ARTIFICIAL REPRODUCTION: THE RIGHT TO REPRODUCE AND THE RIGHT TO FOUND A FAMILY

by

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TO MY PARENTS,

STEWART,

MR. AND MRS. SIMPSON,

AND SUKIE.

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ABBREVIATIONS

ALL. E R (All England Report)
Can. Bar Rev. (Canadian Bar Review)
D & R (Decisions and Reports of the European Commission of Human Rights)
DLR (Dominion Law Report)
Dec. Adm. Com. Ap. (Decision of the European Commission of Human Rights as to the Admissibility of Application)
Fam. Law (Family Law)
M.L.R. (Modern Law Review)
N.L.J. (New Law Journal)
Op. Com. (Opinion of the European Commission of Human Rights)
P (Probate)
SC (Session Cases)
SLT (Scottish Law Times)

SUMMARY

In Britain, approximately 10% of all married couples are infertile. Infertility is a significant human problem which can generate distress and suffering. The use of artificial reproductive methods (artificial insemination, *in vitro* fertilisation, and surrogacy) has been the subject of concern in this country, especially in the last few years. Discussions on the subject have usually been conducted with no reference to specific concepts. This thesis endeavours to fill this theoretical gap. It examines what rights, if any, people have in the areas of reproduction and founding of a family which may support the claim of the infertile to found a family (whether through reproduction or not) by using artificial reproductive methods. If certain rights are apparent, is there any compelling moral, social or legal justification for defeating or hindering their exercise? The moral and social acceptability of artificial reproductive methods and some of the complex and fundamental legal issues they engender will be examined. Assessments will be made as to whether compelling interests and legal difficulties can be satisfactorily resolved, thus removing them as serious obstacles to the exercise of rights. Lastly, the question of the type of access to artificial reproductive methods will be considered in the light of the nature and scope of the rights which have been identified.

CHAPTER 1

INTRODUCTION

(1) INFERTILITY AND ITS EXTENT

The problem of human infertility is as old as humanity. For instance, it was recorded in Genesis 16 that Sarah, Abraham's wife, could not have children and she asked her maid to bear him a child. Today, it is estimated that approximately some 10%[1] of British married couples are infertile for one reason or another;[2] and that the husband's infertility is responsible in about one-third of these couples.[3] This indicates an incidence of 16,000 marriages a year which will be infertile because of the husband.[4] In other words, the total number of infertile marriages per annum in the UK is about 48,000.

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1. See The Report of the Committee of Inquiry into Human Fertilisation and Embryology, London, HMSO, Cmnd. 9314, 1984, para. 2.1, (hereinafter cited as the Warnock Report). The basis on which this figure is arrived at is not mentioned. It was said that 75% of couples engaging in normal sexual intercourse without using contraceptive devices achieve pregnancy within 12 months. Where this is not the case, a couple may be potentially infertile. See Pepperill, R. J., Hudson, B., Wood, C., The Infertile Couple, Edinburgh, Churchill Livingston, 1980, p.1.
2. For the various causes of infertility, see infra., chapter 2.
3. Snowden, R., & Mitchell, G.D., The Artificial Family, London, Allen & Unwin, 1981, p. 14.
4. Snowden, R., & Mitchell, G.D., op. cit. p.14.

(2) CONVENTIONAL MEANS FOR ALLEVIATING INFERTILITY

An obvious means whereby infertile couples can have children is by adoption. Up to 100,000 British couples at any one time would like to adopt babies.[5] However, the number of babies available for adoption has been declining since the 1970s.[6] As the Warnock Report noted,[7] there are at least four reasons for this: (1) the widespread use of contraceptive devices, (2) the increase in the number of abortions, (3) changing attitudes to, and state support for, single parents, and (4) the freer availability of sterilisation. As a result, there are fewer babies available for adoption.[8] In 1983, there were only 9,029 adoptions in England and Wales. Over half of these were 'step-parent adoptions' (that is, where one of the adoptive parents was already the child's biological parent). Fewer than 2,000 of the remaining adoptees were under one year old. The most sought after group of healthy white babies were adopted at a rate of about 1,200 a

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5. See "Is Buying Babies Bad?", The Economist, 12 Jan., 1985, p. 12.
6. "Is Buying Babies Bad?", loc. cit.
7. The Warnock Report, para. 2.1.
8. However, there are some 20,000 'special needs' children in the care of British local authorities. For the work of adoption agencies in finding homes for these children, see Ingram, Miranda, "Adopting the Unadoptable", New Society, 9 August, 1985, pp. 206-7.

year. The demand for them, therefore, is in no way reflected by the supply.[9] Consequently, only a relatively small number of couples can succeed in adopting a baby.

(3) THE POSSIBLE EFFECTS OF INFERTILITY

Whether the desire for a child emanates from an innate biological drive, or relates to social pressures, or a combination of these factors, is not the issue here.[10] The reality is that a large number of infertile couples desperately want either children of their own (that is, they wish to procreate), or other children, in order that they may establish a family.[11]

This is borne out by the fact that a large number of infertile couples seek medical advice and assistance on how to achieve pregnancy.[12] Some couples are even willing to go through often very complicated fertility diagnostic procedures, in some

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9. See "Is Buying Babies Bad?", The Economist, 12 Jan., 1985, p. 12. The demand and supply ratio in the UK is 80:1.
10. For a discussion regarding the tenability of the procreational instinct theory, see Ruut, Veenhoven, "Is There an Innate Need for Children?", (1975) 4 European Journal of Social Psychology, pp. 495-501.
11. See infra. chapter 3, pp. 71-77, for the distinction between procreation and founding of a family.
12. See Menning, B.E., "The Infertile Couple: a Plea for Advocacy", (1975) 54 Child Welfare, 454.

cases to the extent of exhausting the last personal, emotional and medical possibility, in an attempt to have a child.

The diagnostic procedure for infertility is often complicated.[13] It involves the use of basal temperature chart, blood and urine studies for various hormonal levels, semen analysis, biopsies of tissue, x-ray examination of the reproductive tract or even direct visualisation, by surgical means, of internal organs. Depending on the diagnosis, treatment may consist of the provision of hormones or steroids, which may be hazardous or have unpleasant side effects. Surgically, an individual may require resection or repair of organs or a delicate operation in an attempt to open passage ways.

