic and intentional/ psychological parenthood respectively in determining legal parenthood. Each contribution has been promoted and used to determine parenthood depending on the presence of other potential parents, their gender, and the legal family that will be created by such declarations. This chapter advocates the acknowledgment of an initial right to be recognised as a legal parent of *all* such parties because of their independent and unique contributions to a child's creation. Such an approach challenges the common desire to construct the most desirable family form from the circumstances of each case.

Part VI looks at the concerns based on the welfare of the child that will determine whether the right to be recognised leads to legal recognition of parenthood or parental rights in the child in question. It distinguishes concerns with the preservation of the 'normal' or traditional family unit and actual concerns based on the welfare of the child. Part VII outlines the recent legal notion of multi-party parenthood as an important development in breaking the shackles of the traditional family in favour of recognising a child's reality. The possibility that more than two people could be deemed the parent of a child would enhance the courts' ability to deal with such matters openly. The Law Reform Commission's recent Report on the Legal Aspects of Family Relationships does not consider parenthood. However, its promotion of the idea that multiple parties may enjoy guardianship (parental responsibility) rights in relation to a child illustrates a willingness to recognise the complex reality of some children's lives.

I. The Right to Be Legally Recognised as a Parent- Not the Right to Be Parent

This thesis maintains that the constitutional right to procreative autonomy based on dignity protects the right to have one's personal and integral role in the creation of a child legally recognised. This role may be a genetic or gestational contribution, or an intentional or psychological contribution. One's genetic and non-genetic role in the creation of a child through donor insemination, surrogacy or other ARTs should be afforded legal respect. This respect involves acknowledgment of a right to be recognised as a legal parent of a child.

Using the right to procreative autonomy as a starting point offers a different perspective on the appropriate legal response to the complicated family forms created by the use of ARTs. Rights discourse is usually absent in case law or debate surrounding determinations of legal parenthood in all jurisdictions. The law usually deems that one is or is not a legal parent of the child. The preliminary suggestion that different parties may have a right to be recognised as parent, which may then lead to the actual recognition of legal parenthood, depending on the interests of other parties and the best interests of the child, adds an extra step to the determination of legal parenthood. Parenthood arising from ARTs should not be automatically defined without appreciating the different roles of all parties involved.

Arguments in cases surrounding surrogacy and sperm donation often centre on estoppel type claims that the legal rights of those automatically recognised as parents should not be enforced. Such views suggest that representations were made by a surrogate or sperm donor that they would not be involved in the child's life and therefore not enforce their strict legal rights. Claims of legal

parenthood are then based on the notion that it would be unfair to go back on this representation which was relied upon by the intended parents. The basic purpose of promissory estoppel is to prevent parties enforcing their strict legal rights.[1] Estoppel type arguments in this setting are therefore grounded on the assumption that a surrogate *is* the mother of a child, or that the sperm donor *is* the father of the child. The intended parents have to show such parties cannot enforce the legal rights they (the genetic or biological parents) exclusively enjoy. The approach proposed in this chapter challenges two related assumptions. In the first instance, it questions the assumption that a biological mother or father is the exclusive legal parent of the child. It suggests that a surrogate mother may be legally recognised as *a* mother of a child, but not *the* mother. Similarly, the recognition of the role of a sperm donor in a child's life should not necessarily exclude the recognition of an intended father as parent of the child. Secondly, it queries whether we have to promote the notion that a child can, or should, only have one mother and one father, or at the very least a maximum of two parents.

The claim that a right to procreative autonomy includes a prima facie right to be legally recognised as a parent of a child is controversial as well as novel. It may confirm the fears of commentators like Dame Mary Warnock that rights language in this area will champion the automatic right to be a parent.[2] The prima facie right to be recognised as a legal parent does not constitute a right to be a parent. It is not suggested that any party is automatically recognised as the legal parent of the child to the exclusion of all others. The distinction may seem slight but it is important. The scope, not the existence, of the right to be legally recognised as parent will depend on one's connection to the child (genetic, gestational or psychological parent),

---

[1] H. Delany, *Equity and the Law of Trusts in Ireland* (5th ed.) (Dublin: Round Hall, 2011), at 757.
[2] M. Warnock, *Making Babies: Is there a Right to have Children?* (Oxford: Oxford University Press, 2002), at 27-28.

and the extent to which the protection of dignity mandates legal protection for these roles. The initial position that one has a right to be recognised as parent prompts a challenging survey of the reasons why we deem certain parties to be parents of a child, and the family forms we wish to promote. This reflection is the least that the right to procreative autonomy should demand.

A basic property analysis supports the argument that genetic and gestational parents enjoy a right to be recognised as a legal parent. My sperm or my egg created Child A, half of my genes are contained therein, therefore Child A is my child. A strict property or privacy approach does not appreciate the intentions or psychological input of intended parents in commissioning a surrogate or sperm donor to create a child. It also underestimates the personal connection that one may develop in relation to their genetic offspring. Property rights in gametes and embryos flow from the need to respect human dignity. A right to procreative autonomy does not necessarily prioritise the input of intended parents over donors, or vice versa. It should appreciate the different but equally important roles of all parties in the creation of a child. In the case of parties who are not genetically related to children, the decision to attempt to become parent through the use of donor gametes or surrogacy is a deeply personal one. It is based on the intimate hopes or aspirations of becoming a parent to a child. It is arguable that concern to respect the human dignity of each person would warrant support for a right to be recognised as a parent of such future children, in light of their pivotal role in initiating pregnancy and the birth of the child.

The Law Reform Commission's 2010 Report on Legal Aspects of Family Relationships argued that all parents should be treated equally in respect of their relationship with their children regardless of gender

or marital status.[3] The Commission recognised that the current legislative framework in Ireland did not treat unmarried mothers and unmarried fathers in the same manner. It argued that equality as a guiding principle to future legislation was subject to the proviso that the welfare and the best interests of the child are not put at risk.[4] The Law Reform Commission did not recommend that the birth of a child would automatically activate parental responsibility (guardianship).[5] The constitutional right to procreative autonomy based on dignity would promote the notions of equality advocated by the Law Reform Commission. It would also go further than the Commission, in arguing that the right to be legally recognised as parent flows automatically from the biological or psychological connections of the parent to the child. It would not require joint declarations from the parents for this to occur. Like the Commission, this thesis would argue that this notion of equality is conditional on the promotion of the best interests of the child.

As the discussion of case law and legislation from a number of jurisdictions below will outline, it is generally presumed that a surrogate mother (traditional or gestational) is the legal mother of a child, and that the decision to give the child up for adoption is the surrogate's alone. If the surrogate changes her mind (or one might say decides to keep the child- the suggestion being that the child was hers to keep in the first place) then the intended parents cannot be legally recognised as parents of the child. The rights approach advocated in this chapter questions whether a surrogate should be automatically recognised as parent, and whether they possess exclusive rights to legal parenthood.

---

[3] Law Reform Commission, *Legal Aspects of Family Relationships* (LRC 101-2010), at para. [2.03].
[4] *Ibid*, at para. [2.06].
[5] *Ibid*, at para. [2.08]. The Commission was of the opinion that this should not be the case because there may be instances where the non-marital father did not become aware that he was the father of the child until sometime after.

Fatherhood is usually determined by a man's relationship with the legal mother,[6] and more recently by genetic connection to the child.[7] Legal fatherhood traditionally had little concern with natural fatherhood or biological truth. The husband of a woman who gives birth to a child is the presumed father of a child. This practice was primarily motivated by the need to ensure children were legitimate. Biological parenthood is arguably attractive because it constructs parenthood as private, exclusive and binary so that only two persons can be recognised as parents.[8] The rise in the weight afforded to biological parenthood in recent years has coincided with the abolition of different treatment of legitimate and illegitimate children, and the social desire to provide a father for each child.

II. The Recognition of Parenthood and Parental Rights under Irish Law

This thesis has outlined the special position of the martial family under Article 41 and 42. The application of the right supported in this Chapter would threaten the sanctity of the marital family and would not be supported by the Irish courts. This section will focus on the rights of unmarried parents and de facto families. It is suggested that the gaps in the Constitution in relation to these parents and family forms can be supplemented by the right to procreative autonomy.

The Irish courts have protected the natural constitutional rights of the mother in cases like *The State (Nicolaou) v An Bord Uchtála*[9] and *G.*

---

[6] K. Baker, "Bargaining or Biology? The History and Future of Paternity Law and Parental Status" (2004) 14 *Cornell J. L. & Pub Pol'y* 1, at 2.
[7] For detailed discussion of the history of the martial presumption, see T. Glennon. "Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity" (2000) 102 *W. Va. L. Rev.* 547. See also C. Barton & G. Douglas, *Law and Parenthood* (London: Butterworths, 1995), chapter 3.
[8] K. Baker, "Bionormitivity and the Construction of Parenthood" (2008) 42 *Ga. L. Rev.* 649, at 653.
[9] [1966] I.R. 567.

v An Bord Uchtála.[10] Walsh J in *Nicolaou* found that the unmarried mother had a natural right to the custody and care of her child.[11] O'Higgins C.J. in the *G* v *An Bord Uchtála* found that the mother's constitutional rights derived from the fact of motherhood and from nature itself.[12] The right was said to be based on the natural relationship which exists between a mother and a child. O'Higgins C.J. held that "it arises from the infant's total dependency and helplessness and from the mother's natural determination to protect and sustain her child".[13]

The Irish courts have consistently declined to recognise any rights of unmarried fathers under the Constitution.[14] In *Re SW an infant, K v W*, the Supreme Court found that while there may be rights of interest arising from the blood link between the father and the child, the father does not have a constitutional right to guardianship.[15] In *W. O'R. v E.H.*, Finlay C.J. held that the blood link, if it is only a blood link in the absence of other factors beneficial to the children, and in the presence of factors negative to the children's welfare, is of small weight and would not be a determining factor.[16] The inconsistency of the court's position in relation to unmarried mothers' unenumerated rights, which arise from the very fact of biological connection to the child in question, and the rejection of the importance of biology in

---

[10] [1980] I.R. 32.
[11] *Supra* n. 9, at 644.
[12] *Supra* n. 10, at 55.
[13] *Ibid.*
[14] C. O'Mahony, "Irreconcilable Differences? Article 8 ECHR and Irish law on Non-Traditional Families" (2012) 26 *I. J. L. Pol'y & Fam.* 31, at 31. See *State (Nicolaou) v An Bord Uchtala* [1966] I.R. 567 and *Keegan v Ireland* (1994) 18 E.H.R.R. 342. For overview of fathers' rights in Irish law, see D. Walshe, "The Legal Rights of Unmarried Biological Fathers in Ireland and England, 1997-2002: A Comparative Analysis" (2003) 2 *I.J.F.L.* 2, and A. Egan, "The Guardianship Rights of Unmarried Fathers in Ireland and New Zealand" (2005) *I.J.F.L.* 15. See also *G.T.v K.O.* [2007] I.E.H.C. 326, where McKechnie J argued that Irish case law meant that an unmarried father had difficulty establishing custody rights under private international law. The learned judge went on to use Brussels II Regulation to afford the father rights in the case at hand.
[15] [1990] 2 I.R. 437, at 447 (per Finlay C.J.).
[16] [1996] 2 I.R. 248.

relation to rights of unmarried fathers, has to be emphasised and challenged.[17] An unmarried father does not have the automatic right to be appointed as guardian of a child under Irish law. They merely have the right to apply to be appointed guardian under the Guardianship of Infants Act 1964.

McD. v L. concerned an application for guardianship under s. 6(a) of the Guardianship of Infants Act 1964.[18] The case centred on a child born through an agreement between a lesbian couple and the sperm donor. The parties agreed that the sperm donor would have the status of 'favourite uncle' in relation to the child. It was therefore anticipated that the child would know who the sperm donor was and would have some contact with him if the couple agreed. The relationship broke down after the birth of the baby boy. The contrasting decisions of the High Court and the Supreme Court outline the need for a comprehensive legal response to the potential roles of sperm donors and the intentional parents, the recognition of the de facto family in Irish law, and the factors that determine what it is the best interests of the child. This case acts as a platform for debate about the significance of the different parties in a child's creation and upbringing.

The High Court decision was based on a wide interpretation of Article 8 of the European Convention of Human Rights. It must also be recognised that Hedigan J's decision was influenced by the finding of deception on the part of the biological father, and a rejection of his version of events surrounding the agreement and subsequent dealings with the parties. The High Court held that that sperm donor agreements were only enforceable to the extent that the best interests

[17] T. Finegan, "An Unmarried Father's Right to Guardianship of his Child and A Child's Right to the Support of His or Her Father: A Hohfledian View of the Irish Constitution" (2010) 32 *D.U. L. J.* 320, at 324.
[18] [2010] 2 I.R. 199.

of the child were not prejudiced by the agreement.[19] After surveying the individual rights of all parties involved,[20] the learned trial judge suggested that the de facto family, consisting both of the lesbian couple alone, and together with their child, possessed interests and rights to be considered under Article 8. The learned judge does not directly consider the rights of the legal mother's partner in relation to the child.

Hedigan J argued that the silence of the Constitution on the existence of de facto families should not be a bar to their legal recognition.[21] Hedigan J concluded that where a lesbian couple live together in a long term committed relationship of mutual support involving close ties of a personal nature, which were it a heterosexual couple would be regarded as a de facto family, they must be regarded as themselves constituting a de facto family enjoying rights as such under Article 8 of the European Convention.[22] Moreover, where a child is born into such a family unit and is cared for and nurtured therein, it was argued that then the child itself is a part of such a de facto family unit.[23] Hedigan J held that this factor was significant when determining if the father should be appointed guardian of the child.

For such a departure from both Irish law and Convention jurisprudence, there is little analysis beyond that brief summary of the law in this area. The learned trial judge argued that *X, Y and Z v United Kingdom*[24] demonstrated a substantial move towards the finding that a same sex couple enjoyed family life for the purposes of Article 8 of the Convention.[25] Hedigan J did not consider more recent

---

[19] [2008] I.E.H.C. 96, at 34-35.
[20] *Ibid*, at 35-39.
[21] *Ibid*, at 41. Hedigan J noted judicial statements in previous Irish cases where the courts recognised the existence of a de facto family consisting of a heterosexual couple and their children (*W O'R v EH* [1996] 2 I.R. 248).
[22] *Ibid*, at 47.
[23] *Ibid*.
[24] (1997) 24 E.H.R.R. 143.
[25] *Supra* n.19, at 47.

cases like *Estevez v Spain*[26] or *Karner v Austria*[27] which may challenge the speed and direction of any such movement.

Hedigan J also focused on the finding of the European Commission on Human Rights in *M v The Netherlands* to argue that sperm donation did not itself give rise to respect for family life with a child born thereby for the purposes of Article 8.[28] Ursula Kilkelly has correctly noted that the European Court has changed its stance on this point in cases like *Ciliz v Netherlands*[29] and *Boughanemi v France,*[30] and may be moving towards a presumption that family life exists between biological fathers and their children in all circumstances.[31] However, these cases concerned instances where the father and mother in each case had a relationship together but later separated rather than sperm donations. The underlying message from these decisions is that the concept of family life in the Convention embraces situations where the parties do not cohabit and that family ties can only be broken by exceptional events.[32]

At the core of Hedigan J's decision was the finding that the applicant deceived the couple as to his true intentions when entering the agreement, and that the couple had substantial grounds for feeling betrayed and violated.[33] The Supreme Court, by contrast, was of the view that this change of mind to the arrangement was a natural reaction to the birth of the child. It must be questioned whether similar language would be used if the genders of all parties were reversed in this case.

---

[26] Application 56501/00 (10th May 2001).
[27] (2004) 38 E.H.R.R. 24.
[28] *M. v. Netherlands* (App. 16911/90) (judgment of 8th February, 1993).
[29] [2000] 2 F.L.R. 469.
[30] (1996) 22 E.H.R.R. 228.
[31] U. Kilkelly, "Child Law and the ECHR: Issues of Family Life, Adoption and Contact", in U. Kilkelly, *The ECHR and Irish Law* (Jordan's Publishing, 2009) 135, at 141.
[32] *Supra* n. 30, at para. [35].
[33] *Supra* n.19, at 52.

The Supreme Court unanimously overturned the High Court decision. Murray C.J. held that section 2 of the European Convention of Human Rights Act 2003 was not a basis for founding an autonomous claim based on a breach of a particular section of the Act.[34] Therefore, Murray C.J. held that there was no basis in law for applying Article 8 of the Convention to the status of the lesbian couple or any of the parties.[35] Denham J argued that the European Court had not determined that parties in a homosexual relationship are family life pursuant to Article 8 of the Convention.[36] Denham J also noted the same conclusion was reached by the House of Lords in *M v Secretary of State for Work and Pensions*.[37] The previous chapter has already noted the arguments of Geoghegan J and Murray C.J. regarding the naturalness of the change of mind of the sperm donor once the child was born. One must question whether the Supreme Court's decision in *McD* represents a move towards greater recognition of the potential rights of a biological father or whether the importance of blood links depends on the particular facts before the courts.

The role of the different parties in the creation of the child at the centre of the dispute was not considered by the court. The focus of the court on the question of whether the same sex family enjoyed a right to family life under the European Convention failed to engage with the individual interests and important roles that each of three

---

[34] *Supra* n. 18, at 250.
[35] *Ibid*, at 255. It can be argued that as there was no post-2003 legislation relevant to the case at hand, and therefore the Supreme Court's interpretation of the ambit of section 2 of the ECHR Act was correct. However, this narrow formulation of the 2003 Act raises questions about the utility of the Civil Partnership Act 2010 for future claims. The Irish Court has previously issued a declaration of incompatibility where the relevant legislation did not afford any protection or consideration of the rights of transsexuals to have their gender change recognised. The High Court in *Foy* argued that failure of the State, through the absence of having any measures to honour the Convention rights of its citizens is every much in breach of the Convention as if it enacted a piece of prohibited legislation.
[36] *Ibid*, at 273. Denham J considered *Mata Estevez v Spain* where the court reiterated that long term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention.
[37] *Ibid*. See [2006] 2 A.C. 91.

parties played in the child's creation. Just as Chapter VII lamented the focus on non-discrimination in access questions, the court's consideration of this jurisprudence and the limited role of the Convention in Irish law highlights the need for reform of the way parenthood and parental rights are conceived under Irish law. Like the cases from the other jurisdictions considered below, the importance of biological link depends on the relationship status and sexuality of the intended parents. It could be suggested that the decision in *McD* may have been different if the couple at the centre of the case were a heterosexual couple.[38] While the sperm donor was successful in the case, an appreciation of the importance of each role in the creation of the child and in rearing the child would afford more weighty, but not mutually exclusive, protection to both the de facto family and biological parents.

III. Gestational Motherhood

Motherhood is a term that generally refers to two functions: childbearing and childrearing.[39] The common law presumption that the birth mother was also the legal mother of a child was based on the fact that until recently the genetic mother and gestational mother were the same person.[40] There is in turn a presumption that the biological mother and social mother are the same person. Motherhood has always been a legal constant, and biological mothers have enjoyed extensive legal rights in light of the assumption that motherhood is a social and biological role. The bond

---

[38] A former member of the Supreme Court, the Hon Mrs. Justice Catherine McGuinness has posed such a question when considering the *McD* decision (see Plenary Address, Law Student Colloquium; Rethinking Law, Trinity College Dublin (20 February 2010)

[39] M. M. Slaughter, "The Legal Construction of Mother", in M.A. Freeman & I. Karpin (eds.), *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995) 73, at 73.

[40] A. Reichman Schiff, "Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity" (1995) 80 *Iowa L. Rev.* 265, at 274.

between mother and child is widely conceptualised as natural, instinctive and sacred.[41]

The previous section has already recognised that the birth mother of the child enjoys unenumerated constitutional rights to the custody and care of the child. Denham J in *Roche v Roche* noted that while there is a link between genetic parents and their frozen embryos, there was a special relationship between an unborn child and its mother.[42] This case law indicates that the courts would be reluctant to find that a surrogate did not enjoy custody rights in relation to their child. The question for this Chapter is whether the right to procreative autonomy could mandate that such parental rights would not be exclusive, that the rights of the other parties involved in the creation of the child be recognised.

A number of cases in the United States have also recognised the importance of the role of gestation in determining parenthood. In *A.H.W. & P.W. v G.H.B.*,[43] the court noted that during pregnancy the foetus relies on the gestational mother for a number of contributions. The gestational mother's endocrine system determines the timing, amount, and components of hormones that affect the foetus. These components, or an absence thereof, can alter the life, mental capacity and appearance of the foetus forever.[44] The court here noted however that the birth certificate could be altered 72 hours after birth, and expressly outlined that it was not determining any rights of the gestational mother in the case as this was not at issue.[45]

---

[41] R. McKenzie, "Beyond Genetic and Gestational Dualities: Surrogacy Agreements, Legal Parenthood and Choice in Family Formation", in K. Horsey & H. Biggs (eds.), *Human Fertilisation and Embryology: Reproducing Regulation* (Abingdon: Routledge Cavendish, 2007) 181, at 189.
[42] [2010] 2 I.R. 321, at 370.
[43] 339 NJ Super. 495, 772 A 2d 948 (2000).
[44] *Ibid*, at 503.
[45] *Ibid*, at 505.

Under section 30 of the Human Fertilisation and Embryology Act 1990, a 'parental order' may be made in respect of a child carried by the surrogate as result of undergoing treatment for the purposes of the legislation.[46] The order will hold that the commissioning parents are the legal parents of the resulting child. A genetically related couple must adopt the child before they are the legal parents.[47] A parental order is only available to parties where the gametes of the husband, or wife, or both, were used to create the embryo.[48] Under section 30(5), the surrogate and the legal father (partner) must provide consent before the order can be made. The consent of the birth mother cannot be dispensed with under the Act. The Act therefore affords primacy to the wishes of the birth mother and also promotes the importance of biological connection between the intended parents and the child. The Brazier Report in 1997 reviewed certain questions about the future regulation of surrogacy.[49] The Report argued that any woman who has a baby as part of a surrogacy agreement should not be compelled to give it up if she changes her mind.[50] Baker J in *Re T.T. (Surrogacy)* noted that the natural process of carrying and giving birth to a baby creates an attachment which may be so strong that the surrogate mother finds herself unable to give up the child.[51]

---

[46] Comprehensive analysis of the 1990 Act can be found in R. Probert, *Cretney's Family Law* (London: Sweet & Maxwell, 2006), at 212-215.
[47] See criticism of this alleged contradiction in J.K. Mason, *Medico-Legal Aspects of Reproduction and Parenthood* (Aldershot: Ashgate, 1998), at 259.
[48] See section 54(1)(b) of the Human Fertilisation and Embryology Act 2008.
[49] M. Brazier et al, *Surrogacy: Review for Health Ministers of Current Arrangements for Payment and Regulation Consultation Paper* (London: Department of Health, 1997), at para. [2.11]. Available at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_4009697 (accessed 10 March 2010).
[50] *Ibid*, at para. [1.4].
[51] [2011] 2 F.L.R. 392, at para. [1]. For a recent outline of case law concerning surrogacy in England and Wales, see M. Welstead, "This Child is My Child; This Child is Your Child; This Child was Made For You and Me- Surrogacy in England and Wales", in B. Atkin (ed.), *The International Survey of Family Law 2011 Edition* (Bristol: Jordan Publishing, 2011) 165.

Like the United States, surrogacy is regulated in Australia on a state by state basis.[52] The existing parentage presumptions govern surrogacy; the surrogate mother and her partner are regarded as the legal parents of the child, even if they are not genetically related to the child.[53] Parentage orders transferring parental rights can be made in states like Western Australia[54] and Victoria.[55] The case law and legislation considered shows that the physical and emotional investment in the child's creation cannot be disregarded because the surrogate did not intend to be the legal mother of the child on implantation. Affording respect to surrogates and their relationship with the child does not mean legally ignoring all other parties and their relationships with the resulting child in order to give a surrogate mother exclusive parental rights in relation to the child.

IV. Genetic Connection

Genetic essentialism asserts that our genes and our DNA are the essence, the core, and the most important constituent part of who we are as human beings.[56] The notion of the molecular family is based in the cultural expectation that a biological entity can determine emotional connections and social bonds- that somehow genetics can link us to each other and somehow preserve a reliable family model.[57] Genetic ties seem to ground family relationships in a stable and well-

[52] A concise and recent summary of the different legislative positions in Australia on surrogacy is found at Joint Working Group of Standing Committee of Attorney General Australian Health Ministers' Conference Community and Disability Services Ministers' Conference, *A Proposal For a National Model to Harmonise Regulation of Surrogacy* (January 2009), Appendix A. Available at http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_pastconsultations (accessed 10 March 2010).
[53] *Ibid*, at 3.
[54] Surrogacy Act 2008 (Western Australia).
[55] Assisted Reproductive Treatment Act 2008 (Victoria).
[56] L. Binder, "Genes, Parents and Assisted Reproductive Technologies: ARTs Mistakes, Sex, Race and Law" (2003) *Colum. J. Gender & L.* 1, at 4.
[57] S. Lindee & D. Nelkin, *The DNA Mystique: The Gene as a Cultural Icon* (New York: WH Freeman, 1995), at 60.

defined unit, providing the individual with indisputable roots more reliable than ties of love, friendship or shared values.[58] The Irish Supreme Court and the House of Lords have both recently highlighted the importance of biological parenthood. Baroness Hale in *In Re G. (Children)* highlighted the importance of biological motherhood.[59] Baroness Hale, in determining the contact arrangements between a separated lesbian couple and their children, noted that the fact one party was the natural mother of the children was a significant factor in determining what would be best for them now and in the future.[60] Baroness Hale noted that genetic parenthood could be of deep significance on many levels.[61] It is worth remembering that the genetic parent was also the gestational parent in the case, so the *G* decision cannot be perceived to prioritise genetic contribution over gestational. Hardiman J in the *Baby Ann* Supreme Court decision also attached importance to the biological link between the Byrnes and Baby Ann.[62] Fennelly J in the in *McD. v L.* also highlighted the importance of the blood link, and suggested that this link, exerts a powerful influence on the people.[63] This thesis suggests that the right to procreative autonomy promotes property rights in our gametes, in the sense that we possess a bundle of legal rights in relation to this material because of its personal importance and centrality to human flourishing. Property rights are afforded, not in spite of, but because of the significant potential of gametes, in order to afford control to genetically related parties.

John Lawrence Hill claims that the link between the gamete and the newborn child is too attenuated to support a claim to parent the child

---

[58] *Ibid.*
[59] [2006] 1 W.L.R. 2305.
[60] *Ibid*, at para. [44].
[61] *Ibid*, at para. [33].
[62] [2006] 4 I.R. 374, at 547. Similar arguments about the importance of the blood link were noted by Geoghegan J at 582- 583.
[63] *Supra* n. 18, at 310.

by virtue of the genetic contribution alone.[64] Hill argues that while the producers of sperm and ova have an interest in preventing certain uses of their issue, this does not establish that they should be accorded parental rights.[65] In relation to surrogacy, Hill suggests that the claims of the gestational host to legal priority are more compelling. These claims include pre-natal and post-natal bonding, the psychological effects on the birth mother, the physical involvement of the birth mother in bringing the child into the world, and the best interests of the child. The gestational mother experiences and changes to her body, her nurturing of the fetus for nine months and pain of giving birth afford the gestational mother strong rights to privacy and autonomy.[66] The constitutional right to procreative autonomy should recognise the importance of genetic connection and contribution. Chapter V has outlined how genetic connection to unwanted embryos forces many potential parents to destroy unused embryos rather than donate them to third parties. The psychological impact of having genetically related children, even when no contact or obligations are incurred, is recognised in such instances.

a) Genetic Motherhood

There is very little case law on genetic motherhood itself. Questions of motherhood usually centre around the use of surrogate and notions of intention. In *Belsito v Clark*[67] there was no dispute from the gestational surrogate about affording custody to the commissioning parents. The court noted that proof of genetic relationship or blood relationship was still the primary means of establishing parentage. The Court criticised the *Johnson* court for replacing this test with a

---

[64] J. Lawrence Hill, "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 *NYU L. Rev* 353, at 393.
[65] *Ibid.*
[66] L. Gostin, "A Civil Liberties Analysis of Surrogacy Agreements" (1988) 16 *L. Med. & Health Care* 7, at 8.
[67] 67 Ohio Misc 2d 54, 64 4 NE 2d 760 (1994).

test involving the intention of the parties.[68] *Belsito* therefore reiterates the importance of genetic parenthood in a case where the parties were also the intended parents of the child.

b) Genetic/ Biological Fatherhood

We have already noted that the law appreciates that fatherhood is a more transient notion than motherhood. The notion of a man donating his sperm and having no tie or relationship to the resulting child does not cause the same conceptual problems as surrogacy. For example, in the United States, the 2002 Uniform Parentage Act provides that a donor (whether egg or sperm) is not a parent of a child conceived by means of assisted reproduction.[69] The state courts generally find that if sperm donors do not donate sperm through a licensed physician, then the Uniform Parentage Act exclusion of parenthood of sperm donors does not apply.[70] The following analysis suggests that biological fatherhood is prioritised when it does not threaten an existing nuclear family.[71] The importance of fatherhood is also dependent on the presence or absence of another father figure in the child's life.

Biological Fatherhood and the Presence of a Social Father

In *Michael H v Gerald D*[72] Justice Scalia held that the child in question did not have a due process right to maintain a filial relationship with both the putative natural father and the husband of

---

[68] *Ibid*, at 61.
[69] §702 Uniform Parentage Act. See also C. Eastman, "Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination" (2009) 41 *McGeorge L. Rev.* 371 for outline of the 2002 Act.
[70] See *Mintz v Zoernig*, 198 P. 3d 861 (2008).
[71] M. Jacobs, "My Two Dads: Disaggregating Biological and Social Paternity" (2006) 38 *Arizona St. L. J.* 809, at 811.
[72] 491 U.S. 110 (1989).

the child's mother. The court stated that "California law, like nature itself, makes no provision for dual fatherhood".[73] In *Lehr v Robertson*, the Supreme Court held that the mere existence of a biological link between a putative father and a child did not afford the biological father protection under the due process clause when he was not notified about pending adoption proceedings.[74] Biological connection offered an opportunity to develop a relationship with one's offspring, but did not compel a state to listen to one's opinions when determining the best interests of the child.[75]

The English courts have also reduced the importance of genetic connection when another man plays the role of the social father to the child. In *Re R*, the House of Lords determined that a man who began fertility treatment with his ex-partner was not the legal father of the child born using IVF.[76] The relationship broke down before the embryos were implanted and embryos were created using donated sperm. The mother had a new partner at the time of implantation. The High Court had originally granted the original partner a declaration of paternity under section 28(3) of the Human Fertilisation and Embryology Act 1990. The Court of Appeal and the House of Lords found the relevant time for determining whether parties were treated together (which determined the application of the 1990 Act) was implantation of the embryos into the womb. As the couple were separated at this point, they could not be said to have been treated together.

Leeds Teaching Hospital v A. involved an unfortunate case where the sperm of a married man was incorrectly injected into another married

---

[73] *Ibid*, at 118.
[74] 463 U.S. 248 (1983). For detailed analysis of the treatment of unmarried fathers by the United States Supreme Court, see N. Dowd, "Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers" (2005) 54 *Emory L.J.* 1271
[75] *Ibid*, at 262.
[76] *In Re R (A Child) (IVF: Paternity of Child)* [2005] 2 A.C. 621.

woman's eggs and implanted.[77] Both married couples were undergoing ICSI treatment at the time. Mrs. A was the genetic mother of the resulting twins, while Mr. B was their genetic father. Butler-Sloss P. noted that Mr. A was in the position of a father and had established a close relationship with the twins whom he regarded as his children.[78] The court therefore held that his Article 8 Convention Rights were engaged.[79]

The court noted that while Mr. B was the biological father of the children, and was not a consenting sperm donor, he only had a genetic connection to the children.[80] The court held that Mr. B did not have a right to respect for family life that would be breached if Mr A was able to establish that he was the presumed father of the child.[81] However, Butler-Sloss P did not make a declaration that Mr. A was the children's father. The court emphasised the importance of biological truth and the fact that this was not a sperm donor case.[82] Butler-Sloss P noted that Mr. A could enjoy parental responsibility in relation to the children under the Children Act 1989, and a residence order could be made in the couple's favour.[83] While the unusual circumstances of both cases limit their precedential value, again the importance of biological fatherhood is limited in instances where the is another functional father figure in the child's life.

---

[77] [2003] E.W.H.C. 259 (QB).
[78] *Ibid*, at para. [49].
[79] *Ibid.*
[80] *Ibid*, at para. [44].
[81] *Ibid*, at para. [48].
[82] Ibid, at para. [59].
[83] *Ibid.*

Biological Fatherhood when there is no other Father Figure

In *Thomas S. v Robin Y*[84] the New York courts considered whether a biological father was entitled to an order of filiation and visitation in relation to a child born through an arrangement with a lesbian couple. The appellate court saw the family situation as akin to a situation where a divorced mother remarried.[85] This approach was informed by the fact that there was no competing father figure in the case. As noted above, if there is another father figure in the case, the courts generally place less emphasis on biological connection in determining parenthood.[86]

The Californian case of *Jhordan C v Mary K.* also illustrates this point.[87] The Californian Court of Appeal held that a sperm donor (Jhordan) was the legal father of a child born through an arrangement with the birth mother and her close non-cohabiting female friend. The parties did not draft an agreement regarding parental rights or custody.[88] The court, in finding that Jhordan was the legal parent of the child stressed that their finding was not intended to express any judicial preference towards traditional notions of family.[89] The result of the case would question this assertion.

The Connecticut Superior Court in *Browne v D'Alleva*[90] considered a written agreement between a lesbian couple and a sperm donor and his gay partner. In the agreement it was alleged that the biological mother and her partner would be the legal parents of the child, and

---

[84] 618 N.Y. S 2d 356 (1994).
[85] N. Polikoff, "The Deliberate Construction of Families without Fathers: Is it an Option for Lesbian and Heterosexual Mothers?" (1996) 36 *Santa Clara L. Rev.* 375, at 382.
[86] See *Leckie v Voorhies* 128 Or. App. 289, 875 P.2d 521 (1994).
[87] 179 Cal.App.3d 386, 224 Cal.Rptr. 530 (1986)
[88] *Ibid*, at 389-390.
[89] *Ibid*, at 397.
[90] (2007) W.L. 4636692.

that the sperm donor would give up all rights and claims to the child. The court held that the sperm donor was the biological father of the child, and the court granted him standing to bring an application for joint custody and visitation of the child.[91] Similarly, in *Tripp v Hinckley*,[92] a gay sperm donor filed a petition for extra visitation against the custodial parents (the biological mother and her lesbian partner) of two children born under the arrangement. Rose J. in the New York Supreme Court held that the father was entitled to be treated as a parent rather than a sperm donor. The court rejected the birth mother's claim that the donor was not a parent of the children, looking at the undisputed paternity of the children and his regular contact with the children.[93]

In *Re Patrick*, the Family Court of Australia considered an application by a sperm donor for contact with a child born as a result of artificial insemination of one of two lesbian partners.[94] The applicant in *Re Patrick* was not seeking to be recognised as a parent of the child, but rather was applying for regular contact with the child. [95] He was trying to assert his own 'rights' while simultaneously recognising the roles that both the biological mother and her co-parent partner played in the child's life.[96] Guest J found that the 'father'[97] was not a parent for the purposes of s. 60H of the Family Law Act 1975,[98] but had standing as a "person concerned with Patrick's care, welfare and development". He could therefore apply

---

[91] *Ibid*, at 13.
[92] 90 A.D.2d 767, 736 N.Y.S.2d 506 (2002).
[93] *Ibid*, at 767-768.
[94] *Re Patrick: (An Application Concerning Contact)* [2002] Fam. C.A. 193.
[95] *Ibid*, at para. [76].
[96] *Ibid*, at para. [99]. The 'father' was of the opinion that his position was "...one down" from the couple.
[97] The applicant was referred to as the 'father' of the child throughout the case.
[98] The sub-section of 60H(3) states: if
(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man; then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

for a parenting order pursuant to s.65C, and have parental responsibilities conferred on him. Secondly, the court found that while Patrick had a loving relationship with both his mother and his co-parent, he had much to gain from contact with his father and Guest J considered that the development of such a relationship was in Patrick's best interests.[99] Guest J was adamant that the grant of contact with Patrick did not infringe on the two-parent, mother and co-parent, model, and that Patrick would have "two parents and a father", the judgment not to be interpreted as endorsing a three-parent model.[100]

This section has highlighted the malleability of biological parenthood. In some instances biological connection is afforded little weight. In other case the power of the genetic link is underlined. The importance of biological connection is contingent on external factors including the presence or absence of another father figure in the child's life. This thesis argues that genetic connection is significant, and the importance of such a contribution should not depend on the ideal family form that can be created in each case.

IV. Intentional and Social Parenthood

This section develops the argument made in Chapter VIII, that the rights to procreative autonomy of commissioning parents should be recognised. Marjorie Shultz has suggested that the choices generated by reproductive technologies makes personal intention a significant factor in procreation and parenthood.[101] Shultz claimed that intentions

---

[99] *Supra n.* 94, at para. [263].
[100] *Ibid*, at para. [281].
[101] M. M. Shultz, "Reproductive Technology and Intent Based Parenthood: An Opportunity for Gender Neutrality" (1990) *Wis. L. Rev.* 297, at 300. Professor Shultz's work was considered in detail in *Johnson v Calvert*, which is discussed *infra* n.110.

that are voluntarily chosen, deliberate, express and bargained for ought presumptively determine legal parenthood.[102] Andrea Stumpf also suggests that the surrogacy contract creates an attachment between initiating parents and the child.[103] Stumpf champions the "but for" analysis in this regard. She asserts that when the child's existence begins in the minds of the desiring parents, biological conception of the child declines in importance relative to this psychological conception in relation to the creation of the child.[104] Stumpf claims that the surrogate mother could rebut the recommended presumption that initiating parents enjoy recognition, but she would then be seeking to *regain* the rights to the child, rather than retaining them.[105]

Intention, however, is not a necessary condition of parenthood. One can unintentionally become parent.[106] Anne Reichmann Schiff suggests that a system that bases the legal determination of parenthood on biological status may operate well in a context where intentions are somewhat blurred, as is often the case in sexual reproduction. However, it is suggested that it is less appropriate to focus on biology when the roles are delineated in advance of pregnancy.[107]

Intentional Parenthood and Surrogacy

In relation to surrogacy, the notion of intentional parenthood is only considered in instances whether the surrogate does not want to be

---

[102] *Ibid*, at 323.
[103] A. Stumpf, Redefining Mother: A Legal Matrix for new Reproductive Technologies" (1986) 96 *Yale L.J.* 187.
[104] *Ibid*, at 196.
[105] *Ibid*, at 205 (emphasis added).
[106] M. Shapiro, "How (Not) to Think About Surrogacy and Other Reproductive Innovations" (1994) 28 *U. San. Fran. L. Rev.* 647, at 677.
[107] A. Reichman Schiff, "Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity" (1995) 80 *Iowa L. Rev.* 265, at 279.

recognised as a legal parent. In *In the Matter of Baby M*[108] the New Jersey Supreme Court awarded custody of the child to the Sterns (the biological father and his wife) on the basis that this was in the best interests of the child given the perceived stability of the Stern household.[109] The biological and gestational mother was deemed to be the legal mother of the child, and court did not recognise any possible rights of Elizabeth Stern in relation to the child.

In *Johnson v Calvert*[110] the Californian Supreme Court used the notion of intentional parenthood as a tie-breaker when both women, because of their respective biological connections to the child (gestational and genetic), could be deemed the natural mother of the child under Californian law.[111] The court held that a child only had one natural mother under Californian law. As both women had presented "acceptable" proof of maternity, the court went on to consider the parties' intentions under the relevant agreement.[112] Justice Panelli noted that the commissioning couple intended the birth of the child and took the relevant steps to initiate IVF. The court held that "but for their acted-on intention, the child would not exist".[113] Justice Panelli also emphasised that Ms. Johnson, the surrogate, would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. Therefore, in instances where gestational and genetic parenthood do not coincide, she who intended to procreate the child, i.e. the person who intended to raise the child as her own, was the natural mother of the child under Californian law.[114] The Californian courts have subsequently held that the *Johnson* tie-breaker is only applied when more than one woman can

---

[108] 109 N.J. 396, 537 A. 2d 1227.
[109] *Ibid*, at 458.
[110] 851 P 2d 776, 5 Cal. 4th 84 (1993).
[111] *Ibid*, at 778.
[112] *Ibid*, at 782.
[113] *Ibid*.
[114] *Ibid*.

establish a genetic connection to the child at the centre of the legal dispute.[115]

The Californian Court of Appeal in *In Re Marriage of Buzzanca*[116] utilised the notion of intentional parenthood where the surrogate did not want to be recognised a legal parent and the commissioning couple were not genetically related to the couple. The court held that a husband and wife should be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf, just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination.[117]

The Irish Commission on Assisted Reproduction noted that in determining parentage, both genetics and gestation play equally important roles in bringing the child into existence.[118] It argued that in attempting to choose one over the other, the law is imposing an artificial primacy that is arbitrary and illogical.[119] The Commission was of the opinion that rights based on the 'intent of reproduction', in other words what all parties intended from the outset of the arrangement, should form the basis of recommendations on legal parentage in cases of surrogacy.[120] It should be appreciated that the Commission did not directly deal with the potential of the surrogate to change their mind on the birth of the child. However, the importance of intentional parenthood coupled with a de-prioritisation of biological motherhood supports this Chapter's promotion of the right to be legally recognised as a parent.

---

[115] *In re Marriage of Moschetta* 25 Cal App 4th 1218 (1994), at 1226..
[116] 61 Cal App 4th 1410, 72 Cal Rptr 2d 280 (1998).
[117] *Ibid*, at 1413.
[118] Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (Department of Health, 2005), at 51.
[119] *Ibid*.
[120] *Ibid*.

The Commission considered four options in relation to the legal parentage of a child born through surrogacy:

> "(i) The child born through surrogacy *is presumed to be that of the birth* mother;
>
> (ii) The child born through surrogacy *is in general* that of the commissioning person(s);
>
> (iii) The child born through surrogacy *is presumed* to be that of the commissioning person(s), or
>
> (iv) The child born through surrogacy *should be* that of the commissioning person(s)".[121]

The majority of the Commission recommended that the child born through surrogacy should be presumed to be that of the commissioning couple.[122] It promoted this option because the word 'presumed' allowed enough flexibility in relation to the legal parentage of the child to consider cases where some fundamental change in the circumstances under which the surrogate mother consented to the arrangement could be established.[123] However, there was also a minority view within the Commission that favoured more leeway for the birth mother especially in cases where the birth mother had a genetic link with the child.[124]

This position represents a departure from the legal recognition of motherhood in other jurisdictions. The majority approach seems to suggest that there does not need to be any genetic connection between the intended mother and the child in order for her to be legally recognised as the child's mother. At the same time, the Commission is not rejecting the importance of the biological relationship between the birth mother and the child. This thesis

---

[121] *Ibid*, at 52.
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.*

similarly argues that the importance of every role in procreation needs to be appreciated.

The right to procreative autonomy, based on human dignity, should promote the interests of such intended parents. While a direct physical connection to the child is absent, the profound decisions that led to the child's creation, and their impact on such intended parents must be appreciated. The case law considered above shows that intentional parenthood will be promoted by the courts when the surrogate mother continues to consent to the agreement after birth. Recognition of the important role of such parties in initiating the pregnancy process, and their contributions throughout the pregnancy were made in order to become parents of the resulting child, should not be dependent on the wishes or interests of one party in the process. Respect for human dignity, the equal value and worth of every person promotes respect for this aspect of the procreative process. The absence of direct property rights in procreative material or embryos will be a factor in determining actual legal parenthood, but should not diminish the prima facie right of such parties to be legally recognised as parent.

Social Parenthood of A Same Sex Partner in the Absence of Father Figure

In *Elisa B*, the Californian Supreme Court held that there was no reason why both parents of a child could not be women under the Uniform Parentage Act.[125] The court distinguished *Johnson v Calvert* from the case at hand as in *Johnson* the determination that a child could only have one natural mother was made in a case where the biological father of the child wanted to raise the child, so there were

[125] 117 P. 3d 660, 33 Cal. Rptr. 3d 46 (2005), at 666-7.

three potential parents rather than two.[126] It argued that rebutting the presumption that Elisa was the twin's parent would leave them with only one parent and would deprive them of the support of their second parent. Similarly, Moreno J in *Kristine H. v Lisa R.* held that the biological mother was estopped from challenging the validity of the agreement entered into during her pregnancy.[127]

In *Clifford K. v Paul S.*, the Supreme Court of Appeals of West Virginia held that the same sex partner of a deceased mother had standing to intervene in custody proceedings even though she was not a legal parent of the child.[128] The court found that the partner was the child's psychological parent. It held that the most crucial components of the psychological parent concept were the formation of a significant relationship between a child and an adult who may not be related to the child; that there the relationship was of substantial temporal duration; the adult's assumption of caretaking duties for and provision of emotional and financial support to the child, and the fostering and encouragement of such a relationship by the child's legal parent or guardian.[129]

Similarly, in the Californian case of *K.M. v E.G.*,[130] K.M. donated her eggs so that her former lesbian partner could bear a child. Upon relationship breakdown, K.M. filed a petition to establish a parental relationship with the twins. Moreno J held that both of the lesbian partners were the legal parents of the children. K.M. entered into an agreement in E.G., whereby she would not disclose to anyone that she was the ova donor. K.M. claimed however, that she only provided her

---

[126] *Ibid*, at 666.
[127] 117 P. 3d 690, 33 Cal. Rptr. 3d 81 (2005), at 692.
[128] 619 S. E. 2d 138 (2005).
[129] *Ibid*, at 156-157.
[130] 37 Cal 4th 130, 117 P. 3d 673 (2005). For in-depth criticism of this case, see M. Nilsson, "You Can't Force Her to be a Second Mom: *K.M. v E.G.*" (2006) 10 *U.C. Davis J. Juv. J. & Pol'y* 479.

ova in order to raise the children with E.G.. The court was of the view that this was not a true egg donation case.[131] The majority distinguished the case at hand from *Johnson*, in that both K.M. and E.G. could both be the children's mothers, the parental claims were not mutually exclusive.[132] K.M. was claiming that she was the children's mother in addition to E.G., rather than instead of E.G.[133]

The Canadian decisions of *Rutherford v Ontario*[134] and *Gill v British Columbia*[135] support the recognition of same-sex partners as legal parents of children born using ARTs in cases where the biological father did not contest parenthood. The United Kingdom now provides for two female parents of a child born through the use of ARTs. Under section 45(1) of the Human Fertilisation and Embryology Act 2008, if a woman falls under the definition of parent for the purposes of the Act, then no man is to be treated as the father of the child. It is interesting to note that the legislation speaks of the notion of two parents, rather than two mothers. Social parenthood is privileged to create the most natural family possible from the parties in a child's life, a same-sex two-parent model.

These cases promote the role of intentional or social parenthood in determining legal parenthood. The context of these decisions must be highlighted. Like the fate of biological fathers, such decisions depend on the absence of a third party who was biologically related to the child, and concerns for the economic well-being of the child.

---

[131] *Ibid*, at 139.
[132] *Ibid*, at 143.
[133] *Ibid*.
[134] (2006) 270 D.L.R. (4th) 90.
[135] (2001) B.C.H.R.T. 34, at para. [4].

Intentional/ Social Fatherhood

Re Mark[136] was an Australian case concerning a child born pursuant to a surrogacy agreement in the U.S. between the biological father and his gay partner. The court was asked to recognise that the couple were Mark's legal parents. The court held that Mr. X provided his genetic material with the express intention of fathering a child he would parent, and was thus distinguishable form a sperm donor (known or anonymous) as the term was "commonly understood".[137] Brown J recognised that failing to recognise X as Mark's parent sat awkwardly with the realities of Mark's life.

The Uniform Parentage Act recognises social fathers, but only in an instance where there is no other father figure in the child's life, the child can only have one father.[138] In *In Re Nicholas*, the Supreme Court of California found that a man did not lose his status as a presumed father by admitting he is not the biological father.[139] The court was influenced by the circumstances of the case, where the presumed father had provided a loving home for Nicholas, while his mother was homeless and his biological father had not shown any interest in providing the child with a home.[140]

VI. The Best Interests of the Child and the 'Normal' Family Form

This Chapter has established the importance of each connection to a child. It shows that the three different connections have been promoted by the courts, but their promotion was dependent on the particular facts of the case. It is suggested that the main concern for the courts or legislature in determining legal parenthood should be the

---

[136] *Re Mark: (An application relating to parental responsibilities)* [2003] Fam C.A. 822.
[137] *Ibid*, at para. [59].
[138] N. Dowd, "Parentage at Birth: Birth Fathers and Social Fatherhood" (2006) 14 *William & Mary Bill Rts J.* 909, at 915-6.
[139] 46 P. 3d 932 (2002).
[140] *Ibid*, at 933.

best interests of this child. This section underlines the need to distinguish between the best interests of the child and the creation of a normal looking family. The greatest obstacle to recognition of the different respective rights to legally recognised parenthood is the threat such an approach poses to the traditional heterosexual two-parent family form. A number of silent assumptions about appropriate family forms are inherent in the case law considered in this Chapter. The right to procreative autonomy certainly promotes the notion that a wider range of people to be parents and arguably mandates reconsideration of the two-parent heterosexual model that most courts and legislatures try to mould out of these complex situations.

The Australian Joint Working Group of Standing Committee of Attorneys General published some harmonisation proposals of the law regulating surrogacy throughout Australia. It proposed that in making a parentage order, the best interests and welfare of the child are the paramount concerns for the court, not the interests of the adult parties to the agreement.[141] The Committee noted that a parentage order would not be made just because all the parties consented to it. It would only be made if it was in the best interests of the child.[142] The Working Group suggested that parental orders could be made in favour of persons who were not genetically related to the child, but only if the surrogate mother agreed to this.[143] Alternatively, the Committee argued that parentage orders could be limited to cases where neither the surrogate mother nor her partner were genetically related, based on the assumption that the surrogate would find it easier to relinquish a child she was genetically unrelated to.[144]

The notion of the 'best interests of the child" is often indeterminate and subjective, and is open to generic interpretations by each

[141] *Supra* n. 52, at 3.
[142] *Ibid*, at 10.
[143] *Ibid*, at 4.
[144] *Ibid*.

adjudicator.[145] Even with the aid of statutory guidelines, the best interest standard can potentially reflect biases and presumptions based on particular notions of family.[146] This standard can focus on assigning parents' rights rather than identifying actual needs.[147] The test therefore has symbolic appeal and the authoritative language of the phrase creates the illusion that the "best interests" standard constitutes an objective analysis.[148] In reality, it gives decision makers broad discretion and requires the invocation of personal values.[149] This thesis supports the Irish Commission's test for best interest of the child. The considerations outlined in Chapter IV ensure that the tangible interests of the child are central in determining access, and in this case, legal parenthood. Again, the Commission cautioned against the notion of best interests of the child being determined by a subjective view of normality.[150]

The ability of the child to have a relationship with their genetic parent will be important. The right of the child to know their biological identity has been extensively developed in many jurisdictions in recent years.[151] However, the recent failed legislative reform in the U.K. highlights the limited legal importance of biological connection. The Human Fertilisation and Embryology Amendment Act 2008 stopped short of requiring any indication on the birth certificate of a child born through the use of reproductive technologies that the biological parenthood of the child was different. The Joint Committee of the Human Tissue and Embryos (Draft) Bill noted that a birth

---

[145] R. Mnookin, "Child-custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 *Law & Contemporary Problems* 226, at 229.
[146] F. Kelly, "Redefining Parenthood: Gay and Lesbian Families in the Family Court- The Case of *Re Patrick*" (2002) *Australian J. Fam. L.* 17, at 58.
[147] B. Cossman & R. Mykitiuk, "Reforming Child Custody and Access Law in Canada: A Discussion Paper" (1998) 15 *Can. J. Fam. L.* 13, at 24.
[148] M. Ryburn, "The Myth of Assessment" (1991) 15(1) *Adoption & Fostering* 20, at 21.
[149] N. Bala, J.A. Isenegger & B. Walter, "'Best Interests' in Child Protection Proceedings: Implications and Alternatives" (1995) 12 *Can. J. Fam. L.* 367, at 367.
[150] Commission, at 121.
[151] See A Bainham, 'Arguments About Parentage' (2008) *C.L.J.* 322 and D. Madden, "Recent Developments in Assisted Human Reproduction: Legal and Ethical Issues" (2001) 7 *M.L.J.I.* 53.

certificate should register the fact that a person was born using donor conception.[152] It was thought to be in the best interests of the child that they know their complete biological identity. The government noted the sensitivity of the issue and was reluctant to force parents into disclosing to children the circumstances of their creation.[153] Reservations were expressed about forcing parents to disclose the circumstances surrounding the birth of the child.

Chapter IV has already noted the importance of the nuclear family in Western society.[154] This 'institutionalisation' of the family denies its fluidity, dynamism and the reality of complex kinship networks. Dramatic changes have occurred in the composition and diversity of families.[155] The U.S. Supreme Court has recognised the "demographic changes of the past century [that] make it difficult to speak of the average American family. The composition of families varies greatly from household to household".[156] Increases in divorce rates, remarriages, single parent households, and common law heterosexual and same-sex relationships have complicated parental roles and family forms. The notion that there is a single homogenous family form ignores the diversity of reality. A legal adherence to the nuclear family form bears little relation to the complex lives of many children. It is suggested that any concerns about the stability of the family created or the poor relationships between the parties would be directly considered under the best interests of the child.

---

[152] Joint Committee on the Human Tissue and Embryos (Draft) Bill, Volume II: Evidence, HL Paper 169-II, HC Paper 630-II, Ev.14, para. [276]. See *ibid* for extensive discussions of the debate surrounding this issue.
[153] Government Response to the Report from the Joint Committee on the Human Tissue and Embryos (Draft) Bill Cm 7209 (October 2007), at para 70.
[154] C. Siebel, "Defining Fatherhood: Emerging Case Law Reflections of Changing Societal Realities" (2003) 2 *Whittier J. of Child & Family Advocacy* 125, at 140.
[155] See J. Teachman et al, "The Changing Demography of America's Families" (2000) 62(4) *J. Marriage & the Fam.* 1247.
[156] *Troxel v Granville* 530 U.S. 57 (2000), at 63-64.

VII. Multi Party Parenthood or Parental Responsibility

This section suggests that reassessment of recognition of legal parenthood through the right to procreative autonomy prompts reconsideration of the assumption that a child can, and should, only have two parents. Some jurisdictions like the United States, Canada, New Zealand, and Ireland in the *McD* decision have grappled with multi-party parenthood with varying results. It is suggested that the right to legal recognition of parenthood correctly challenges the notion that a child can only have two legal parents. The previous section has highlighted that the paramount consideration in such determinations should be the best interests of the child, rather than a desire to construct a normal family form from the reality of the child's complex conception.

In the Pennsylvanian case of *Jacob v Shultz- Jacob*,[157] the court considered a custody application of a biological mother's former same sex partner for full legal custody of four children, two of whom were adopted. The court here recognised three parental figures in the children's lives for the purposes of child support. The trial court found that former partner had to pay child support for the children, while the court simultaneously recognised the involvement of the biological father of two of the children.[158]

In the Ontario case of *A.A. v B.B.*, the female partner of a child's biological mother applied for a declaration that she, as well as the biological parents of the child, was a legal parent of the child.[159] The trial judge at first instance held that he did not have the jurisdiction to make such an order. The trial court was of the view that the statute

[157] 923 A. 2d 473 (2007).
[158] *Ibid*, at 481-482.
[159] (2007) 278 D.L.R. (4th) 519.

could not be used to make more than two people parents.[160] Ashton J focused on the use of the definite article "the" in both sections, in suggesting the legislature had not intended the legislation be used to find more than two people parents,[161] In preserving the perceived exclusivity of parenthood, Ashton J recognised that this result was not in the best interest of the child but deferred to the legislature to remedy this situation.[162] Ashton J expressed concern for the precedential value of a recognition of the three individual's legal parentage in less harmonious situations.[163] The Ontario Court of Appeal however held that it was contrary to the best interests of the child that he was deprived of the legal recognition of parentage of one of his mothers.[164] The court felt that the relevant legislation did not intentionally prevent the lesbian partner of a mother being recognised as the legal parent of the child.[165] This is the only Canadian decision which recognised more than two legal parents.[166]

D.W.H. v D.J.R.[167] is a case from the Alberta Court of Appeal which concerns a more complicated family arrangement between an lesbian couple and a gay couple.[168] One woman and one man from each couple were the biological parents of the three year old girl at the centre of the dispute. The couples agreed they would have one child each, one raised primarily by the female couple and one by the male

---

[160] *Ibid*, para. [38].
[161] *Ibid*, para. [28]. The court cited *Buist v Greaves* ((1997) 72 A.C.W.S. (3d) 301), where Benotto J suggested that the use of the definite article connotes a singular person or relationship. However, that case did not determine the issue of parentage under s.4 (1) as the court was of the view that the relationship of mother-child was not established for the purposes of s.4(3), (see para. [35]).
[162] *Ibid*, at para. [40].
[163] *Ibid*, at para. [41].
[164] *Ibid*, at para. [37] (per Rosenberg JA).
[165] *Ibid*, at para. [38], where the court considered the Children's Law Reform Act. In the case of *Alliance for Marriage and Family v AA* [(2007) 3 S.C.R. 124], the Supreme Court of Canada denied five organisations standing to apply for leave to appeal this decision. Le Bel J noted that neither the Attorney General nor the immediate parties intended to contest the Court of Appeal's judgment (para 6).
[166] See L. Harder & M. Thomarat, "Parentage Law in Canada: The Numbers Game of Standing and Status" (2012) 26 *I. J. L. Pol'y & F,* 62.
[167] (2007) 280 D.L.R. (4th) 90.
[168] For comprehensive assessment of this decision, see A. Cameron, "Regulating the Queer Family: The Assisted Human Reproduction Act" (2008) 24 *Can. J Fam. L.* 101, at 102-106.

couple, with some involvement with the other couple in each of the children's lives. The baby girl in this case resided primarily with the male couple. The couple separated, and the girl's birth father and mother would not allow the appellant (who was not biologically related to the child) contact with the child. The Alberta court had to consider the parental status of the appellant in order to determine if a contact order should be made in relation to the child.[169] The court noted that from 2003 to 2006 the child lived with the appellant and the male respondents in their home as a family. The court also noted that the female respondent (the birth mother) played an active role in the child's life.[170] The court also noted that the appellant was involved in planning the child's conception, preparing the home for birth, was present at the birth and cared for the child for three years.[171] The court concluded that the appellant stood in the place of a parent to the child.[172] The reluctance of the court to find that the appellant was a legal parent of the child is arguably based on an aversion to the notion that a child has three parents.

The New Zealand High Court decision of *P. v K.* has prompted much debate about whether all sperm donors should be treated the same in law.[173] Here, the biological mother and her lesbian partner were in a stable relationship, as was the biological father and his same sex partner. The parties attempted to draw up an agreement which would define the role that each person would play in the child's life. The father's name appeared on the birth certificate in the U.K.. The couple then moved to New Zealand with the boy. The mother's partner filed as application seeking appointment as an additional guardian of the child under section 8 of the Guardianship Act 1968, and a custody order jointly with the biological mother. The biological father in turn also filed an application for appointment as an

---

[169] *Supra* n. 167, at para. [1].
[170] *Ibid*, at para. [5].
[171] *Ibid*, at para. [18].
[172] *Ibid.*
[173] [2003] 2 N.Z.L.R. 787 (HC).

additional guardian, as well as an application for access. The High Court held that as the child here was conceived by artificial insemination the father was prevented by the Status of Children Amendment 1987 from exercising the statutory right conferred on a parent.

The Law Commission of New Zealand, in a 2005 report on determinations of legal parenthood, argued for a legal mechanism that would recognise known gamete donors as legal parents of children upon the agreement of the intending parents.[174] It argued that the Status of Children Act 1969 be amended to provide that *the couple can appoint* the donor to be a parent of the child in two stages.[175] It recommended that the scheme should operate to enable donors to "opt into" parenthood so long as the recipient couple or single mother agrees.[176] The Commission noted that while there may be a heightened potential for conflict because of the extra parties with legal rights in relation to the child, this risk was not a reason to limit the number of legal parents.[177] However, this scheme would only apply when the donor intended to be have a parental from the outset. The Commission argued that the decision to donate gametes on the basis of relinquishing legal parenthood should be determinative from the point of conception.[178] Any support for the notion of multi-party parenthood is therefore conditional on the commissioning couple agreeing to this and that the intention to create this was present from the outset. The Commission would not impose multi-party parenthood in instances where a sperm donor changes their mind and wants to part of the child's life.[179]

---

[174] New Zealand Law Commission, *New Issues on Legal Parenthood* (NZLCR 88) (April 2005), at paras. [6.51]-[6.52] (recommendation 10).
[175] *Ibid* (emphasis added).
[176] *Ibid*, at para. [6.51].
[177] *Ibid*, at para. [6.67].
[178] *Ibid*, at para. [6.53].
[179] *Ibid*, at para. [6.59].

In categorising lesbian co-parents as mere third party petitioners or legal strangers, the courts overlook the actual parental relationship that has been established.[180] Some commentators have argued for different degrees of parenthood, so that sperm donors, for example, would not be treated as either a legal father or a legal stranger to a child.[181] Such an intermediate position would foster a relationship with the child and would prove more flexible that the black and white notion of legal parenthood. For example, parental responsibility under the Children Act 1989 in England and Wales can attach to more than two persons.[182]

Similarly, the Law Reform Commission Report on the Legal Aspects of Family Relationships recommended that legislative provisions be introduced to facilitate the extension of parental responsibility (guardianship) to civil partners and step parents.[183] However, the Commission suggested that where a person is in loco parentis in respect of a child but is not in a civil partnership with or married to a biological parent of the child then he or she would not be in a position to apply for parental responsibility under the recommended reforms.[184] This report did not consider legal parenthood. However, legal mechanism like parental responsibility begin to question the exclusivity of the nuclear family form. Such reforms have some potential to ensure that those connected with children, but who are not the legal parents of the, have a legally defined role in the child's life. Such mechanisms could be used to translate the right to procreative autonomy and to be recognised as a legal parent into

---

[180] M. Jacobs, "Micah has One Mommy and One Legal Stranger: Adjudicating Maternity for Non-biological Lesbian Co-parents" (2002) 50 *Buff. L. Rev.* 341, at 350.
[181] F. Bernstein, "This Child Does Have Two Mothers... And A Sperm Donor with Visitation" (1996) 22 *N.Y.U. L. & Soc. Change* 1, at 5.
[182] For an outline of the notion of parental responsibility under English law, see R. Probert, *Cretney's Family Law* (London: Sweet & Maxwell, 2006), at chapter 11.
[183] *Supra* n.3, at para. [3.24].
[184] *Ibid*, at para. [3.27].

actual legal recognition of some permanent role and importance in a child's life.

VIII. Conclusion

The application of the right supported in this Chapter would force change about the way we perceive parenthood and families. Its application will lead to greater distinctions between marital families and non-marital families. The special position afforded to the marital family under Articles 41 and 42 would arguably protect it from this scrutiny. Non-marital families will be recognised for their diverse foundations, and the different contributions of all parties to the creation of a child will be promoted if this is consistent with the best interests of the child. In a circular fashion, such an approach may probe the rationale behind the constitutional sanctity of the marital family.

It has been argued on a number of occasions that the law on parenthood should adapt to reflect the reality of a child's life, so that if the child's family includes more than two adults then the law should preserve these important relationships.[185] While permitting more than two adults to petition the court for access or visitation may add to the complexity of the child's relationships, this risk may be outweighed by the importance of such relationships that may be left unprotected by the courts.[186] The right to procreative autonomy advocated in this Chapter would have accommodated the interests of the lesbian couple and the sperm donor in *McD. v L.*, subject to

[185] P. Gatos, "Third-Parent Adoption in Lesbian and Gay Families" (2001) 26 *Vermont L. Rev.* 195, at 197. See also L. Kessler, "Community Parenting" (2007) 24 *Wash. U. J. L. & Pol'y* 47, at 72.
[186] D. Wald, "The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage" (2007) *15 Am. U. J. Gender Soc. Pol'y L.* 379, at 387.

consideration of whether rights or responsibilities on more than two parties was in the best interests of the child.

The right to legal recognition of parenthood articulates the deeply personal connections that all parties involved in ARTs have with the resulting child. It demands a review of what we mean by "mother", "father" and "parent", and the way we legally construct families created from ART. It also halts the automatic association of the best interests of the child considerations and normal, stable looking families. The best interests of the child test under this approach looks for substance over form.

Chapter X: The Right to Procreative Autonomy and Preimplantation Genetic Diagnosis

"There are certain things in a matured society that we do not do, simply because they are wrong."[1]

This chapter considers the extent to which a constitutional right to procreative autonomy protects individual use of preimplantation genetic diagnosis (PGD). PGD can be used to ensure that implanted embryos have a desired genetic makeup. It questions whether the right to procreative autonomy guarantees that one can determine the genetic characteristics of one's children, including their sex or the presence of certain genetic conditions, without interference from the state. The reasons behind restrictions on the use of PGD will be examined.

Preimplantation genetic diagnosis involves a number of stages. In the first instance embryos are created. Blastomeres are then removed when the embryo consists of six to ten cells. These blastomeres are tested for certain conditions and the desired embryos are subsequently transferred to the intended birth mother.[2] Two diagnostic approaches can be used in this regard, polymerase chain reaction and chromosome visualization by fluorescence in situ hybridization (FISH). Polymerase chain reaction allows for the amplification of target DNA sequences to facilitate the diagnosis of single-gene defects and the identification of sex X-linked diseases. FISH is used

---

[1] K. Downing, "A Feminist is a Person Who Answers "Yes" to the Question, 'Are Women Human?' An Argument Against the use of Preimplantation Genetic Diagnosis for Gender Selection" (2005) 8 *De Paul J. Health Care L.* 431, at 448.
[2] See Human Fertilisation and Embryology Authority Code of Practice (6th ed) (2003), at para. [14.1]. For descriptions of the procedures themselves: see J. Robertson, "Extending Preimplantation Genetic Diagnosis: The Ethical Debate" (2003) 18(3) *Human Reproduction* 465; and D. Wells & J. Sherlock, "Strategies for Preimplantation Genetic Diagnosis of Single Gene Disorders by DNA Amplification" (1998) *18 Prenatal Diagnosis* 1389.

to screen for ancuploidy, to identify chromosomal abnormalities and to determine sex in X-linked diseases.[3]

This chapter will examine the role of the right to procreative autonomy in permitting intended parents to avail of PGD in five different situations. These are: the screening for severe or serious genetic conditions; screening to avoid less serious disabilities or genetic conditions; the positive selection of embryos with disabilities; sex selection for non therapeutic purposes, and the use of PGD in conjunction with tissue typing to create so-called 'saviour siblings'. Each of these uses raise different ethical concerns about such levels of control over the future form of our children, and the message the availability of such technology sends about diversity and equality in our society. This Chapter will focus on the regulation of PGD in other jurisdictions in order to consider the potential future regulation of ARTs in Ireland.

The recognition of the existence of a right to procreative autonomy means that the mere fact that an action may be seen immoral or unethical does not justify its legal prohibition.[4] The key concerns that would justify limitations in the interests of the common good are usually calls to avoid discrimination on the basis of sex or disability, as well as general concerns about the creation of a slippery slope. The Irish Commission on Assisted Reproduction highlighted public concerns in relation to the creation of slippery slopes towards the creation of children to order, and suggested that this would also indicate that there should be a general disapproval of these techniques.[5] This Chapter will illustrate the dual role of human

---

[3] C. Bouffard, S. Viville & B. Knoppers, "Genetic diagnosis of Embryos: Clear Explanation, not Rhetoric is Needed" (2009) 181 (6-7) *C.M.A.J.* 387, at 387-8. See also J. Gunning, "Preimplantation Genetic Diagnosis", in J. Gunning (ed.), *Assisted Conception: Research, Ethics and Law* (Aldershot: Ashgate, 2000) 17, at 19-20.
[4] E. Dahl, "Sex Selection: Morality, Harm and the Law" (2007) 100 *Southern Medical Journal* 105, at 105.
[5] Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (Department of Health, 2005), recommendation 38, at 62.. For more consideration of the regulation of PGD in Ireland, see B. Scannell,

dignity in promoting both self-determination and personal freedom, and curtailing freedom in order to protect the dignity of others or human dignity in general. We have property rights in relation to our embryos in that we can decide when or if they will be implanted, and we have exclusive rights to use the embryos. An absolute property right would suggest that gamete providers and/ or potential parents should have the absolute or unfettered right to control the use of their genetic material. Chapter V has rejected the use of absolute notions of property and ownership, and instead adopted the bundle of rights approach to property.

It can be coherently argued that it is permissible to destroy embryos on the basis of the rights of progenitors who do not want to use embryos, but it is not permissible to choose which ones to implant using PGD in all instances. The different positions in relation to the weight of the right to procreative autonomy and concerns about the promotion of respect for the value of potential life and the promotion of human dignity result in different balances of the respective interests in each circumstance. If an embryo does not have the right to be implanted and be born, it may seem futile to impose any restrictions on the ability to screen what types of children we have. Part IV of this Chapter will consider these questions in looking at permissible restrictions on the availability of PGD.

The reasons for limiting the availability of PGD are rarely articulated in the legislation of the jurisdictions considered herein (or more correctly the few jurisdictions that provide any detailed regulation of PGD). There is a reluctance evident in both legislation concerning PGD, and the absence thereof in many jurisdictions, to really engage with the underlying issues at the core of the potential use of these technologies. For example regulatory approaches and academic

---

"Brave New World? The Ethics of Pre-implantation Genetic Diagnosis in Ireland" (2007) *M. L. J. I.* 27.

commentary highlight a common opposition to permitting parents to screen embryos on the basis of disability, while simultaneously concerned by parents seeking to positively screen for disability to ensure a child is deaf for example. Examining the use of PGD within the Irish constitutional framework that promotes the right itself and limitations in the interests of the common good forces honest consideration of the justifications behind the limitations on PGD availability.[6]

The European Court of Human Rights recently considered the prohibition on PGD in Italy for a couple seeking to screen embryos for cystic fibrosis.[7] The Court unanimously held that there was a violation of Article 8. The Court focused on the disproportionate interference with the applicants' right to respect for private and family life. In particular, the Court noted the inconsistency in Italian law that denied the couple access to embryo screening but authorised medically-assisted termination of pregnancy if the foetus showed symptoms of the disease.[8] The Court's focus on this paradox has been criticised as it failed to emphasise the human dignity and protection of the embryo.[9]

Part I will consider the permissibility of PGD to screen for serious genetic conditions. Most jurisdictions considered in this thesis permit the use of PGD in such instances. This Part will consider the justifications for this generally accepted use of PGD, questioning whether it is based on recognition of the rights of prospective parents or considerations of welfare of the future children born with these

---

[6] J. Harris, "No Sex Selection Please, We're British" (2005) 31 *J. Med. Ethics* 286, at 287.

[7] *Costa & Pavan v Italy* (Application 54270/10) (Judgment of 28th August 2012). For background to the Italian legislation (Law 40 of 2004), see E. Turillazzi & V. Fineschi, "Preimplantation Genetic Diagnosis: A Step by Step Guide to recent Italian Ethical and Legislative Troubles" (2008) 34 *J. Med. Ethics* e21.

[8] *Ibid*, at para. [64].

[9] Gregor Puppinck, "Prohibition of Preimplantation Genetic Diagnosis: the ECHR Censors the Italian Law" European Centre for Law and Justice (30 August 2012), available online at: http://eclj.org/Releases/Read.aspx?GUID=01f87a19-6a91-42a8-98da-13fbf4fdefb0 (accessed 29th September 2012).

severe or serious conditions. Part I also probes the distinction between this permissible category of PGD screening and screening for disability or sex for non-therapeutic purposes.

Part II will consider the regulation of both screening to avoid, and screening to ensure, disability. Part III will examine the extent to which the right to procreative autonomy permits screening the sex of embryos for non therapeutic reasons. Part IV will outline the real concerns at the use of PGD to screen for sex and disabilities, which in turn justify the use of limitations on the right to procreative autonomy in this area. It will be suggested that, while such practices may discriminate against some groups in society, an underlying problem with this technology is that it questions the legal and social assumption about the unconditional love in a parent child relationship. The controversy surrounding the use of such technology challenges the notion that parents love their children no matter what, and that the family unit will always protect the vulnerable.

PGD also exposes the assumption that there is a certain standard of normality that all human beings should possess. It will be argued that the right to procreative autonomy itself it limited by the protection of the communitarian notion of human dignity. The balance between these interests leads to a determination that a right to decide what are normal or acceptable genetic traits of future children cannot be protected. It will be suggested that PGD to screen for serious disease that effect the quality of life of the future child should be permitted.

Part V will consider the permissibility of tissue typing. Kant's categorical imperative, already considered in Chapters IV and VIII, challenges the extent to which parents have a right to create a child in order to help save an older child suffering from a genetic condition. It will examine concerns based on the best interests of the future child in using this technology. It is also highlights that Article 41 and 42 will often bolster married parents' attempts to create such siblings.

I. The Permissibility of PGD for Serious/Severe Genetic Conditions

While some jurisdictions like Austria and Italy completely ban PGD, most permit screening for serious or severe genetic conditions. There seems to be a general consensus that PGD is permissible for serious or severe genetic conditions, but should be prohibited for less severe conditions or disabilities, or determination of sex.[10] The rationale for this common distinction is not clearly outlined in any jurisdiction.

Following a public consultation on PGD in the United Kingdom, the Joint Working Group of the Human Fertilisation and Embryology Authority and the Human Genetics Commission agreed that a prescriptive list of serious conditions which could be screened for should not be compiled.[11] The Working Group was determined to balance the interests or wishes of those seeking treatment with ensuring that the treatment should not be available on demand.[12] The Human Fertilisation and Embryology Authority and the Human Genetics Commission jointly expressed fears about permitting parents themselves to solely determine what was a serious condition. It suggested that some parents may have a very wide definition of what counted as serious, which many others would not agree with.[13]

In the United Kingdom, PGD can currently be performed where there is "a significant risk of a serious genetic condition being present in the embryo".[14] Schedule 2 of the 1990 Act is amended by the 2008 Act with the insertion of Paragraph 1ZA. This mirrors the position of the Human Fertilisation and Embryology Authority and Human Genetics Commission. It provides that testing of embryos is only

---

[10] For an example of this position, see M. Damewood, "Ethical Implications of a New Application of Preimplantation Diagnosis (2001) 285(24) *Journal of American Medical Association* 3143.
[11] Human Fertilisation and Embryology Authority and the Human Genetics Commission, *Outcome of the Public Consultation on Preimplantation Genetic Diagnosis* (November 2001), at 5 (rec. 23).
[12] *Ibid* (rec. 28).
[13] Minutes of Genetic Testing Group, 12 January 2001.
[14] See paragraph 1ZA(2) Human Fertilisation and Embryology Act 2008.

permissible if testing is to establish whether the embryo has a genetic or chromosomal abnormality that may affect its capacity to result in a live birth,[15] or if there is a particular risk that the embryo has any genetic, chromosomal or mitochondrion abnormality.[16]

Paragraph 1ZA(3) provides for the instances in which screening for sex of the embryo is permissible, and will be considered in Part III. For the purpose of this section it is worth noting that the adjective "serious" is used to describe the gender-related physical or mental disability, illness or medical condition that may be screened. Neither the 1990 Act nor the 2008 Act define what "serious" means. This notion of a serious condition or disease seems wider than the adjectives used by France or Germany in regulating PGD. The "central" role given to the persons seeking treatment in determining the seriousness of a condition suggests it would include conditions that are not life threatening.[17] From a right to procreative autonomy perspective, the U.K. approach recognises the wishes of future parents, but uses the notion of seriousness, as adjudicated by medical professionals, to limit the availability of PGD for screening genetic disorders.