The final verdict of infertility is always traumatic. The initial shock of it gives way to a protracted period of human suffering, with an eventual resolution of feelings and, hopefully, recovery. Nijs & Rouffa[14] reported a sequence of four stages which embrace a feeling of confusion for one week; puzzlement, rebellion and doubting for 2 or 3 weeks; sexual dysfunction for 2 or 3 months and a depressive reaction which may last 6 months. According to

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13. Menning, B.E., loc. cit.
14. Nijs, P., Rouffa, L., "AID Couples: Psychological and Psychopathological Evaluation", (1975) 7 Andrologia 187.

them, this sequence is reminiscent of the changes which follow bereavement. The initial sense of shock is accompanied by feelings of confusion and numbness, often with an associated sense of isolation and loneliness. They reported that the individual may experience anger at the sense of losing control of his or her body. Lowered self-esteem may lead to feelings of despair, and quilt feelings may be evoked. Grief is felt not only over the loss of the body's fertility function but also over the implicit loss of a natural child (potential, anonymous and idealised).

Furthermore, infertility may have serious social and psychological consequences in both men and women. In a survey of patients in an in vitro fertilisation programme, some of the important reasons given for wanting children are that one has a strong desire to have a child, life is incomplete without a child, or the feeling of uselessness without a child.[15] An infertile woman, thus, may feel that her life is incomplete, unfulfilled and that she is not quite a 'woman' because she is unable to have a child, or to undertake the role of parenting.

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15. Singer, P. & Wells, D, The Reproduction Revolution, Oxford, Oxford University Press, 1984, p. 237.

If a man is infertile, he is somehow seen to be lacking manhood and inadequate. This, perhaps, explains partly why AID (that is, artificial insemination using semen from a donor) is almost invariably kept secret.[16] A wife who has received AID writes,

> "...I personally would prefer to adopt a child but my husband was absolutely against it. He was scared by the thought that people should know he was no good..."[17]

Infertility may also put great strain on marriages. One infertile woman describes her feeling in this way:

> "I gave myself to the end of this year to become pregnant (having tried to have a baby for the past five years), and I decided that if I wasn't, then I had best leave my husband and let him look for a younger, more productive lady to have a baby with. This will be a very sad thing, as Martin and I have everything going for us, but children."[18]

Infertility, therefore, is a genuine and sometimes destructive human problem. Its circumvention has considerable importance both for the happiness of individuals, and for the future of the species. Yet, decisions taken in this respect have

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16. See infra. chapter 4, pp. 108-116.
17. Snowden, R. & Mitchell, G. D., op. cit. p. 40. See also Snowden, R. & Mitchell, G. D., Artificial Reproduction: a Social Investigation, Allen & Unwin, London, 1984.
18. See Singer, P. & Wells, D., op. cit. p. 54.

both moral and legal implications which must be considered in tandem with social consequences. It is not sufficient, therefore, merely to state that there is a problem causing human suffering and demanding attention. If already limited resources are to be channelled into this area, a consistent ideology is needed to explain the commitment to infertility circumvention, and delineate the extent to which services can, or should, be made available. If such a rationale can be found and adequately explained, then there are implications for society, for medicine and for the law.

It is clear that there is a sizeable proportion of the population for whom the inability to procreate and/or to found a family can cause considerable suffering. Since the conventional means for the circumvention of infertility eg. adoption are inadequate to meet all these needs, and since alternative artificial reproductive methods (artificial insemination,[19] in vitro fertilisation[20] and surrogacy) have been developed which can circumvent various causes of infertility, the contention is often that these methods should be available to enable people to found a family

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19. Hereinafter referred to as AI.
20. Hereinafter referred to as IVF.

(whether through reproduction or not),[21] and that they should also be part of state funded infertility treatments. This thesis examines the strength of this contention.

(4) FRAMEWORK OF THE THESIS

Before embarking on an appraisal of the strength of this contention, chapter 2 will explain the nature, usefulness and current status of the artificial reproductive methods which will be considered in this thesis.

The use of artificial reproductive methods for the founding of a family (whether through reproduction or not) has been the subject of concern both in British and in many other affluent societies. Although debates today are mainly centred on the acceptability of surrogacy, rather than AI & IVF, an examination and appraisal of the debates regarding the latter, and not simply the former, can and will furnish a wider picture concerning the claim of the infertile to have access to artificial reproductive methods.

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21. Eg. a wife, with a sterile husband, undertaking artificial insemination using semen of a donor will be founding a family through reproduction, whereas the husband may be said to be founding a family without reproduction, see infra. chapter 3, pp. 71-77, for a fuller exposition of the distinction between the concepts of reproduction and founding of a family.

In considering this, one is clearly dealing with moral and social issues as well as legal ones. Although the law is not the exact mirror of morality, the reaction and the role of the law regarding artificial reproductive methods must and should be anchored on conclusions reached after rational discussion of the issues involved.[22]

Debates regarding the acceptability of artificial reproductive methods have often been conducted in a vacuum in which no specific conceptual position is adopted or referred to. This is so even in relation to AI & IVF which have largely been accepted by the British society at large as viable alternative methods of enabling the founding of a family (whether through reproduction or not). The relative absence of a theoretical perspective is especially striking, and significant, in debates regarding the acceptability of surrogacy.

In this thesis, endeavours will, thus, be made to fill this theoretical gap in the current debates. The discussion, therefore, will concentrate on viewing the problems of infertility and their circumvention from a rights-based perspective. This type of discourse is increasingly used to validate claims

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22. This is particularly vital in the context of surrogacy where emotion and sentiment can run high.

which individuals feel to be particularly significant. It may, therefore, prove to be fruitful to consider analytically the value of such discourse in relation to those whose condition militates against the satisfaction of a need, which is strongly felt to be both legitimate and desirable.

To that end, endeavours will be made, in chapter 3, to examine what rights, if any, people have in the areas of reproduction and founding of a family both by analysing Anglo-American judicial attitudes, and the philosophy behind Article 12 of the European Convention on Human Rights which talks about the "right to marry and to found a family".[23]

In this chapter, the two concepts - reproduction and founding of a family - will be discussed in detail in order to assess whether or not they are essentially aspects of the same right, or whether they can be meaningfully perceived as separate individual rights.