In France, PGD is authorised only when a doctor in a prenatal diagnosis centre declares that a couple, because of familial conditions, has a high probability of producing a child affected by a particularly severe genetic disease recognised as incurable at the time of diagnosis.[18] The diagnosis may only be carried out if the abnormality responsible for such a disease has been precisely

---

[15] Paragraph 1ZA(1)(a).
[16] Paragraph 1ZA(1)(b).
[17] *Supra* n. 11, at paras. [32-34].
[18] Law No. 94-654; Article L. 162-17, July 1994. Article 23 of Act No. 2004-800 of 6 August 2004 on Bioethics amended the Public Health Code so that Article L. 2131-4-1 now provides that PGD is permissible where the couple in question would give birth to a child with a genetic disease leading to death in the early years of their lives.

identified in one of the parents.[19] The French National Consultative Ethics Committee for Health and Life Sciences argued that the only ethical purpose of PGD was to give parents the possibility of having a child in situations where family history or a severely handicapped firstborn would have induced them to abandon the project for fear of the *high* risk of transmitting a *seriously* hereditary disorder.[20]

While there is no federal legislation on PGD in the United States, the American Medical Association and the American Society of Reproductive Medicine have both approved the use of PGD for 'serious' genetic disorders. The American Medical Association's Code of Medical Ethics finds it ethically acceptable for doctors to use PGD and prenatal tests "to prevent, cure or treat genetic disease".[21] The Code considers the question as part of a wider examination of genetic counselling. The provision focuses on prenatal testing of the fetus but includes PGD as part of the notion of prenatal screening.[22] It goes on to state that the appropriateness of selection depends on the severity of the disease, the probability of its occurrence and the age of onset. The Code does not define what severity means. The Ethics Committee of the American Society of Reproductive Medicine has consistently distinguished between the permissible use of PGD when screening for genetic conditions, and sex selection for non-therapeutic reasons which it deems impermissible.[23] The American Society of

---

[19] For background to the French approach to PGD see M. Plachot & J. Cohen, "Regulations for PGD in France" (2004) 21(1) *Journal of Assisted Reproduction & Genetics* 5; Y. Menezo, R. Frydman & N. Frydman, "Preimplantation Genetic Diagnosis (PGD) in France" (2004) 21(1) *Journal of Assisted Reproduction & Genetics* 7, and S. Viville et al., "Preparing for Preimplantation Genetic Diagnosis in France" (1998) 13(4) *Human Reproduction Update* 1022.

[20] National Consultative Ethics Committee for Health and Life Sciences, *Opinion on Ethical Issues in Connection with Antenatal Diagnosis: Prenatal Diagnosis and Preimplantation Genetic Diagnosis* (15th October 2009) (Opinion No. 107), at 19 (emphasis added).

[21] Opinion 2.12, American Medical Association, Code of Medical Ethics.

[22] *Ibid.* See also S. Wolf, J. Kahn & J. Wagner, "Using PGD to Create a Stem Cell Donor: Issues, Guidelines and Limits" (2003) 31 *Journal of Law, Medicine & Ethics* 327, at 329.

[23] For example, see Ethics Committee of American Society of Reproductive Medicine, "Preconception Gender Selection for Non-Medical Reasons" (2001) 75(5) *Fertility & Sterility* 861; and Practice Committee of the Society for Assisted Reproductive Technology and the Practice Committee of the American Society for

Reproductive Medicine's Practice Committee Opinion in 2008 focused on the use of PGD for autosomal dominant, autosomal recessive and X-linked disorders as well as unbalanced chromosomal translocations.[24] Such imbalances may miscarriages and potential birth defects for future children depending on the specific autosome involved. The language used indicates that the Committees do not support screening for every genetic disease.

PGD is also permissible in New Zealand in relation to familial sex-linked disorders (like fragile-X syndrome and Duchenne muscular dystrophy), or familial chromosomal or single gene disorders (like Huntington disease or cystic fibrosis).[25] The National Ethics Committee on Assisted Human Reproduction's Guidelines on PGD use the condition that the future individual be 'seriously impaired by each particular condition".[26] Like the United Kingdom, the notion of seriousness is not clearly defined in the Guidelines or in the Order of Council.[27] In Australia, the National Health and Medical Research Council, whose non-binding recommendations are followed in the states that do not have their own legislation on PGD, suggests that PGD is permissible as long as it is used to prevent conditions that seriously harm the person that will be born.[28]

Reproductive Medicine, "Preimplantation Genetic Testing: A Practice Committee Opinion" (2008) 90(3) *Fertility & Sterility* 136.

[24] *Ibid*, at 136.

[25] See National Ethics Committee on Assisted Human Reproduction, *Guidelines on Preimplantation Genetic Diagnosis* (March 2005). Under the Human Assisted Reproductive Technology Order 2005, PGD for screening the afore mentioned disorders are deemed to be "established procedures" which do no require external scrutiny by the Ethics Committee on Assisted Reproductive Technology (Section 6 of Schedule, Human Assisted Reproductive Technology Order 2005 (SR 2005/181)).

[26] *Ibid*, at 5.

[27] J. Snelling, "Implications for Providers and Patients: A Comment on the Regulation Framework for Preimplantation Genetic Diagnosis in New Zealand" (2006) 8 *Med. L. Int'l.* 23, at 30

[28] National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (September 2004), at paras. [12.1-12.2]. See also s. 14(2)(b) of the Human reproductive Technology Act 1991 (WA) which requires a "significant risk of a serious genetic abnormality or disease being present in the embryo".

It was presumed that any use of PGD was prohibited in Germany in light of the Basic Law's right to life protection and the Embryo Protection Act 1990.[29] However, a ruling from the Federal Supreme Court in Leipzig in 2010 held that embryos created using IVF could be screened for serious genetic diseases before implantation into the womb.[30] The case concerned the criminal liability of a Berlin gynecologist who had carried out screening for three different couples.[31] The court noted that in the three cases, the respective partners carried the risk of a congenital genetic illness that would have either led to a miscarriage, the death of the newborn after delivery or the birth of a critically ill child.[32] The court emphasised the ultimate goal of the screening was to ensure a healthy pregnancy rather than the creation of designer babies. This decision lead to three different proposals before Germany's Bundestag: one calling for a complete ban on PGD, and the other two permitting different degrees of PGD.[33] In July 2011 the Bundestag passed the Praimplantationsdiagnostikgesetz.[34] The law permits future parents to test embryos for possible life-threatening genetic defects. The law provides exceptions to the Embryo Protection Act, leaving the core message of protecting the dignity of human embryos in tact.[35] The strict conditions of the legislation mandate that screening is only permissible when the parents have a strong likelihood of passing on a

---

[29] See German National Ethics Council, *Genetic Diagnosis Before and During Pregnancy* (January 2003). See also A. Fahrenkrog, "A Comparison of International Regulation of Preimplantation Genetic Diagnosis and a Regulatory Suggestion for the United States" (2006) 15 *Transnational L. & Contemporary Problems* 757, at 763-4.

[30] *Wegen Verstoβes gegen das Embryonenshutzgesetz* (2010) 5 StR 386/09 (6 July 2010) (Bundesgerichtshof).

[31] A. Tuffs, "Court Allows Preimplantation Genetic Diagnosis in Germany" (2010) 341 (3741) *British Medical Journal* 3741

[32] A. Tuffs, "German MPs are to Vote on Allowing Preimplantation Genetic Diagnosis" (2010) 341 *British Medical Journal* 6017.

[33] See N. Stafford, "German Parliament considers Three Bills on Preimplantation Genetic Diagnosis" (2011) 342 *British Medical Journal* 2473. See also Bundestagsdrucksache 17/5451 for an outline of the different options in the debate, available at http://gesetzgebung.beck.de/sites/gesetzgebung.beck.de/files/bt-drs1705451.pdf (accessed 4th August 2012).

[34] The full title of the Act is Gesetz zur Regeling der Praimplantationsdiagnostik.

[35] See A. Tuffs, "Germany Allows Restricted Access to Preimplantation Genetic Diagnosis" (2011) 343 *British Medical Journal* 4425.

genetic defect; or when the chances of miscarriage or stillbirth are genetically high.[36] The Act does not permit the creation of saviour siblings.

The German and French approaches are narrow and seem focused on avoiding the unavoidable suffering of future child. Other jurisdictions offer less clarity regarding the rationale behind determinations of the seriousness or severity of a condition which warrants the use of PGD. There seems to be a general consensus that PGD is permissible for serious conditions or diseases, but not for disability or non-therapeutic sex selection. The size of the gap between what is deemed serious or severe and what is deemed impermissible is unclear.

In light of the discretion that is afforded to parents in providing consent to medical treatment for their children, could it be suggested that the use of preventative non-implantation techniques is no less an act of protecting bodily integrity than opting to terminate life support for a suffering child?[37] The suggestion that future parents have property rights in their embryos would suggest they have a right to screen the embryos. Again, property rights in the embryo does not guarantee absolute control to determine what sort of family they want. A right to procreative autonomy approach based on human dignity would arguably sanction the availability of PGD in such instances on two grounds. The need to protect the dignity of parents could mandate that available technology be used to avoid such harrowing and difficult outcomes for parents. It is submitted that respect for the communitarian notion of human dignity would also support the avoidance of such suffering where the future child has poor quality of life.

---

[36] Gesetz zur Regeling der Praimplantationsdiagnostik (21.11.2011). The law came into effect on 8th December 2011.

[37] M.A. Jellinek, "Disease Prevention an the Genetic Revolution Defining a Parental Right to Protect the Bodily Integrity of Future Children" (2000) 27 *Hastings Const. L.Q.* 369, at 391.

The infamous potential of a slippery slope argument that would extend PGD from serious genetic conditions to superficial characteristics like hair colour or I.Q. has flooded much debate in this area. It is argued that this focus on the extreme or even eugenic potential of PGD has detracted attention from consideration of what is it about the serious genetic illness that makes such uses of PGD permissible.

As will be noted below, the selection process does not remove the disease from embryos, but rather permits us to say we would rather create child 1 than child 2. Child 2 would be better off if they were not born. The dignity of humanity would demand that such an opinion is only formed in the most extreme circumstances where that stark fact is established. One cannot accept the use of PGD in relation to serious conditions, and then automatically disqualify its use in screening out disability or sex without considering what the difference is between these two categories.

The importance of the objective opinions of medical professionals in some jurisdictions seems to suggest that the latter is the most prevailing concern. Such positions are not founded on the suggestion that parents have a right to a healthy child who has a certain perceived quality of life.

II. PGD and Disability- Making Sense of Double Standards?

This Part will begin by considering the definition of disability, before considering the various regulatory regimes concerning the screening to avoid genetic conditions, and screening to ensure children possess certain impairments.[38]

[38] For comprehensive consideration of PGD and disability rights, see R. Scott, "Prenatal Testing, Reproductive Autonomy, and Disability Interests" (2005) 14 *Cambridge Quarterly of Healthcare Ethics* 65.

a) What is 'disability'?

Two general models or views on what constitutes disability have developed in disability studies- the medical or individual model and the social model.[39] The individual or medical model was best outlined by the World Health Organisation (WHO), which viewed disability as a problem of the person that is directly caused by a disease, trauma or other health condition. The WHO had separately defined impairment, disability and handicap in its first International Classification of Impairments and Handicaps in 1980.[40] Impairment was defined as any loss or abnormality of psychological, physiological or anatomical structure or function.[41] Disability was defined as any restriction or lack of ability (resulting from an impairment) to perform an activity in the manner or within the range considered normal for a human being.[42] Handicap was described as a disadvantage for a given individual resulting from an impairment or disability, that limits or prevents the fulfillment of a rile for that individual.[43]

Many disability commentators criticised these solely medical definitions which suggest there is a certain and visible standard of normality.[44] This prompted a revision of the definitions in 2001 which was termed the International Classification of Functioning, Disability and Health.[45] The UN Convention of the Rights of People with Disabilities defines people with disability as including those

---

[39] For extensive consideration of these models, see C. Barnes & G. Mercer (eds.), *Implementing the Social Model of Disability: Theory and Research* (Leeds: The Disability Press, 2004).

[40] World Health Organisation, *International Classification of Impairments, Disabilities and Handicaps: a manual for classification relating to the consequences of disease* (Geneva: WHO, 1980). For a comprehensive review of this material see Council of Europe, *Literature Review of the WHO International Classification of Impairments, Disabilities and Handicaps(ICIDH) and rehabilitation of people with disabilities* (Strasbourg: Council of Europe Publishing, 1998).

[41] *Ibid*, at 27.

[42] *Ibid*, at 28.

[43] *Ibid*, at 29.

[44] C. Barnes, G. Mercer & T. Shakespeare, *Exploring Disability: A Sociological Introduction* (Oxford: Polity Press, 1999), at 25.

[45] World Health Organisation, *International Classification of Functionality, Disability and Health* (WHO, Geneva 2001).

with long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[46] This definition seems to incorporate both the medical and social models of disability.

The social model argues that disability should be understood in terms of the ways in which social structures exclude and oppress disabled people rather than just considering any corporeal deficit.[47] The Union of the Physically Impaired Against Segregation in 1976 argued that disability is the disadvantage or restriction of activity caused by a contemporary social organisation which takes no, or little, account of people who have impairments, and thus excludes them from the mainstream of social activities.[48] At the heart of the social understanding of disability is the claim that people with impairments are detrimentally affected by the impact of social and environmental barriers, discriminatory attitudes and negative cultural stereotypes.[49] Impairment is the lack of part or all of a limb, or a certain mechanism of the body, but disability is the disadvantage or restriction of activity caused by a society that does not take real account of people with physical impairments.[50] While the social model has gained more prominence in disability studies, it is not without its critics. Many question the suggestion that all pain and discomfort has a purely social foundation,[51] and argue that the social model fails to capture the complexity of disabled people's lives.[52]

---

[46] Article 1, UN Convention on the Rights of Persons with Disabilities.
[47] B. Hughes, "Disability and the Body", in C. Barnes, M. Oliver, & L. Barton (eds.), *Disability Studies Today* (Cambridge: Polity Press, 2002) 58, at 58.
[48] C. Thomas, "Disability Theory: Key Ideas, Issues and Thinkers", in C. Barnes, M. Oliver & L. Barton (eds.), *Disability Studies Today* (Cambridge: Polity Press, 2002) 38, at 39.
[49] S. McLean & L. Williamson, *Impairment and Disability: Law and Ethics at the Beginning and End of Life* (Oxford: Routledge-Cavendish, 2007), at 22.
[50] M. Oliver, *Understanding Disability: From Theory to Practice* (Houndsmill: McMillan Press, 1996), at 22.
[51] D. Johnstone, *An Introduction to Disability Studies* (London: David Fulton Publishers, 2001), at 20.
[52] T. Shakespeare, " Debating Disability" (2008) 34 *J. Med. Ethics* 11. Tom Shakespeare's criticism and indeed rejection of the social model has been criticism

This brief consideration of what we mean by disability is important when determining whether one can screen to avoid disabilities. Advocates of the social model would suggest that screening embryos for disability only enhances the role of society in isolating those with physical impairments and perpetuates the extent of disability in society. Screening to avoid disability illustrates a narrow focus on the individual or medical model.

b) Screening to Avoid Disability

Courts and legislatures are slow to override the wishes of parents in matters concerning their children. Should parents be able to make decisions about the characteristics of their future children themselves on the basis of their financial and emotional resources to provide for a child with disabilities?[53] Most parents' primary wish when having a child is that they are healthy, and have every opportunity in life to be happy. Therefore, the use of PGD cannot be simply rejected as a nod to the creation of a new world devoid of all morals and tolerance of pluralism. Future parents' attempts to screen for disability are based on the desire to ensure that their children are as healthy or normal as possible. It is overly simplistic to suggest that it merely constitutes discrimination against those with disabilities.

The Human Fertilisation and Embryology Authority's approach, which holds that seriousness is not a subjective parent-centred assessment, means that the interests of the disability community are respected.[54] The legislation and the recommendations of the Joint Working Group try to balance the personal nature of the issues at

---

by many disability scholars (see C. Thomas, "Disability: Getting it 'Right'" (2008) 34 *J. Med. Ethics* 15, and S.D. Edwards, "The Impairment/ Disability Distinction: A Response to Shakespeare" (2008) 34 *J. Med. Ethics* 26).

[53] C. Thomas, "Preimplantation Genetic Diagnosis: Development and Regulation" (2006) 25 *Med & L.* 365, at 370.

[54] For consideration of the permissibility of screening for Downs Syndrome, see T. Krahn, "Regulating Preimplantation Genetic Diagnosis: The Case of Down's Syndrome" (2011) *Med. L. Rev.* 157.

stake with societal limitations on what conditions can be screened by deferring to the opinion of medical professionals.[55]

Similarly in Victoria,[56] section 10(3) of the Assisted Reproduction Treatment Act 2008 imposes responsibility for the assessment of risk of transmission of a genetic abnormality or disease on a doctor with specialist qualifications in human genetics. The Act therefore places the job of gate keeping on the doctor in determining what is a genetic abnormality.[57] The more conservative approach in France and Germany would not permit PGD for screening of disability that did not threaten the life of the child or concern a risk of miscarriage.

Screening for disability suggests that embryos that will develop into 'normal', healthy children can be chosen over embryos that will develop into children with disabilities or impairments, that disability can be avoided if desired, and perhaps that disability is something that should be avoided. An obvious limitation to the right to use PGD would be Mill's harm principle. The freedom to use PGD is curtailed when it harms others, in this instance harming the disability community by suggesting that children without disabilities should be born ahead of those with disabilities. Many would claim that embryo selection cannot comfortably coexist with society's goals of promoting inclusion and equality for people with disabilities.[58] Asch argues that it is not unethical for parents to want healthy children, and highlights the danger of drawing lines between disabilities that it is acceptable to screen for, and those it is not.[59] Asch argues against

---

[55] R. Scott, *Choosing Between Possible Lives: Law and Ethics of Prenatal and Preimplantation Genetic Diagnosis* (Portland: Hart Publishing, 2007), at 209. See also R. Scott, "Prenatal Testing, Reproductive Autonomy and Disability Interest" (2005) 14 *Cambridge Quarterly of Healthcare Ethics* 65.

[56] Victorian Assisted Reproductive Treatment Authority, Conditions for Use of Preimplantation Genetic Diagnosis (February 2010), available at: http://www.varta.org.au/preimplantation-genetic-diagnosis/w1/i004361/ (accessed 16th October 2010).

[57] *Ibid*, at 6.

[58] A. Asch, "Disability, Equality and Prenatal Testing: Contradictory or Compatible?" (2003) 30 *Fla. St. U. L. Rev* 315, at 315.

[59] *Ibid*, at 339.

society determining the conditions or disabilities that can be screened.[60] Under this argument, society should not expressly decide on notions like seriousness or severity of the condition because such categorisations will have detrimental effects for persons with such conditions.

c) Positively Selecting Disability

Can we positively create and chose embryos that will develop into a deaf child, or one with dwarfism to mirror our own characteristics? Those who support the social model of disability would surely argue that permitting positive selection of embryos with certain conditions sends a positive message from society about its views on disability. The desire of parents to have children who are deaf or blind sends a positive message that disability is not something to be avoided, but can in fact be desirable. This positive message about disability and would compliment the general position outlined above that screening for disabilities should be prohibited. [61]

The example of Sharon Duchesneau and Candy McCullogh in the United States has inspired much commentary on this issue. Here both individuals were deaf and used sperm donated by a friend with hereditary deafness in order to have a deaf baby. Deaf activists describe Deafness, with a capital D, as a culture, not a disability.[62] This leads back to the argument discussed in the previous section regarding the relevant opinions about the seriousness of the disability or impairment should determine the availability of information and choice in this matter. Empirical research does show a desire for some

---

[60] *Ibid.*

[61] The notion that certain impairments are not disabilities but rather a culture or another characteristic can be taken to the extremes by advocates of the social model, especially in relation to mental illness. For background to the social model in the study of mental disorders, see J. Mulvany, "Disability, Impairment or Illness? The Relevance of the Social Model of Disability to the Study of Mental Disorder" (2000) 22 *Sociology of Health & Illness* 582.

[62] K. Schiavone, "Playing the Odds or Playing God? Limiting Parental Ability to Create Disabled Children through Preimplantation Genetic Diagnosis" (2009) 73 *Alb. L. Rev.* 283, at 294. See also P. Ladd, *Understanding Deaf Culture: In Search of Deafhood* (Clevedon: Multilingual Matters Ltd., 2003).

parents to have a child who is deaf, has achondroplasia (dwarfism), or Down Syndrome.[63]

Some argue that the deliberate creation of a child with a disability conflicts with the child's potential autonomy, or a right to an open future.[64] In violating a child's right to an open future, parents are defining the child as a thing solely existing to fulfill parental hopes and dreams rather than a unique human being with hopes and dreams of their own.[65] It can be argued that blindness or deafness impairs human flourishing.[66] Deafness, for example, involves functional limitation, which in turn will limit the capacities of the child and inhibit their ability to flourish.[67] In legislation and academic debate, there is a general discomfort with positively selecting a trait that can limit a child's experiences and opportunities.

The Human Fertilisation and Embryology Act 2008 expressly states that persons or embryos that are known to have a gene, chromosome or mitochondrion abnormality involving a significant risk that a person with the abnormality will have or develop a serious physical or mental disability, a serious illness or any other serious medical condition must not be preferred to those that are not known to have such an abnormality.[68] This has been hailed by some disability communities, like the Deaf community, as a new eugenic programme or genocide being launched against the community.[69] If the objective of denying parents sole decision making powers in screening out disability is to protect the disability community and relay a positive

---

[63] See J. King, "Duty to the Unborn: A Response to Smolensky" (2008) 60 *Hastings L.J.* 377, at 378.
[64] D.S. Davis, "Genetic Dilemmas and the Child's Right to an Open Future" (1997) 28 *Rutgers L .J.* 549, at 562.
[65] *Supra* n. 62, at 299.
[66] J. Glover, *Choosing Children: Genes, Disability and Design* (Oxford: Clarendon Press, 2006), at 23.
[67] S. Wilkinson, *Choosing Tomorrow's Children: The Ethics of Selective Reproduction* (Oxford: Clarendon Press, 2010), at 62.
[68] See section 13 (9) of the Human Fertilisation and Embryology Act 1990.
[69] M. Richards, "Which Children Can we Choose? Boundaries of Reproductive Autonomy", in S. Day Sclater et al., *Regulating Autonomy: Sex, Reproduction and Family* (Oxford: Hart Publishing, 2009) 197, at 209.

message about their value within society, should we encourage positive screening to ensure the presence of disability? It seems that we do not want to ensure that children are born deaf, or blind, or with dwarfism. Such a practice curtails the human flourishing of these children and infringes their autonomy. However, we do not want society to permit parents to openly screen to avoid such impairments as this sends the message that children with disabilities should not be born, or are inferior. Reliance on the need to avoid discrimination cannot justify how PGD is curtailed and regulated in the jurisdictions considered. While the need to avoid discrimination will inform constitutional interpretation of these practices. Part IV will suggest that there are two underlying concerns or objections to such uses of this technology that have little to do with discrimination against disability, or indeed sex.

III. Sex Selection for Non-Therapeutic Purposes

Screening for the sex of embryos can be used to detect certain sex linked disorders like Duchenne muscular dystrophy. This section examines the permissibility of screening for non-medical reasons. Should this be absolutely prohibited, or should permission be conditional upon a non-discriminatory justification for sex selection, like family balancing? Sex selection for non-therapeutic purposes is an instance where parental preference, as opposed to the health or welfare of the future child, is the immediate motivation for PGD.[70] Edgar Dahl argues that sex selection is arguably not based on sexism, but rather the assumption that raising a girl is different from raising a boy, not on the idea that one sex is superior to the other.[71] Such an argument assumes that sex discrimination is the real concern fuelling the prohibition on non-therapeutic sex selection.

---

[70] S. Wilkinson, "Sexism, Sex Selection and Family Balancing" (2008) 16 *Medical L. Rev.* 369, at 370.

[71] E. Dahl, "Sex Selection: Morality, Harm and the Law" (2007) 100 *Southern Medical Journal* 105, at 106.

Under Article 14 of the European Convention on Human Rights and Biomedicine 1997, techniques for sex selection should not be used except to avoid serious sex linked diseases. Sex selection for non-medical purposes is expressly prohibited in Canada,[72] and in New Zealand.[73] In both instances the prohibition on sex selection is the only consideration of PGD found in domestic legislation. Section 50(2) of the Infertility Treatment Act (Victoria) 1995 expressly bans sex selection for non-medical reasons. Sex selection was practiced at the Sydney IVF Clinic until 2005 when ethical guidelines published by the Australian Health Ethics Committee opposed sex selection.[74] The Australian National Health and Medical Research Council Guidelines of 2007 suggested that admission to life should not be conditional upon a child being of a particular sex.[75]

The Ethics Committee of the American Society for Reproductive Medicine found that the central concern over the use of PGD for non-medical reasons was whether such practices would contribute to gender discrimination.[76] It suggested that non-medical use of PGD to screen sex may be permissible where a family already have a child of the opposite gender, so called family balancing. The non-discriminatory reasons for wishing to have a boy or a girl were important to the Committee.[77]

The Human Fertilisation and Embryology Authority has been criticised for basing its recommendations to prohibit sex selection on popular moral consensus that reproductive technologies should not

---

[72] Section 5(1)(e) of the Assisted Human Reproduction Act 2004.
[73] Section 11 of the Human Assisted Reproductive Technology Act 2004.
[74] See Sydney IVF website at: www.sydneyivf.com (accessed 16th October 2010).
[75] National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technologies in Clinical Practice and Research* (June 2007), at para. [11.1].
[76] Ethics Committee of the American Society for Reproductive Medicine, "Preconception Gender Selection for Non-Medical Reasons" (2001) 75 *Fertility & Sterility* 861, at 862.
[77] *Ibid*, at 863.

permit parents to select the sex of their children.[78] The House of Commons Science and Technology Committee has questioned the Authority's restrictive interpretation of the 1990 Act. It claimed that there was nothing in the Act that indicates that selection for non-medical reasons should not be permitted.[79] It noted that the Authority has drawn on theoretical psychological harms in formulating policy on sex selection, invoking the precautionary principle. The Committee were concerned that the potential for harm is often quoted without recourse to a growing body of evidence of its absence.[80] The Committee questioned the suggestion that sex selection would sanction sex discrimination, by arguing that most people seeking to use PGD for this purpose wanted a balanced family. Therefore preferences in gender were not necessarily an expression of sexist attitudes or gender bias.[81] The U.K. government rejected the report's calls for a re-examination of the prohibition on non therapeutic sex selection.[82]

Paragraph 1ZB (1) considers the impermissibility of sex selection. It states that a licence cannot authorise any practice designed to secure that any resulting child will be of one sex rather than the other, except where a purpose under paragraph 1ZA is established,[83] and in particular where there is a particular risk that the child may have a gender-related serious physical or mental disability,[84] serious illness[85] or any other gender-related serious medical condition.[86] We have to question whether sex selection is automatically wrong purely because

---

[78] E. Nelson, "Comparative Perspectives: Regulating Preimplantation Genetic Diagnosis in Canada and the United Kingdom" (2006) 85(6) *Fertility & Sterility* 1646, at 1648.
[79] House of Commons Science and Technology Committee, *Human Reproductive Technologies and the Law: Fifth Report of Session 2004/05*, at para. [130].
[80] *Ibid*, at para. [139].
[81] *Ibid*, at para. [140].
[82] Government Response to the Report from the House of Commons Science and Technology Committee (August 2005) (cm 6641), at para. [45].
[83] See paragraph 1ZB(2).
[84] See paragraph 1ZB(3)(a).
[85] Paragraph 1ZB(3)(b).
[86] Paragraph 1ZB(3)(c).

we oppose gender discrimination.[87] It has been argued that sex selection may undermine diversity in society and create an imbalance in the ratio between men and women.[88]

Sex selection for family balancing questions the assumed motives of parents in seeking to determine the sex of future children. Research in the United States suggests that PGD is currently most commonly requested for sex selection of a third child, when a family already has two children of the same sex.[89] In one sense, family balancing is less objectionable as parents are not saying that boys are better than girls or vice versa. They are simply arguing they would like at least one boy and one girl. Arguments about sex discrimination and influencing population ratio have little impact here. This thesis argues that family balancing could be opposed on different grounds to sex selection in and of itself. Family balancing strips children of their individual identity as procreation becomes about creating a certain type of family rather than creating children, and is contrary to the notion of dignity promoted in this thesis.

The two objections leveled at screening for, or to avoid, disability can be leveled at sex selection for non-therapeutic purposes. The opposition to sex selection, and the use of PGD in general, is based on the idea that the willingness to accept one's child, regardless of characteristics like sex, is a trait of a good parent.[90] Sex selection should also be limited because the practice involves consciously choosing the potential of one child over another.

---

[87] B. Steinbock, "Sex Selection: Not Obviously Wrong" (2002) *Hastings Center Report* 23, at 23.
[88] See discussion of this in A. Bumgamer, "A Right to Choose? Sex Selection in the International Context" (2007) 14 *Duke J. Gender L. & Pol'y* 1289.
[89] K. Downing, "A Feminist is a Person Who Answers "Yes" to the Question, 'Are Women Human?" An Argument Against the use of preimplantation Genetic Diagnosis for Gender Selection" (2005) 8 *De Paul J. Health Care L.* 431, at 445.
[90] R. McDougall, "Acting Parentally: An Argument Against Sex Selection" (2005) 31 *J. Med. Ethics* 601, at 601.

IV. PGD- What's the Problem? Permissible Limitations on PGD

Parts II and III have suggested that the real opposition to the use of PGD has little to do with concerns about discrimination against those with disabilities, or on the basis of gender. This Part suggests that a factor supporting opposition to PGD is its challenge to the assumption that parents love their children unconditionally. Under this argument, the desire to use PGD is unnatural or contrary to our usual perception of parenthood and the parent-child relationship. From a constitutional perspective the strongest argument for limiting a right to procreative autonomy comes from human dignity in general. The general use of PGD presents a troubling statement about what sort of children should not be born, or what traits make a 'normal' child.

a) Questions About the Purity of Parenthood

A societal dimension of parenthood is the committing oneself to caring for any kind of child, parental love is unconditional and constant.[91] We would surely expect that prospective parents possess the same virtues. One of the limitations to the right to procreative autonomy outlined in Chapter IV was the gut reaction that certain actions are unnatural or immoral It is arguable that a certain amount of opposition to the use of PGD is the idea that it shows an unnatural notion of conditional parenthood, parenthood is not about loving a child irrespective of differences or genetic conditions. The traditional reason for bringing a child into the world is love, or what is more commonly perceived as unconditional love, with no wish to control or infringe a child's individual autonomy.[92] It has been argued that parental preferences in this area are unacceptable because parents ought to love and accept their children irrespective of gender or

---

[91] S. Vehmas, "Response to 'Abortion and Assent' by Rosamund Rhodes and 'Abortion, Disability, Assent and Consent' by Matti Hayry" (2001) 10 *Cambridge Quarterly of Healthcare Ethics* 433, at 439.

[92] B Stankovi, "It's A Designer Baby! Opinions on Regulation of Preimplantation Genetic Diagnosis" (2005) *UCLA J. L. & Tech* 3, at 34.

disability.[93] This argument is claiming that gut reactions to such preferences are subconsciously motivating concerns about PGD.

Perhaps our main problem is that offspring are no longer a random gift or creation of nature, but are selected products chosen by consumers as an expression of parental aspirations and desires.[94] Perhaps PGD highlights the conditionality of parenthood just as much as discrimination or prejudice towards certain sections of society. The suggestion that parents do not unconditionally welcome a child into the world, but rather mould the perceived perfect family, erodes the very sanctity of family. In the recent Irish case of *Attorney General v Dowse*,[95] the Irish High Court considered the application of a couple who adopted a child from Indonesia in 2001, to have the registration of the foreign adoption in Ireland cancelled. The child at this time had been re-united with his Indonesian family. The judgment of MacMenamin J illustrates a certain disbelief with the notion that a couple could go through the lengthy adoption process and then reject the child. MacMenamin J noted that parental duty owed by the Dowses to their adopted son under Article 42.1 of the Constitution. The learned judge found that there had been a clear breach of this duty owned to Tristan.[96] The court noted the high quality of life that Tristan Dowse would not enjoy because of the cancellation of the registration. The court outlined an extensive maintenance order beyond the level of maintenance connected to the standard of living and cost of living in Indonesia.[97] The judgment was arguably motivated by a reaction to a perceived unnaturalness of the facts and actions of the adoptive parents.

---

[93] S. Baruch, "Preimplantation Genetic Diagnosis and Parental Preferences: Beyond Deadly Disease" (2008) 8 *Hous. J. Health L. & Pol'y* 245, at 258.
[94] See D. King, "Preimplantation Genetic Diagnosis and the 'New' Eugenics" (1999) 25 *J. Med. Ethics* 176.
[95] [2006] 2 I.R. 507. See also R. McNamara, "The Law Reform Commission's Consultation Paper on Aspects of Inter-country Adoption Law" (2007) 10 *I.J.F.L.* 7.
[96] *Ibid*, at 525.
[97] *Ibid*, at 531.

The law places a lot of trust in the ability of parents to decide what is best for children, and affords a large margin of appreciation to them in this regard. This devolution of decision-making authority is premised on the presumption that parents will care for their children more than any other person, and will therefore always know and decide what is best for their child. This presumption is not always the case. The injection of notions of consumerism into some uses of PGD is therefore perceived unnatural and at a fundamental level is driving opposition to PGD based on claims of discrimination which have a limited role in shaping the permissibility of PGD. This argument is not trying to demonise parents, but it is suggested that PGD does challenge a fundamental assumption about the unconditional nature of parental care.

b) The Quest for Normality- The Abnormal Should not be Born?

It can be argued that while the eugenics of old relied on state sponsored practices like forced sterilisation, the new eugenics does not involve coercion or promotion of any blueprint for what sort of people should be brought into the world.[98] The new eugenics leaves decisions about the genetic quality of each offspring to the discretion of individual parents.[99] The idea of selecting the traits of offspring could undermine the inherent worth and dignity of children, or views them as commodities.[100] Selecting the traits of one's child before gestation suggests a supermarket of options that may result in parents' valuing children for discrete traits rather than for their personhood more broadly.[101]

---

[98] D. Fox, "Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos" (2007) 53 *Am. J.L. & Med.* 567, at 569. For more examination of eugenics and PGD see S. Suter, "A Brave New World of Designer Babies?' (2007) 22 *Berkley Tech. L.J.* 897.

[99] *Ibid*, at 570.

[100] J. Robertson, "Genetic Selection of Offspring Characteristics " (1996) 76 *B. U. L. Rev.* 421, at 423.

[101] J. L. Dolgin, "Method, Mediation, and the Moral Dimensions of Preimplantation Genetic Diagnosis" (2004) 35 *Cumb. L. Rev.* 519, at 524.

In light of the dignity based interests of the individual in reproductive decisions, access to information material to the decision to reproduce should be equally fundamental.[102] Does democracy involve the recognition of areas of decision-making so personal to our individuality, that they should be protected from the opinions of the majority?[103]

There is something contradictory about PGD in relation to assisted human reproduction in general. ARTs are a recognition of the sanctity and precious nature of family and children. PGD seems to suggest that we do not accept the gift of technology and the children created from its use in and of themselves, but it is conditional on the appearance, genetic make-up or gender of the child. These desires may not be based on ideas that one genetic make up is necessarily better then another, but we want to raise a family with one boy and one girl, we do not want our children to be abnormal or sick or different. Do we want the best for our children, or simply the best children?

Technology has developed to the stage where embryos can be screened for certain types of cancers. The Human Fertilisation and Embryology Authority decided to licence PGD for hereditary breast and ovarian cancer (BRCA1 and BRAC2 mutations) and hereditary non-polyposis colorectal cancer in 2006.[104] Society has no problem saying that cancer is bad and people should avoid getting skin cancer by wearing sunscreen, or not smoke because they can develop lung cancer. We can discriminate against cancer because it is an inherently bad thing. However, does this mean that embryos should be rejected because they could develop this terrible disease? It may be argued that there is no difference between screening to avoid disability and

---

[102] *Supra* n. 100, at 427.
[103] C. Gavaghan, *Defending the Genetic Supermarket: Law and Ethics of Selecting the Next Generation* (London: Routledge-Cavendish, 2007), at 13.
[104] See T. Krahn, "Where are we Going with Preimplantation Genetic Diagnosis" (2007) 176(10) *Canadian Medical Association Journal* 1445.

avoid diseases like cancer. Both practices still provoke the same underlying opposition which has little to do with discrimination.

Screening for diseases like cancer indirectly suggests that one embryo should not be implanted and their potential to develop into a human being prevented because 30 years down the line they may fall ill with the disease. We are saying potential child Y should not be born or is better off if they are not born, and instead healthy potential child Z is implanted. The notion of the slippery slope is often considered in this area. The inherent suggestion in recourse to this imagery is that certain screening for genetic conditions or serious disability is permissible in itself, but that opening the availability of PGD at all could lead to an escalation where parents are creating children to order from a menu of options including hair colour, eye colour.[105] One has to question the need to consider the slippery slope argument at all, because it ignores the problems with screening for any disability and normalises a practice that society should perhaps be very cautious in supporting. Extensive availability for PGD could eventually impose a moral obligation on parents to prevent the genetic transmission of certain conditions.[106]

The irony of arguing for autonomy or individual control in this area is that it supports a desire that has been opposed in preceding chapters- the desire to create perfection. Restrictions on accessing ARTs or the legal determinations of parenthood in such cases are motivated by the desire to promote a vision of the ideal or perfect family. Restrictions in PGD by contrast endeavor to prevent the quest for the "perfect" and /or "normal" child. Instead of merely looking at the issue as one of potential creation of designer children, perhaps we should view it as the creation of designer families.

---

[105] See discussion of the slippery slope in T.S. Petersen, "Just Diagnosis? Preimplantation Genetic Diagnosis and Injustices to Disabled People" (2005) 31 *Journal of Medical Ethics* 231.

[106] See R. Hull, "Cheap Listening? Reflections on the Concept of Wrongful Disability" (2006) 20 *Bioethics* 55.

With PGD, the child will either exist with a disability or be of a certain gender, or not at all. The question is whether it is more harmful to live a disabled life or not to exist at all?[107] Derek Parfit has discussed the "Non-Identity Problem" in depth, the idea that each of us may not have existed at all.[108] Parfit uses the example of trying to stop a 14 year old girl having a baby because the child would be better off if the mother would wait until she was older.[109] The problem with this is that if the girl waits until she is older them that child will not be the same child as the one she could have given birth to. The child will not be worse off if they were born, because that child will never be born.[110] The same applies in relation to PGD in general, we are not eradicating disability from an embryo, we are deciding that these embryos will not be afforded the opportunity to develop in the uterus and be born. We are not saving a child from a life of disability and missed opportunities, we are choosing a different child that will look different and be genetically unique because of the imperfections of the other embryos. Therefore, PGD, except in the case of certain horrific genetic conditions, cannot be about preventing suffering, it is choosing one child over another. This is contrary to the promotion of human dignity based on the intrinsic value and worth of all persons, irrespective of any personal characteristics.

Commentators like John Harris argue that because women can choose whether to implant any embryos at all, the decision to implant some or none of the embryos is the potential parents' to make.[111] This confuses the right to life of the embryo with a wider communitarian concern based on human dignity. In the case of PGD the fundamental concern is not the welfare of the embryo, but rather the suggestion

---

[107] *Supra* n.70, at 296.
[108] D. Parfit, *Reasons and Persons* (New York: Oxford University Press, 1984), at 351.
[109] *Ibid*, at 359.
[110] *Ibid*, at 359.
[111] J. Harris, "One Principle and Three Fallacies of Disability Studies" (2001) 27 *Journal of Medical Ethics* 383, at 385.

that certain future children with certain genetic conditions should not be born. This conscious exclusion of imperfection itself must be opposed.

V. Tissue Typing – Rights of the Family and the Best Interests of the Child

"The crucial distinction has been put as being between 'screening out abnormalities' and 'screening in preferences'. That distinction raises a spectre of eugenics and 'designer babies'. But it is a crude over-simplification to view [saviour siblings] as being about preferences'."[112]

Tissue or HLA (Human Leukocyte Antigen) typing involves taking a cell from an early embryo and testing it to see if the resulting child would be a good tissue match for a sick sibling in need of treatment like a bone marrow transplant.[113] Tissue typing raises questions about the rights and interests of donor children, and the extent to which PGD with HLA typing treats children as means rather than ends, in contravention to the message of Kant's categorical imperative. This part will question whether the rights of parents here to screen for embryos for such a purpose is accepted because it promotes the right to procreative autonomy, or because it is an aspect of parental rights and the right to family privacy.

In 2001, the Colorado-based parents of Molly Nash, who suffered from Fanconi aneamia used both PGD and HLA typing to prevent the birth of another child suffering from the same disorder, and to select HLA-matching embryos which could act as donors of stem cells from

---

[112] *R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2004] Q.B. 168 (CA), at 206 (per Mance L.J.).
[113] E. Jackson, *Medical Law: Text, Cases and Materials* (2nd ed) (Oxford: Oxford University Press, 2010), at 808. For background on tissue typing, see R. Sparrow & D. Cram, "Saviour Embryos? Preimplantation Genetic Diagnosis as a Therapeutic Technology" (2010) 20(5) *Reproductive Biomedicine Online* 667; and R. Storrow, "Therapeutic Reproduction and Human Dignity" (2009) 21(2) *Law & Literature* 257.

umbilical cord blood.[114] Adam Nash was born using these technologies.[115] The US does not have any legislation regulating the availability of such procedures. The American Society for Reproductive Medicine's guidelines do not consider the use of PGD to create a donor.[116]

In the U.K., the Human Fertilisation and Embryology Authority initially decided that tissue typing was only acceptable in limited circumstances, under which the child to be born had to be at risk of suffering from the same genetic disease as their older sibling.[117] The Authority agreed that in principle the procedure was ethically acceptable but that safeguards had to be put in place to prevent unacceptable uses of the procedures.[118] This criterion created the infamous distinction between the permissibility of tissue typing in the Hashmi and Whitaker cases.

This criterion was the subject of criticism as it prevented a family (the Whitakers) from availing of tissue typing, when the Authority permitted tissue typing in relation to a similar case concerning the Hashmi family. The Authority distinguished the Whitaker case on the basis that in that instance the threat to the child's life did not have a genetic cause, and therefore the PGD would be used solely to ensure the creation of a tissue match for him. This would violate the rule that embryos could only be screened if it was to prevent a genetic disorder from being passed on.[119]

---

[114] R. Dobson, "'Designer Baby' Cures Sister" (2000) 321(7268) *British Medical Journal* 1040.
[115] G. de Wert, "Preimplantation Genetic Diagnosis: The Ethics of Intermediate Cases" (2005) 20(12) *Human Reproduction* 3261, at 3261-2.
[116] See S. Wolf, J. Kahn & J. Wagner, "Using Preimplantation Genetic Diagnosis to Create a Stem Cell Donor: Issues, Guidelines and Limits" (2003) 31 *Journal of Medicine & Ethics* 327, at 329.
[117] *Supra* n. 113, at 808.
[118] See HFEA Ethics Committee, "Ethical Issues in the Creation and Selection of Preimplantation Embryos to Produce Tissue Donors" (December 2001).
[119] L.A. Vacco, "Preimplantation Genetic Diagnosis: From Preventing Genetic Disease to Customising Children. Can the Technology be Regulated Based on the Parents' Intent?" (2005) 49 *St. Louis U. L.J.* 1181, at 1202.

The Human Fertilisation and Embryology Authority in 2004 announced that no distinction should be made between the situations of the two families. PGD would be allowed for the sole purpose of tissue typing, but there needed to be evidence that all other alternatives were exhausted.[120] In reviewing their policy in 2004, the Authority noted that it had doubts about the desirability of using PGD to select on the basis of tissue type (and not in order to avoid a particular genetic condition) because of the possible risks, both physical and psychological, to the child born as a result of the procedure.[121] It was of the opinion in 2001 that the theoretical risk of embryo biopsy to the resulting child was enough to convince them that PGD for tissue typing alone would not be a desirable use of the procedure.[122] The Ethics and Law Committee reviewed evidence about the risk associated with embryo biopsy. The Authority took the view that the risk to the resulting child associated with embryo biopsy was not enough to warrant a policy which distinguished between cases in which preimplantation tissue typing is used in combination with PGD for serious disease and where discovering tissue type is the sole treatment objective.[123] The Authority also found that there was no evidence to suggest that adverse psychological effects would result from the procedure. However the suggested that the sensitivity of the issues be addressed by counselling and follow up studies of the affected children and there families be undertaken.[124]

The capacity of the Human Fertilisation and Embryology Authority to regulate tissue typing was unsuccessfully challenged in the House of Lords in *R (Quintavalle) v Human Fertilisation Embryology Authority*,[125] which concerned the legality of the Authority decision to permit the Hashmis' use of PGD and tissue typing. This decision

---

[120] *Ibid*, at 1205.
[121] Human Fertilisation and Embryology Authority, *Human Fertilisation and Embryology Report: Preimplantation Tissue Typing* (July 2004), at para. [8].
[122] *Ibid*, at para. [9].
[123] *Ibid*, at para. [14].
[124] *Ibid*, at para. [17].
[125] [2005] 2 A.C. 561.

was handed down after the 2004 change in policy.[126] The Human Fertilisation and Embryology Authority argued in the case that Mrs. Hashmi was entitled to regard an embryo as unsuitable if unless it is both free of abnormality and tissue compatible with the older sibling.[127] The Authority suggested that without this testing, Mrs. Hashmi could not make an informed choice as to whether she wanted the embryo placed in her body or not.[128]

Lord Hoffmann considered the Warnock Report and noted that the Committee did not seek to expressly prohibit sex selection on social grounds, rather it was suggested that the Authority could decide the circumstances in which such selection could be authorised. Lord Hoffmann therefore suggested that as sex selection was the most obvious ground of selecting an embryo on criterion other than health, the Warnock Report did not intend that selection of IVF embryos on grounds that went beyond genetic abnormality should be altogether banned.[129] This recognition is interesting beyond consideration of the tissue typing issue. Lord Hoffmann concluded that a broad interpretation of what was suitable within the construction of the 1990 Act at the time, would include activities highly unlikely to be acceptable to the majority of public opinion.[130] Therefore, the learned judge held that it should be for the Authority to decide what should be acceptable. This reading of the legislation and the capacity of the authority challenges the assumptions about the acceptability and indeed legal permissibility of certain practices beyond the tissue typing situation. The wishes and needs of the potential mother were interpreted as central to determining the suitability of the practice at issue.[131]

---

[126] For background to this case, see R. Brownsword, "Reproductive Opportunities and Regulatory Challenges" (2004) 67 *Modern L. Rev* 304.
[127] *Supra* n. 125, at para. [12].
[128] *Ibid.*
[129] *Ibid*, at para. [19].
[130] *Ibid*, at para. [26].
[131] D.M. Gitter, "Am I My Brother's Keeper? The Use of Preimplantation Genetic Diagnosis to Create a Donor of Transplantable Stem Cells for an Older Sibling Suffering from a Genetic Disorder" (2006) 13 *Geo. Mason L. Rev.* 975, at 1004.

The 2008 Act puts the 2004 reform on a statutory footing. Paragraph 1ZA(1)(d) outlines authority for a licence in a case where a person ("the sibling") who is the child of the persons whose gametes are used to bring about the creation of the embryo (or of either of those persons) suffers from a serious medical condition which could be treated by umbilical cord blood stem cells, bone marrow or other tissue of any resulting child, establishing whether the tissue of any resulting child would be compatible with that of the sibling. It should be noted that Paragraph 1ZA(4) underlines that in 1ZA(1)(d) the reference to "other tissue" of the resulting child does not include a reference to any whole organ of the child. The Irish Commission approved the Authority's change in policy in relation to tissue typing.[132]

The Advisory Committee on Assisted Reproductive Technologies (ACART) in New Zealand has recently recommended that the relevant legislation and guidelines be amended in light with the HFEA's change in practice. At the moment, PGD with HLA typing can only be used to benefit a sibling when that sibling suffers from a genetic disorder or disease which the embryo or resulting child is also at risk of having.[133] In its 2008 advice to the Minister for Health, the ACART recommended that policy and guidelines regarding the use of PGD with HLA tissue typing should be extended to include its use to select an embryo that will be a tissue match for an existing individual with a non-genetic disorder, like leukemia.[134] The ACART suggested that any harms or benefits of the procedures were present irrespective

---

[132] *Supra* n. 5, at 66.
[133] National Ethics Committee on Assisted Human Reproduction, Guidelines on PGD (March 2005). The NECAHR no longer exists, its roles are now assumed by 2 new committees, the ACART and the ECART.
[134] ACART, *Committee Advice on PGD to the Minister* (May 2008) (AD20-86-10), at para. [19].

of whether PGD was restricted to situations where the future child was at risk of only a genetic disorder, or not.[135]

In Australia, the National Health and Medical Research Guidelines recognised that in rare circumstances, PGD may be used to select an embryo that is tissue compatible to the existing sibling.[136] The relevant ethics committees must consider the welfare and interests of the child to be born, the medical condition suffered by the sick sibling, the lack of alternative treatments for the condition suffered and the underlying motivation of the parents of the child to have another child.[137] Victoria, South Australia and Western Australia regulate ARTs with specific legislation. The Infertility Treatment Authority in Victoria has allowed for the creation of saviour siblings since 2002.[138] The legislation requires the HLA typing must be carried out in conjunction with PGD to prevent a heritable disease, as the absence of a transmissible genetic disease precludes access to any treatment including PGD. A similar position is found under the South Australian Council on Reproductive Technology Code of Ethical Practice, as access to PGD in general is only permissible when there is a danger of transferring a genetic defect.[139] In France, PGD in conjunction with tissue typing is only permissible where the child is

---

[135] *Ibid*, at para. [14]. See also ACART, Consultation on Draft Guidelines for the Use of Preimplantation Genetic Diagnosis with Human Leukocyte Antigen Testing (Wellington 2008), available at <htpp://www.acarthealth.govt.nz> (accessed 25th April 2011).

[136] National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2007), at para. [12.1]. See also C. Thomas, "Preimplantation Testing and the Protection of the 'Saviour Sibling'" (2004) 9 *Deakin L. Rev* 119. For comprehensive analysis of PGD and the issue of saviour siblings in Australia, see M. Taylor-Sands, *Creating Saviour Siblings: Reconsidering the Role of the Welfare of the Child Principle in Regulating Preimplantation Tissue Typing* (Thesis-Melbourne Law School, 2010), and M. Smith, Reviewing Access to Assisted Reproductive Technologies for the Creation of 'Saviour Siblings': Limits on the Basis of Genetic Disposition" (Melbourne, 2007), available at: http://eprints.qut.edu.au. (accessed 15th October 2010).

[137] *Ibid*, at para [12.3].

[138] L. A. Vacco, "Preimplantation Genetic Diagnosis: From Preventing Genetic Disease to Customising Children. Can the Technology be Regulated Based on the Parents' Intent?" (2005) 49 *St Louis U.L.J.* 1181, at 1209.

[139] Reproductive Technology (Code of Ethical Practice) Regulations 1995 (SA), reg 11 (1)(b)(i)(B).

question is suffering from a life threatening illness, and treatment does not impair the integrity of the new sibling.[140]

Those opposing the creation of saviour siblings have argued that this practice leads to a commodification of babies, it leads us down the slippery slope towards the creation of designer babies, and perhaps most importantly, it adversely affects the welfare if the child that is to be created.[141] There is uncertainty regarding the psychological effect of being a saviour sibling on the children born using this technology. Early studies on this suggest that the impact depends on the success of treatment on the sick sibling following the use of PGD and HLA typing.[142] The British Medical Association in its submission to the Consultation on the Review of the 1990 Act expressed concern about possible psychological harm resulting to the child selected and born to be a donor. The child might resent being selected or feel less wanted or respected.[143]

The biggest ethical problem with the creation of saviour siblings is that the resulting children are being created to save another child, not because of the desire of parents to have and nurture that child. The child is therefore being used as a means and not an end in itself. It is suggested that this contradicts the Kantian imperative. As noted in Chapter VIII, the notion of 'merely' treating a person as means is often used to qualify the imperative, we cannot merely or exclusively treat someone as a means and not also as an end in themselves. This line of reasoning suggests that there is nothing objectionable per se in using someone as a means provided that we do not lose sight of the

---

[140] Article L. 2131-4-1 of the Public Health Code, inserted in 2004. See also National Consultative Ethics Committee, Opinion No. 72, July 2002.
[141] S. Sheldon & S. Wilkinson, "Hashmi and Whitaker: An unjustifiable and misguided distinction" (2004) *Medical L. Rev.* 137, at 146. See also S. Sheldon, "Saviour Siblings and the Discretionary Power of the HFEA" (2005) *Medical L. Rev.* 403.
[142] K. MacLeod (et al), "Pediatric Sibling Donors of Successful and Unsuccessful Hematopoietic Stem Cell Transplants (HSCT): A Qualitative Study of their Psychological Experience" (2003) 28(1) *Journal of Pediatric Psychology* 223.
[143] British Medical Association in its submission to the Consultation on the Review of the Human Fertilisation and Embryology Act 1990 (March 2006), at 36.

fact that they are an end in themselves also.[144] This general desire in relation to tissue typing to narrow the ambit of Kant's statement ignores its fundamental message, that we must value each individual for that person's inherent and unique value rather than their potential uses.

At the heart of the consideration of the permissibility of creating saviour siblings is sense of an invasion of family privacy that regulation of tissue typing demands. Parents have children for many reasons. Some have children because society expects it- one marries and one has 2.4 children. Some couples consciously have children in order to 'save' a relationship. Some accidentally fall pregnant and never intended to have children at all. Society and the law does not question parents' motives and affords families extensive rights and privacy to forge their own path in life.

The creation of saviour siblings seems like a win-win situation, we cure a sick child and bring another person into the world that will be part of a family that clearly cares about its children. However, we must recognise that we are creating children to cure older sick children, not because parents want another child for themselves. Unlike surrogacy which Chapter VIII argued is prohibited for its unnaturalness, the creation of saviour siblings does infringe of Kant's categorical imperative. This thesis argues that the general support for the creation of saviour siblings emanates from the fact that parents rather than potential parents are making this decision. Chapter III underlined the extensive rights enjoyed by parents in relation to their child, especially the marital family under Articles 41 and 42. The state would be slow to intervene in relation to these matters. The rights of parents to shape their family for a good reason, conforming

[144] See same argument in D. Coker, "Obtaining Salvation- Regulation of Access to PGD for the Selection of Saviour Siblings in Australia" (ANU College of Law Research Paper No. 09-08), available at http://ssm.com/AuthrID=1238773 (accessed 5th November 2010), at 7-8; and N.R. Ram, "Britain's New Preimplantation Tissue Typing Policy: An ethical Defence" (2006) 32 *Journal of Medical Ethics* 278.

to our assumptions about parental love towards their children, is more socially acceptable than screening for sex or genetic condition. This thesis has consistently maintained that one does not reject the permissibility of an activity because it seems unnatural or immoral. Conversely, the right to procreative autonomy demands greater scrutiny of an activity which seems socially acceptable.

One can hardly argue that it would be in the best interests of potential saviour sibling if they were not born. The parents who seek to use these technologies clearly love their existing child very much and will love their future child also. Concerns about the psychological effects on future children are not weighty enough to counter the benefits of this technology. The socially acceptable use of technologies in this regard highlights the consequentialist rationale for promoting tissue typing.

VI. Conclusion

Colin Gavaghan correctly argues that there is a world of difference between decisions of which we disapprove, and decisions which we should feel justified in prohibiting.[145] Like many of the other Chapters in this thesis, this Chapter has attempted to dissect the many reasons for promoting and opposing the availability of PGD. It envisaged how a right to procreative autonomy under the Irish Constitution would engage with the justifications for limiting the availability of PGD in Ireland. It suggests that a right based on the inherent dignity of the person and of humanity cannot be used to objectify children and undermine diversity and tolerance in society. Such results are contrary to the very foundation of the right to procreative autonomy.

[145] C. Gavaghan, *Defending the Genetic Supermarket: Law and Ethics of Selecting the Next Generation* (London: Routledge-Cavendish, 2007), at 3.

Chapter XI: Conclusion

"Constitutional rights are declared not alone because of bitter memories of the past but no less because of the improbable, but not-to-be-overlooked, perils of the future".[1]

This thesis maintains that a right to procreative autonomy based on the promotion of human dignity can be recognised under the Irish Constitution. It argues that this right can force an important dialogue regarding the content of future legislation on ARTs. It also underlines the potential role of the Irish courts in promoting this right when dealing with future regulation, or a lack thereof. There is a clear need for comprehensive regulation of ARTs in Ireland. There is also a need for detailed consideration of the competing claims that will shape the content of this legislation.

The right to procreative autonomy of the individual has to be balanced by communitarian concerns in this sensitive area. This thesis encourages a frank assessment about the importance of individual rights and the justifications for the limitation of such freedoms. It argues that the Constitution can provide a sound framework to promote these important concerns. The limited role of the right to procreative autonomy in Irish law to date should not impede its potential to contribute to the future regulation of ARTs.

This thesis promotes a right to procreative autonomy based on respect for human dignity. Human dignity articulates the primary values that warrant protection within the right to procreative autonomy, including the intrinsic worth and equality of every human being. It highlights the personal significance of a right to self-determination in relation to the use of ARTs. The Irish courts have recognised the value of human dignity in a diverse range of cases.

---

[1] *McMahon v Attorney General* [1972] I.R. 69, at 111 (per O'Dalaigh C.J.).

A number of potential justifications for the restriction of the right to procreative autonomy were also outlined. The Constitution recognises that individuals rights can be limited in interests of the "common good". This broad justification can be used to validate many limitations on the use of ARTs. The thesis suggests that rights discourse will force detailed consideration of the underlying rationales behind opposition to certain uses of ARTs, or certain legal consequences arising from their use. It also claims that the potential of the embryo should be respected under the Constitution. This is arguably consistent with the spirit of the Constitution and the case law concerning the right to life of the unborn.

The Commission on Assisted Reproduction's assessment of the content of the best interests of the child limitation provides the framework for a common sense and comprehensive test for future use by the legislature. In a time when the rights of the child may ne afforded greater constitutional consideration and separated from the rights of the family, this issue should be a paramount concern for the future regulation of ARTs.

Chapter V advocates the use of property rights to describe basic rights of control over embryos. It outlines the difficult choices that face the legislature or the courts in balancing the right to procreative autonomy and respect for the potential of the embryo. There are no "right" answers to these fundamental questions about basic uses of gametes and embryos. Any future regulation on these matters will have to prioritise one interest over the other. The Chapter also outlines the justifications for prohibiting human cloning, the sale of gametes and embryos, and for limiting multiple implantation of embryos.

Chapter VI promotes the equality of the right to become a parent and the right not to become a parent. It recognises that this approach will lead to uncertainty regarding future case law but claims that certainty

cannot come at the expense of respect for both the positive and negative aspects of the right to procreative autonomy. Chapter VII argues that a prima facie right to access ARTs forces honest examination of restrictions on access. It maintains concerns about the best interests of future children should be the sole justification for limiting access to ARTs. Chapter VIII illustrates how the right to procreative autonomy forces detailed consideration of the reasons why contracts in relation to surrogacy or the disposition of frozen embryos should not be enforced. It criticises the use of soft paternalism (freedom based rationales) to justify non-enforcement of such contracts. Paternalistic intervention by the state should be clearly recognised and justified in such matters.

Chapter IX suggests that the right to procreative autonomy could promote a prima facie right to be recognised as a legal parent of a child. It underlined the importance of gestational, genetic and intentional contributions to the creation of a child. This approach to the recognition of parenthood is novel but can afford greater attention to the best interests of the child and the reality of the child's creation and family life. Chapter X considers the permissibility of different uses of PGD in light of the right to procreative autonomy. It advocates a general prohibition on the use of PGD except in circumstances where the illness in question is serious. The use of PGD threatens the communitarian notion of dignity, which is based on the promotion of the intrinsic equal worth and value of all individuals, irrespective of their individual traits or characteristics.

Reproductive technologies have rebutted all our common assumptions about who can be a parent and what constitutes parenthood. It allows us unprecedented control over the future genetic characteristics of our children. As a society we have never enjoyed such control over our reproductive choices. Phillip Harvey highlights the aspirational; contingent; and evolutionary character of human

rights.[2] Harvey underlines that the aspirational nature of human rights claims make human rights law a kind of law by which societies set goals for themselves. Human rights are always a work in progress, constantly raising the bar for states regarding treatment of their citizens.[3] The right to procreative autonomy in Irish law will always be a work in progress, and will have to compete with strong communitarian concerns about the use of ARTs. The recognition and promotion of a right to procreative autonomy under Irish law will raise the bar regarding the state's treatment of such important personal freedoms.

[2] P. Harvey, "Aspirational Law" (2004) 52 *Buffalo L. Rev.* 701, at 717.
[3] *Ibid.* Harvey asserts that human rights must remain a work in progress rather than a finished project.

BIBLIOGRAPHY

CASES

IRELAND

Supreme Court

- *Abbey Films Ltd v Attorney General* [1981] I.R. 158
- *In the matter of A Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 I.R. 100
- *In re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 I.R. 305
- *In Re Article 26 and the Matter of the Employment Equality Bill 1996* [1997] 2 I.R. 321
- *In Re Article 26 and the Health (Amendment)(No. 2) Bill 2004* [2005] 1 I.R. 105
- *In Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 I.R. 1
- *Attorney General v X* [1992] 1 I.R. 1
- *Attorney General (Society for Protection of Unborn Children (Ireland) Ltd) v Open Door Counselling Ltd and Dublin Well Woman Clinic Ltd* [1988] I.R. 593
- *Blake v Attorney General* [1982] I.R. 117
- *Buckley & Others (Sinn Fein) v Attorney General* [1950] I.R. 67
- *C.C. v Ireland* [2006] 4 I.R. 1
- *Cox v Ireland* [1992] 2 I.R. 503
- *Crowley v Ireland* [1980] I.R. 102
- *Devlin v National Maternity Hospital* [2007] I.E.S.C. 50
- *Dreher v Irish Land Commission* [1984] I.L.R.M. 94
- *Finn v Attorney General* [1983] I.R. 154
- *Fisher v Irish Land Commission* [1948] I.R. 3
- *G. v An Bord Uchtala* [1980] I.R. 32
- *Hand v Dublin Corporation* [1991] 1 I.R. 409
- *Herrity v Associated Newspapers (Ireland) Ltd* [2009] 1 I.R. 316
- *I. O'T. v B.* [1998] 2 I.R. 321
- *J.K. v V.W.* [1990] 2 IR 437
- *Kennedy v Ireland* [1987] I.R. 587
- *McD. v L.* [2010] 2 I.R. 199
- *McGee v Attorney General* [1974] I.R. 284
- *McMahon v Attorney General* [1972] I.R. 69

- *Meskell v C.I.E.* [1973] I.R. 121
- *Murray v Ireland* [1991] I.L.R.M. 465
- *N and Others v Health Services Executive* [2006] 4 I.R. 374
- *The State (Nicolaou) v An Bord Uchtala* [1966] I.R. 567
- *Norris v Attorney General* [1984] I.R. 36
- *North Western Health Board v H.W.* [2001] 3 I.R. 622
- *O'B. v S.* [1984] I.R. 316
- *The People (Director of Public Prosecutions) v Shaw* [1982] I.R. 1
- *P.M.P.S. v Attorney General* [1983] I.R. 355
- *Quinn's Supermarket v Attorney General* [1971] I.R. 11
- *Roche v Roche* [2010] 2 I.R. 321
- *Rock v Ireland* [1997] 3 I.R. 484
- *Ryan v Attorney General* [1965] I.R. 294
- *Sinnott v Minister for Education* [2001] 2 I.R. 545
- *S.P.U.C. (Ireland) Ltd. v Grogan (No. 1)* [1989] I.R. 753
- *The State (Healy) v Donoghue* [1976] I.R. 325
- *Re SW an infant, K v W* [1990] 2 I.R. 437
- *T.D. v Minister for Education* [2001] 4 I.R. 545
- *Tuohy v Courtney* [1994] 3 I.R. 1
- *W. O'R. v E.H.* [1996] 2 I.R. 248

High Court

- *A. and B. v Eastern Health Board* [1998] 1 I.R. 464
- *Attorney General v Dowse* [2006] 2 I.R. 507
- *B. F. v Clinical Director of Our Lady's Hospital* [2010] I.E.H.C. 243
- *Central Dublin Development Association v Attorney General* [1975] 108 I.L.T.R. 69
- *Fitzpatrick & Another v K.* [2008] I.E.H.C 104
- *Foy v An tArd-Chlaraitheoir* [2007] I.E.H.C. 470
- *G.T. v K.O.* [2007] I.E.H.C. 326
- *Gray v Minister for Justice* [2007] 2 I.R. 654
- *Health Service Executive v X. (A Person of Unsound Mind not so Found)* [2011] I.E.H.C. 326
- *Heaney v Ireland* [1994] 3 I.R. 593
- *Kangethe v Minister for Justice* [2010] I.E.H.C. 351
- *McCann v Judge of Monaghan District Court* [2009] 4 I.R. 200
- *McD. v L.* [2008] I.E.H.C. 96
- *M.R. v T.R.* [2006] I.E.H.C. 359

- *M.R. v T.R.* [2006] 3 I.R. 449
- *Mulligan v Governor of Portlaoise Prison* [2010] I.E.H.C. 269
- *Murphy v PMPA Insurance Co* [1978] I.L.R.M. 25
- *Murray v Ireland* [1985] I.R. 532
- *Northampton County Council v A.B.F. & M.B.F.* [1982] I.L.R.M. 64
- *O'Connor and another v Lenihan* [2005] I.E.H.C. 176
- *Phonographic Performance (Ireland) Ltd. v Cody* [1998] 4 I.R. 504
- *Pigs Marketing Board v Donnelly (Dublin) Ltd.* [1939] I.R. 413
- *Redmond v Minister for the Environment* [2001] 4 I.R. 61
- *Ugbelase v Minister for Justice* [2010] 4 I.R. 233
- *V.T.S. v Health Service Executive & Others* [2009] I.E.H.C. 106
- *Whelan v The Minister for Justice* [2008] 2 I.R. 142
- *Zappone v The Revenue Commissioners* [2008] 2 I.R. 417

Court of Criminal Appeal

- *The People (D.P.P.) v Murray* [2012] I.E. C.C.A. 60

UNITED KINGDOM (ENGLAND AND WALES)

House of Lords/ Supreme Court

- *Re B (A Minor)* [1987] 2 All E.R. 206
- *Re F (Mental Patient: Sterilisation)* [1990] 2 A.C. 1
- *Ghaidan v Godin-Mendoza* [2004] 2 A. C. 557
- *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 A.C. 112
- *Granatino v Radmacher* [2010] 3 W.L.R. 1367
- *In Re G (Children)* [2006] 1 W.L.R. 2305
- *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] A.C. 785
- *M. v Secretary of State for Work and Pensions* [2006] 2 A.C. 91
- *In Re P (Adoption: Unmarried Couple)* [2009] 1 A.C. 173
- *In Re R (A Child) (IVF: Paternity of Child)* [2005] 2 A.C. 621
- *R. v Bentham* [2005] 1 W.L.R. 1057

Court of Appeal

- *Dobson v North Tyneside Health Authority* [1997] 1 W.L.R. 596
- *Evans* v. *Amicus Healthcare Ltd* [2005] Fam. 1
- *Haynes's Case* (1614) 12 Co. Rep.113: 77 E.R. 1389
- *Re Organ Retention Group* [2005] Q.B. 506
- *R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2004] Q.B. 168
- *Re R (A Minor) (Wardship: Consent to Treatment)* [1991] 4 All E.R. 177
- *R. v Kelly* [1999] Q.B. 621
- *R. v Sheffield Health Authority, ex parte Seale* (1994) 25 B.M.L.R. 1
- *Re T.T. (Surrogacy)* [2011] 2 F.L.R. 392
- *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 4 All E.R. 627
- *Yearworth v North Bristol NHS Trust* [2010] Q.B. 1

High Court

- *A & Another v P & Others* [2012] 3 W.L.R. 369
- *B v A, C, D* (2006) E.W.H.C. 2 (Fam)
- *Re D (Minors)(Surrogacy)* [2012] E.W.H.C 2631
- *T. v B.* [2010] Fam. 193
- *Wilkinson v Kitzinger* [2007] 1 F.L.R. 295
- *In the Matter of X. and Y.* [2011] E.W.H.C. 3147

Queens Bench Division

- *R (Axon) v Secretary of State for Health* [2006] 1 F.C.R. 175
- *Leeds Teaching Hospital v A* [2003] E.W.H.C. 259 (QB)

Court of Exchequer Chamber

- *Foster v Dodd* (1867) L.R. 3 Q.B. 67

Central Criminal Court

- *R. v Bourne* [1938] 3 All E.R. 615

Court for Crown Cases Reserved

- *R. v Sharpe* (1857) Dears & Bell 160

Northern Ireland

- *Re Morrison's Application for Judicial Review* [2010] N.I.Q.B. 51
- *The Northern Ireland Human Rights Commission Application* [2012] N.I.Q.B. 77

UNITED STATES

United States Supreme Court

- *Carey v Population Services* (1977) 431 U.S. 678
- *Eisenstadt v Baird* 405 U.S. 438 (1972)
- *Griswold v. Connecticut* 381 U.S. 479 (1965)
- *Lawrence v Texas* 539 U.S. 588 (2003)
- *Lehr v Robertson* 463 U.S. 248 (1983)
- *Michael H. v Gerald D.* 491 U.S. 110 (1989)
- *Palko v Connecticut*, 302 U.S. 319 (1937)
- *Planned Parenthood of Southern Pennsylvania v Casey* 505 U.S. 833 (1992)
- *Roe v Wade* 410 U.S. 113 (1973)
- *Skinner v Oklahoma* 316 US 535 (1942)
- *Thornburg v American College of Obstetricians* 476 US 747 (1986)
- *Troxel v Granville* 530 U.S. 57 (2000)
- *Webster v Reproductive Health Services* 492 U.S. 490 (1989)
- *Wisconsin v Yoder* 406 U.S. 205 (1972)

State Court Decisions

- *In the Adoptions of B.L.V.B. & E.L.V.B.* (1003) 628 A. 2d 1271
- *In the Adoption of Tammy* (1993) 619 N. E. 2d 315 (1993) (Massachusetts)
- *AHW & PW v GHB* 339 NJ Super. 495, 772 A 2d 948 (2000)
- *A.Z. v B.Z.* (2000) 725 N.E. 2d 1051 (Mass. 2000)
- *In the Matter of Baby M* 537 A. 2d 1227, 109 N.J. 396 (N.J., 1988)
- *Belsito v Clark* 67 Ohio Misc 2d 54, 64 4 NE 2d 760 (1994)
- *Browne v D'Alleva* (2007) WL 4636692 (Connecticut)
- *Cassidy v Williams* (2008) WL 2930591 (Conn Super 2008)
- *Clifford K. v Paul S* 619 S. E. 2d 138 (2005)
- *C.M. v C.C.* 152 N.J. Super. 160, 377 A.2d 821 (1977) (New Jersey)
- *Dahl v Angle* 194 P. 3d 834 (2008)
- *Davis v Davis* 842 S.W. 2d 588 (1992) (Tenn)

- *Mary Doe v John Doe*, 717 A 2d 706 (Conn 1998)
- *Florida Department of Children & Families v In Re Matter of Adoption of XXG & NRG* 45 So. 3d 79 (2010)
- *Georgina G. v Jerry M* 516 N. W. 2d 678 (1994)
- *Hamilton v. Lowe* 328 F. Supp 1182
- *Hecht v Superior Court* 16 Cal. App. 4th 836, 20 Cal. Rptr. 2d 275 (1993) (California)
- *Hall v Fertility Institute of New Orleans* 647 SO 2d 1348 (La App 4th Cir 1994)
- *Jacob v Shultz-Jacob* 923 A. 2d 473 (2007)
- *J.B. v. M.B.* 783 A. 2d 707 (2001) (New Jersey)
- *Jeter v Mayo Clinic Arizona* 121 P. 3d 1256 (2005)
- *J.F. v D.B* (2004) WL 1570142 (Pa Com Pl), 66 Pa. D. & C. 4th 1
- *Jhordan C. v. Mary K.* 179 Cal.App.3d 386, 224 Cal. Rptr. 530 (1986)
- *Johnson v Calvert* 851 P 2d 776, 5 Cal. 4th 84 (1993)
- *Kass v Kass* 696 N.E. 2d 174 (1998) (New York)
- *K.M. v E.G* 37 Cal 4th 130, 117 P. 3d 673 (2005)
- *In the Interest of K.M.H.* 169 P. 3d 1025 (2007)
- *Kristine H. v Lisa R.* 117 P. 3d 690, 33 Cal. Rptr. 3d 81 (2005)
- *Leckie v Voorhies* 128 Or. App. 289, 875 P.2d 521 (1994)
- *Litowitz v Litowitz* 48 P. 3d 261 (2002)
- *Maria B v Superior Cour*t 13 Cal. Rptr 3d 494 (2005)
- *In Re Marriage of Buzzanca* 61 Cal app 4th 1410, 72 Cal Rptr 2d 280 (1998)
- *In Re Marriage of Moschetta* 25 Cal App 4th 1218 (1994)
- *In Re the Marriage of Witten* 672 N. W. 2d 768 (Iowa, 2003)
- *Miles Laboratories Inc. Cutler Laboratories Division v Doe* 556 A. 2d 1107 (1989)
- *Mintz v Zoernig* 198 P. 3d 861 (2008)
- *Moore v. Regents of the University of California* 793 P. 2d 479 (1990)
- *In the Interest of R.C.* 775 P. 2d 27 (1989)
- *R.R. v M.H.* 689 N.E. 2d 790 (Mass, 1998)
- *Roman v Roman* 193 S.W. 3d 40 (2006)
- *Steven S. v Deborah D.* 127 Ca. App. 4th 319 (2005)
- *Surrogate Parenting Associates v Commonwealth of Kentucky, ex rel Armstrong* 704 S.W. 2d 209 (1986)
- *Syrkowski v Appleyard* 333 N.W. 2d 90, at 93-94 (Mich App 1983)
- *Thomas S. v Robin Y* 618 N.Y.S. 2d 356 (1994)
- *Tripp v Hinckley* 736 N.Y.S. 2d 506 (2002)
- *Wakeman v Dixon* 921 So. 2d 669 (2006)

- *York v Jones* 717 F. Supp. 421 (E.D. Va 1989)

EUROPEAN COURT OF HUMAN RIGHTS

- *A,B,C v Ireland* (2011) 53 E.H.R.R. 13.
- *Airey v Ireland* (1979-80) 2 E.H.R.R. 305
- *Boughanemi v France* (1996) 22 E.H.R.R. 228
- *Bruggemann and Scheuten v Federal Republic of Germany* (1981) 3 E.H.R.R. 244
- *Ciliz v Netherlands* [2000] 2 F.L.R. 469
- *Costa & Pavan v Italy* (Application 54270/10) (Judgment of 28th August 2012)
- *E.B. v France* (2008) 47 E.H.R.R. 21
- *Estevez v Spain* (Application 56501/00) (10th May 2001)
- *Evans* v. *United Kingdom* (2006) 43 E.H.R.R. 21; (2008) 46 E.H.R.R. 34 (GC)
- *Frette v France* (2004) 38 E.H.R.R. 21
- *Gas & Dubois v France* (Application 25951/07) (15th March 2012)
- *H v Austria* [2012] 2 F.C.R. 291
- *H. v Norway* (Application 17004/90)
- *J.M. v United Kingdom* (2011) 53 E.H.R.R. 6
- *Karner v Austria* (2004) 38 E.H.R.R. 24
- *Keegan v Ireland* (1994) 18 E.H.R.R. 342
- *M. v. Netherlands* (Application 16911/90) (8th February 1993)
- *Niemetz v Germany* (1993) 16 E.H.R.R. 97
- *Paton v United Kingdom* (1981) 3 E.H.R.R. 408
- *Pretty v United Kingdom* (2002) 35 E.H.R.R. 1
- *S v Austria* (2011) 52 E.H.R.R. 6
- *Schalk and Kopf v Austria* (2011) 53 E.H.R.R. 20
- *Tysiac v Poland* (2007) 45 E.H.R.R. 42
- *Vo v France* (2005) 40 E.H.R.R. 12
- *Wagner & J.M.W.L. v Luxembourg* (Application 76240/01) (28 June 2008)
- *X. v United Kingdom* (Application 8416/79)
- *X, Y, Z v United Kingdom* [1997] 24 E.H.R.R. 143