Chapter 3, in effect, sets out the thematic approach of the whole thesis. If individuals have certain rights in the areas of reproduction and founding of a family, some social and legal implications can be drawn from this regarding the use

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23. See generally, Jacobs, F.G., The European Convention on Human Rights, Oxford, Clarendon Press, 1975, p. 162.

of artificial reproductive methods. Moreover, the nature of any identificable rights may significantly affect the expectations which may legitimately attach to the behaviour of a given state. These issues will be the subjects of consideration in the rest of the thesis.

Having examined what rights people have in the areas of reproduction and founding of a family, the question is:- is the use of artificial reproductive methods in order to exercise these rights acceptable? In other words, are there compelling moral, social or legal reasons which may hinder or defeat the exercise of rights? Chapters 4 and 6, therefore, deal with the moral and social acceptability of artificial techniques (AI, IVF, and the use of donated gametes), and surrogacy, respectively, in founding a family (whether through reproduction or not).

These two chapters essentially involve analysis of the validity, compellingness and superability of certain arguments - whether personal, social or moral in nature - against the use of artificial reproductive methods. This is consistent with the theme, established in chapter 3, that the burden of proof in arguments seeking to deny access to use artificial reproductive methods for the founding of a family (whether through reproduction or not) is on those who maintain such a view.

It will be argued, in both chapters 4 & 6, that artificial reproductive methods, as means of founding a family (whether through reproduction or not) should not be outlawed. Regulation may furnish a bedrock for these methods, and a proper legal foundation for their use, which is also important, can be shaped.

Consequently, in chapters 5 & 7, certain vital legal issues involved in founding a family through artificial reproductive methods will be examined.

One legal issue, engendered by the use of artificial reproductive methods, is the definition of parenthood. The law and society are obviously interested in this question,[24] since all children have legally defined parents unless they are unknown (e.g. in cases of babies abandoned at birth, or where fathers are unknown). Furthermore, since current English and Scottish law use the concept of parenthood as the device for according parental duties regarding children born as a result of natural reproduction, it seems logical to analyse, in relation to children born as a result of artificial reproductive methods where the question of parenthood is not totally certain at the moment, who ought to, or should, have parental

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24. See eg. attempts to amend Clause 1 of the Family Law Reform Bill 1987 by Lord Denning and Lord Kilbracken, to include definitions of 'mother' and 'father'. See Weekly Hansard, Vol. 484, No. 1352, Col. 552-527, See Appendix 1.

duties in their respect. Resolution of this issue may further facilitate questions relating to, for example, registration of births.

Surrogacy as a means of founding a family, however, can generate additional legal issues, including questions of enforceability and the means of securing a legally recognised relationship between the commissioning parties and a surrogate-born child. These issues will be examined in chapters 6 & 7.

In conclusion, therefore, it will be contended that certain rights are apparent in matters relating to human reproduction in general, and in artificial reproductive methods in particular. Such rights can be the cornerstone of an argument in favour of access to artificial reproductive methods - an argument which could be defeated only where the individual concerned is deemed not to have such rights, or where the methods themselves are perceived as morally or socially unacceptable *in se*.

In chapter 8, however, consideration will be given to the implications of accepting such methods, and will explore specifically the issue as to whether or not identification and exposition of these rights necessarily implies a certain type of access - that is, given that artificial reproductive methods are not inherently unacceptable morally and socially, and that fundamental legal difficulties are not insurmountable, does this demand state provision of these methods?

The use of artificial reproductive methods for the founding of a family can raise many social and legal issues.[25] This thesis, therefore, is only an inceptive attempt to examine the question, and to analyse some of the fundamental legal issues which are consequential on medical advance. It is hoped that the thesis will generate, and contribute to, debate both in respect of the issues discussed, and on a wider range of important issues in the field of artificial reproduction.

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25. For a discussion of the issue of eligibility, see eg. the Warnock Report, paras. 2.5-2.12; Higgs Roger, "Lesbian Couples: Should Help Extend to AID", (1978) 4 Journal of Medical Ethics, p. 91; Hanscombe, Gillian, "The Right to Lesbian Parenthood", (1983) 9 Journal of Medical Ethics, p. 133. For a discussion of the possible legal issues engendered by the use of artificial reproductive methods, see eg. Cusine, D. J., "Artificial Insemination", in McLean, S.A.M. (ed), Legal Issues in Medicine, Aldershot, Gower, 1981, p. 163; Wright Gerald, "The Legal Implications of IVF", in Test-Tube Babies, a Christian View, London, Unity Press, Becket Publications, 1984, pp. 39-44.

CHAPTER 2

ARTIFICIAL REPRODUCTIVE METHODS

(1) INTRODUCTION

This chapter will seek to provide a brief exposition of both the nature and the estimated efficacy of artificial reproductive methods in the circumvention of infertility (whether through reproduction or not).

Throughout this thesis, certain terminology is used to differentiate and distinquish the matter under consideration. Thus, the term artificial reproductive 'techniques' is used to refer to artificial insemination[26] and *in vitro* fertilisation,[27] including their variations where donated gametes are used. Surrogacy, therefore, is not taken to be an artificial reproductive technique as such, but is rather one of the artificial reproductive 'methods', when it is being implemented by artificial techniques. Thus, the term artificial reproductive 'methods' will be used in this thesis to include AI, IVF and surrogacy (as implemented by artificial techniques), whereas, artificial 'techniques' refers only to AI, IVF and the use of donated gametes. Since the thesis concerns artificial reproduction, surrogacy as implemented by natural means will not be discussed.[28]

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26. Hereinafter referred to as AI.
27. Hereinafter referred to as IVF.
28. That is, no consideration will be given to pregnancies achieved by means of sexual intercourse even when they are specifically achieved with the aim that the subsequent child should be handed over to the social mother.

In this chapter, three main artificial reproductive methods, as options for the infertile who seek to found a family (whether through reproduction or not), will be considered.

(2) ARTIFICIAL INSEMINATION (AI)

AI is a technique whereby semen of a man is mechanically introduced into a woman's vagina with the intention that conception will take place.