CANADA

Supreme Court of Canada

- *Alliance for Marriage and Family v AA* (2007) 3 S.C.R. 124
- *Eldridge v British Columbia* [1997] 3 S.C.R. 624
- *Re Eve* [1986] 2 S.C.R. 388
- *R v Morgentaler* [1988] 1 S.C.R. 30
- *Reference Re Assisted Human Reproduction Act* (2010) S.C.C. 61
- *Tremblay v Daigle* (1989) 62 D.L.R. (4th) 634

State Decisions

- *A.A. v B.B.* (2007) 278 D.L.R. (4th) 579.
- *A.C. v Manitoba* (Director of Child and Family Services) [2009] 2 S.C.R. 181
- *C.C. v A.W.* [2005] A.B.Q.B. 290
- *Children's Aid Society of Metropolitan Toronto v K* (1985) 48 R.F.L. (2d) 164
- *D.W.H. v D.J.R* (2007) 280 D.L.R. (4th) 90
- *Gill v British Columbia* (2001) B.C.H.R.T. 34
- *Re K. and B* (1995) 125 D.L.R. (4th) 653
- *Potter v Korn* (1996) 134 D.L.R. (4th) 437
- *Rutherford v Ontario* (2006) 270 D.L.R. (4th) 90

AUSTRALIA

Federal Decisions

- *B. v J* (1996) F.L.C. 92-716
- *B.M. v D.A.* [2009] 39 Fam. L. R. 168
- *Doodeward v Spence* (1908) 6 C.L.R. 406
- *Re Evelyn* [1998] 145 F.L.R. 90
- *Re Mark (An Application relating to Parental Responsibilities)* [2003] Fam C.A. 822
- *Re Patrick* [2002] Fam. C.A. 193
- *Secretary, Department of Health and Community Services v J.W.B. & S.M.B.* (1992) 175 C.L.R. 218
- *Tobin v Tobin* (1999) F.L.C. 92-848

State Decisions

- *A.W. v C.W.* [2002] N.S.W.S.C. 301 (New South Wales)
- *Bazley v Wesley Monash IVF Pty* [2010] Q.S.C 118 (Queensland)
- *Burrows v Cramley* [2002] W.A.S.C. 47 (Western Australia)
- *Re Gray* [2001] 2 Qd. R. 35 (Queensland)
- *J.M. v Q.F.G. & G.K.* [1998] Q.C.A. 228 (Queensland)
- *Leeburn v Derndorfer* [2004] V.S.C. 172
- *McBain v Victoria* [2000] F.C.A. 1009 (Victoria)
- *Pearce v South Australian Health Commission* (1996) 66 S.A.S.R. 486 (South Australia)
- *R v Davidson* [1969] V.R. 667
- *R v Wald* (1971) 3 N.S.W.D.C.R. 25 (New South Wales)
- *Yfantidis v Jones and Flinders Medical Centre* (1993) 61 S.A.S.R. 458 (South Australia)

NEW ZEALAND

- *P v K* [2003] 2 NZLR 787 (HC)

FRANCE

- *Paraplaix v CECOS*, Trib. gr. Inst. Creteil 16-17 September 1984
- *Procureur General v Madame X* Cass. Ass. Pleniere, 31 May 1991, J. 417

GERMANY

- *Census Act Case* (1983) 65 BVerfGE 1
- *Entscheidungen des Bundesverfassungsgerichts* 203 (88) (28th May 1993)
- *Entscheidungen des Bundesverfassungsgerichts* BVerfGE 39 (25th February 1975)
- *Investment Aid Case I* (1954) 4 BVerfGE 7
- *Life Imprisonment Case* (1977) 45 BVerfGE 187
- *Mephisto Case* (1971) 30 BVerfGE 173
- *Peepshow Case* (1981) 64 BVerwGE 374
- *Wegen Verstoßes gegen das Embryonenshutzgesetz* (2010) 5 StR 386/09 (6 July 2010)(Bundesgerichtshof)

ISRAEL

- *Nachmani* v. *Nachmani* 50(4) P.D. 661, A.H. 2401/95

SOUTH AFRICA

South African Constitutional Court

- *August v The Electoral Commission* (1999) 3 S.A. 1
- *Carmichele v Minister of Safety and Security* (2001) 4 S.A. 938
- *Christian Education South Africa v Minister of Education* (2000) 4 S.A. 757
- *Dawood v Minister of Home Affairs* (2000) 1 S.A. 997
- *Government of the Republic of South Africa v Grootboom* (1996) 4 S.A. 744
- *MEC for Education: Kwazula-Natal & Others v Pillay* (2008) 1 S.A. 474
- *Minister of Home Affairs v Tsebe* (2012) 5 S.A. 467
- *Minister of Home Affairs v Fourie* (2006) 1 S.A. 524
- *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 S.A. 6
- *N.M. & Others v Smith & Others* (2007) 5 S.A. 250
- *Soobramoney v Minister of Health* (1997) 1 S.A. 765
- *State v Makwanyane* (1993) 3 S.A. 391
- *State v Mamabolo (E.TV & Others Intervening)* (2001) 3 S.A. 409
- *State v Williams* (1995) 3 S.A. 632
- *The Citizen 1978 (Pty) Ltd. V McBride* (2011) 4 S.A. 191

LEGISLATION

Ireland

- Adoption Acts 1952-2010
- Civil Liability Act 1961
- Civil Partnership Act 2010
- European Convention on Human Rights Act 2003
- Guardianship of Infants Act 1964
- Health (Family Planning) Act 1979

- Health (Family Planning) (Amendment) Act 1985
- Mental Health Act 2001

United Kingdom

- Abortion Act 1967
- Adoption and Children Act 2002
- Adoption and Children (Scotland) Act 2007
- Children Act 1989
- Civil Partnership Act 2004
- Human Fertilisation and Embryology Act 1990
- Human Fertilisation and Embryology Act 2008
- Human Reproductive Cloning Act 2001
- Human Rights Act 1998
- Surrogacy Arrangements Act 1985

Australia

Federal

- Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryos Research Amendment Act 2006
- Prohibition of Human Cloning for Reproduction Act 2002
- Research Involving Human Embryos Act 2002

State

- Acts Amendment (Abortion) Act (Western Australia)
- Assisted Reproductive Treatment Act 2008 (Victoria)
- Criminal Code Amendment Act (No 2) 2001 (Tasmania)
- Health Act 1911 (WA)
- Assisted Reproductive Technology Act 2007 (amended by Surrogacy Act 2010)(NSW)
- Medical Practitioners Act 1930 (Australian Capital Territory)
- Surrogacy Act 2010 (Queensland)
- Surrogacy Act 2008 (Western Australia)

France

- Law No. 2011- 814, July 7 2011
- Law No. 2004-800, August 6 2004
- Law No. 94-654, July 29 1994
- Law No. 94-653, July 29 1994
- Law No. 75-17, January 18 1975

Canada

- Assisted Human Reproduction Act 2004

United States

- Ariz. Rev. Stat. Ann. § 25-218 (1981)
- Ark. Code Ann. § 9-8-301-3
- Fla. Stat. Ann § 63.042(3) (West 2005).
- N.D. Cent. Code § 14-18-05 (1991) (North Dakota)
- Ind. Code Ann § 31-8-2-1 (West Supp 1991) (Indiana)
- Ky. Rev. Stat. Ann. § 199.590(3) (1991) (Kentucky)
- Mich. Comp. Laws Ann. § 722.859(2) (1991) (Michigan)
- La. Rev. Stat. Ann. § 9.2713 (1991) (Louisiana)
- N.H. Rev. Stat. Ann. § 168-B (Equity Supp. 1991) (New Hampshire)
- Utah Code Ann. § 78-30-9(3).
- Va. Code Ann. § 20-160 (Michie Supp. 1991) (Virginia)

New Zealand

- Contraception, Sterilisation and Abortion Act 1977
- Human Assisted Reproductive Technology Act 2004

Germany

- Funftes Gesetz zur Reform des Strfrechts (5. StrRG), v. 18.6.1974
- Embryonenschutzgesetz (Embryo Protection Act) 1990
- Gesetz zur Regeling der Praimplantationsdiagnostik 2011

- Gesetz zur Sicherstellung des Embryonenschutzes im Zusammenhang mit Einfuhr und Verwendung menschlicher embryonaler Stammzellen (Stem Cell Act) 2002 v. 28.6.2002 (BGB1. I. S2277)

INTERNATIONAL CONVENTIONS

- Universal Declaration of Human Rights
- European Convention on Human Rights and Biomedicine
- European Convention of Human Rights and Fundamental Freedoms
- UN Convention on the Rights of the Child
- UN Convention on the Rights of Persons with Disabilities
- International Covenant on Civil and Political Rights
- International Covenant on Social and Economic Rights

BOOKS

- Patrick Selim Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979)
- Thomas Aquinas, *Political Writings* (translated and edited by Robert W. Dyson) (Cambridge: Cambridge University Press, 2002)
- Ross Aylward, *Pre-Nuptial Agreements* (Dublin: Thomson Roundhall, 2006)
- Andrew Bainham, *Children: The Modern Law* (3rd ed.) (Bristol: Jordan Publishing, 2005)
- Maureen Baker, *Families, Labour and Love- Family Diversity in a Changing World* (Vancouver: University of British Columbia Press, 2001)
- Colin Barnes & Geof Mercer (eds.), *Implementing the Social Model of Disability: Theory and Research* (Leeds: The Disability Press, 2004)
- Colin Barnes, Mike Oliver & Len Barton (eds.), *Disability Studies Today* (Cambridge: Polity Press, 2002)
- Colin Barnes, Geof Mercer and Tom Shakespeare, *Exploring Disability: A Sociological Introduction* (Oxford: Polity Press, 1999)
- Chris Barton and Gillian Douglas, *Law and Parenthood* (London: Butterworths, 1995)
- Michael D. Bayles, *Reproductive Ethics* (Englewood Cliffs: Prentice-Hall, 1984)

- Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford: Oxford University Press, 2001)
- Lawrence C. Becker, *Property Rights: Philosophical Foundations* (London: Routledge & Kegan Paul Ltd., 1980)
- Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001)
- Francis Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective* (Dublin: Round Hall Sweet & Maxwell, 1997)
- William Blackstone, *Commentaries on the Laws of England* (Vol. 1) (New York: W.E. Dean, 1849)
- Robert Blank, *Redefining Human Life: Reproductive Technologies and Social Policy* (Epping: Bowker Publishing, 1984)
- Margaret Brazier, *Medicine, Patients and the Law* (3rd ed) (London: Penguin Books, 2003)
- Dan Brock, *Life and Death: Philosophical Essays in Biomedical Ethics* (Cambridge: Cambridge University Press, 1993)
- Justine Burley (ed.), *The Genetic Revolution and Human Rights- The Oxford Amnesty Lectures 1998* (Oxford: Oxford University Press, 1999)
- Krister Bykvist, *Utilitarianism: A Guide for the Perplexed* (London: Continuum, 2010)
- Naomi Cahn and Helena Michie, *Confinements: Fertility and Infertility in Contemporary Culture* (New Brunswick: Rutgers University Press, 1997)
- James Casey, *Constitutional Law in Ireland* (3rd. ed.) (Dublin: Round Hall Sweet & Maxwell, 2000)
- Basil Chubb, *The Politics of the Irish Constitution* (Dublin: Institute of Public Administration, 1991)
- Richard Collier & Sally Sheldon, *Fragmenting Fatherhood: A Socio- Legal Study* (Oregon: Hart Publishing, 2008)
- Richard Collier & Sally Sheldon, *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Oxford and Portland: Hart Publishing, 2006)
- Michael Connolly (ed.), *Discrimination Law* (London: Sweet & Maxwell, 2006)
- Maurice Cranston, *What are Human Rights?* (London: The Bodley Head, 1973)
- Iain Currie & Johan de Waal, *The Bill of Rights Handbook* (5th ed.) (Lansdowne: Juta & Co., 2008)
- Ian Currie & Johan de Waal, *The New Constitution and Administrative Law* (Lansdowne: Juta & Co., 2001)

- Howard Davies and David Holdcroft (eds.), *Jurisprudence: Texts and Commentary* (London: Butterworths, 1991)
- Dena S. Davis, *Genetic Dilemmas: Reproductive Technology, Parental Choices, and Children's Future* (New York: Routledge, 2001)
- Richard Dean, *The Value of Humanity in Kant's Moral Theory* (Oxford: Clarendon Press, 2006)
- Mark De Blacam, *Judicial Review* (2nd ed.) (Haywards Heath: Tottel Publishing, 2009)
- Ruth Deech and Anna Smajdor, *From IVF to Immortality: Controversy in the Era of Reproductive Technology* (Oxford: Oxford University Press, 2007)
- David De Grazia, *Human Identity and Bioethics* (Cambridge: Cambridge University Press, 2005)
- Hilary Delany, *Equity and the Law of Trusts in Ireland* (5th ed.) (Dublin: Round Hall, 2011)
- Fiona De Londras & Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Dublin: Round Hall, 2011)
- George E. Devenish, *A Commentary on the South African Constitution* (Durban: Butterworths, 1998)
- Donna Dickenson, *Property in the Body: Feminist Perspectives* (Cambridge: Cambridge University Press, 2007)
- Alison Diduck, *Law's Families* (Cambridge: Cambridge University Press, 2003)
- Jack Donnelly, *Universal Human Rights in Theory and Practice* (London: Cornell University Press, 1989)
- Brian Doolan, *Constitutional Law and Constitutional Rights in Ireland* (3rd ed.) (Dublin: Gill & Macmillan, 1994)
- Oran Doyle, *Constitutional Equality Law* (Dublin: Thomson Roundhall, 2004)
- Shadia B. Drury, *Aquinas and Modernity: The Lost Promise of Natural Law* (Plymouth: Rowman & Littlefield Publishers, 2008)
- Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988)
- Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth Publishing, 1997)
- Ronald Dworkin, *Life's Dominion* (London: Harper Collins, 1993)
- Ronald Dworkin, *A Matter of Principle* (London: Harvard University Press, 1985)
- Peter Eardley & Carl Still, *Aquinas: A Guide for the Perplexed* (London: Continuum, 2010)

- Robert Edwards, *Life Before Birth: Reflections on the Embryo Debate* (London: Hutchinson Press, 1989)
- Margrit Eichler, *Family Shifts; Families, Policies and Gender Equality* (Toronto: Oxford University Press, 1997)
- Thomas Emerson, *The System of Freedom of Expression* (New York: Random House, 1970)
- Amitai Etzioni, *The Common Good* (Oxford: Polity, 2004)
- Cecile Fabre, *Social Rights under the Constitution: Government and the Decent Life* (Oxford: Clarendon Press, 2000)
- Joel Feinberg, *Harm to Self: The Moral Limits of the Criminal Law (vol.3)* (New York: Oxford University Press, 1986)
- Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law (vol.1)* (New York: Oxford University Press, 1984)
- Joel Feinberg, *Rights, Justice and the Bounds of Liberty* (Princeton: Princeton University Press, 1980)
- David Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Oxford University Press, 2003)
- Helen Fenwick, *Civil Liberties and Human Rights* (4th ed) (Abingdon: Routledge-Cavendish, 2007)
- John Finnis, *Human Rights and Common Good: Collected Essays (Volume III)* (Oxford: Oxford University Press, 2011)
- John Finnis, *Aquinas: Moral. Political, and Legal Theory* (Oxford: Oxford University Press, 1998)
- John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980)
- Norman Ford, *The Prenatal Person: Ethics from Conception to Birth* (Oxford: Blackwell Publishing, 2002)
- Norman Ford, *When Did I Begin? Conception of the Human Individual in History, Philosophy and Science* (Cambridge: Cambridge University Press, 1988)
- Charles Foster, *Human Dignity in Bioethics and Law* (Oxford: Hart Publishing, 2011)
- Nigel Foster, *German Legal System and Laws* (Oxford: Oxford University Press, 2002)
- Lorraine Fox Harding, *Family, State and Social Policy* (Basingstoke: MacMillan, 1996)
- Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008)
- Michael D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed.) (London: Sweet & Maxwell, 2001)

- Colin Gavaghan, *Defending the Genetic Supermarket: Law and Ethics of Selecting the Next Generation* (London: Routledge-Cavendish, 2007)
- Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991)
- Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge: Harvard University Press, 1987)
- Jonathan Glover, *Choosing Children: Genes, Disability and Design* (Oxford: Clarendon Press, 2006)
- John David Gordon et al, *Obstetrics, Gynecology and Infertility: Handbook for Clinicians* (6th ed.) (Arlington: Scrub Hill Press, 2007)
- Larry Gostin (ed.), *Surrogate Motherhood: Politics and Privacy* (Indianapolis: Indiana University Press, 1990)
- John Gray & G.W. Smith (eds.), *J.S. Mill's 'On Liberty' in Focus* (London: Routledge, 1991)
- Ronald Green, *The Human Embryo Research Debates: Bioethics in the Vortex of Controversy* (Oxford: Oxford University Press, 2001)
- Andrew Grubb (ed.), *Medical Law* (3rd ed) (London: Butterworths, 2000)
- Louis Guenin, *The Morality of Embryo Use* (Cambridge: Cambridge University Press, 2008)
- Paul Guyer, *Kant* (London: Routledge, 2006)
- David Gwynn Morgan, *Constitutional Law of Ireland* (Dublin: Round Hall Press, 1990)
- Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Oxford: Hart Publishing, 2009)
- Henry Hardy (ed.), *Liberty: Incorporating Four Essays on Liberty* (Oxford: Oxford University Press, 2002)
- John Harris (ed.), *Bioethics* (Oxford: Oxford University Press, 2004)
- John Harris, *The Value of Life: An Introduction to Medical Ethics* (London: Routledge, 1997)
- James W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996)
- Sonia Harris-Short & Joanna Mills, *Family Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2007)
- Heta Hayry, *The Limits of Medical Paternalism* (New York: Routledge, 2002)
- Friedrich A. Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1960)
- Linda Heffner, *Human Reproduction at a Glance* (Oxford: Blackwell Science, 2001)
- Jonathan Herring, *Medical Law and Ethics* (2nd ed) (Oxford: Oxford University Press, 2008)

- Bob Hepple, *Equality: The New Legal Framework* (Oxford: Hart Publishing, 2011)
- Tom Hesketh, *The Second Partitioning of Ireland? The Abortion Referendum of 1983* (Dublin: Brandsma Books, 1990)
- Donna Hicks, *Dignity: The Essential Role it Plays in Resolving Conflict* (New Haven: Yale University Press, 2011)
- Thomas Hill Jr., *Dignity and Practical Reason in Kant's Moral Theory* (Ithaca: Cornell University Press, 1992)
- Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 2008)
- Gerard Hogan and Gerry Whyte, *J.M. Kelly: The Irish Constitution* (4th ed.) (Dublin: Butterworths, 2004)
- Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Aldershot: Darmouth Publishing, 1996)
- Julie C. Inness, *Privacy Intimacy and Isolation* (Oxford: Oxford University Press, 1992)
- Emily Jackson, *Medical Law* (2nd ed) (Oxford: Oxford University Press, 2010)
- Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001)
- David Johnstone, *An Introduction to Disability Studies* (London: David Fulton Publishers, 2001)
- David Albert Jones, *The Soul of the Embryo: An Enquiry into the Status of the Embryo in the Christian Tradition* (London: Continuum, 2004),
- Hardy E. Jones, *Kant's Principles of Personality* (London: University of Wisconsin Press, 1971)
- Immanuel Kant, *Groundwork of the Metaphysics of Morals* (translated by H.J. Paton) (New York: Harper & Row Publishers, 1982)
- Immanuel Kant, *Lecture on Ethics* (translated by P. Heath) (Cambridge: Cambridge University Press, 1997)
- Immanuel Kant, *Critique of Practical Reason* (translated by Thomas Kingsmill Abbott) (Mineola: David & Charles, 2004)
- Leon Kass, *Life, Liberty and the Defense of Dignity: The Challenge for Bioethics* (San Francisco: Encounter Books, 2002)
- George Kateb, *Human Dignity* (Cambridge: Harvard University Press, 2011)
- John M. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 2005)
- John M. Kelly, *Fundamental Rights in the Irish Law and Constitution* (2nd ed.) (Dublin: Allen Figgis & Co, 1967)

- Dermot Keogh & Andrew McCarthy, *The Making of the Irish Constitution 1937: Bunreacht na hEireann* (Cork: Mercier Press, 2007)
- Mary M. Keys, *Aquinas, Artistotle, and the Promise of the Common Good* (Cambridge: Cambridge, 2006)
- Doreen King, *Human Reproduction: Some Common Genetic Terms* (Essex: Opran Publications, 2003)
- James Kingston & Anthony Whelan, *Abortion and the Law* (Dublin: Round Hall Sweet & Maxwell, 1997)
- Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed.) (Durham: Duke University Press, 1997)
- Helga Kuhse and Peter Singer (eds.), *Bioethics: An Anthology* (2nd ed.) (Oxford: Blackwell Publishing, 2006)
- Paddy Ladd, *Understanding Deaf Culture: In Search of Deafhood* (Clevedon: Multilingual Matters Ltd., 2003)
- William Ledger, Seang Lin Tan & Adil O.S. Bahathiq (eds.), *The Fallopian Tube in Infertility and IVF Practice* (Cambridge: Cambridge University Press, 2010)
- Robert Lee and Derek Morgan, *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (London: Blackstone Press Ltd, 2001)
- Susan Lindee and Dorothy Nelkin, *The DNA Mystique: The Gene as a Cultural Icon* (New York: WH Freeman, 1995)
- Richard Lindley, *Autonomy* (Hong Kong: MacMillan Education, 1986)
- John Locke, *The Second Treatise of Government* (Minola: Dover Publications, 2002)
- Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (10th ed) (Oxford: Oxford University Press, 2007)
- Mary Lydon Shanley, *Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption and Same Sex and Unwed Parents* (Boston: Beacon Press, 2001)
- Deirdre Madden, *Medicine, Ethics and the Law* (2nd ed) (Dublin: Bloomsbury Professional, 2011)
- Deirdre Madden, *Medical Law in Ireland* (The Netherlands: Kluwer Law International, 2011)
- John K. Mason, T*he Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (Cambridge: Cambridge University Press, 2007)
- John K. Mason, *Medico-Legal Aspects of Reproduction and Parenthood* (Aldershot Darmouth: Ashgate, 1998)
- Aileen McColgan, *Women Under the Law: The False Promise of Human Rights* (Harlow: Longman, 2000)

- Sheila McLean & Laura Williamson, *Impairment and Disability: Law and Ethics at the Beginning and End of Life* (Oxford: Routledge-Cavendish, 2007)
- Jeff McMahon, *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford University Press, 2002)
- Abraham Irving Melden. *Rights and Persons* (Berkley: University of California Press, 1977)
- John Graham Merrills, *The Development of International Law By the European Court of Human Rights* (Manchester: Manchester University Press, 1993)
- John Stuart Mill, *Utilitarianism* (edited by George Sher) (2nd ed.) (Indianapolis: Hackett Publishing, 2001)
- Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004)
- John Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Lansdowne: Juta & Co., 2004)
- Tim Mulgan, *Understanding Utilitarianism* (Stocksfield: Acumen, 2007)
- Stephen Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990)
- Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006)
- James Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (Berkley: University of California Press, 1987)
- Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell Publishing, 1975)
- Michael Oliver, *Understanding Disability: From Theory to Practice* (Houndsmill: McMillan Press, 1996)
- Kerry O'Halloran, *The Welfare of the Child: The Principle and the Law* (Aldershot: Ashgate, 1999)
- Onora O'Neill, *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press, 2002)
- Onora O'Neill & William Ruddick (eds.), *Having Children: Philosophical and Legal Reflection on Parenthood* (New York: Oxford University Press, 1979)
- Christine Overall, *Human Reproduction: Principles, Practices and Policies* (Toronto: Oxford University Press, 1993)
- Christine Overall, *Ethics and Human Reproduction: A Feminist Analysis* (Boston: Allen & Unwin, 1987)

- Clare Ovey and Robin White, *Jacobs & White The European Convention on Human Rights* (5th ed.) (Oxford: Oxford University Press, 2010)
- Derek Parfit, *Reasons and Persons* (New York: Oxford University Press, 1984)
- Gregory Pence, *Who's Afraid of Human Cloning?* (Lanham: Rowman & Littlefield, 1998)
- James E. Penner, *The Idea of Property Law* (Oxford: Oxford University Press, 1997)
- Philip Pettit, *Judging Justice: An Introduction to Contemporary Political Philosophy* (London: Routledge & Kegan Paul, 1980)
- Rebecca Probert, *Cretney's Family Law* (London: Sweet & Maxwell, 2006)
- Laura Purdy, *Reproducing Persons: Issues in Feminist Bioethics* (New York: Cornell University Press, 1996)
- Margaret Radin, *Contested Commodities* (Cambridge: Harvard University Press, 1996)
- John Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972)
- Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986)
- Van Rensselaer Potter, *Bioethics: Bridge to the Future* (Englewood Cliffs: Prentice-Hall, 1971)
- Patrick Riordan, *A Grammar of the Common Good: Speaking of Globalisation* (London: Continuum, 2008)
- John Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press, 1994)
- Michael Rosen, *Dignity: Its History and Meaning* (Cambridge: Harvard University Press, 2012)
- Rosamund Scott, *Choosing Between Possible Lives: Law and Ethics of Prenatal and Preimplantation Genetic Diagnosis* (Portland: Hart Publishing, 2007)
- John Seymour, *Childbirth and the Law* (Oxford: Oxford University Press, 2000)
- Geoffrey Shannon, *Child Law* (2nd ed) (Dublin: Roundhall, 2010)
- Carmel Shalev, *Birth Power: The Case for Surrogacy* (New Haven: Yale University Press, 1989)
- Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980)
- Roger Smith, *Property Law: Cases and Materials* (5th ed.) (Harlow: Pearson Education Ltd., 2012)
- Horacio Spector, *Autonomy and Rights: The Moral Foundations of Liberalism* (Oxford: Clarendon Press, 1992)

- Bonnie Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* (Oxford: Oxford University Press, 1992)
- John Stuart Mill, *On Liberty* 1859 (reprinted edition) (London: Penguin Books, 1987)
- Michelle Taylor-Sands, *Creating Saviour Siblings: Reconsidering the Role of the Welfare of the Child Principle in Regulating Preimplantation Tissue Typing* (Thesis-Melbourne Law School, 2010)
- Donald VanDeVeer, *Paternalistic Intervention: The Moral Bounds on Benevolence* (Princeton: Princeton University Press, 1986)
- Jeremy Waldron (ed.), *Theories of Rights* (New York: Oxford University Press, 1984)
- Peter Wardle and David Cahill, *Understanding Infertility* (Poole: Family Doctor Publications, 2005)
- Mary Warnock, *Nature and Morality: Reflections of a Philosopher in Public Life* (London: Continuum, 2003)
- Mary Warnock, *Making Babies: Is there a Right to have Children?* (Oxford: Oxford University Press, 2002)
- Mary Warnock, *A Question of Life: The Warnock Report on the Human Fertilisation and Embryology* (Oxford: Basil Publishing, 1985)
- Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Dublin: Institute of Public Administration, 2002)
- Elizabeth Wicks, *Human Rights and Healthcare* (Oxford: Hart Publishing, 2007)
- Stephen Wilkinson, *Choosing Tomorrow's Children: The Ethics of Selective Reproduction* (Oxford: Clarendon Press, 2010)
- Dennis Wood, *The Human Embryo: Its Nature and Abuse: A Guide for Christians* (Edinburgh: Handsel Press, 2007)
- Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague: Kluwer Law International, 1996)

ARTICLES AND CONTRIBUTIONS TO BOOKS

- Paula Abrams, "The Tradition of Reproduction" (1995) 37 *Arizona Law Review* 453
- Laurens W.H. Ackermann, "The Legal Nature of the South African Constitutional Revolution" (2004) *New Zealand Law Review* 633
- Laurens W. H. Ackermann, "Equality and the South African Constitution: The Role of Dignity" (2000) 60 *Heidelberg Journal of International Law* 537
- Marcelo De Alcantara, "Surrogacy in Japan: Legal Implications for Parentage and Citizenship" (2010) 48 *Family Court Review* 417
- Gregory Alexander & Eduardo Penalver, "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127
- Amel Alghrani & Margaret Brazier, "What is it? Re-positioning the Foetus in the Context of Research" (2011) 70 *Cambridge Law Journal* 51
- Erez Aloni, "Cloning and the LGBT Family: Cautious Optimism" (2011) 35 *New York University Review Law & Social Change* 1
- Philip Alston, "The Best Interests Principle: Towards A Reconciliation of Culture and Human Rights" (1994) 8 *International Journal of Law and the Family* 1
- Philip Alston & Joseph Weiler, "An 'Ever Closer Union' in need of a Human Rights Policy" (1998) 9 *European Law Journal* 658
- Paul Amato, "The Well-Being of Children with Gay and Lesbian Parents" (2012) 41 *Social Science Research* 771
- Paul Amato, "The Impact of Family Formation Change on the Cognitive Social, and Emotional Well-Being of the Next Generation" (2005) 15(2) *The Future of Children* 75
- Paula Amato and Mary Casey Jacob, "Providing Fertility Services to Lesbian Couples: The Lesbian Baby Boom" (2004) 2 *Sexuality, Reproduction and Menopause* 83
- Richard Ameson, "Mill versus Paternalism" (1980) 90 *Ethics* 470
- Roberto Andorno, "Human Dignity and Human Rights as a Common Ground for a Global Bioethics" (2009) 34 *Journal of Medicine & Philosophy* 223
- Lori B. Andrews, "Mom, Dad, Clone: Implication for Reproductive Privacy" (1998) 7 *Cambridge Quarterly of Healthcare Ethics* 176
- Lori B. Andrews, *"*Alternative Modes of Reproduction*"*, in Sherrill Cohen and Nadine Taub (eds.), *Reproductive Laws for the 1990s* (Clifton: Humana Press, 1989) 361

- Lori B. Andrews, "My Body, My Property" (1986) 16 *Hastings Center Report* 28
- George Annas, "Regulating the New Reproductive Technologies", in Sherrill Cohen and Nadine Taub (eds.), *Reproductive Laws for the 1990s* (Clifton: Humana Press, 1989) 411
- Annette R. Appell & Bruce A. Boyer, "Parental rights v Best Interests of the Child: A False Dichotomy in the Context of Adoption" (1995) 2 *Duke Journal of Gender Law & Policy* 63
- Thomas Aquinas, "Concerning the Nature of Law from *Summa Theologica*", in Joel Feinberg & Hyman Gross (ed.), *Philosophy of Law* (California: Dickenson Publishing, 1975) 9
- Adrienne Asch, "Disability, Equality and Prenatal Testing: Contradictory or Compatible?" (2003) 30 *Florida State University Law Review* 315
- Susanne Baer, "Dignity. Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism" (2009) 59 *University of Toronto Law Journal* 417
- Mirko Bagaric & James Allan, "The Vacuous concept of Dignity" (2006) 5 *Journal of Human Rights* 257
- James Bailey, "An Analytical framework for Resolving Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance" (1998) 47 *De Paul Law Review* 747
- Martha Bailey. "Limits on Autonomy", in Bill Atkin (ed.), *The International Survey of Family Law 2010 Edition* (Bristol: Jordan Publishing, 2010) 95
- Alexia M. Baiman, "Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?" (2009) 16 *William & Mary Journal of Women & Law* 133
- Andrew Bainham, 'Arguments About Parentage' (2008) 67 *Cambridge Law Journal* 322
- Andrew Bainham, "Homosexual Adoption" (2008) 67 *Cambridge Law Journal* 479
- Katharine Baker, "Bargaining or Biology? The History and Future of Paternity Law and Parental Status" (2004) 14 *Cornell Journal of Law & Public Policy* 1
- Nicholas Bamforth, "Conceptions of Anti-Discrimination Law" (2004) 24 *Oxford Journal of Legal Studies* 693
- Donal Barrington, "Private Property Under the Irish Constitution" (1973) 8 *Irish Jurist* 1
- Ursula Barry, "Movement, Change and Reaction: The Struggle over Reproductive Rights in Ireland", in Ailbhe Smyth (ed.), *The Abortion Papers, Ireland* (Dublin: Attic Press, 1992) 107

- Chris Barton, "'In Stoke-on-Trent, My Lord, They Speak of Little Else': *Radmacher v Granatino*" [2011] *Family Law* 67
- Susannah Baruch, "Preimplantation Genetic Diagnosis and Parental Preferences: Beyond Deadly Disease" (2008) 8 *Houston Journal of Health Law & Policy* 245
- Kenneth Baum, "Golden Eggs: Towards the Rational Regulation of Oocyte Donation" (2001) *Brigham Young University Law Review* 107
- Francoise Baylis, "Canada Bans Human Cloning " (2004) 34 *Hastings Center Report* 5
- Tom L. Beauchamp, "Principalism and Its Alleged Competitors", in John Harris (ed.), *Bioethics* (Oxford: Oxford University Press, 2004) 479
- Jan Beckmann, "On the German Debate on Human Embryonic Stem Cell Research" (2004) 29 *Journal of Medicine & Philosophy* 603
- Sonu Bedi, "Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy obsolete" (2006) 53 *Cleveland State Law Review* 447
- Henning M. Beier & Jacques O. Beckman, "Implications and Consequences of the German Embryo Protection Act" (1991) 6(4) *Human Reproduction* 607
- Kara Belew, "Stem Cell Division: Abortion Law and Its Influence on the Adoption of Radically Different Embryonic Stem Cell Legislation in the United States, the United Kingdom and Germany" (2004) 39 *Texas International Law Journal* 479
- Jospeh Bell, "Schiavo's Right to Refuse Food and Water: Ascendancy of the Artificial Natural Person" (2007) 2 *Liberty University Law Review* 193
- Ernst Benda, "The Protection of Human Dignity (Article 1 of the Basic Law)" (2000) 53 *Southern Methodist University Law Review* 443
- Vern Bengtson, "The Burgess Award Lecture: Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds" (2001) 63 *Journal of Marriage & Family* 1
- Stanley Benn, "Privacy, Freedom and Respect for Persons", in John William Chapman & James Roland Pennock (eds.), *Privacy: Nomos XIII* (New York: Atherton Press, 1971) 1
- Belinda Bennett, "Reproductive Technology, Public Policy and Single Motherhood" (2000) 22 *Sydney Law Review* 625
- Belinda Bennett, "Posthumous Reproduction and the Meaning of Autonomy" (1999) 23 *Melbourne University Law Review* 286
- Lyria Bennett Moses, "Understanding Legal responses to Technological Change: The Example of In Vitro Fertilisation" (2005) 6 *Minnesota Journal of Law Science & Technology* 505

- Barbara Bennett Woodhouse, "It all Depends on What You Mean by Home: Toward a Communitarian Theory of the 'Non-Traditional' Family" (1996) *Utah Law Review* 569
- Isaiah Berlin, "Two Concepts of Liberty", in David Miller (ed.), *Liberty* (Oxford: Oxford University Press, 1991) 33
- Fred Bernstein, "This Child Does Have Two Mothers... And A Sperm Donor with Visitation" (1996) 22 *New York University Review of Law & Social Change* 1
- Denis Berthiau, "Law, Bioethics and Practice in France: Forging a New Legislative Pact" (2012) 1 *Medicine, Health Care & Philosophy (Online First)* (April 2012)
- Flavia Berys, "Interpreting a Rent-A-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Agreements Go Sour" (2006) 42 *California Western Law Review* 321
- Samantha Besson, "Gender Discrimination under EU and ECHR law: Never Shall the Twain Meet?" (2008) 8 *Human Rights Law Review* 647
- Lammy Betten, "The Protection of Fundamental Social Rights in the European Union- Discussion Paper", in Lammy Betten and Delma MacDevitt (eds.), *The Protection of Fundamental Social Rights in the European Unio*n (The Hague: Kluwer Law International, 1996) 3
- Dieter Bimbacher, "Human Cloning and Human Dignity" (2005) 10 *Reproductive BioMedicine Online* 50
- William Binchy, "*Meskell*, the Constitution and Tort Law" (2011) 33 *Dublin University Law Journal* 339
- William Binchy, "Human Dignity: its Implications for Marriage, the Family and Society", in Scott Fitzgibbon, Lynn Wardle & A. Scott Loveless (eds.), *The Jurisprudence of Marriage and Other Intimate Relationships* (New York: William S. Hein & Co, 2010) 3
- William Binchy, "Dignity as a Constitutional Concept", in Oran Doyle and Eoin Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 307
- William Binchy, "Article 40.3.3 of the Constitution: Respecting the Dignity and Equal Worth of Human Beings", in Jennifer Schweppe (ed.), *The Unborn Child, Article 40.3.3 and Abortion in Ireland- Twenty Five Years of Protection?* (Dublin: Liffey Press, 2008) 189
- William Binchy, "Autonomy, Commitment and Marriage", in Oran Doyle & William Binchy (eds.), *Committed Relationships and the Law* (Dublin: Four Courts Press, 2007) 159

- Leslie Binder, "Genes, Parents and Assisted Reproductive Technologies: ARTs Mistakes, Sex, Race and Law" (2003) *Columbia Journal of Gender and Law* 1
- Barbro Bjorkman & Sven Hansson, "Bodily Rights and Property Rights" (2006) 32 *Journal of Medical Ethics* 209
- Eric Blyth, Lucy Frith, Marilyn Paul & Roni Berger, "Embryo relinquishment for Family Building: How Should if be Conceptualised?" (2011) 25 *International Journal of Law, Policy & the Family* 260
- Melissa Boatman, "Bringing Up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes After Divorce" (2008) 37 *University of Baltimore Law Review* 285
- Andrea Boggio, "Italy enacts New law on Medically Assisted Reproduction" (2005) 20 *Human Reproduction* 1153
- Ada Borkenhagen, Elmar Brahler, Heribert Kentenich & Manfred Beutel, "Attitudes of German Infertile Couples Towards Multiple Births and Elective Embryo Transfer" (2007) 22(11) *Human Reproduction* 2833
- Gary L. Bostwick, "A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision" (1976) 64 *California Law Review* 1447
- Henk Botha, "Human Dignity in Contemporary Perspective" (2009) 20 *Stellenbosch Law Review* 171
- Jeffrey Botkin, "Ethical Issues and Practical Problems in Preimplantation Genetic Diagnosis" (1998) 26 *Journal of Law, Medicine and Ethics* 17
- Chantal Bouffard, Stephane Viville & Bartha Knoppers, "Genetic diagnosis of Embryos: Clear Explanation, not Rhetoric is Needed" (2009) 181 (6-7) *Canadian Medical Association Journal* 387
- Matthew Boughman, "In Search of Common Ground: One Pragmatist Perspective on the Debate over Contract Surrogacy" (2001) 10 *Columbia Journal of Gender & Law* 263
- William Boulier, "Sperm, Spleens, and other Valuables: The Need to Recognise Property Rights in Human Body Parts" (1995) 23 *Hofstra Law Review* 693
- Alan Brady, "Proportionality, Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of *Meadows*" (2010) *Dublin University Law Journal* 136
- V. Bradley Lewis, "Liberal Democracy, Natural Law and Jurisprudence: Thomastic Notes on an Irish Debate", in Timothy Fuller & John Hittinger (eds.), *Reassessing the Liberal State: Reading Maritain's Man and the State* (Washington: Catholic University of America Press, 2001) 140
- V. Bradley Lewis, "Natural Law in Irish Constitutional Jurisprudence" (1997) *2 Catholic Social Science* Review 171

- James Braxton Craven Jr, "Personhood: the Right to Be Let Alone" (1976) *Duke Law Journal* 699
- Margaret Brazier, "Retained Organs: Ethics and Humanity" (2002) *Legal Studies* 550
- Dan Brock, "Creating Embryos for Use in Stem Cell Research" (2010) 38 *Journal of Law, Medicine & Ethics* 229
- Dan Brock, "Pre-commitment in Bioethics: Some Theoretical Issues" (2003) 81 *Texas Law Review* 1805
- Barry Brown, "Human Cloning and Genetic Engineering: The Case for Proceeding cautiously" (2002) 65 *Albany Law Review* 649
- Catherine Brown, "The Queensland Investigation into the Decriminalisation of Altruistic Surrogacy" (2008) 29 *Queensland Lawyer* 78
- Catherine Brown, Lindy Willmott & Ben White, "Surrogacy in Queensland: Should Altruism be a Crime?" (2008) 20 *Bond Law Review* 1
- Stuart Brown, "Inalienable Rights" (1955) 64(2) *The Philosophical Review* 192
- Roger Brownsword, "Human Dignity, Ethical Pluralism, and the Regulation of Modern Biotechnologies", in Therese Murphy (ed.), *New Technologies and Human Rights* (Oxford: Oxford University Press, 2008) 19
- Roger Brownsword, "Reproductive Opportunities and Regulatory Challenges" (2004) 67 *Modern Law Review* 304
- Kristin Brudy, "*S.H. v Austria*: European Court of Human Rights Holds that Rights to Family Life and Sexism Trump Governmental Limitations on Artificial Procreation" (2011) 19 *Tulane Journal of International & Comparative Law* 691
- Niall Buckley, "Merging Principles of Public Law: Towards Proportionality in an Irish Context" (2004) 39 *Irish Jurist* 161
- Ashely Bumgamer, "A Right to Choose? Sex Selection in the International Context" (2007) 14 *Duke Journal of Gender Law & Policy* 1289
- Jonathan Burchell, "Personality Rights in South Africa: Re-Affirming Dignity", in Niall Whitty & Reinhard Zimmermann (eds.), *Rights of Personality in Scots law: A Comparative Perspective* (Dundee: Dundee University Press, 2009) 349
- Melissa Burchell, "America's Struggle to Develop Stem Cell Research and Therapeutic Cloning: Are The Politics Getting in the Way of Hope?" (2004) 32 *Syracuse Journal of International Law & Commerce* 133
- Ailis Burpee, "Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State

Regulation of Surrogacy" (2009) 37 *Georgia Journal of International & Comparative Law* 305

- Dean Byrd, "Gender Complementarity and Child-Rearing: When Tradition and Science Agree" (2004) 6 *Journal of Law & Family Studies* 213
- Laura Byrne, "The Parental Right to be Make 'Mistakes' and Irish Constitutional Reform", in Craig Lind, Heather Keating & Jo Bridgeman (eds.), *Taking Responsibility, Law and the Changing Family* (Surrey: Ashgate Publishing, 2011) 239
- Guido Calabresi, "An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts" (2003) 55 *Stanford Law Review* 2113
- Daniel Callahan, "Individual Good and Common Good: A Communitarian Approach to Bioethics" (2003) 46(4) *Perspectives in Biology and Medicine* 496
- Daniel Callahan, "Principalism and Communitarianism" (2003) 29 *Journal of Medical Ethics* 287
- Daniel Callahan, "The Puzzle of Profound Respect" (1995) 25 *Hastings Center Report* 39
- Angela Cameron, "Regulating the Queer Family: The Assisted Human Reproduction Act" (2008) 24 *Canadian Journal of Family Law* 101
- Angus Campbell & Heather Lardy, "Transsexuals- the ECHR in Transition" (2003) 54 *Northern Ireland Law Quarterly* 209
- Liz Campbell, "From Due Process to Crime Control- The Decline of Liberalism in the Irish Criminal Justice System" (2007) 25 *Irish Law Times* 281
- Hubert Cancik, "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Reflections on Cicero, *De Officiis I 105-107*", in David Kretzmer & Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 19
- Simon Caney, "Liberalism and Communitarianism: a Misconceived Debate" (1992) 40(2) *Political Studies* 273
- Paolo Carozza, "Human Dignity and Judicial Interpretation of Human Rights: A Reply" (2008) 19 *European Journal of International Law* 931
- Adrienne Cash, "Attack of the Clones: Legislative Approaches to Human Cloning in the United States" (2005) 4 *Duke Law & Technology Review* 1
- Timothy Caulfield, "Human Cloning Laws, Human Dignity and the Poverty of the Policy Making debate" (2003) *BioMedCentral Medical Ethics* 3
- Timothy Caulfield & Roger Brownsword, "Human Dignity: A Guide to Policy Making in the Biotechnological Era?" (2006) 7 *Nature* 72

- Christopher Carnahan, "Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with the Best Interests of the Child" (2004) 11 *Cardozo Women's Law Journal* 1
- Jennifer Carow, "*Davis v Davis*: An Inconsistent Excpetion to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology" (1994) 43 *De Paul Law Review* 523
- Georgina Chamber, Peter Illingworth & Elizabeth Sullivan. "Assisted Reproductive Technology: Public Funding and the Voluntary Shift to Single Embryo Transfer in Australia" (2011) 195(1) *Medical Journal of Australia* 594
- Joseph Chan, "Raz on Liberal Rights and Common Goods" (1995) 15 *Oxford Journal of Legal Studies* 15
- Sarah Chan & Muireann Quigley, "Frozen Embryos, Genetic Information and Reproductive Rights" (2007) 21 *Bioethics* 439
- Andrea Charlow, "Awarding Custody: The Best Interests of the Child and Other Fictions" (1986) 5 *Yale Law & Policy Review* 267
- Arthur Chaskalson, "Human Dignity as a Foundational Value of Our Constitutional Order" (2000) 16 *South African Journal on Human Rights* 193
- James Childress, "An Ethical Defense of Federal Funding for Human Embryonic Stem Cell Research" (2001) 2 *Yale Journal of Health Policy, Law & Ethics* 157
- Eric Christiansen, "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court" (2007) 38 *Columbia Human Rights Law Review* 321
- Janice Ciccarelli & John Ciccarelli, "The Legal Aspects of Parental Rights in Assisted Reproductive Technology" (2005) 61 *Journal of Social Issues* 127
- Janice Ciccarelli & Linda Beckman, "Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy" (2005) 61 *Journal of Social Issues* 21
- Scott Clark, "Utah Prefers Married Couples" (2006) 18 *St. Thomas Law Review* 215
- Scott Clark, "Married Persons Favoured as Adoptive Parents: The Utah Perspective" (2003) 5 *Journal of Law & Family Studies* 203
- Desmond Clarke, "Unenumerated Rights in Constitutional Law" (2011) 34 *Dublin University Law Journal* 101
- Desmond Clarke, "Ireland: A Republican Democracy, A Theocracy, or a Judicial Oligarchy" (2011) 29 *Irish Law Times* 81

- Desmond Clarke, "The Role of Natural Law in Irish Constitutional Law" (1982) 17 *Irish Jurist* 187
- Richard Clayton, "Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle" (2001) 5 *European Human Rights Law Review* 504
- Inge Clissmann & Jane Barrett, "The Embryo in Vitro after Roche v Roche: What Protection is now offered? (2012) *Medico-Legal Journal of Ireland* 13
- I. Glenn Cohen, "Regulating Reproduction: The Problem with Best Interests" (2011) 96 *Minnesota Law Review* 423
- Carl Coleman, "Procreative Liberty and Contemporary Choice: An Inalienable Rights Approach to Frozen Embryo Disputes" (1999) 84 *Minnesota Law Review* 56
- Ruth Colker, "Pregnant Men Revisited or Sperm is Cheap, Eggs are Not" (1996) 47 *Hastings Law Journal* 1063
- Hilary Coveney, "A Brave New World: Family Law Implications of Assisted Reproductive Technologies" (2005) 8 *Irish Journal of Family Law* 12
- Andrea Corvalan, "Fatherhood After Death: Legal and Ethical Analysis of Posthumous Reproduction" (1997) 7 *Albany Law Journal of Science & Technology* 335
- Brenda Cossman & Roxanne Mykitiuk, "Reforming Child Custody and Access Law in Canada: A Discussion Paper" (1998) 15 *Canadian Journal of Family Law* 13
- Declan Costello, "Limiting Rights Constitutionally", in James O'Reilly (ed.), *Human Rights and Constitutional Law* (Dublin: Round Hall Press, 1992) 177
- Declan Costello, "The Terminally Ill- The Law's Concerns" (1986) 21 *Irish Jurist* 35
- Declan Costello, "The Natural Law and the Irish Constitution" (1956) 45 *Studies* 403
- Susie Cowen, "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17 *South African Journal on Human Rights* 34
- Neville Cox, "The Failure of 'Rights Talk' in the Field of Bioethics: The European Convention on Human Rights and Biomedicine", in Maureen Junker Kenny (ed.), *Designing Life? Genetics, Procreation and Ethics* (Aldershot: Ashgate, 1999) 23
- Crionna Creagh, "Property in the Living Body" (2001) *Bar Review* 209
- John Crosby, "The Personhood of the Human Embryo" (1993) 18 *Journal of Medicine & Philosophy* 399

- Frank Cross, "The Error of Positive Rights" (2001) 48 *UCLA Law Review* 857
- David B. Cruz, "The Sexual Freedom Cases? Contraception, Abortion, Abstinence, and the Constitution" (2000) 35 *Harvard Civil Rights-Civil Liberties Law Review* 299
- Ian Curry-Sumner, "*E.B. v France*: a missed opportunity" (2009) *Child & Family Law Quarterly* 356
- Daniela Cutas, "Post-Menopausal Motherhood: Immoral, Illegal? A Case Study" (2007) 21(8) *Bioethics* 458
- Judith Daar, "The Prospect of Human Cloning: Improving Nature or Dooming the Species?" (2003) 33 *Seton Hall Law Review* 511
- Judith Daar, "Frozen Embryo Disputes Revisited: A Trilogy of Procreation- Avoidance Approaches" (2001) 29 *Journal of Law, Medicine & Ethics* 197
- Edgar Dahl, "Sex Selection: Morality, Harm and the Law" (2007) 100 *Southern Medical Journal* 105
- Marian Damewood, "Ethical Implications of a New Application of Preimplantation Diagnosis (2001) 285(24) *Journal of American Medical Association* 3143
- Arthur D'Andrea, "Federalising Bioethics- Science and Technology Revolutionise Our Lives, But Memory, Tradition and Myth Frame our Response" (2005) 83 *Texas Law Review* 1663
- Mary Taylor Danforth, "Cells, Sales, and Royalties: The Patient's Right to a Portion of the Profits" (1985) 6 *Yale Law & Policy Review* 179
- Ken Daniels, "The Policy and Practice of Surrogacy in New Zealand", in Rachel Cook, Shelley Day Sclater & Felicity Kaganas (eds.), *Surrogate Motherhood: International Perspectives* (Oxford: Hart Publishing, 2003) 55
- Cheryl Davenport, "Achieving Abortion Law Reform in Western Australia" (1998) 13 *Australasian Feminist Studies* 299
- Dena S. Davis, "Genetic Dilemmas and the Child's Right to an Open Future" (1997) 28 *Rutgers Law Journal* 549
- Peggy Davis, "Alternative Modes of Reproduction: The Locus and Determinants of Choice", in Sherill Cohen & Nadine Taub (eds.), *Reproductive Laws for the 1990s* (Clifton: Humana Press, 1989) 421
- Camille M. Davidson, "Octomom and Multi-Fetal Pregnancies: Why Federal Legislation Should Require Insurers to Cover In Vitro Fertilisation" (2010) 17 *William & Mary Journal of Women and the Law* 135

- Elizabeth De Armond, "A Dearth of Remedies" (2008) 113 *Penn State Law Review* 1
- Mark de Blacam, "Justice and Natural Law" (1997) 32 *Irish Jurist* 323
- Lachlan de Crespigny & Julian Savulescu, "Abortion; Time to Clarify Australia's Confusing Laws" (2004) 181(4) *Medical Journal of Australia* 201
- Sheryl de Lacey, "Decisions for the Fate of Frozen Embryos: Fresh Insights into Patients' Thinking and their Rationales for Donating or Discarding Embryos" (2007) 22 *Human Reproduction* 1751
- Sheryl de Lacey, "Parent Identity and 'Virtual' Children: Why Patients Discard rather than Donate Unused Embryos" (2005) 20 *Human Reproduction* 1661
- Jennifer Denbow, "Abortion: When Choice and Autonomy Conflict" (2005) 20 *Berkley Journal of Gender Law & Justice* 261
- Katrien Devolder & John Harris, "The Ambiguity of the Embryo: Ethical Inconsistency in the Human Embryonic Stem Cell Debate", in Lori Gruen, Laura Grabel & Peter Singer (eds.), *Stem Cell Research: The Ethical Issues* (Oxford: Blackwell Publishing, 2007) 16
- Guido de Wert, "Preimplantation Genetic Diagnosis: The Ethics of Intermediate Cases" (2005) 20(12) *Human Reproduction* 3261
- Guido De Wert, "The Post-Menopause: Playground for Reproductive Technology? Some Ethical Reflections", in John Harris & Soren Holm (eds.), *The Future of Human Reproduction: Ethics, Choice and Regulation* (Oxford: Oxford University Press, 1998) 221
- Bernard Dickens, "The Control of Living Body Materials" (1977) 27 *University of Toronto Law Journal* 142
- Robert Dixon, "Equality- The Elusive Value" (1979) *Washington University Law Quarterly* 5
- Roger Dobson, "'Designer Baby' Cures Sister" (2000) 321(7268) *British Medical Journal* 1040
- Kathleen Doody, "Moral, Ethical, and Legal Controversy Surrounding Pluripotent Stem Cell Research" (2002) 48 *Loyola Law Review* 267
- Janet L. Dolgin, "Method, Mediation, and the Moral Dimensions of Preimplantation Genetic Diagnosis" (2004) 35 *Cumberland Law Review* 519
- Janet L. Dolgin, "Embryonic Discourse: Abortion, Stem Cells and Cloning" (2004) 19 *Issues of Law & Medicine* 203
- Janet L. Dolgin, "Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate" (1990) 38 *Buffalo Law Review* 515

- Mary Donnelly, "Non-Consensual Sterilisation of Mentally Disabled People: The Law in Ireland" (1997) 32 *Irish Jurist* 297
- Sonya Donnelly, "*A, B and C v Ireland*: A Commentary" (2011) 17 *Medico-Legal Journal of Ireland* 43
- Alexander Dorozynski, "France Battles out Bioethics Bill" (1994) 308 *British Medical Journal* 291
- Gillian Douglas, "The Retreat from *Gillick*" (1992) 55 *Modern Law Review* 569
- Gillian Douglas, "Assisted Reproduction and the Welfare of the Child" (1993) 5 *Current Legal Problems* 53
- Bruce Douglass, "The Common Good and the Public Interest" (1980) 8(1) *Political Theory* 103
- Nancy Dowd, "Parentage at Birth: Birth Fathers and Social Fatherhood" (2006) 14 *William & Mary Bill of Rights Journal* 909
- Tami Dower, "Redefining Family: Should Lesbians Have Access to Assisted Reproduction?" (2001) 25 *Melbourne University Law Review* 466
- Kimberly Kristin Downing, "A Feminist is a Person Who Answers "Yes" to the Question, 'Are Women Human?" An Argument Against the use of Preimplantation Genetic Diagnosis for Gender Selection" (2005) 8 *De Paul Journal of Health Care Law* 431
- Oran Doyle, "Legal Validity: Reflections on the Irish Constitution" (2003) *Dublin University Law Journal* 56
- Oran Doyle, "The Human Personality Doctrine in Constitutional Equality Law" (2001) 9 *Irish Student Law Review* 101
- Katherine Drabiak, Carole Wegner, Valita Fredland & Paul Helft, "Ethics, Law and Commercial Surrogacy: A Call for Uniformity" (2007) 35 *Journal of Law Medicine & Ethics* 300
- Catherine Dupre, "Unlocking Human Dignity: Towards a Theory for the 21st Century" (2009) 2 *European Human Rights Law Review* 190
- Catherine Dupre, "Human Dignity an the Withdrawal of Medical Treatment: A Missed Opportunity?" (2006) *European Human Rights Law Review* 678
- Gerald Dworkin, "Paternalism", in Joel Feinberg & Hyman Gross (eds.), *Philosophy of Law* (California: Dickenson Publishing, 1975) 174
- Gerald Dworkin, "Paternalism" (1972) 56 *The Monist* 64
- Gerald Dworkin & Ian Kennedy. "Human Tissue: Rights in the Body and its Parts" (1993) 1 *Medical Law Review* 29
- Ronald Dworkin, "What is Equality? Part 1: Equality of Welfare" (1981) 10(3) *Philosophy & Public Affairs* 185

- Deirdre Dwyer, "Beyond Autonomy: The Role of Dignity in 'Biolaw'" (2003) 23 *Oxford Journal of Legal Studies* 319
- Christina M. Eastman, "Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination" (2009) 41 *McGeorge Law Review* 371
- Edward Eberle, "Human Dignity, Privacy, and Personality in German and American Constitutional Law" (1997) *Utah Law Review* 963
- William Edmundson, "What is Interference?", in William Edmundson, *An Introduction to Rights* (Cambridge: Cambridge University Press, 2004) 161
- Steven D. Edwards, "The Impairment/ Disability Distinction: A Response to Shakespeare" (2008) 34 *Journal of Medical Ethics* 26
- John Eekelaar, "Beyond the Welfare Principle" (2002) *Child and Family Law Quarterly* 237
- Anne Egan, 'The Guardianship Rights of Unmarried Fathers in Ireland and New Zealand' (2005) *Irish Journal of Family Law* 15
- Asbjorn Eide, "Economic, Social and Cultural Rights as Human Rights", in Asbjorn Eide, Catarina Krause & Allan Rosas (eds.), *Economic, Social and Cultural Rights* (2nd. ed.) (The Hague: Kluwer Law International, 1996) 9
- Marleen Eijkott, "Procreative Autonomy and the Human Fertilisation and Embryology Act 2008: Does a Coherent Conception Underpin UK Law?" (2011) 11 *Medical Law International* 93
- Marleen Eijkott, "The Right to Procreate is Not Aborted" (2008) *Medical Law Review* 284
- Vered H. Eisenberg & Joseph G. Schenker, "Pregnancy in the Older Woman: Scientific and Ethical Aspects" (1997) 56 *International Journal of Gynaecology & Obstetrics* 163
- Sarah Elliston & Alison Britton, "Is Infertility an Illness?" (1994) *New Law Journal* 1552
- Nanette Elster, "Less is More: The Risks of Multiple Births" (2000) 74(4) *Fertility & Sterility* 617
- Christoph Enders, "A Right to Have Rights- The German Constitutional Concept of Human Dignity" (2010) 3 *National University of Juridical Sciences Law Review* 253
- Martha Ertman, "What's Wrong With A Parenthood Market? A New and Improved Theory of Commodification" (2003) 82 *North Carolina Law Review* 1
- Edward Fagan, "The Natural Law and Distributive Justice" (1956) 2 *Catholic Lawyer* 41
- Aaron Fahrenkrog, "A Comparison of International Regulation of Preimplantation Genetic Diagnosis and a Regulatory Suggestion for the

United States" (2006) 15 *Transnational Law & Contemporary Problems* 757

- Richard Fallon, "The Two Senses of Autonomy" (1994) 46 *Stanford Law Review* 875
- Kristin Fasullo, "Beyond *Lawrence v Texas*: Crafting a Fundamental Right to Sexual Privacy" (2009) 77 *Fordham Law Review* 2997
- Dermot Feenan, "Death, Dying and the Law" (1996) *Irish Law Times* 90
- Joel Feinberg, "Legal Paternalism", in Rolf Sartorious (ed.), *Paternalism* (Minneapolis: University of Minnesota Press, 1984) 3
- Joel Feinberg, "Autonomy", in John Christman (ed.), *The Inner Citadel: Essays on Individual Autonomy* (New York: Oxford University Press, 1989) 27
- Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?" (1983) 58 *Notre Dame Law Review* 445
- Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life" (1978) 7(2) *Philosophy and Public Affairs* 93
- Joel Feinberg, "The Nature and Value of Rights" (1970) 4 *Journal of Value Inquiry* 243
- Joel Feinberg, "Duties, Rights and Claims" (1966) 3(2) *American Philosophical Quarterly* 137
- David Feldman. "Human Dignity as a Legal Value: Part 2" (2000) *Public Law* 61
- David Feldman, "Human Dignity as a Legal Value: Part 1" (1999) *Public Law* 682
- Martha A. Field, "Surrogate Motherhood", in John Eekelaar & Petar Sarcevic (eds.), *Parenthood in Modern Society- Legal and Social Issues for the 21st Century* (Dordrecht: Martinus Nijhoff, 1993) 223
- David Fiestal, "A Solomonic Decision: What Will Be the Fate of Frozen Preembryos" (1999) 6 *Cardozo Women's Law Journal* 103
- Thomas Finegan, "An Unmarried Father's Right to Guardianship of his Child and A Child's Right to the Support of His or Her Father: A Hohfledian View of the Irish Constitution" (2010) 32 *Dublin University Law Journal* 320
- Vittorio Fineschi, Margherita Neri & Emanuela Turillazzi, "The new Italian Law on Assisted Reproduction Technology" (2005) 31 *Journal of Medical Ethics* 536
- John Finnis, "Legal Enforcement of 'Duties to Oneself': Kant v Neo-Kantians" (1987) 87 *Columbia Law Review* 433

- Anthony Fisher, "The Duties of a Catholic Politician with Respect to Bio-Lawmaking" (2006) 20 *Notre Dame Journal Law Ethics & Public Policy* 89
- Fleur Fisher & Ann Sommerville, "To Everything there is a Season? Are there Medical Grounds for Refusing Fertility Treatment to Older Women?", in John Harris & Soren Holm (eds.), *The Future of Human Reproduction: Ethics, Choice and Regulation* (Oxford: Oxford University Press, 1998) 203
- James Fleming, "Securing Deliberative Autonomy" (1995) 48 *Stanford Law Review* 1
- Noel Fleming, "Navigating the Slippery Slope of Frozen Embryo Disputes: the Case for A Contractual Approach" (2002) 75 *Temple. Law Review* 345
- Mary Ford, "The Personhood Paradox and the 'Right' to Die" (2005) 13 *Medical Law Rev*iew 80
- William Frankena, 'Natural and Inalienable Rights" (1955) 64(2) *The Philosophical Review* 212
- Michael Freeman, "Saviour Siblings", in Sheila McLean (ed.), *First Do no Harm: Law, Ethics and Healthcare* (Aldershot: Ashgate, 2006) 389
- Michael Freeman "Rethinking Gillick" (2005) 13 *International Journal of Children's Rights* 201
- Michael Freeman, "Taking the Body Seriously?", in Kristina Stern & Pat Walsh (eds.), *Property Rights in the Human Body* (Centre of Medical Law & Ethics: King's College London, 1997) 13
- Michael Freeman, "Is Surrogacy Exploitative?", in Sheila McLean (ed.), *Legal Issues in Human Reproduction* (Aldershot: Dartmouth, 1990) 164
- Susan Frelich Appleton, "Reproduction and Regret" (2011) 23 *Yale Journal of Law & Feminism* 255
- Ruth Fretts, Julie Schmittdiel, Frances McLean, Robert Usher & Marlene Golman, "Increased Maternal Age and the Risk of Fetal Death" (1995) 333(15) *The New England Journal of Medicine* 953
- Paul Freund, "The Philosophy of Equality" (1979) *Washington University Law Quarterly* 11
- Raymond G. Frey, "Privacy, Control and Talk of Rights", in Ellen Frankel Paul, Fred D. Miller Jr. & Jeffrey Paul (eds.), *The Right to Privacy* (Cambridge: Cambridge University Press, 2000) 45
- Dov Fox, "Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos" (2007) 53 *American Journal of Law & Medicine* 567
- Giuliana Fuscaldo, "Stored Embryos and The Value of Genetic Ties", in Jennifer Gunning & Helen Szoke (eds.), *The Regulation of Assisted Reproductive Technology* (Aldershot: Ashgate, 2003) 177

- Amy Galatis, "Can We Have a Happy 'Family'? Adoption by Same Sex Parents in Massachusetts" (2001) 6 *Suffolk Journal of Trial and Appellate Advocacy* 7
- Colin Gavaghan, "Right Problem, Wrong Solution: A Pro-Choice Response to Expressivist Concerns about Preimplantation Genetic Diagnosis" (2007) 16 *Cambridge Quarterly of Healthcare Ethics* 20
- Alexandra George, "Marketing Humanity: Should We Allow the sale if Human Body Parts?" (2006) 7 *UTS Law Review* 11
- Tom Gerety, "Redefining Privacy" (1977) 12 *Harvard Civil Rights-Civil Liberties Law Review* 233
- Steven Gersz, 'The Contract in Surrogate Motherhood: A Review of the Issues" (1984) 12 *Law of Medicine & Health Care* 107
- Bernard Gert & Charles Culver, "Paternalistic Behaviour" (1976) 6 *Philosophy & Public Affairs* 45
- Nancy Gertner, "Interference with Reproductive Choice", in Sherrill Cohen & Nadine Taub (eds), *Reproductive Laws for the 1990s: Contemporary Issues in Biomedicine, Ethics and Society* (Clifton: Humana Press, 1989) 307
- Alan Gewirth, "Human Dignity as the Basis of Rights", in Michael J. Meyer & William Parent (eds.) *The Constitution of Rights: Human Dignity and American Values* (Ithaca: Cornell University Press, 1992)
- Sheri Gilbert, Fatherhood from the Grave: An Analysis of Post-mortem Insemination" (1993) 22 *Hofstra Law Review* 521
- Donna M. Gitter, "Am I My Brother's Keeper? The Use of Preimplantation Genetic Diagnosis to Create a Donor of Transplantable Stem Cells for an Older Sibling Suffering from a Genetic Disorder" (2006) 13 *George Mason Law Review* 975
- Theresa Glennon, "Choosing One: Resolving the Epidemic of Multiples in Assisted Reproduction" (2010) 55 *Villanova Law Review* 147
- Theresa Glennon. "Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity" (2000) 102 *West Virginia Law Review* 547
- Richard Gold, "Owning Our Bodies: An Examination of Property Law and Biotechnology" (1995) 32 *San Diego Law Review* 1167
- Steven Goldberg, "Cloning Matters: How *Lawrence v Texas* Protects Therapeutic Research" (2004) 4 *Yale Journal Health Policy & Ethics* 306
- David Gomez, "The Special Status of the Human Embryo in the Regulation of Assisted Conception and Research in the United Kingdom" (2011) 17 *Medico Legal Journal of Ireland* 6

- Robert Goodin, "The Political Theories of Choice and Dignity" (1981) 18 *American Philosophical Quarterly* 91
- Michele Goodwin, "Prosecuting the Womb" (2008) 76 *George Washington Law Review* 1657
- Lawrence Gostin, "A Civil Liberties Analysis of Surrogacy Agreements" (1988) 16 *Law Medicine and Health Care* 7
- Fionnuala Gough, "Ireland and the Frozen Embryo: A Slight Thawing?" (2010) *Medical Law Review* 239
- Steven Greer, "Balancing and the European Convention on Human Rights: A Contribution to the Habermas- Alexy Debate" (2004) 63 *Cambridge Law Journal* 412
- Maya Grosz, "To Have and to Hold: Property and State Regulation of Sexuality and Marriage" (1998) 24 *New York University Review Law & Social Change* 235
- Andrew Grubb, "The Nuffield Council Report on Human Tissue" (1995) 3 *Medical Law Rev* 235
- Andrew Grubb, "'I, Me, and Mine': Bodies, Parts and Property" (1998) 3 *Medical Law International* 299
- Jennifer Gunning, "Preimplantation Genetic Diagnosis", in Jennifer Gunning (ed.), *Assisted Conception: Research, Ethics and Law* (Aldershot: Ashgate, 2000) 17
- Jurgen Habermas, "The Concept of Human Dignity and the Utopia of Human Rights" (2010) 41 *Metaphilosophy* 464
- Karin Hammarberg, Louise Johnson & Tracey Petrillo, "Gamete and Embryo Donation and Surrogacy in Australia: The Social Context and Regulatory Framework" (2011) 4(4) *International Journal of Family Studies* 176
- Patrick Hanafin, "Reproductive Rights and the Irish Constitution: From Sanctity of Life to the Sanctity of Autonomy?" (1996) 3 *European Journal of Health Law* 179
- Lois Harder & Michelle Thomarat, "Parentage Law in Canada: The Numbers Game of Standing and Status" (2012) 26 *International Journal of Law, Policy & the Family* 62
- Roy Hardiman, "Toward the Right of commerciality: Recognising Property Rights in the Commercial Value of Human Tissue" (1986) 34 *UCLA Law Review* 207
- Maebh Harding, "A Softening of the Marital Family Paradigm?" in Bill Atkin (ed.), *The International Survey of Family Law 2012 Edition* (Bristol: Jordan Publishing, 2012) 151

- Ivan Hare, "Social Rights as Fundamental Human Rights", in Bob Hepple (ed.), *Social and Labour Rights in a Global Context* (Cambridge: Cambridge University Press, 2002) 153
- Shawn Harman, "*Yearworth v North Bristol NHS Trust*: A Property Case of Uncertain Significance?" (2010) 13 *Medicine, Health Care & Philosophy* 343
- Shawn Harman & Graeme Laurie, "*Yearworth v North Bristol NHS Trust*: Property, Principles, Precedents and Paradigms" (2010) 69 *Cambridge Law Journal* 476
- John Harrington, "Withdrawal of Treatment from An Incompetent Person" (1995) 17 *Dublin University Law Journal* 120
- John Harris, "No Sex Selection Please, We're British" (2005) 31 *Journal of Medical Ethics* 286
- John Harris, "One Principle and Three Fallacies of Disability Studies" (2001) 27 *Journal of Medical Ethics* 383
- John Harris, "Rights and Reproductive Choice", in John Harris & Soren Holm (eds.), *The Future of Human Reproduction* (Oxford: Clarendon Press, 1998) 5
- John Harris, "Cloning and Human Dignity" (1998) 7 *Cambridge Quarterly of Healthcare Ethics* 163
- John Harris, "'Goodbye Dolly?' The Ethics of Human Cloning" (1997) 23 *Journal of Medical Ethics* 353
- John Harris, "Is Cloning on Attack on Human Dignity?" (1997) 387 *Nature* 754
- John Harris, "The Right to Found a Family", in Geoffrey Scarre (ed.), *Children, Parents and Politics* (Cambridge: Cambridge University Press, 1989) 133
- Weldon Harris & James Dalessio, "Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating 'Non-Traditional' Gestational Surrogacy" (2000) 31 *McGeorge Law Review* 673
- Olivia Harvey, "Regulating Stem Cell Research and Human Cloning in an Australian context: The Lockhart Review" (2008) 27 *New Genetics & Society* 33
- Cynthia Hawkes, "Property Interests in Body Parts: *Yearworth v North Bristol NHS Trust*" (2010) 73 *Modern Law Review* 130
- Linda Heffner, "Advanced Maternal Age- How Old is Too Old?" (2004) 351 *The New England Journal of Medicine* 1927
- Thomas Heinemann & L.udger Honnefelder, "Principles of Ethical Decision Making Regarding Embryonic Stem Cell Research in Germany" (2002) 6 *Bioethics* 530

- Wendy Hensel, "The Disabling Impact of Wrongful Birth and Wrongful Life Actions" (2005) 40 *Harvard Civil Rights-Civil Liberties Review* 114
- Stephanie Hennette- Vauchez, "A Human *Dignitas*? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept" (EUI Working Papers: Law 2008/18)
- Jonathan Herring & Pak-Lee Chau, "My Body, Your Body, Our Bodies" (2007) 15 *Medical Law Review* 34
- Bonnie Hertberg, "Resolving the Abortion Debate: Compromise Legislation, An Analysis of the Abortion Policies of the United States, France and Germany" (1993) 16 *Suffolk Transnational Law Review* 513
- R.F.V. Heuston, "Personal Rights Under the Irish Constitution" (1976) 11 *Irish Jurist* 205
- Jessie B. Hill, "Reproductive Rights as Health Care Rights" (2009) 18 *Columbia Journal of Gender & Law* 501
- Russell Hittinger, "Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?" (1993) 55 *The Review of Politics* 5
- Gerard Hogan, "Judicial Review and Socio-economic Rights" in Jeremy Sarkin & William Binchy (eds.). *Human Rights, the Citizen and the State- South African and Irish Approaches* (Dublin: Round Hall Sweet and Maxwell, 2001) 1
- Gerard Hogan, "Unenumerated Personal Rights: Ryan's Case Re-Evaluated" (1990-92) 25-27 *Irish Jurist* 95
- Gerard Hogan, "Law and Religion: Church-State Relations in Ireland from Independence to the Present Day" (1987) 35 *American Journal of Comparative Law* 47
- Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 *Yale Law Journal* 710
- Wesley N. Hohfeld, "Some Fundamental Legal Conceptions As Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16
- Suzanne Holland, "Selecting Against Difference: Assisted Reproduction, Disability and Regulation" (2003) 30 *Florida State University Law Review* 401
- Anthony M. Honore, "Ownership", in Anthony G. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) 107
- Tatjana Hornle, "Criminalising Behaviour to Protect Human Dignity" (2012) 6 *Criminal Law & Philosophy* 307
- Bill Hughes, "Disability and the Body", in Colin Barnes, Mike Oliver, & Len Barton (eds.), *Disability Studies Today* (Cambridge: Polity Press, 2002) 58

- Richard Hull, "Cheap Listening? Reflections on the Concept of Wrongful Disability" (2006) 20 *Bioethics* 55
- Richard Humphreys, "Interpreting Natural Rights" (1993-95) 30 *Irish Jurist* 221
- Nan Hunter, "Living with Lawrence" (2004) 88 *Minnesota Law Review* 1103
- Michael Hutchinson, "The Margin of Appreciation in the European Court of Human Rights" (1999) 48 *International Comparative Law Quarterly* 638
- Teresa Iglesias, "The Dignity of the Individual in the Irish Constitution – The Importance of the Preamble" (2000) 89 *Studies* 19
- Lisa Ikemto, "The Infertile, The Too Fertile and the Dysfertile" (1996) 47 *Hastings Law Journal* 1007
- Melanie Jacobs, "My Two Dads: Disaggregating Biological and Social Paternity" (2006) *38 Arizona State Law Journal* 809
- Gary Jeffrey Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective" (2006) 4 *International Journal of Constitutional Law* 460
- Emily Jackson & Shelley Day Sclater, "Introduction: Autonomy and Private Life", in Shelley Day Sclater, Fatemeh Ebtehaj, Emily Jackson & Martin Richards (eds.), *Regulating Autonomy: Sex, Reproduction and Family* (Oxford: Hart Publishing, 2009) 1
- Emily Jackson, "Abortion, Autonomy and Prenatal Diagnosis" (2000) *Social and Legal Studies* 467
- Robert Jansen, "Sperm and Ova as Property" (1985) 11 *Journal of Medical Ethics* 123
- Sandra Johnson, "The Baby M Decision: Specific Performance of a Contract for Specifically Manufactured Goods" (1987) 11 *South Illinois University Law Journal* 1339
- Vicki Jackson, "Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse" (2004) 65 *Montana Law Review* 15
- Melanie Jacobs, "My Two Dads: Disaggregating Biological and Social Paternity" (2006) 38 *Arizona State Law Journal* 809
- Melanie Jacobs, "Micah has One Mommy and One Legal Stranger: Adjudicating Maternity for Non-biological Lesbian Co-parents" (2002) 50 *Buffalo Law Review* 341
- Judith Jarvis Thomson, "A Defence of Abortion", in John Harris (ed.), *Bioethics* (Oxford: Oxford University Press, 2001) 25