The first recorded human artificial insemination was in 1790 when a British doctor, John Hunter, succeeded in inseminating the wife of a linen draper in London with the seed of her husband who was suffering from a disability which made normal intercourse impossible. It was reported that normal pregnancy and delivery ensued.[29]

The first recorded successful human insemination by donor (AID) was not performed until 1884 in the U.S.A.. This was revealed when, in 1909, Addison Davis Hard published in a letter in an American journal - Medical World - in which he claimed that the first human donor insemination had been performed at Jefferson Medical College in America in 1884. The operation was performed when it was found

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29. Finegold, Wilfred J., Artificial Insemination, Springfield, Illinois, Charles C. Thomas, 1964, pp. 5-9.

that a patient's husband was azoospermic.[30] The surgeon discussed the case in the medical school with a group of students, one of whom was Hard. They suggested that semen should be collected from the 'best looking member of the class' and used to inseminate the wife. According to Hard, the operation was performed under anaesthetic and neither the wife nor the husband was informed. The wife became pregnant and a son was born. The secret was kept until the son was 25 when Hard published information concerning the experiment.

In the U.K., the issue of artificial insemination was discussed seriously in the 1930s.[31] In 1945, the general public, the press and parliament became involved.[32] The then Archbishop of Canterbury set up a commission to enquire into the development of AI. The Commission's report, published in 1948, strongly criticised AID and recommended that the practice should be made a criminal offence.[33] In 1960, the Feversham Committee Report concluded that AID was

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30. That is, the husband's semen contained no livng sperm cells, and thus, he was sterile.
31. See Snowden, R. & Mitchell, G.D., The Artificial Family, London, Allen & Unwin, 1981, p. 15.
32. See Snowden, R., & Mitchell, G.D., op. cit., p. 15.
33. See the Report of the Commission, Human Artificial Insemination, published in 1948, reprinted in 1952 by S.P.C.K..

undesirable.[34] Nonetheless, AID continued to be practised on a small scale. By 1970, public opinion had changed considerably regarding AID, and a Panel of inquiry under the chairmanship of Sir John Peel reported more favourably on AID.[35] In 1979, the practice had become so widespread that the Royal College of Obstetricians and Gynaecologists (RCOG) provided the following written information to prospective recipients:

> "Artificial insemination has been practised in this country for many years. Each year several hundred children are born following this procedure, bringing a great deal of happiness to parents...The treatment is straight-forward and painless. It will be carried out by a doctor or nurse who will insert a single instrument into the vagina to place the sperm in the mucus at the neck of the womb."[36]

The actual number of human artificial inseminations performed from nation to nation is unknown. This is due partly to the secrecy surrounding artificial insemination, and partly to the fact that the introduction of regulation and control

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34. Departmental Committee on Human Artificial Insemination, London, HMSO, Cmnd. 1105, 1960, para. 239, (hereinafter cited as the Feversham Report).
35. Peel Committee, "Report of the Panel on Human Artificial Insemination", (1973) 2 British Medical Journal, Suppl., Appendix V, p. 3, para. 12.
36. RCOG, Artificial Insemination, explanatory information booklet for patients, London, 1979.

is a recent phenonmenon in many countries.[37] Recent estimates are that about 1,700 children a year are born as a result of AID in the UK,[38] and there are a number of medical centres in the UK performing AI either as private service or as part of the NHS. Developments in the last few decades clearly show that AI has gradually become an acceptable method of circumventing certain causes of infertility.

Types of Artificial Insemination

There are three kinds of artificial insemination which may be used to enable the founding of a family (whether through procreation or not).[39]

(a) Artificial Insemination Using Husband's Semen

This form of artificial insemination uses semen from a husband to inseminate his wife (AIH), and is

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37. Thus, in December 1972, at the CIBA Foundation symposium on Law and Ethics of AID & ET held in London, it was said that no nation kept a register recording details of AID, see Law & Ethics of AID and Embryo Transfer, London, Associated Scientific Publishers, 1973, p. 4.
38. See Legislation on Human Infertility Services and Embryo Research - A Consultation Paper, HMSO, London, Cm. 46, 1986, (hereinafter cited as the Consultation paper).
39. For a further discussion of these techniques, see Cusine, D. J., Modern Reproductive Techniques, Aldershot, Gower, (Forthcoming 1988).

sometimes referred to as homologous insemination. This is not frequently used, because there are very few situations where it is of value. However, it is appropriate in the following situations:[40]

(i) Where there are factors, for example, physical difficulties, on the part of either a husband or wife (or both) preventing achievement of intercourse, but when the fertility of both parties is otherwise adequate. Male physical difficulties include retrograde ejaculation,[41] physical impotence, penile deformity and obesity. Female physical difficulties may include obesity, vaginal scarring or tumours, abnormal uterine position, vaginismus[42] and cervical hostility.[43]

(ii) Where a husband is subfertile because of defective spermatozoa, the chances of conception may be improved if one can separate the fertile part of the semen from the less fertile. Since semen can be preserved, several specimens of a husband's semen can be collected to form one single insemination. AI,

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40. See generally, the Feversham Report, paras. 62-70.
41. Patients suffering from this condition have the sensation of ejaculation but semen is deflected into the bladder instead of being discharged externally. Sperm can be salvaged for AIH.
42. This entails painful spasm of the vagina associated with aversion from intercourse.
43. This is where sperm are killed or rendered inactive by cervical mucus.

therefore, may be more effective than natural intercourse. AIH can also be used where a husband's subfertility is caused by poor motility of sperm cells.

(iii) If a man is about to undergo vasectomy, he may wish to obtain a store of his semen so that he can have children if he wishes in the future.

The advantages of AIH are that a husband and wife can found a family through reproduction. Consequently, a husband will not feel left out of the reproductive process. Furthermore, there is no difficulty or ambiguity with a resulting child's legal status,[44] and the question of parenthood is not raised.[45] AIH is, thus, the least controversial of the available artificial techniques, morally, socially and legally.[46]

(b) Artificial Insemination by Donor

Artificial insemination by donor is sometimes called heterologous insemination. This involves the insemination of a woman (usually a married woman) with the semen of a donor, and may be the answer to certain causes of infertility. There are three situations where AID can be used:

(i) AID is mainly used where a husband's semen is defective for one reason or another, causing

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44. Compare this with an AID child, see infra. chapter 5, pp. 119-121.
45. See infra. chapter 5, pp. 133-144.
46. See infra. chapters 4 & 5.

sterility or gross subfertility. This may be due to the following conditions. For instance, his semen may contain no living sperm cells (azoospermia), or it may have no sperm cells at all (aspermia). Both of these conditions result in absolute male sterility. Other conditions may be where the husband's semen contains too few spermatozoa (oligospermia), or very few motile sperm cells (oligozoospermia).[47]

(ii) AID may be used where a husband suffers from hereditary diseases, for example, Huntington's Chorea, haemophilia, hereditary blindness or certain types of muscular dystrophy, which are likely to be transmitted to his children. AID can sometimes be used in cases of rhesus incompatibility, or where the wife has a history of spontaneous abortion which may be due to abnormality in her husband's sperm.