- Judith Jarvis Thomson, "The Right to Privacy" (1975) 4(4) *Philosophy & Public Affairs* 295
- James Jeffers, "Dead or Alive? The Fate of Natural Law in Irish Constitutional Jurisprudence" (2003) 2 *Galway Student Law Review* 2
- Megan A. Jellinek, "Disease Prevention an the Genetic Revolution Defining a Parental Right to Protect the Bodily Integrity of Future Children" (2000) 27 *Hastings Constitutional Law Quarterly* 369
- Oliver Johnson, "The Kantian Interpretation" (1974) 85 *Ethics* 58
- Brian Johnstone, "The Moral Status of the Embryo: Two Viewpoints", in William Walters & Peter Singer (eds.), *Test-tube Babies: A Guide to Moral Questions, Present Techniques and Future Possibilities* (Melbourne: Oxford University Press, 1982) 49
- Robert Jonas & John Gorby, "West German Abortion Decision: A Contrast to *Roe v Wade*" (1976) 9 *John Marshall Journal of Practice & Procedure* 605
- Derek J. Jones, "Artificial Procreation, Societal Preconceptions: Legal Insight from France" (1988) 36 *American Journal of Comparative Law* 525
- Lindsay Jonker, "Learning From the Past: How the Events That Shaped the Constitutions of the United States and Germany Play Out in the Abortion Controversy" (2011) 23 *Regent University Law Review* 447
- Charles M. Jordan Jr & Casey J. Price, "First Moore, Then Hecht: Isn't it Time We Recognise a Property Interest in Tissues, Cells and Gametes?" (2002) 37 *Real Property Problems & Trust Journal* 151
- Kelly Jordan, "ART Class: Assisted Reproductive Technology Class- Six Questions Answered" (2009) 28 *Canadian Family Law Quarterly* 71
- Matthew Jordan, "Bioethics and 'Human Dignity'" (2010) 35 *Journal of Medicine & Philosophy* 180
- Courtney Joslin, "Searching for Harm: Same-Sex Marriage and the Well-Being of the Children" 92011) 46 *Harvard Civil Rights- Civil Liberties Law Review* 81
- Maureen Junker- Kenny, "Embryos In Vitro, Personhood, and Rights", in Maureen Junker-Kenny (ed.), *Designing Life? Genetics, Procreation and Ethics* (Aldershot: Ashgate, 1999) 103
- Axel Kahn, "Cloning, Dignity and Ethical Revisionism" (1997) 388 *Nature* 320
- Jonathan Kahn, "Bringing Dignity Back to Light: Publicity Rights and the Eclipse if the Tort of Appropriation of Identity" (1999) 17 *Cardozo ARTs & Entertainment Law Journal* 213
- Lawrence Kalevitch, "Contract, Will and Social Practice" (1995) 3 *Journal of Law & Policy* 379

- Amy Kamoroski, "After *Woodward v Commissioner of Social Services*: Where Do Posthumously Conceived Children Stand in the Line of Descent?" (2002) 11 *Boston University Public Interest Law Journal* 297
- Shana Kaplan, "From A to Z: An Analysis of Massachusetts' Approach to the Enforceability of Cryopreserved Pre-Embryo Dispositional Agreements" (2001) *Boston University Law Review* 1093
- Kari Karsjens, "Boutique Egg Donations: A New Form of Racism and Patriarchy" (2002) 5 *De Paul Journal of Health Care Law* 57
- Leon Kass, "The Wisdom of Repugnance", in Leon Kass & James Wilson, *The Ethics of Human Cloning* (Washington: AEI Press, 1998) 3
- Leon Kass, "The Wisdom of Repugnance" (1997) 216 *New Republic* 17
- Leon Kass, "The Meaning of Life in the Laboratory", in Kenneth D. Alpern (ed.), *The Ethics of Reproductive Technology* (New York: Oxford University Press, 1992) 88
- Gail A. Katz, "Paraplaix c CECOS: Protecting Intent in Reproductive Technology" (1998) 11 *Harvard Journal of Law & Technology* 683
- Aileen Kavanagh, "Policing the Margins: Rights Protection and the European Court of Human Rights" (2006) *European Human Rights Law Review* 422
- Aileen Kavanagh, "The Quest for Legitimacy in Constitutional Interpretation" (1997) 32 *Irish Jurist* 195
- Ronan Keane, "The Constitution and the Family: The Case for a New Approach", in Oran Doyle & Eoin Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Roundhall, 2008) 347
- Ronan Keane, "Judges as Lawmakers: The Irish Experience" (2004) 4 *Judicial Studies Institute Journal* 1
- Ronan Keane, "Property in the Constitution and the Courts", in Brian Farrell (ed.), *De Valera's Constitution and Ours* (Dublin: Gill & McMillan, 1988) 137
- Fiona Kelly, "Redefining Parenthood: Gay and Lesbian Families in the Family Court- The Case of *Re Patrick*" (2002) *Australian Journal of Family Law* 17
- John Kelly, "Fundamental Rights and the Constitution", in Brian Farrell (ed.), *De Valera's Constitution and Ours* (Dublin: Gill & McMillan, 1988) 163
- John Kelly, "The Constitution: Law and Manifesto", in Frank Litton (ed.), *The Constitution of Ireland, 1937-1987* (Dublin: Institute of Public Administration, 1988) 208
- Jeff Kenner, "Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility", in Tamara Hervey and Jeff Kenner (eds.),

Economic and Social Rights under the EU Charter of Fundamental Rights- A Legal Perspective (Oxford: Hart Publishing, 2003) 1

- Dermot Keogh, "Church, State and Society", in Brian Farrell (ed.), *De Valera's Constitution and Ours* (Dublin: Gill & McMillan, 1988) 103
- Christine Kerian, "Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?" (1997) 12 *Wisconsin Women's Law Journal* 113
- Ursula Kilkelly, "In Re P: adoption, discrimination and the best interests of the child" (2010) *Child and Family Law Quarterly* 115
- Ursula Kilkelly, "Child Law and the ECHR: Issues of Family Life, Adoption and Contact", in Ursula Kilkelly (ed.), *The ECHR and Irish Law* (2nd ed.) (Bristol: Jordans Publishing, 2009) 135
- David King, "Preimplantation Genetic Diagnosis and the 'New' Eugenics" (1999) 25 *Journal of Medical Ethics* 176
- James King, "Duty to the Unborn: A Response to Smolensky" (2008) 60 *Hastings Law Journal* 377
- Eckart Klein, "Human Dignity in German Law", in David Kretzmer & Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 145
- Berma Klein Goldewijk, "From Seattle to Porto Alegre: Emergence of a New Focus on Dignity and the Implementation of Economic, Social and Cultural Rights", in Berma Klein Goldewijk, Adalid Contreras Baspineiro & Paulo Cesar Carbonari (eds.), *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (New York: TCM Asser Press, 2002) 1
- Lynne Kohm, Megan Lindsey & William Catoe, "An International Examination of Same Sex Parent Adoption" (2007) 5 *Regent Journal International Law* 237
- Kathryn Kolbert, "Webster Amicus Curiae Briefs: Perspectives on the Abortion Controversy and the Role of the Supreme Court- Did the Amici Effort Make a Difference?" (1989) 15 *American Journal of Law & Medicine* 153
- Timothy Krahn, "Regulating Preimplantation Genetic Diagnosis: The Case of Down's Syndrome" (2011) *Medical Law Review* 157
- Timothy Krahn, "Where are we Going with Preimplantation Genetic Diagnosis" (2007) 176(10) *Canadian Medical Association Journal* 1445
- Sanjivi Krishnan, "What's the Consensus: The Grand Chamber's decision on abortion in *A, B and C v Ireland*" (2011) 2 *European Human Rights Law Review* 200

- Arthur Kuflik, "The Utilitarian Logic of Inalienable Rights" (1986) 97 *Ethics* 75
- Will Kymlicka, "Liberalism and Communitarianism" (1988) 18(2) *Canadian Journal of Philosophy* 181
- Hugh LaFollette, "Licensing Parents" (1980) 9 *Philosophy & Public Affairs* 182
- Kellie La Gatta, "The Frozen Embryo Debate Heats Up: A Call for Federal Regulation and Legislation" (2002) *4 Florida Coastal Law Journal* 99
- Jessica Lambert, "Developing a Legal Framework for Resolving Disputes Between "Adoptive Parents" of Frozen Embryos A Comparison to Resolutions of Divorce Disputes Between Progenitors" (2008) 49 *Boston College Law Review* 529
- Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory", in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 3
- Pamela Laufer-Ukeles, "Approaching Surrogate Motherhood: Reconsidering Difference" (2002) 26 *Vermont Law Review* 407
- Nicholas Lavender, "The Problem of the Margin of Appreciation" (1997) *European Human Rights Law Review* 380
- John Lawrence Hill, "What Does it Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights" (1991) 66 *New York University Law Review* 353
- Vanessa Lavely, "The Path to Recognition of Same Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption" (2007) 55 *UCLA Law Review* 247
- Mette Lebech, "What is Human Dignity?" (2004) 1 *Maynooth Philosophical Papers* 3
- Lord Lester, "Universality versus Subsidiarity: A Reply" (1998) *European Human Rights Law Review* 73
- Meredith Leigh Birdsall, "An Exploration of "The Wild West' of Reproductive Technology": Ethical and Feminist Perspectives on Sex-Selection Practices in the United States" (2010) 17 *William & Mary Journal of Women and the Law* 223
- Megan Leonard Kane, "Lesbian Co-Parenting and Assisted Reproduction: In an Age of Increasing Alternative Family Forms, Can Ireland Continue to Ignore the Need for Legislative Boundaries" (2012) 13 *Trinity College Law Review* 5
- John Lewis, "Giving Way: Martha Nussbaum and the Morality of Privation" (2001) 8 *University of Chicago Law School Roundtable* 215

- Justyn Lezin, "Misconceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and their Use of Known Donors" (2003) 14 *Hastings Women's Law Journal* 185
- Kathleen Liddell & Alison Hall, "Beyond Bristol and Alder Hey: The Future Regulation of Human Tissue" (2005) 13 *Medical Law Review* 170
- Sandra Liebenberg, "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *South African Journal on Human Rights* 1
- Katherine Lieber, "Selling the Womb: can the Feminist Critique of Surrogacy Be Answered?" (1992) 68 *Indiana Law Journal* 205
- John Lizza. "Potentiality and Human Embryos" (2007) 21 *Bioethics* 379
- Arnold Loewy, "Why *Roe v Wade* Should be Overruled" (1989) 67 *North Carolina Law Review* 939
- Jennifer Long Collins, "*Hecht v Superior Court*: Recognising A Property Right in Reproductive Material" (1995) 33 *University of Louisville Journal of Family Law* 662
- Michael Ludwig, Beate Schopper, A. Katalinic, R. Sturm, Safaa Al-Hasani & Klaus Diedrich, "Experience with the Elective Transfer of Two Embryos under the Conditions of the German Embryo Protection Law" (2000) 15(2) *Human Reproduction* 319
- Elizabeth Luk, "The United Kingdom and Germany: Differing Views on Therapeutic Cloning and How the Belgian Resolution Brings them Together" (2006) 10 *Michigan State University Journal of Medicine & Law* 523
- Anne Drapkin Lyerly, Sanae Nakagawa & Miriam Kuppermann, "Decisional Conflict and the Disposition of Frozen Embryos: Implications for Informed Consent" (2011) 26 *Human Reproduction* 646
- Kerry Lynn Macintosh, "Brave New Eugenics: Regulating Assisted Reproductive Technologies in the Name of Better Babies" (2010) *University of Illinois Journal of Law Technology & Policy* 257
- Kate Lyon, "Babies on Ice: The Legal Status of Frozen Embryos Involved in Custody Disputes During Divorce" (2000) 21 *Whittier Law Review* 695
- Cynthia Mabry, "Opening Another Exit From Child Welfare for Special Needs Children- Why Some Gay Men and Lesbians Should Have the Privilege to Adopt Children in Florida" (2006) 18 *St. Thomas Law Review* 269
- Fiona MacCallum & Susan Golombok, "Children Raised in Fatherless Families from Infancy: A Follow Up of Children of Lesbian and Single Hetrosexual Mothers at Early Adolescence" (2004) 45(8) *Journal of Child Psychology & Psychiatry* 1407
- Gerald MacCallum, "Negative and Positive Freedom" (1967) 76 *Philosophical Quarterly* 312

- Neil MacCormick, "Rights, Claims and Remedies" (1982) 1 *Law & Philosophy* 337
- Margaret MacDonald, "Natural Rights", in Jeremy Waldron (ed.), *Theories of Rights* (New York: Oxford University Press, 1984) 21
- Robin Mackenzie, "Beyond Genetic and Gestational Dualities: Surrogacy Agreements, Legal Parenthood and Choice in Family Formation", in Kirsty Horsey & Hazel Biggs (eds.), *Human Fertilisation and Embryology: Reproducing Regulation* (Abingdon: Routledge-Cavendish, 2007) 181
- Patrick Macklem, "Social Rights in Canada", in Daphne Barak-Erez & Aeyal M. Gross (eds.), *Exploring Social Rights: Between Theory and Practice* (Oxford: Hart Publishing, 2007) 213
- Kendra MacLeod, Stan Whitsett, Eric Mash & Wendy Pelletier, "Pediatric Sibling Donors of Successful and Unsuccessful Hematopoietic Stem Cell Transplants (HSCT): A Qualitative Study of their Psychological Experience" (2003) 28(1) *Journal of Pediatric Psychology* 223
- Ruth Macklin, "Dignity is a Useless Concept" (2003) 377 *British Medical Journal* 1419
- Crawford B. MacPherson, "The Meaning of Property", in Crawford B. MacPherson (ed.), *Property: Mainstream and Critical Positions* (London: University of Toronto Press, 1978) 1
- Deirdre Madden, "Article 40.3.3 and Assisted Human Reproduction in Ireland", in Jennifer Schweppe (ed.), *The Unborn Child, Article 40.3.3 and Abortion in Ireland- Twenty Five Years of Protection?* (Dublin: Liffey Press, 2008) 303
- Deirdre Madden, "Legal Status of Archived Human Tissue" (2004) *Medico-Legal Journal of Ireland* 76
- Deirdre Madden, "Recent Developments in Assisted Human Reproduction: Legal and Ethical Issues" (2001) 7 *Medico-Legal Journal of Ireland* 53
- Deirdre Madden, "The Quest for Legal Parenthood in Assisted Human Reproduction" (1999) 6 *Dublin University Law Journal* 1
- Deirdre Madden, "Is there a Right to a Child of One's Own?" (1999) 5 *Medico-Legal Journal of Ireland* 8
- Roger Magnusson, "Proprietary Rights in Human Tissue", in Norman Palmer & Ewan McKendrick, *Interests in Goods* (2nd ed) (London: LLP, 1998) 25
- Matthias Mahlmann, "The Basic Law at 60- Human Dignity and the Culture of Republicanism" (2010) 11 *German Law Journal* 9
- Paul Mahoney, "Marvelous Richness of Diversity or Invidious Cultural Relativism?" (1998) 19 *Human Rights Law Journal* 1

- Lauren Makar, "Procreational Autonomy as a Fundamental Attribute of the Privacy Rights- Where the Right to Procreate and the Right not to Procreate are in Direct Conflict over the Disposition of Frozen Embryos, ordinarily, the Party Wishing to Avoid Procreation Should Prevail" (2002) 12 *Seton Hall Constitutional Law Journal* 681
- Steven Malby, "Human Dignity and Human Reproductive Cloning" (2002) 6 *Health and Human Rights* 102
- Earl M. Maltz, "Abortion, Precedent, and the Constitution: A Comment on *Planned Parenthood of Southeastern Pennsylvania v Casey*" (1992) 68 *Notre Dame Law Review* 11
- Jennifer Marigliano Dehmel, "To Have or not to Have: Whose Procreative Rights Prevail in Disputes over Dispositions of Frozen Embryos?" (1995) 27 *Connecticut Law Review* 1377
- Patricia Martin & Martin Lagod, "The Human Preembryo, the Progenitors and the State: Toward a Dynamic Theory of Status, Rights and Research Policy" (1990) 5 *High Tech. Law Journal* 257
- Rex Martin & James Nickel, "Recent Work on the Concept of Rights" (1980) 17 (3) *American Philosophical Quarterly* 165
- Kenyon Mason & Graeme Laurie, "Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey" (2001) 64 *Modern Law Review* 711
- Henry Mather, "Natural Law and Liberalism" (2001) 52 *South Carolina Law Review* 331
- Paul Matthews, "The Man of Property" (1995) 3 *Medical Law Review* 251
- Paul Matthews, "Whose Body? People As Property" (1983) *Current Legal Problems* 193
- Marc McAllister, "Human Dignity and Individual Liberty in Germany and the United States as Examined Through Each Country's Leading Abortion Cases" (2004) 11 *Tulsa Journal of Comparative and International Law* 491
- Linda McCann, "Rights and Irresponsibility" (1994) 43 *Duke Law Journal* 989
- Kirsten L. McCaw, "Freedom of Contract Versus the Anti-Discrimination Principle: A Critical Look at the Tension Between Contractual Freedom and Anti-Discrimination Provisions" (1996) 7 *Seton Hall Constitutional Law Journal* 195
- Niall McCarthy, "Observations on the Protection of Fundamental Rights in the Irish Constitution", in Deirdre Curtin & David O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Honourable Mr. Justice T.F. O'Higgins* (Dublin: Butterworths, 1992) 179

- Linda C. McClain, "The Poverty of Privacy?" (1992) 3 *Columbia Journal of Gender & Law* 119
- H. J. McCloskey, "Rights" (1965) 15 *Philosophical Quarterly* 115
- Moira McConnell, "Sui Generis: The Legal Nature of the Foetus in Canada" (1991) 70(3) *Canadian Bar Review* 548
- Terrance McConnell, "The Nature and Basis of Inalienable Rights" (1984) 3 *Law & Philosophy* 25
- Brian McCracken, "The Irish Constitution- An Overview", in Jeremy Sarkin & William Binchy (eds.), *Human Rights, the Citizen and the State- South African and Irish Approaches* (Dublin: Round Hall Sweet and Maxwell, 2001) 52
- Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19 *European Journal of International Law* 655
- Eileen McDonagh, "My Body, My Consent: Securing the Constitutional Right to Abortion Funding" (1999) 62 *Albany Law Review* 1057
- Enda McDonagh, "Philosophical-Theological Reflections in the Constitution", in Frank Litton (ed.), *The Constitution of Ireland, 1937-1987* (Dublin: Institute of Public Administration, 1988) 192
- Elizabeth McDonald, 'Sperm Donor or Thwarted Father? How Written Agreement Statutes are Changing the Way Courts Resolve Legal Parentage Issues In Assisted Reproduction Cases" (2009) 47 *Family Court Review* 340
- Orla McDonnell & Jill Allison, "From Biopolitics to Bioethics: Church, State, Medicine and Assisted Reproductive Technologies in Ireland" (2006) 28 *Sociology of Health & Illness* 817
- Rosalind McDougall, "Acting Parentally: An Argument Against Sex Selection" (2005) 31 *Journal of Medical Ethics* 601
- Clare McGlynn, "Families and the European Union Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo" (2001) 26 *European Law Review* 582
- Dominic McGrattan, "No Need for a Father: The Human Fertilisation and Embryology Act" (2009) 12 *Irish Journal of Family Law* 33
- Joan McGregor & F. Dreifuss-Netter, "France and the United States: The Legal and Ethical Differences in Assisted Reproductive Technologies" (2007) 26 *Medicine & Law* 117
- Aileen McHarg, Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62 *Modern Law Review* 671
- Catharine McKinnion, "Reflections on Sex Equality Under Law" (1991) 100 *Yale Law Journal* 1281

- Jeff McMahon, "Killing Embryos for Stem Cell Research", in Lori Gruen, Laura Grabel & Peter Singer (eds.), *Stem Cell Research: The Ethical Issues* (Oxford: Blackwell Publishing, 2007) 32
- J.R. McMillan, "NICE, the Draft Fertility Guideline and Dodging the Big Question" (2003) 29 (6) *Journal of Medical Ethics* 313
- Richard McNamara, "The Law Reform Commission's Consultation Paper on Aspects of Inter-country Adoption Law" (2007) 10 *Irish Journal of Family Law* 7
- Jennifer L. Medenwald, "A 'Frozen exception' for the Frozen Embryo: The Davis 'Reasonable Alternatives Exception'" (2001) *Indiana Law Journal* 507
- Yves Menezo, Rene Frydman & Nelly Frydman, "Preimplantation Genetic Diagnosis (PGD) in France" (2004) 21(1) *Journal of Assisted Reproduction & Genetics* 7
- Francoise Merlet, "Regulatory Framework in Assisted Reproductive Technologies, Relevance and Main Issues" (2009) 47 (5) *Folia Histchemica Et Cytobiologica* 59
- Christine Metteer Lorillard, "Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Agreements" (2010) 16 *Cardozo Journal of Law & Gender* 237
- Jesse Michael Nix, "You Only Donated Sperm" Using Intent to Uphold Paternity Agreements" (2009) 11 *Journal of Law & Family Studies* 487
- Jean Michaud, "French Laws on Bioethics" (1995) 2 *European Journal of Health Law* 55
- Nicole Miller Healy, "Beyond Surrogacy: Gestational Parenting Agreements under California Law" (1991) 1 *UCLA Women's Law Journal* 89
- Martha Minow, "Redefining Families: Who's In and Who's Out?" (1991) 62 *University of Colorado Law Review* 269
- Robert Mnookin, "Child-custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 *Law and Contemporary Problems* 226
- Kai Moller, "Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights" (2009) 24 *Oxford Journal of Legal Studies* 757
- Derek Morgan & Robert Lee, "In the Name of the Father? *Ex parte Blood*: Dealing with Novelty and Anomaly" (1997) 60 *Modern Law Review* 840
- John Paul Mould, "The Quest for the Status of Microscopic Queenslanders" (2009) *Queensland Law Society Journal* 5

- Alastair Mowbray, "The Creativity of the European Court of Human Rights" (2005) *Human Rights Law Review* 57
- Siobhan Mullaly, "Abortion Law: Rights Discourse, Dissent and Reproductive Autonomy", in Jennifer Schweppe (ed.), *The Unborn Child, Article 40.3.3 and Abortion in Ireland- Twenty Five Years of Protection?* (Dublin: Liffey Press, 2008) 213
- Siobhan Mullally, "Searching for Foundations in Irish Constitutional Law" (1998) 33 *Irish Jurist* 333
- Andrea Mulligan, "Frozen Embryo Disposition in Ireland after Roche v Roche" (2011) *Irish Jurist* 202
- Julie Mulvany, "Disability, Impairment or Illness? The Relevance of the Social Model of Disability to the Study of Mental Disorder" (2000) 22 *Sociology of Health & Illness* 582
- Jessica Munyan, "Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions" (2003) 26 *Suffolk University Law Review* 717
- Stephen Munzer, "The Special Case of Property Rights in Umbilical Cord Blood for Transplantation" (1999) 51 *Rutgers Law Rev* 493
- Stephen Munzer, "Kant and Property Rights in Body Parts" (1993) 6 *Canadian Journal of Law and Jurisprudence* 319
- Tim Murphy, "The Cat Amongst the Pigeons: Garrett Barden and Irish Natural law Jurisprudence", in Oran Doyle & Eoin Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 121
- Tim Murphy, "St. Thomas Aquinas and the Natural Law Tradition", in Tim Murphy (ed.), *Western Jurisprudence* (Dublin: Thomson Round Hall, 2004) 94
- Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies" (2001) 39 *Osgoode Hall Law Journal* 771
- Thomas Nagal, "The Meaning of Equality" (1979) *Washington University Law Quarterly* 25
- A. Nakash & J. Herdman, "Surrogacy" (2007) 27(3) *Journal of Obstetrics & Gynaecology* 246
- Lauren Neal, "Organ Donation, Therapeutic Cloning and Laws of the States" (2012) 26 *Syracuse Science & Technology Law Reporter* 80
- Christine Neff, "Woman, Womb, and Bodily Integrity" (1991) *Yale Journal of Law and Feminism* 327

- Erin Nelson, "Comparative Perspectives: Regulating Preimplantation Genetic Diagnosis in Canada and the United Kingdom" (2006) 85(6) *Fertility & Sterility* 1646
- Dwight Newman, "An Examination of Saskatchewan Law on the Sterilisation of Persons with Mental Disabilities" (1999) 62 *Saskatchewan Law Review* 329
- Christopher Newton, John Fisher, Valter Feyles, Frances Tekpetey, Lesley Hughes & D. Isacsson, "Change in Patient Preferences in the Disposal of Cryopreserved Embryos" (2007) 27 *Human Reproduction* 3124
- Matthew Nisbet, "Public Opinion About Stem Cell Research and Human Cloning" (2004) 68 *Public Opinion Quarterly* 131
- Jeff Nisker, "Socially Based Discrimination Against Clinically Appropriate Care" (2009) 181 (10) *Canadian Medical Association Journal*
- Aoife Nolan, "The Separation of Powers Doctrine vs. Socio-Economic Rights", in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 295
- Laurence Nolan, "Posthumous Conception: A Private or Public Matter?" (1997) 11 *Brigham Young University Journal Public Law* 1
- Lennart Nordenfelt, "The Varieties of Dignity" (2004) 12 *Health Care Analysis* 69
- Martha Nussbaum, "Capabilities and Human Rights" (1997) 66 *Fordham Law Review* 273
- Martha Nussbaum, "In Defence of Universal Values" (2000) 36 *Idaho Law Review* 379
- Martha Nussbaum, "In Defense of Universal Values", in Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000) 34
- Remigius Nwabueze, "Death of the 'No-Property' Rule for Sperm Samples" (2010) 21 *Kings Law Journal* 561
- Paul O'Connell, "The Death of Socio-Economic Rights" (2011) 74 *Modern Law Review* 532
- Rory O'Connell, "The Role of Dignity in Equality Law: Lessons From Canada and South Africa" (2008) 6 *International Journal of Constitutional Law* 267
- Cian O'Connor, Laurence Kelly & Eoghan McSwiney, "Natural Law: A Bible for Judicial Reasoning" (2012) 15 *Trinity College Law Review* 75
- Tony O'Connor & David Walsh, "Donors' Privacy in Assisted Human Reproduction" (2011) 17 *Medico-Legal Journal of Ireland* 19

- Donal O'Donnell, "Property Rights in the Irish Constitution: Rights for Rich People, or a Pillar of Free Society?", in Oran Doyle & Eoin Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 412
- John O'Dowd, "Dignity and Personhood in Irish Constitutional Law", in Gerard Quinn, Attracta Ingram & Stephen Livingstone (eds.), *Justice and Legal Theory in Ireland* (Dublin: Oak Tress Press, 1995) 163
- Helen O'Driscoll, "Rights of Unmarried Fathers" (1999) 2 *Irish Journal of Family Law* 18
- Roderick O'Hanlon, "Natural Rights and the Irish Constitution" (1993) 11 *Irish Law Times* 129
- Conor O'Mahony, "Irreconcilable Differences? Article 8 ECHR and Irish law on Non-Traditional Families" (2012) 26 *International Journal of Law. Policy and the Family* 31
- Conor O'Mahony, "There is no Such Thing as a Right to Dignity" (2012) 10 *International Journal of Constitutional Law* 551
- Aisling O'Sullivan, "Same Sex Marriage and the Irish Constitution" (2009) 13 *International Journal of Human Rights* 477
- Frances Olsen, "The Myth of State Intervention in the Family" (1985) 18 *University of Michigan Journal of Law* 835
- Margaret Otlowski, "*Re Evelyn*- reflection of Australia's First Litigated Surrogacy Case" (1997) 7 *Medical Law Review* 38
- Alicia Ouellette, Arthur Caplan, Kelly Carroll, James Fosset, Dyrleif Bjarnadottir, Darren Schickle & Glenn McGee, "Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States" (2005) 31 *American Journal of Law & Medicine* 419
- Clare Ovey, "The Margin of Appreciation and Article 8 of the Convention" (1998) 19 *Human Rights Law Journal* 10
- David Ozar, "The Case Against Thawing Unused Frozen Embryos" (1985) 15 *Hastings Center Report* 4
- William Parent, "Some Recent Work on the Concept of Liberty" (1974) 11 *American Philosophical Quarterly* 149
- Stephen Parker, "The Best Interests of the Child: Principles and Problems" (1994) 8 *International Journal of Law and the Family* 26
- Richard Parker, "Defining and Delineating the Right to Reproductive Choice" (1998) 67 *Nordic Journal of International Law* 77
- Charlotte Patterson, "Children of Lesbian and Gay Parents (Review)" (1992) 63 *Child Development* 1025
- Richard Paulson, Robert Boostanfar & Peyman Saadat, Eliran Mor, David Tourgeman, Cristin Slater, Mary Francis & John Jain "Pregnancy in the

Sixth Decade of Life: Obstetrical outcomes of Women of Advanced Reproductive Age" (2002) 288(18) *Journal of the American Medical Association* 2320

- James E. Penner, "The 'Bundle of Rights': Picture of Property" (1995) 43 *UCLA Law Review* 711
- Guido Pennings, "Reproductive Tourism as Moral Pluralism in Motion" (2002) 28(6) *Journal of Medical Ethics* 337
- Jarred Pennington & Tess Knight, "Through the Lens of Hetero-Normative Assumptions: Re-thinking Attitudes Towards Gay Parenting" (2011) 13 *Culture, Health & Sexuality* 59
- Christian Perring. "Degrees of Personhood" (1997) 22 *Journal of Medicine & Philosophy* 173
- Thomas S. Petersen, "Just Diagnosis? Preimplantation Genetic Diagnosis and Injustices to Disabled People" (2005) 31 *Journal of Medical Ethics* 231
- Philip Pettit, "Can the Welfare State Take Rights Seriously?" in Charles Sampford & Denis Galligan (eds.), *Law, Rights and the Welfare State* (London: Croom Helm, 1986) 67
- Richard Pildes, "Why Rights are not Trumps: Social Meanings, Expressive Harms and Constitutionalism" (1998) 27 *Journal of Legal Studies* 725
- Cornelia TJ. Pillard, "Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy" (2007) 56 *Emory Law Journal* 941
- Michelle Plachot & Jean Cohen, "Regulations for PGD in France" (2004) 21(1) *Journal of Assisted Reproduction & Genetics* 5
- Adam Plant, "With A Little Help from My Friends: The Intersection of the Gestational Carrier Surrogacy Agreements, Legislative Inaction and Medical Advancement" (2003) 54 *Alabama Law Review* 639
- Nancy Polikoff, "Recognising Partners but Not Parents or Recognising Parents but not Partners: Gay and Lesbian Family Law in Europe and the United States" (2000) 17 *New York Law School Journal of Human Rights* 711
- Nancy Polikoff, "The Deliberate Construction of Families without Fathers: Is it an Option for Lesbian and Hetrosexual Mothers?" (1996) 36 *Santa Clara Law Review* 375
- Katherine Poste Gunnison, "Poaching the Eggs: Courts and the Custody Battles over Frozen Embryos" (2006) 8 *Journal of Law & Family Studies* 275
- Kraig Powell, "The Other Double Standard: Communitarianism, Federalism, and American Constitutional Law" (1996) 7 *Seton Hall Constitutional Law Journal* 69

- David Price, 'The Human Tissue Act 2004" (2005) 68 *Modern Law Review* 798
- Elizabeth Price Foley, "The Constitutional Implications of Human Cloning" (2000) 42 *Arizona Law Review* 647
- Helen Pringle, "Urban Mythology: The Question of Abortion in Parliament" (2007) 22(2) *Australasian Parliamentary Review* 5
- Rosalind Pollack Petchesky, "Reproductive Freedom: Beyond a Woman's Right to Choose" (1980) 5(4) *Signs* 661
- Nicolette Priaulx, "Rethinking Reproductive Injury" [2009] *Family Law* 1161
- Daryl Pullman, "Universalism, Particularism and the Ethics of Dignity" (2001) 7 *Christian Bioethics* 333
- Laura Purdy, "Children of Choice: Whose Children? At What Cost?" (1995) 52 *Washington & Lee Law Review* 197
- Muireann Quigley, "Property: The Future of Human Tissue?" (2009) 17 *Medical Law Review* 457
- John Quinlan, "The Right to Life of the Unborn- An Assessment of the Eighth Amendment to the Irish Constitution" (1984) 3 *Brigham Young University Law Review* 371
- James Rachels, "Why Privacy is Important" (1975) 4(4) *Philosophy & Public Affairs* 323
- Margaret Radin, "The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood" (1995) 74 *Oregon Law Review* 423
- Margaret Radin, "Property and Personhood" (1982) 34 *Stanford Law Review* 957
- Margaret Radin, "Market-Inalienability" (1987) 100 *Harvard Law Review* 1849
- Natalie R. Ram, "Britain's New Preimplantation Tissue Typing Policy: An Ethical Defence" (2006) 32 *Journal of Medical Ethics* 278
- David A. Rameden, "Frozen Semen as Property in Hecht v Superior Court: One Step Forward, Two Steps Backward" (1994) 62 *UMKC Law Review* 377
- Mark Rankin, "Contemporary Australian Abortion Law: The Description of a Crime and the Negation of a Woman's Right to Abortion" (2001) 27 *Monash University Law Review* 229
- Mark Rankin, "Recent Developments in Australian Abortion Law: Tasmania and the Australian Capital Territory " (2003) 29 *Monash University Law Review* 316
- Neomi Rao, "On the Use and Abuse of Dignity in Constitutional Law" (2008) 14 *Columbia Journal of European Law* 201

- Radhika Rao, "Equal Liberty: Assisted Reproductive Technology and Reproductive Equality" (2008) *George Washington Law Review* 1457
- Radhika Rao, "Coercion, Commercialisation and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research" (2996) 21 *Berkeley Technology Law Journal* 1055
- Radhika Rao, "Surrogacy Law in the United States: The Outcome of Ambivalence", in Rachel Cook, Shelley Day Sclater & Felicity Kaganas (eds.), *Surrogate Motherhood: International Perspectives* (Oxford, Portland: Hart Publishing, 2003) 23
- Radhika Rao, "Property, Privacy and the Human Body" (2000) 80 *Boston University Law Review* 359
- Radhika Rao, "Reconceiving Privacy: Relationships and Reproductive Technology" (1998) 45 *UCLA Law Review* 1077
- Janice Raymond, "Of Ice and Men: The Big Chill Over Women's Reproductive Rights" (1990) 49 *Issues in Reproductive and Genetic Engineering: Journal of International Feminist Analysis* 1
- Joseph Raz, "Professor Dworkin's Theory of Rights" (1978) *Political Studies* 123
- Mary Redmond, "Towards an Hohfeldian View of the Rights and Freedoms in the Irish Constitution" (1979-1980) *Dublin University Law Journal* 52
- Helen Reece, "Paramountcy Principle: Consensus or Construct" (1996) *Current Legal Problems* 267
- William H. Rehnquist, "Is an Expanded Right to Privacy Consistent with Fair and Effective Law Enforcement?" (1974) 23 *Kansas Law Review* 1
- Charles Reich, "The New Property" (1964) 73 *Yale Law Journal* 733
- Anne Reichmann Schiff, "Arising from the Dead: Challenges of Posthumous Procreation" (1997) 75 *North Carolina Law Review* 901
- Anne Reichman Schiff, "Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity" (1995) 80 *Iowa Law Review* 265
- Dan Reilly, "Surrogate Pregnancy: A Guide for Canadian Prenatal Health Care Providers" (2007) 176 (4) *Canadian Medical Association Journal* 483
- Jeffrey Reiman, 'Privacy, Intimacy and Personhood", in Ferdinand D. Schoeman, *Philosophical Dimensions of Privacy: An Anthology* (Cambridge: Cambridge University Press, 1984) 300
- Sandra Reineke, "New Reproductive and Genetic Technologies and Women's Rights in Contemporary France" (2008) 1 *International Journal of Feminist Approaches to Bioethics* 92

- Melissa Reynolds, "How Old is Too Old? The Need for Federal Regulation Imposing a Maximum Age Limit on Women Seeking Infertility Treatments" (2010) 7 *Indiana Health Law Review* 277
- Martin Richards, "Which Children Can we Choose? Boundaries of Reproductive Autonomy", in Shelley Day Sclater, Fatemeh Ebtehaj, Emily Jackson & Martin Richards (eds.), *Regulating Autonomy: Sex, Reproduction and Family* (Oxford: Hart Publishing, 2009) 197
- Patrick Riordan, "A Blessed Rage for the Common Good" (2011) 76 *Irish Theological Quarterly* 3
- Patrick Riordan, "Property Rights and Property Duties" (1988) 77 *Studies* 84
- Michael Ritter, "Adoption By Same Sex Couples: Public Policy Issues in Texas Law and Practice" (2010) 15 *Texas Journal on Civil Liberties & Civil Rights* 235
- John Robertson, "Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics" (2004) 43 *Columbia Journal of Transnational Law* 189
- John Robertson, "Protecting Embryos and Burdening Women: Assisted Reproduction in Italy" (2004) 19 *Human Reproduction* 1693
- John Robertson, "Extending Preimplantation Genetic Diagnosis: The Ethical Debate" (2003) 18(3) *Human Reproduction* 465
- John Robertson, "Pre-commitment Strategies for Disposition of Frozen Embryos" (2001) 50 *Emory Law Journa*l 989
- John Robertson, "Two Models of Human Cloning" (1999) 27 *Hofstra Law Review* 609
- John Robertson, "Genetic Selection of Offspring Characteristics " (1996) 76 *Boston University Law Review* 421
- John Robertson, "Liberalism and the Limits of Procreative Liberty: A Response to My Critics" (1995) 52 *Washington & Lee Law Review* 233
- John Robertson, "Posthumous Reproduction" (1994) 69 *Indiana Law Journal* 1027
- John Robertson, "Prior Agreements for Disposition of Frozen Embryos" (1990) 51 *Ohio State Law Journal* 407
- John Robertson, "Decisional Authority Over Embryos and Control of IVF Technology" (1988) 28 *Jurimetrics Journal* 285
- John Robertson, "Liberty, Identity and Human Cloning" (1997) 76 *Texas Law Review* 1371
- Robert Robertson, "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realising Economic, Social and Cultural Rights" (1994) 16 *Human Rights Quarterly* 693