The advantages of AID in the above situations are obvious. It gives certain infertile couples an opportunity to have a child of whom the wife is the biological mother. Furthermore, AID does not

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47. In a normal man, there may be a hundred million or more spermatozoa per cubic centimetre of semen. Sixty million may be regarded as below normal but not low enough for AID to be considered. However, it is not possible to say that a man with less than a certain number of sperm cells is completely sterile. The number of sperm cells per cubic centimetre varies from one week to another. Therefore, a husband's semen is usually examined on several occasions before a practitioner decides whether AID is necessary. This is a precaution taken to avoid a situation where after the birth of an AID child, the husband is found to be capable of fathering a child.

necessarily entail public admission of male sterility, and a wife can experience pregnancy, which may be very important to some women.

(iii) The third possible use of AID is where a single woman wants a child but is unwilling to conceive by conventional means for one reason or another.

At present, semen in AID is mainly collected from medical students and husbands of obstetric patients.[48] General criteria for selection of semen donors are as follows: the donor should be of reasonable intelligence and should understand the nature of the donation, he should have a good medical background, with no former record of mental disease or other transmittable hereditary diseases. In addition, a donor with matching physical characteristics to that of the husband is often preferred. The donors's identity is kept anonymous. Thus, neither the donor nor the couple know each other.[49] The success rate of AID depends on the selection of the participants, but it may be as

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48. Joyce, D.N., "Recruitment, Selection and Matching of Donors", in Brudenell, M., et al. (eds.), Artificial Insemination, Proceedings of the Fourth Study Group of the Royal College of Obstetricians and Gynaecologists, RCOG, 1976, pp. 60-69, (hereinafter cited as Artificial Insemination, RCOG, 1976).
49. See Snowden, R. & Mitchell, G.D., op. cit., pp. 62-72.

high as 75%.[50] On average, it takes 3 or 4 cycles for conception to occur and, sometimes, it can take much longer.[51]

(c) Artificial Insemination Using Combined Semen of a husband and donor

This technique is otherwise known as CAI or confused artificial insemination, and is sometimes used where a husband is not completely sterile but has only a few motile sperm cells (oligozoospermia). A child conceived as a result of the use of this method of conception may still be the biological child of the husband. There is no way to determine whether this is so without paternity testing.[52] However, majority opinion in medical circles is against CAI on the ground that it diminishes the effectiveness of AID.[53] Moreover, it confuses the status of resulting children.

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50. See Kerr, M.G. & Rogers, C., "Donor Insemination", (1975) 1 Journal of Medical Ethics, 30, 31. See also Artificial Insemination, RCOG, 1976.
51. See Artificial Insemination, RCOG, 1976.
52. See Maidment Susan, "DNA Fingerprinting", (1986) 136/1 N.L.J. 326.
53. See Human Procreation, Ethical Aspects of the New Techniques, Report of a Working Party Council for Science and Society, Oxford, Oxford University Press, 1984, p. 40, (hereinafter cited as Human Procreation, CSS, 1984). Neither the Warnock Report nor the Consultation paper mentioned this particular type of artificial insemination.

Current Status of AI

The provision of AI seems to be relatively uncomplicated.[54] Whether AIH or AID, the technique is relatively simple and in terms of its use, AI is now a well-established technique. Current debates have tended to centre on certain social and legal problems which are consequential to the technique itself, for example, the status of AID children, the issue of fatherhood, registration and recording of AID births,[55] rather than on the acceptability or legality of the technique itself.[56]

(3) IN VITRO FERTILISATION (IVF), EMBRYO REPLACEMENT AND EMBRYO TRANSFER

Whereas artificial insemination essentially dominated artificial reproductive technology until fairly recently, additional techniques are now available which may be useful in cases of infertility where AI is of little or no assistance.

Whilst AI functioned mainly when the infertility was that of the male partner, female difficulties in conception may now also be overcome in

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54. See Artificial Insemination, RCOG, 1976.
55. See infra. chapter 5, pp.133-151.
56. See generally, Snowden, R., & Mitchell, G.D., op. cit. and Snowden, R., & Mitchell, G.D., Artificial Reproduction: a Social Investigation, London, Allen & Unwin, 1983.

some cases. Perhaps the commonest, and best known, of these techniques is that of in vitro fertilisation (IVF).

The publicity surrounding the development and use of this technique has rendered the phrase 'test-tube baby' a part of everyday language. In fact, this is something of a misnomer, since 'in vitro', is Latin for 'in glass', and therefore IVF simply means fertilisation of a female ovum by male sperm in a shallow saucer.[57]

The technique of IVF was developed in order to facilitate conception by bypassing damaged or blocked fallopian tubes whose functions were inadequate to produce pregnancies.[58] Unsuccessful tubal surgery is the major reason for turning to IVF.

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57. See Human Proceation, CSS, 1984, pp. 13-27.
58. The functions of fallopian tubes include the collection of oocytes, transportation of sperm from the uterus to the outer end of the fallopian tube, nutrition and transportation of an early embryo down the fallopian tube to the uterine cavity. Inadequacies in any of these functions would make pregnancies difficult or impossible. The major kind of tubal pathology which causes infertility is adhesions; inflammation of the lining of the uterus to which the fallopian tubes connect directly on either side, by way of a structure known as the horn of the uterus. Such inflammation can be caused by intra-uterine devices (IUD's), pelvic inflammatory disease, or gonorrhoea.

IVF in humans is a recent development. Most of the early technical advances were made in England by Edwards and Steptoe.[59] These included collection of occytes by laparoscopy,[60] fertilisation of occytes matured in vitro, in vitro development of embryos to the blastocyst stage.[61] In 1976, they reported a tubal ectopic pregnancy[62] resulting from IVF.[63] The first successful replacement of an embryo to a uterus was made by them in 1978 in the treatment of Mrs. Lesley Brown, resulting in the birth of the first IVF baby.[64]

It has been said that IVF may be useful for about 5% of women who have damaged or diseased fallopian tubes.[65] It will be useful, for example, where a woman's fertility cannot be alleviated by tubal surgery because of the severity of the blockage or disease, or where the tube has been removed altogether. Where a woman is not ovulating, IVF of a donated ovum may be achieved. IVF may also be used

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59. See Edwards, R.G. & Steptoe, P., A Matter of Life, London, Hutchinson & Co. Ltd., 1980; Hann, Judith, The Perfect Baby, London, George Weidenfeld & Nicolson Ltd., 1982, Chapter 7.
60. Laparoscopy is an operation performed under local anaesthesia whereby a telescope is passed into the abdominal cavities enabling the inspection of internal organs and the collection of ova from the ovaries.
61. Han, Judith, op. cit.
62. Foetus growing in the fallopian tube instead of the womb.
63. Han, Judith, op. cit.
64. Edwards, R.G. & Steptoe, P., op. cit.
65. See the Warnock Report, para. 5.1.

in cases where a husband's semen contains an insufficient number of spermatozoa (oligospermia). In such cases, fertilisation may take place under laboratory conditions rather than after sexual intercourse. Additionally, IVF may be useful to couples who suffer from unexplained sterility.[66]

In other words, IVF can be useful to some infertile people for the founding of a family (whether through reproduction or not). Thus, where a couple's infertilty is due, for instance, to the female partner's blocked fallopian tubes, IVF allows the couple both to reproduce and to found a family. The technique is completed by the reimplantation of the fertilised ovum - otherwise known as embryo replacement (hereinafter referred to as ER). Thus, the woman who provides the ovum, may have it fertilised outside of her womb and reimplanted. Where reimplantation is successful, she is both the biological and the bearing mother.

The same technique can also be applied in situations where the woman is sterile, but is able to carry a child. In this case, fertilisation is undertaken of a donated ovum, and the resulting embryo is then implanted in the womb of the bearing, but not biological mother. This technique is referred to as embyro transfer (hereinafter referred to as ET).

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66. See the Warnock Report, para. 5.1.

Additionally, donated semen can be used in IVF. For instance, where a male partner is sterile, and the female partner has blocked fallopian tubes, fertilisation of the female's ovum can be achieved in vitro using donated semen.

Although the permutations of IVF are varied, and the social and legal implications may differ, IVF remains simply a fertilisation technique in it purest form, and need not be associated with surrogacy.[67] Thus, in the situations described above, surrogacy is not involved, and the arguments which may be used against surrogacy cannot be taken to apply automatically or fully to these uses of IVF.[68]

Success Rate of IVF

It is difficult to give a uniform assessment of the 'success rate' of IVF because scientists use the term in different ways. However, one way of assessing the issue is to consider the number of pregnancies per laparoscopy.

In England, the figures given by Edwards & Steptoe in 1983 were 967 laparoscopies and 192 pregnancies. That is, a pregnancy rate of between 19-20%.[69]

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67. For a discussion on surrogacy, see infra. pp. 35-42.
68. For a full discussion of the arguments for or against surrogacy, see infra, chapter 6.
69. See the Warnock Report, para. 5.13.

Another way of looking at the success rate of IVF is to ask how many embryos created actually result in pregnancies. One trial in Melbourne resulted in a pregnancy rate of 12-18% when only one embryo was put back into the uterus.[70]

This, however, does not indicate the survival rate of all embryos created, which depends on the practice of particular IVF centres. For instance, the practice of Carl Wood's team in Melbourne is to collect as many cocytes as possible in one single laparoscopy, fertilise them all and select the best for implantation.[71] Thus, some embryos may be found to be unsuitable for implantation whilst others are 'spare' embryos and are frozen. Since the survival rate for frozen embryos is very low, they are counted amongst those that do not survive. With this practice, one achieves a higher birth rate per laparoscopy but a lower rate of birth per embryos created. According to the figures supplied by Dr. Alan Trounson, between 1980-1982, Wood's team obtained 876 oocytes and succeeded in fertilising 633 of them for 272 patients. Out of these 633, there were 45 live births. That is, for every 14 embryos created, one finally became a baby.[72] In England, the

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70. See Singer, P., & Wells, D., op. cit., p. 25.
71. Singer, P., & Wells, D., op. cit. p. 25.
72. Singer, P., & Wells, D., p. 25.

practice is similar, except that where embryos are not implanted, they are thrown away or used for research and experiments.[73] Some may be frozen.

These practices have met with some moral objections.[74] As a result, in Norfolk, Virginia, the practice is to fertilise only as many oocytes as a woman is willing to have transferred to her womb.[75]

Up until now, there have been two reported abnormalities following IVF pregnancies. One was the spontaneous abortion of a triploid foetus,[76] and the other was the birth of a child with transposition of the major vessels of the heart.[77] The limited data, thus, does not suggest an increased frequency of congenital abnormalities among IVF conceptuses. In experienced IVF clinics, the frequency of spontaneous abortions also does not seem to be in excess of that

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73. See Guardian, October, 8, 1982.
74. For the debates on the moral status of embryos, see Jonston, Brian, "The Moral Status of the Embryo: Two Viewpoints", in Test-Tube Babies: a Guide to Moral Questions, Present Techniques and Future Possibilities, in Walters, W.A.W. & Singer, P. (eds.), Oxford, Oxford University Press, 1984, p. 49.
75. Singer, P. & Wells, D., op. cit., p. 25.
76. A triploid has 69 chromosomes rather than 46. See Steptoe, Edwards & Purdy, "Clinical Aspects of Pregnancies Established with Cleaving Embryos Growth In Vitro", (1980) 87 British Journal of Obstetric and Gynaecology.
77. Wood, Trounson, Leeton etc., "Research Features of Eight Pregnancies Resulting from IVF & ET", (1982) 38 Fertility Sterility 22.

anticipated in natural conception (12-18%).[78] Finally, several tubal pregnancies have been reported following IVF, but these are not unexpected since most of the women in question had remnants of severely damaged fallopian tubes, which might predispose them towards ectopic pregnancies.[79]

Current Status of IVF

IVF, in comparison with AI, is a much newer artificial reproductive technique. It has generated a number of wider issues which have moral, social and legal implications.[80] Nonetheless, as an artificial reproductive technique which aims at circumventing certain causes of infertility in order to enable some infertile people to found a family, it is now widely accepted.