- Ruthann Robson, "Mostly Monogamous Moms? An Essay on the Future of Lesbian Legal Theories and Reforms" (2000) 17 *New York Law School Journal of Human Rights* 703
- Michael Rosenfield, "Nontraditional Families and Childhood Progress Through School" (2010) 47 *Demography* 755
- Michel Rosenfeld, "Between Rights and Consequences: A Philosophical Inquiry into the Foundations of Legal Ethics in the Changing World of Securities Regulation" (1981) 49 *George Washington Law Review* 462
- Jeannie Rosoff, "'Hard Cases' and Reproductive Rights", in Sherrill Cohen & Nadine Taub (eds.), *Reproductive Laws for the 1990s: Contemporary Issues in Biomedicine, Ethics and Society* (Clifton: Humana Press, 1989) 237
- Diarmuid Rossa Phelan, "Natural Law and Popular Sovereignty: The Irish Legal Order" (1997) 86 *Studies* 215
- Jeb Rubenfeld, "The Right to Privacy" (1989) 102 *Harvard Law Review* 737
- Fergus Ryan, "21st Century Families, 19th Century Values: Modern Family Law in the Shadow of the Constitution", in Oran Doyle & Eoin Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 356
- Maura Anne Ryan, "Creating Embryos for Research: On Weighing Symbolic Costs", in Paul Lauritzen (ed.), *Cloning and the Future of Human Embryo Research* (Oxford: Oxford University Press, 2001) 50
- Maura Anne Ryan, "The New Reproductive Technologies: Defying God's Dominion?"(1995) 20 *Journal of Medicine & Philosophy* 419
- Murray Ryburn, "The Myth of Assessment" (1991) 15(1) *Adoption & Fostering* 20
- Macerena Saez, "Same Sex Marriage, Same Sex Cohabitation, and Same Sex Families Around the World: Why 'Same' is So Different" (2011) 19 *American University Journal of Gender Social Policy & Law* 1
- Hamisu Salihu, Nicole Shumpert, Muktar Aliyu, Russell Kirby & Greg Alexander, "Childbearing Beyond Maternal Age of 50 and Fetal Outcomes in the United States" (2003) 102 *Obstetrics & Gynaecology* 1006
- Kristin Savell, "Sex and the Sacred: Sterilisation and Bodily Integrity in English and Canadian Law" (2004) 49 *McGill Law Journal* 1093
- Julian Savulescu, "Death, Us and Our Bodies: Personal Reflections" (2003) 29 *Journal of Medical Ethics* 127
- Julian Savulescu, "The Public Interest in Embryos", in Jennifer Gunning & Helen Szoke (eds.), *The Regulation of Assisted Reproductive Technology* (Aldershot: Ashgate, 2003) 191

- Thomas Scanlon, "Thomson on Privacy" (1975) 4(4) *Philosophy & Public Affairs* 315
- Barry Scannell, "Brave New World? The Ethics of Pre-implantation Genetic Diagnosis in Ireland" (2007) *Medico-Legal Journal of Ireland* 27
- Frederick Schauer, "On the Relation Between Chapters One and Two of John Stuart Mill's On Liberty" (2011) *Capital University Law Review* 571
- Jody Schechter, "Promoting Human Embryonic Stem Cell Research: A Comparison of Policies in the United States and the United Kingdom and Factors Encouraging Advancement" (2010) 45 *Texas International Law Journal* 603
- Jens Scherpe, "Medically Assisted Procreation: This Margin Needs to be Appreciated" (2012) 71 *Cambridge Law Journal* 276
- Jens Scherpe, "Same Sex couples Have Family Life" (2010) 69 *Cambridge Law Journal* 463
- Karen Schiavone, "Playing the Odds or Playing God? Limiting Parental Ability to Create Disabled Children through Preimplantation Genetic Diagnosis" (2009) 73 *Albany Law Review* 283
- Glenn Schram, "Pluralism and the Common Good" (1991) *36 American Journal of Jurisprudence* 119
- Jennifer Schweppe, "Taking Responsibility for the 'Abortion Issue': Some Thoughts on Legislative Reform in the Aftermath of *A, B and C*" (2011) 2 *Irish Journal of Family Law* 50
- Elizabeth S. Scott, "Rehabilitating Liberalism in Divorce Law " (1994) *Utah Law Review* 687
- Rosamund Scott, Clare Williams, Kathryn Ehrich & Bobbie Farsides, "Donation of 'Spare' Fresh or Frozen Embryos to research: Who Decides That an Embryo is 'Spare' and How Can We Enhance the Quality and Protect the Validity of Consent?" (2012) 20 *Medical Law Review* 255
- Rosamund Scott, "Prenatal Testing, Reproductive Autonomy, and Disability Interests" (2005) 14 *Cambridge Quarterly of Healthcare Ethics* 65
- Erik Seeney, "Moore 10 Years Later- Still Trying to Fill the Gap: Creating A Personal Property Right in Genetic Material" (1998) 32 *New England Law Review* 1131
- Adam Seligman, "Individualism and Principle: its Emergence, Institutionalisation and Contradictions" (1997) 72 *Indiana Law Journal* 503
- Amartya Sen, "Equality of What?" in Sterling McMurrin, (ed.), *Tanner Lectures on Human Values* (Cambridge: Cambridge University Press, 1980) 197

- Tracey Setter & Louise Johnson, "Assisted Reproductive Technologies-Science, Ethics, Law and Current Issues" (2009) 21(4) *Legal Date* 1
- Cynthia Siebel, "Defining Fatherhood: Emerging Case Law Re*flections of Changing Societal Realities" (2003) 2 Whittier* Journal of Child & Family Advocacy 125
- Tom Shakespeare, " Debating Disability" (2008) 34 *Journal of Medical Ethics* 11
- Yuval Shany, "Toward a General Margin of Appreciation in International Law?" (2005) 16 *European Journal of International Law* 907
- Donald Shapiro & Benedene Sonnenblick, "The Widow and the Sperm: The Law of Post-Mortem Insemination" (1986-87) 1 *Journal of Law & Health* 229
- Michael Shapiro, "Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives" (1996) 47 *Hastings Law Journal.* 1081
- Michael Shapiro, "How (Not) to Think About Surrogacy and Other Reproductive Innovations" (1994) 28 *University of San Francisco Law Review* 647
- Asim A. Sheikh, "The Latest Medical Council Guidelines: New and Improved" (2010) *Medico-Legal Journal of Ireland* 62
- Sally Sheldon, "The Abortion Act 1967: A Critical Perspective", in Ellie Lee (ed.), *Abortion Law & Politics Today* (London: Macmillan, 1998) 43
- Sally Sheldon, "A Missed Opportunity to Reform an Outdated Law" (2009) 4 *Clinical Ethics* 3
- Sally Sheldon & Stephen Wilkinson, "Hashmi and Whitaker: An unjustifiable and misguided distinction" (2004) *Medical Law Review* 137
- Sally Sheldon, "Saviour Siblings and the Discretionary Power of the HFEA" (2005) *Medical Law Rev*iew 403
- Susan M. Shell, "Kant's Concept of Human Dignity as a Resource for Bioethics", in President's Council on Bioethics, *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (Washington: U.S. Government Printing Office, 2008) 333
- Francoise Shenfield, J. de Mouzon, Guido Pennings et al, "Cross Border Reproductive Care in Six Countries" (2010) 25 (6) *Human Reproduction* 1361
- Ann Sherlock, "The Right to Life of the Unborn and the Irish Constitution" (1989) 24 *Irish Jurist* 13
- Jerome Shestack, "The Philosophical Foundations of Human Rights", in Janusz Symonides (ed.), *Human Rights: Concepts and Standards* (Paris: UNESCO, 2003) 31

- Adam Shulman, "Bioethics and the Question of Human Dignity", in President's Council on Bioethics, *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (Washington: U.S. Government Printing Office, 2008) 3
- Marjorie M. Shultz, "Reproductive Technology and Intent Based Parenthood: An Opportunity for Gender neutrality" (1990) *Wisconsin Law Review* 297
- Evelyne Shuster, "The Posthumous Gift of Life: The World According to Kane" (1999) 15 *Journal of Contemporary Health Law & Policy* 410
- William Sieck, "In Vitro Fertilisation and the Right to Procreate: The Right to No" (1998) 147 *University of Pennsylvania Law Review* 435
- Reva Siegel, "Dignity and Sexuality: Claims on Dignity in Transnational debates over Aboriton and Same-Sex Marriage" (2012) 10 *International Journal of Constitutional Law* 355
- Lee Silver and Susan Silver, "Confused Heritage and the Absurdity of Genetic Ownership" (1998) 11 *Harvard Journal of Law & Technology* 593
- Peter Singer & Karen Dawson, "IVF Technology and the Argument from Potential", in Peter Singer, Helga Kuhse, Stephen Buckle, Karen Dawson & Pascal Kasimba (eds.), *Embryo Experimentation* (Cambridge: Cambridge University Press, 1990) 76
- Joseph Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" (1982) 6 *Wisconsin Law Review* 975
- Krista Sirola, "Are You My Mother: Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania" (2006) 14 *American University Journal of Gender, Social Policy & Law* 13
- Stephanie Sivinski, "Putting Too Many (Fertilised) Eggs in One Basket: Methods of Reducing Multifetal Pregnancies in the United States" (2010) 88 *Texas Law Review* 897
- Peter Skegg, "Human Corpses, Medical Specimens and Law of Property" (1975) 4 *Anglo- American Law Review* 412
- Loane Skene, "Proprietary Interests in Human Bodily Material: *Yearworth*, Recent Australian Cases on Stored Semen and Their Implications" (2012) 20 *Medical Law Review* 227
- Loane Skene, "Recent Developments in Stem Cell Research: Social, Ethical and Legal Issues for the Future" (2010) 17 *Indiana Journal of Global Legal Studies* 211
- Loane Skene, 'Proprietary Rights in Human Bodies, Body Parts and Tissue: Regulatory Contexts and Proposals for New Laws" (2002) *Legal Studies* 102

- Loane Skene, "An Overview of Assisted Reproductive Technology Regulation in Australia and New Zealand" (2000) 35 *Texas International Law Journal* 31
- Mary M. Slaughter, "The Legal Construction of Mother", in Martha Albertson Freeman and Isabel Karpin (eds.), *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995) 73
- David Smith, "Wombs for Rent, Selves for Sale?" (1988) 4 *Journal of Contemporary Health Law & Policy* 23
- Malcolm Smith, "Revising Old Ground in Light of New Dilemma: The Need for Queensland to Reconsider the Regulation of Assisted Reproductive Technologies" (2007) *Queensland University of Technology Law and Justice Journal* 24
- Jeanne Snelling, "Implications for Providers and Patients: A Comment on the Regulation Framework for Preimplantation Genetic Diagnosis in New Zealand" (2006) 8 *Medical Law International* 23
- Amy Spady, "The Sexual Freedom of Eve: A Recommendation for Contraceptive Sterilisation Legislation in the Canadian Post Re Eve Context" (2008) 25 *Windsor Review of Legal & Social Issues* 33
- Robert Sparrow & David Cram, "Saviour Embryos? Preimplantation Genetic Diagnosis as a Therapeutic Technology" (2010) 20(5) *Reproductive Biomedicine Online* 667
- Carla Spivack, "The Law of Surrogate Motherhood in the United States" (2010) 58 *American Journal of Comparative Law* 97
- Daniel Sperling, "'Male and Female he created them': Procreative Liberty, its Conceptual Deficiencies and the Legal Right to Access Fertility care of Males" (2011) *International Journal of Law in Context* 375
- Brad Spurgeon, "France bans Reproductive and Therapeutic Cloning" (2004) 329 *British Medical Journal* 130
- Ronald St. J. Macdonald, "The Margin of Appreciation" in Ronald Macdonald, Franz Matscher & Herbert Petzold (eds.), *The European System for the Protection of Human Rights* (London: Martinus Nijhoff, 1993) 83
- Judith Stacey. "Gay and Lesbian Families: Queer Like Us", in Jerome Skolnick & Arlene Skolnick (eds.), *Family in Transition* (15th ed.) (Boston: Pearson/ Allyn & Bacon Publishers, 2009) 480
- Judith Stacey, "The Family Values Fable", in Stephanie Coontz, Maya Parson & Gabrielle Raley (eds.), *American Families- A Multicultural Reader* (New York: Routledge, 1999) 487
- Christian Stack, "Embryonic Stem Cell Research According to German and European Law" (2005) 7 *German Law Journal* 625

- Ned Stafford, "German Parliament considers Three Bills on Preimplantation Genetic Diagnosis" (2011) 342 *British Medical Journal* 2473
- Michael Staines, "The Concept of 'The Family' Under the Irish Constitution" (1976) 11 *Irish Jurist* 223
- Lee Stang, "The Role of the Common Good in Legal and Constitutional Interpretation" (2005-2006) 3 *University of St. Thomas Law Journal* 48
- Bratislav Stankovi, "It's A Designer Baby! Opinions on Regulation of Preimplantation Genetic Diagnosis" (2005) *UCLA Journal of Law & Technology* 3
- Christian Starck, "The Religious and Philosophical Background of Human Dignity", in David Kretzmer & Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 179
- Mark Stasser, "You Take the Embryos But I Get the House (And the Business): Recent Trends in Awards Involving Embryos Upon Divorce" (2009) 57 *Buffalo Law Review* 1159
- Bronwyn Statham, "(Re)Producing Lesbian Infertility Discrimination in Access to Assisted Reproductive Technology" (2000) 9 *Griffith Law Review* 112
- Ciara Staunton, "Issues Concerning Embryonic Stem Cell Research in Ireland" (2012) *Medico-Legal Journal of Ireland* 38
- Daniel Steinberg, "Divergent Conception: Procreational Rights and Disputes over the Fate of Frozen Embryos" (1998) 7 *Boston University Public Interest Law Journal* 315
- Bonnie Steinbock, "The Morality of Killing Human Embryos" (2006) 34 *Journal of Law, Medicine & Ethics* 26
- Bonnie Steinbock, "Sex Selection: Not Obviously Wrong" (2002) *Hastings Center Report* 23
- Bonnie Steinbock, "Respect for Human Embryos", in Paul Lauritzen (ed.), *Cloning and the Future of Human Embryo Research* (Oxford: Oxford University Press, 2001) 21
- Bonnie Steinbock, "Sperm As Property", in John Harris & Soren Holm (eds.), *The Future of Human Reproduction- Ethics, Choice, and Regulation* (Oxford: Clarendon Press, 1998) 150
- Eva Steiner, "Surrogacy Agreements in French Law" (1992) 41 *International & Comparative Law Quarterly* 866
- Kristina Stern, 'Strict Liability and the Supply of Donated Gametes" (1994) 2 *Medical Law Review* 261

- Hamish Stewart, "A Formal Approach to Contractual Duress" (1997) 47 *University of Toronto Law Journal* 175
- Alissa Stockage, "Regulation Multiple Birth Pregnancies: Comparing the United Kingdom's Comprehensive Regulatory Scheme with the United States' Progressive Intimate Decision-Making Approach" (2010) 18 *Michigan State Journal of International Law* 559
- Timothy Stoltzfus Jost, "Rights of Embryo and Foetus in Private Law" (2002) 50 *American Journal of Comparative Law* 633
- Richard Storrow, "Therapeutic Reproduction and Human Dignity" (2009) 21(2) *Law & Literature* 257
- Richard Storrow, "The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard of Gatekeeping in Infertility Clinics" (2007) 28 *Cardozo Law Review* 2283
- Carson Strong, "Too Many Twins, Triplets, Quadruplets, and So On: A Call for New Priorities" (2003) 31 *Journal of Law, Medicine & Ethics* 272
- Anita Stuhmcke, "Limiting Access to Assisted Reproduction: *J.M. v Q.F.G.*" (2002) 1616 *Australian Journal of Family Law* 245
- Andrea Stumpf, "Redefining Mother: A Legal Matrix for new Reproductive Technologies" (1986) 96 *Yale Law Journal* 187
- Daniel Sulmasy, "Four Basic Notions of the Common Good" (2001) 7 *St. John's Law Review* 303
- Alastair Sutcliffe & Catherine Derom, "Follow-up of Twins: Health, Behaviour, Speech, Language Outcomes and Implications for Parents" (2006) 82 *Early Human Development* 379
- Sonia M. Suter, "The Repugnance 'Lens of *Gonzales v Calhart* and Theories of Reproductive Rights: Evaluating Advanced Reproductive Technology" (2008) 76 *George Washington Law Review* 1514
- Sonia Suter, "A Brave New World of Designer Babies?' (2007) 22 *Berkley Technology Law* Journal 897
- Sonia Suter, "Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy" (2004) 72 *George Washington Law Review* 737
- Elaine Sutherland, "A Step Closer to Same Sex Marriage Throughout Europe" (2011) *Edinburgh Law Review* 97
- Elaine Sutherland, "Is There a Right not to Procreate?", in Sheila McLean (ed.), *First Do No Harm: Law, Ethics, and Healthcare* (Aldershot: Ashgate, 2006) 319
- Amy Swiffen, "Life, Law, and the Common Good" (2010-2011) 11 *Insights on Law & Society* 4

- Tuija Takala & Matti Hayry, "Benefiting from Past Wrongdoing, Human Embryonic Stem Cell Lines, and the Fragility of the German Legal Position" (2007) 21 *Bioethics* 150
- Fiona Tasker, "Same-Sex Parenting and Child Development: Reviewing the Contribution of Parental Gender" (2010) 72 *Journal of Marriage & Family* 35
- Sara Taub, "The Human Egg as "Gift of Life": its Price is on the Rise" (2000) 2 *A.M.A. Journal of Ethics*
- Jochen Taupitz, "The German Stem Cell Act" (2010) 11 *German Law Journal* 1373
- Charles Taylor, "What's Wrong with Negative Liberty", in David Miller (ed.), *Liberty* (Oxford: Oxford University Press, 1991) 141
- Rachel Taylor, "Reversing the Retreat from *Gillick*? *R (Axon) v Secretary of State for Health*" (2007) 19 *Child and Family Law Quarterly* 8
- Roger Taylor, "The Fear of Drawing the Line at Cloning" (2003) 9 *Boston University Journal of Science & Technology Law* 379
- Sarah Terman, "Marketing Motherhood: Rights and Responsibilities of Egg Donors in ART Agreements" (2008) 3 *Northwestern Journal of Law and Social Policy* 167
- David Theyssen, "Balancing Interests in Frozen Embryo Disputes: Is Adoption a Reasonable Alternative?" (1999) 74 *Indiana Law Review* 711
- Carol Thomas, "Disability: Getting it 'Right'" (2008) 34 *Journal of Medical Ethics* 15
- Carol Thomas, "Disability Theory: Key Ideas, Issues and Thinkers", in Colin Barnes, Mike Oliver & Len Barton (eds.), *Disability Studies Today* (Cambridge: Polity Press, 2002) 38
- Cordelia Thomas, "Preimplantation Genetic Diagnosis: Development and Regulation" (2006) 25 *Medicine & Law* 365
- Cordelia Thomas, "Preimplantation Testing and the Protection of the 'Saviour Sibling'" (2004) 9 *Deakin Law. Review* 119
- Diane Tober, "Semen as Gift, Semen as Goods: Reproductive Workers and the Market in Altruism" (2001) 7 *Body & Society* 137
- Brian Tobin, "Same-sex couples and the Law: Recent Developments in the British Isles" (2009) *International Journal of Law, Policy and the Family* 309
- Mario Trespalacios, "Frozen Embryos: Towards an Equitable Solution" (1992) 46 *University of Miami Law Review* 803
- Christopher Tucker, "Sex, Lies and Legal Debate: Abortion Law in Australia- Note on *CES v Superclinics Australia*" (1995) 17 *Sydney Law Review* 446

- Annette Tuffs, "Germany Allows Restricted Access to Preimplantation Genetic Diagnosis" (2011) 343 *British Medical Journal* 4425
- Annette Tuffs, "German MPs are to Vote on Allowing Preimplantation Genetic Diagnosis" (2010) 341 *British Medical Journal* 6017
- Annette Tuffs, "Court Allows Preimplantation Genetic Diagnosis in Germany" (2010) 341 *British Medical Journal* 3741
- Kevin Tuininga, "The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law" (2008) 41 *Creighton Law Review* 185
- Emanuela Turillazzi & Vittorio Fineschi, "Preimplantation Genetic Diagnosis: A Step by Step Guide to recent Italian Ethical and Legislative Troubles" (2008) 34 *Journal of Medical Ethics* e21.
- Adrian Twomey, "The Death of the Natural Law?" (1995) 13 *Irish Law Times* 270
- Laura Underkuffler, "On Property: An Essay" (1990) 100 *Yale Law Journal* 127
- Angela Upchurch, "The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes Through the Adversarial Process" (2005) 33 *Florida State University Law Review* 395
- Lindsey A. Vacco, "Preimplantation Genetic Diagnosis: From Preventing Genetic Disease to Customising Children. Can the Technology be Regulated Based on the Parents' Intent?" (2005) 49 *St. Louis University Law Journal* 1181
- Ernest Van Den Haag, "On Privacy", in John William Chapman & James Roland Pennock (eds.), *Privacy: Nomos XIII* (Atherton Press: New York, 1971) 149
- Walter J. Ganshof van der Meersch, "Le caractere "autonome" des termes et la "marge d'appreciation" des governments dans l'interpretation de la Convention europeene des Droits de l'Homme", in Franz Matshcer & Herbert Petzold, (eds.), *Protecting Human Rights: The European Dimension- Studies in Honour of Gerard Wiarda* (Cologne: Carl Heymanns, 1988) 201
- Kenneth Vandervelde, " The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 *Buffalo Law Review* 325
- Jeffrey Van Detta, "Compelling Governmental Interest Jurisprudence of the Burger court: A New Perspective on *Roe v Wade*" (1986) 50 *Albany Law Review* 675
- Donald Van De Veer, "Are Human Rights Alienable?" (1980) 37(2) *Philosophical Studies* 165

- Andre Van der Walt, "The Protection of Private Property under the Irish Constitution: A Comparative and Theoretical Perspective", in Oran Doyle and Eoin Carolan (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 398
- Katrien Vanfraussen, Ingrid Ponjaert-Kristoffersen & Anne Brewaeys, "Family Functioning in Lesbian Families created by donor Insemination" (2003) 73 *American Journal of Orthopsychiatry* 78
- Liezl van Zyl and Anton van Niekerk, "Interpretations, Perspectives and Intentions in Surrogate Motherhood" (2000) 26 *Journal of Medical Ethics* 404
- Sandi Varnado, "Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology" (2006) 66 *Louisiana Law Review* 609
- Simo Vehmas, "Response to 'Abortion and Assent' by Rosamund Rhodes and 'Abortion, Disability, Assent and Consent' by Matti Hayry" (2001) 10 *Cambridge Quarterly of Healthcare Ethics* 433
- Kathryn Venturos Lono, "From Cradle to Tomb: Estate Planning Considerations of the New Procreation" (1996) 57 *Louisiana Law Review* 27
- Patrick Verspieren, "Dignity in Political and Bioethical Debates", in Regina Ammicht-Quinn, Maureen Junker-Kenny & Elsa Tamez (eds.), *The Discourse of Human Dignity* (London: SCM Press, 2003) 13
- Egbert W. Vierdag, "The Legal Nature of Rights Granted by the International Covenant on Economic, Social and Cultural Rights" (1978) 9 *Netherlands Journal of International Law* 103
- Stephane Viville, Nadia Messaddeq, Elisabeth Flori & Pierre Gerlinger, "Preparing for Preimplantation Genetic Diagnosis in France" (1998) 13(4) *Human Reproduction Update* 1022
- Ferdinand von Prondzynski, "Natural Law and the Constitution" (1977) 1 *Dublin University Law Journal* 32
- Humphrey Waldock, "The Effectiveness of the System Set up by the European Convention on Human Rights" (1980) *Human Rights Law Journal* 1
- Ellen Waldman, "The Parent Trap: Uncovering the Myth of 'Coerced Parenthood' in Frozen Embryo Disputes" (2004) 53 *American University Law Review* 1021
- Jeremy Waldron, "Autonomy and Perfectionism in Raz's *Morality of Freedom*" (1989) 62 *South Californian Law Review* 1097

- April Walker, "His, Hers or Ours? Who Has the Right to Determine the Disposition of Frozen Embryos after Separation or Divorce?" (2008) 16 *Buffalo Women's Law Journal* 39
- Kristen Walker, "The Bishops, The Doctor, His Patient and the Attorney-General: The Conclusion of the McBain Litigation" (2002) 30 *Federal Law Review* 507
- Julie Wallbank, "Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child" (2002) 10 *Medical Law Review* 271
- Brian Walsh, "The Judicial Power, Justice and the Constitution of Ireland", in Deirdre Curtin & David O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Honourable Mr. Justice T.F. O'Higgins* (Dublin: Butterworths, 1992) 145
- Brian Walsh, "The Constitution and Constitutional Rights", in Frank Litton (ed.), *The Constitution of Ireland, 1937-1987* (Dublin: Institute of Public Administration, 1988) 86
- Rachael Walsh, "Private Property Rights in the Drafting of the Irish Constitution" (2011) 33 *Dublin University Law Journal* 86
- Paula Walter, "His, Hers, or Theirs- Custody, Control and Contracts: Allocating Decisional Authority over Frozen Embryos" (1999) 29 *Seton Hall Law Review* 937
- Andrew Wancata, "No Value for a Pound of Flesh: Extending Market-Inalienability of the Human Body" (2003-04) 18 *Journal of Law & Health* 199
- Lynn Wardle, "Comparative Perspectives on Adoption of Children by Cohabiting, Non-Marital Couples and Partners" (2010) 63 *Arkansas Law Review* 31
- Mary Warnock, "The Limits of Rights Based Discourse", in Antje Du Bois-Pedain & John R. Spencer (eds.), *Freedom and Responsibility in Reproductive Choice* (Oxford: Hart Publishing, 2006) 3
- Mary Warnock, "Do Human Cells have Rights?" (1987) 1 *Bioethics* 1
- Mary Anne Warren, "On the Moral and Legal Status of Abortion" (1973) 57 *The Monist* 43
- Samuel Warren & Louis D. Brandeis, "The Right to Privacy" (1890) 4 *Harvard Law Review* 193
- Chantelle Washenfelder, "Regulating a Revolution: the Extent of Reproductive Rights in Canada" (2004) 12 *Health Law Review* 44
- Carl Wellman, "A New Conception of Human Rights", in Eugene Kamenka & Alice Erh-Soon Tay (eds.), *Human Rights* (London: Edward Arnold Publisher, 1978) 48

- Christina Wells, "Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence" (1997) 32 *Harvard Civil Rights – Civil Liberties Law Review* 159
- Dagan Wells & Jon Sherlock, "Strategies for Preimplantation Genetic Diagnosis of Single Gene Disorders by DNA Amplification" (1998) *18 Prenatal Diagnosis* 1389
- Mary Welstead, "This Child is My Child; This Child is Your Child; This Child was Made For You and Me- Surrogacy in England and Wales", in Bill Atkin (ed.), *The International Survey of Family Law 2011 Edition* (Bristol: Jordan Publishing, 2011) 165
- Steven Wheatley, "Human Rights and Human Dignity in the Resolution of Certain Ethical Questions in Biomedicine" (2001) *European Human Rights Law Review* 312
- James Q. Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty" (2004) 113 *Yale Law Journal* 1151
- Gerry Whyte, "The Moral Status of the Embryo" (2006) 12 *Medico-Legal Journal of Ireland* 77
- Gerry Whyte, "The Role of the Supreme Court in Our Democracy: A Response to Mr. Justice Hardiman" (2006) 28 *Dublin University Law Journal* 1
- Gerry Whyte, "Natural Law and the Constitution" (1996) 14 *Irish Law Times* 8
- Stephen Wilkinson, "Sexism, Sex Selection and Family Balancing" (2008) 16 *Medical Law Review* 369
- Glanville Williams, "The Fetus and the 'Right to Life'" (1994) 53 *Cambridge Law Journal* 71
- Bryn Williams- Jones, "Commercial Surrogacy and the Redefinition of Motherhood" (2002) 2 *Journal of Philosophy, Science & Law*
- James Wilson, "The Paradox of Cloning", in Leon Kass & James Wilson, *The Ethics of Human Cloning* (Washington: AEI Press, 1998) 61
- James Wilson, "Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum" (1995) 27 *Arizona State Law Journal* 773
- Susan Wolf, Jeffrey Kahn & John Wagner, "Using PGD to Create a Stem Cell Donor: Issues, Guidelines and Limits" (2003) 31 *Journal of Law, Medicine & Ethics* 327
- George Wright, "Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle" (2002) 36 *University of Richmond Law Review* 271
- Marcia Joy Wurmbrand, "Frozen Embryos: Moral, Social, and Legal Implications" (1986) 59 *South Californian Law Review* 1079

- John Baldwin Young, "Introduction: A Look at Privacy", in John Baldwin Young (ed.), *Privacy* (Chicester: John Wiley & Sons, 1978) 1
- Robert Young, "Autonomy and the 'Inner Self'", in John Christman (ed.), *The Inner Citadel: Essays on Individual Autonomy* (New York: Oxford University Press, 1989) 77
- Robert Young, "The Value of Autonomy" (1982) *32 Philosophical Quarterly* 35
- Farhat Yusuf & Stefania Siedlecky, "Legal Abortion in South Australia: A Review of the First 30 years" (2002) 42(1) *Australian and New Zealand Journal of Obstetrics & Gynecology* 15
- Andrew Zacher, "Oocyte Donor Compensation for Embryonic Stem Cell Research: An analysis of New York's 'Payment for Eggs Program'" (2011) 21 *Albany Law Journal of Science & Technology* 323
- Sanja Zganjanin, "What Does It Take to be A (Lesbian) Parent? On Intent and Genetics" (2005) 16 *Hastings Women's Law Journal* 251
- Jonathan Zimmern, "Consent and Autonomy in the Human Tissue Act 2004" (2007) 18 *Kings Law Journal* 313
- Marisa Zizzi, "The Preembryo Prenup: A Proposed Pennsylvania Statute Adopting A Contractual Approach to Resolving Disputes Concerning the Disposition of Frozen Embryos" (2012) 21 *Widener Law Journal* 391
- Jamie Zuckerman, "Extreme Makeover- Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements" (2008) 32 *Nova Law Review* 661

REPORTS

IRELAND

- Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (Department of Health, 2005)
- Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996)
- Department of An Taoiseach, *Green Paper on Abortion* (1999)
- Irish Council for Bioethics, *Stem Cell Research: Hope or Hype? Exploration of the Scientific and Ethical Questions* (February 2010)
- Irish Council for Bioethics, *Ethical, Scientific and Legal Issues Concerning Stem Cell Research* (2008)

- Irish Council for Bioethics, *Human Biological Material: Recommendations for Collection, Use and Storage in Research* (2005)
- Joint Committee on the Constitutional Amendment, *Final Report- Proposal for a Constitutional Amendment to Strengthen Children's Rights* (February 2010)
- Law Society Law Reform Committee, *Adoption Law- A Case for Reform* (August 2000)
- Law Reform Commission, *Children and the Law: Medical Treatment* (LRC 103-2011)
- Law Reform Commission, *Legal Aspects of Family Relationships* (LRC 101-2010)
- Law Reform Commission, *Report on the Implementation of the Hague convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1998* (LRC 58-1998)
- Deirdre Madden, *Report of Dr. Deirdre Madden on Post Mortem Practice and Procedures: Presented to Mary Harney T.D.* (Dublin: Stationery Office, 2006)
- Valerie O'Brien & Valerie Richardson, *Towards a Standardised Framework for Intercountry Adoption Assessment Procedures: A Study of Assessment Procedures in Intercountry Adoption* (Dublin: The Stationery Office, 1999)
- Judy Walsh & Fergus Ryan, *The Rights of De Facto Couples* (Dublin: Irish Human Rights Commission, 2006)

UNITED KINGDOM

- All Party Parliamentary Group on Infertility, *Holding Back the British IVF Revolution? A Report into NHS IVF Provision in the UK Today* (June 2011)
- Peter Braude, *One Child at a Time: Reducing Multiple Births after IVF: Report of the Expert Group on Multiple Births after IVF* (October 2006)
- Margaret Brazier, Susan Golombok & Alastair Campbell, *Surrogacy: Review for the UK Health Ministers of Current Arrangements for Payment and Regulation: Consultation Paper* (London: Department of Health, 1997)
- Department of Health, *Adoption: A New Approach- A White Paper* (cm 5017, December 2000).
- Department of Health and Welsh Office, *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group- A Consultation Document* (Department of Health and Welsh Office, 1992)

- Department of Health and Social Security, *Report of the Committee of Inquiry Into Human Fertilisation and Embryology* (Cmnd 9314) (London: The Stationery Office, 1984)
- *Review of the Human Fertilisation and Embryology Act- Proposals for Revised Legislation (including establishment of the Regulatory Authority for Tissue and Embryos)*, presented to Parliament by the Secretary of State for Health (December 2006)
- Human Fertilisation and Embryology Authority, *Code of Practice- 8th Edition* (2009)
- Human Fertilisation and Embryology Authority, *The Best Possible Start to Life: A Consultation Document on Multiple Births After IVF* (April 2007)
- Human Fertilisation and Embryology Authority, Multiple Birth and Single Embryo Transfer Review: Evidence Base and Policy Analysis (October 2007) HFEA (17/10/07) 401
- Human Fertilisation and Embryology Authority, Human Fertilisation and Embryology Report: Preimplantation Tissue Typing (July 2004)
- House of Commons Science and Technology Committee, *Human Reproductive Technologies and the Law: Fifth Report of Session 2004/05*
- National Institute for Clinical Excellence, *Fertility: Assessment and Treatment for People with Fertility Problems* (Clinical Guidance 11)(February 2004)
- Nuffield Council on Bioethics, *Human Tissue: Ethical and Legal Issues* (London, April 1995)

UNITED STATES

- American Psychological Association, *Lesbian and Gay Parenting* (Washington: American Psychological Association, 2005)
- American Society of Reproductive Medicine, *Practice Committee Report: Multiple Pregnancy Associated with Infertility Treatment* (November 2000)
- Ethics Committee of American Society of Reproductive Medicine, "Donating Spare Embryos for Stem Cell Research" (2009) 91 *Fertility & Sterility* 667
- Ethics Committee of the American Society of Reproductive Medicine, "Financial Compensation of Oocyte Donors" (2007) 88 *Fertility & Sterility* 306
- Ethics Committee of American Society of Reproductive Medicine, "Preconception Gender Selection for Non-Medical Reasons" (2001) 75 *Fertility & Sterility* 861

- Ethics Committee of the American Society of Reproductive Medicine, "Human Somatic Cell Nuclear Transfer" (2000) 74 *Fertility & Sterility* 873
- Judith Johnson & Erin Williams, *Human Cloning: CRS Report for Congress (CRL31015)* (The Library of Congress: Congressional Research Service, 2006)
- National Bioethics Advisory Commission, *Cloning Human Beings: Report and Recommendations of the National Bioethics Advisory Commission* (June 1997)
- The Practice Committee of the Society of Assisted Reproductive Technology and American Society of Reproductive Medicine, "Guidelines on the Number of Embryos Transferred" (2009) 92(5) *Fertility & Sterility* 1518
- Practice Committee of the Society for Assisted Reproductive Technology and the Practice Committee of the American Society for Reproductive Medicine, "Preimplantation Genetic Testing: A Practice Committee Opinion" (2008) 90(3) *Fertility & Sterility* 136
- The Practice Committee of the Society of Assisted Reproductive Technology and American Society of Reproductive Medicine, "Guidelines on the Number of Embryos Transferred" (2004) 82(3) *Fertility & Sterility* 773

AUSTRALIA

- Fertility Society of Australia- Reproductive Technology Accreditation Committee, *Code of Practice for Assisted Reproductive Technology Units* (October 2010)
- Joint Working Group of Standing Committee of Attorneys-General Australian Health Ministers' Conference and Community and Disability Services Ministers' Conference, *A Proposal For a National Model to Harmonise Regulation of Surrogacy* (January 2009)
- Legislation Review Committee, *Legislation Review of the Prohibition of Human Cloning Act 2002 and the Research Involving Human Embryos Act 2002* (Lockhart Review) (December 2005)
- Legislative Council Government Administration Committee 'A', *Inquiry into Surrogacy Bill 2011 and Surrogacy (Consequential Amendments) Bill 2011* (No. 41 of 2011) (Parliament of Tasmania)
- Law Reform Commission of Australia, *Human Tissue Transplants* (1977) (Report no 7)

- New South Wales Department of Health, *Consultation Draft: Assisted Reproductive Technology Bill 2003* (New South Wales)
- National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (September 2007)
- Victoria Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (March 2007)
- Victorian Assisted Reproductive Treatment Authority, Conditions for Use of Preimplantation Genetic Diagnosis (February 2010)

CANADA

- Assisted Reproduction Canada, "Prevention of Multiple Births Associated with Infertility Treatments: A Canadian Framework"
- Canadian Institutes of Health Research, *Updated Guidelines for Human Pluripotent Stem Cell Research* (June 2010)
- Law Reform Commission of Canada, *Procurement and Transfer of Human Tissue and Organs* (Working Paper No 66, 1992)
- Patricia Baird, Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies (Volume 1) (Government of Canada Publications, 1993)

NEW ZEALAND

- National Ethics Committee on Assisted Human Reproduction, *Guidelines on Preimplantation Genetic Diagnosis* (March 2005)
- New Zealand Law Commission, *New Issues on Legal Parenthood* (NZLCR 88) (April 2005)

FRANCE

- CCNE, *Re-Examination of the Law on Bioethics* (No 60- June 25, 1998)
- National Consultative Ethics Committee for Health and Life Sciences, *Opinion on Ethical Issues in Connection with Antenatal Diagnosis: Prenatal Diagnosis and Preimplantation Genetic Diagnosis* (15th October 2009) (Opinion No. 107)

GERMANY

- German National Ethics Council, *Genetic Diagnosis Before and During Pregnancy* (January 2003)

INTERNATIONAL REPORTS

- Council of Europe, *Literature Review of the WHO International Classification of Impairments, Disabilities and Handicaps(ICIDH) and rehabilitation of people with disabilities* (Council of Europe Publishing, Strasbourg, 1998)
- World Health Organisation, *International Classification of Impairments, Disabilities and Handicaps: a manual for classification relating to the consequences of disease* (WHO, Geneva, 1980)