For instance, the British Medical Association's working group on In Vitro Fertilisation and Embryo Replacement and Transfer (1982) took the view that IVF was an acceptable means to circumvent certain forms of infertility.[81] The Warnock Report took the same

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78. Trounson & Conti, "Research in Human IVF & ET", (1982) 285 British Medical Journal 244.
79. Steptoe & Edwards, "Reimplantation of a Human Embryo with Subsequent Tubal Pregnancy", (1975) Lancet 880.
80. See infra. chapter 5.
81. See "Interim Report on Human In Vitro Fertilisation and Embryo Replacement and Transfer", (1983) 286 British Medical Journal, 1594.

view, and recommended that IVF "should continue to be available within the NHS."[82]

Consistent with the acceptance of the use of donated semen in AI, the BMA considers the use of a male partner's sperm and a donated ovum for IVF & ET to a female partner not unethical.[83] The same view was also reached by the Warnock Report, which endorsed the use of donated embryos by infertile couples where a female partner is capable of carrying a child to term.[84]

In 1984, there were some hundreds of babies born throughout the world as a result of IVF,[85] and some 36 medical teams offering IVF in Britain, Australia, the USA and most of Western Europe.[86] The government Consultation paper published in 1986 stated that about 1,000 births in total in the UK were thought to have involved IVF.[87]

It can be seen, therefore, that - whatever objections there may be to this practice - it is now widely used and relatively uncontentious. Of course, this explains only its use, and says nothing about its

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82. See para. 5.10.
83. See "Interim Report on Human In Vitro Fertilisation and Embryo Replacement and Transfer", (1983) 286 British Medical Journal, 1594.
84. See The Warnock Report, paras. 6.6 and 7.4.
85. See the Warnock Report, para. 5.5.
86. See Singer & Wells, "IVF: the Major Issues", (1983) 9 Journal of Medical Ethics 192.
87. para. 8.

social and moral acceptability.[88] However, the apparently general acceptance of IVF does say something about its value as a technique in circumventing infertility.

88. See infra. Chapter 4.

(4) SURROGACY

A third artificial method to which the infertile may have access in order to found a family (whether through reproduction or not) is surrogacy. Surrogacy, as has been said,[89] is not a distinct artificial reproductive technique. Rather it is a particular situation in which these techniques are applied.

Essentially, surrogacy involves a woman (the surrogate) agreeing to bear a child, and subsequently to surrender that child to be brought up by a person or persons other than herself. The terms commissioning mother and father (or parties) are generally used to denote the persons who intend to bring up a surrogate-born child.[90]

Surrogacy may be useful where a woman is unable to bear a child. This may be because she suffers severe pelvic disease or has had a hysterectomy, or because she has a medical condition (eg. heart or kidney disease) and pregnancy may seriously threathen her life or health.[91]

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89. See supra. p. 15.
90. See S1(6) of the Surrogacy Arrangements Act 1985. It has been argued that the correct definition of a surrogate is a woman who is a substitute mother. The contention is that a surrogate is in fact the mother, and the commissioning mother is the surrogate. See H.L. Vol. 473, Col. 172. This is not how the term is used in this thesis.
91. See the Warnock Report, para. 8.2.

Surrogacy is not a novel, but rather an ancient, method for the circumvention of infertility. For instance, it was recorded in the Bible that Abraham's wife, Sarah, could not bear him a child. Sarah gave Abraham her slave girl so that she could bear him a child.[92] Another example of ancient surrogacy was the story of Jacob and his barren wife Rachel.[93] In these cases, the surrogates conceived by natural means and thus they were also the biological mothers.

One of the novel aspects of surrogacy today is the capacity to implement it by use of artificial techniques. These techniques replace conception by natural means, and a surrogate-born child may have a number of possible genetic links. He or she may be genetically connected with two of the following people: the surrogate, the commissioning parties and the donors of gametes.

One may classify surrogacy according to whether a surrogate has any biological link with the child.

Where a surrogate has a biological link with the child, this can be achieved by artificial techniques in the following ways. First, the most common form of surrogacy is where a couple arrange for a surrogate to undertake artificial insemination using

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92. Genesis 16.
93. Genesis 13.

the semen of the commissioning male partner. This will hereinafter be called partial surrogacy.[94] Alternatively, a surrogate may have a biological link with the child she bears by virtue of the fact that fertilisation was achieved by means of the technique of IVF followed by embryo replacement.[95] This is certainly a rare form of surrogacy and will hereinafter be referred to as IVF & ER surrogacy.

Conversely, a surrogate-born child may have no genetic link with the surrogate at all. In other words, the surrogate is merely offering her gestational function to an embryo. The embryo may be genetically linked to the commissioning parties. This is possible because of the availability of IVF followed by embryo transfer. Such a case will hereinafter be referred to as full surrogacy. A more unlikely possibility, where the surrogate has no genetic link with the child, is where the

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94. See Singer & Wells, op. cit. pp. 110-111. See a different usage of the terms by Wright Moira, in "Surrogacy and Adoption: Problems and Possibilities", (1986) 16 Fam. Law 109, p. 109. "In partial surrogacy the surrogate mother is implanted with an embryo which is genetically that of the commissioning mother and father. In full surrogacy the surrogate mother's egg is fertilised in vivo by AID and replaced in her uterus." This terminology is not used here, since surely, in the latter case, no replacement of anything is necessary.
95. For instance, where a surrogate has blocked fallopian tubes but has no ovulation problems.

commissioning parties have also no genetic link with the child, for instance, where an embryo is donated by anonymous gamete donors. This will be referred to as donated embryo surrogacy.

Surrogacy can also be classified according to whether or not money is involved. It is important to bear this aspect in mind, since the nature of the arguments both for and against surrogacy may change significantly according to the circumstances under which it is entered into. Moreover, the response of society to the parties involved, and to the acceptability of a surrogacy arrangement, may also be coloured or influenced by the presence or absence of money payment.

Thus the media often calls surrogacy 'baby-selling'.[96] However, money is not necessarily an inevitable part of surrogacy which may be purely an altruistic act. For instance, a sister may bear a child for her infertile sister, and the whole transaction may involve no payment of money or other rewards.[97] This will be called surrogacy in principle.

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96. See infra., chapter 6, pp. 188-198, for the baby-selling argument.
97. Although the British Medical Association have recently advised doctors not to participate in any surrogacy arrangement, even that which is undertaken for no reward by sisters, for sisters. See the Guardian, May 8, 1987, p. 3.

Where money payment is involved, depending on the sort of payment and to whom it is made, one can envisage at least three different possibilities.

(1) One possible situation arises where a woman agrees to be a surrogate providing that the commissioning parties will compensate her for all expenses she is likely to incur, for instance, medical expenses for the conception and birth of the child, and any loss of earnings by the surrogate during the period of confinement. This will be called surrogacy with reasonable compensation.

(2) A surrogate may receive payment besides that which represents a reasonable compensation. This will be called surrogacy for a fee.

The distinction between surrogacy with reasonable compensation and surrogacy for a fee may not, however, always, be easily drawn. Surrogacy arrangements, for example, in the United States may involve payment to the surrogate of about $10,000 - $12,000, but it will often be unclear whether such payment is a genuine costing of out-of-pocket expenditure, or whether it represents compensation plus a fee, and if the latter, which proportion relates to which aspect of the transaction. Approximately the same amount (that is, about £6,500) was paid in the Baby Cotton case[98] and the Adoption

98. Re A Baby, The Times, 15 Jan., 1985, p. 8.

Application: Surrogacy case.[99] The judge in the latter case, in fact, said that the £5,000 paid was insufficient to compensate the surrogate's loss of earnings and expenses.[100]

The distinction between surrogacy with reasonable compensation and surrogacy for a fee must depend on individual circumstances of each case, and no fixed line can be drawn which divides the two categories. Thus, a large amount paid to a surrogate who has to give up a highly paid job may be reasonable compensation to that particular surrogate. Yet, when that same amount is paid to a surrogate with a low income, it may be a case of surrogacy for a fee. As will be seen later,[101] a rough distinction is important for subsequent discussions on the permissibility of surrogacy with money payment, but a precise distinction between the two categories is not vital.

(3) Money payment in surrogacy may be made to a party other than the surrogate. An agency may operate on a commercial basis, arranging surrogacy and charging both surrogates and commissioning parties for linking the two parties together and for the provision

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99. The Times, 12 March, 1987, p.27.
100. ibid.
101. See infra, chapter 6.

of counselling services. These will be called commercial surrogacies.[102]

Current Status of Surrogacy

Since it was first reported that an American lawyer[103] had set up a commercial agency, surrogacy has been a very controversial issue.[104] Because of its potential moral, social and legal implications, the debate about surrogacy continues,[105] and the British Parliament is still considering its approach to surrogacy. In the UK, Section 2 of the Surrogacy Arrangements Act 1985 has criminalised the activities of commercial surrogacies. The Act has also made it a criminal offence to advertise in respect of or for

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102. Section 2 of the Surrogacy Arrangements Act 1985 has criminalised the activities of commercial surrogacies in the UK.
103. See Keane, Noel & Breo D. L., The Surrogate Mothers, New York, Everest House, 1981.
104. The issue has been considered by various reports, see the Warnock Report; Human Procreation, CSS, 1984; Surrogate Motherhood, Report of the Board of Science and Education, BMA, 1987. Reports in other jurisdictions include, Report on the Disposition of Embryos produced by IVF, the Committee to consider the social, ethical an legal issues arising from IVF, chaired by Professor Louis Waller, Victoria, Australia, 1984, (hereinafter cited as the Waller Report); Report on Human Artifcial Reproduction and Related Matters, 2 Vols., Ministry of the Attorney General, Toronto, 1985, (hereinafter cited as the Ontario Report).
105. For the debates generated by the Baby M case, see "Judges Press For Guidelines", The Times, 2 April, 1987, p. 8; "The Future of Baby M", The Daily Telegraphy, 3 April, 1987, p. 15.

surrogacy.[106] Surrogacy itself, however, is not illegal or unlawful.[107] Nonetheless, the general attitude towards surrogacy seems to be one of disapproval and rejection, and doctors have been advised by the BMA not to participate in such arrangements.[108] Indeed, the Warnock Report by a majority of 16:14 rejected all forms of surrogacy.[109]

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106. Section 3.
107. See infra. chapter 7.
108. See the Guardian, 8 May, 1987, p. 3.
109. The Warnock Report, Chapter 8.

(5) CONCLUSION

This somewhat brief description of the three main types of artificial methods currently available has been undertaken to provide some information as to the situations in which they are relevant. It also serves to illustrate that their use may vary according to the nature of the infertility problem. A distinction has also been highlighted between those methods which are generally used to circumvent infertility by involving both of the partners in the actual reproduction, and those which do not. This distinction and its significance for the rights to which the infertile may lay claim on will be considered in context later.[110]

It is not, however, considered necessary to describe the practicalities of these artificial methods in more depth, since they have been extensively reviewed elsewhere.[111] Their significance for the purposes of this thesis lies essentially in the extent to which they facilitate reproduction and founding of a family, or merely permit the founding of a family. Whilst these two concepts may tend to be thought of as inseparable, it may be that distinctions can be drawn which, whilst not suggesting that they never coincide, may

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110. See infra. chapter 3, pp. 71-77.
111. For example, see Singer, P. & Wells, D., op. cit., pp. 1-69; Artificial Insemination, RCOG, 1979.

nonetheless serve to highlight what it is about the rights (if any) of an individual, and particularly, the infertile, that is truly significant, especially in view of the possibility of artificial reproduction. Analysis of the value of conceptualising procreation and founding a family separately, and of the significance of using the language of rights, is therefore undertaken in the following chapter in order to provide a sound conceptual basis from which moral deductions can be drawn, and which may serve to stimulate and inform relevant social and legal change.

CHAPTER 3

ARTIFICIAL REPRODUCTIVE METHODS: THE RIGHT TO REPRODUCE AND THE RIGHT TO FOUND A FAMILY

(1) INTRODUCTION

As has been seen, the infertile have *interests* in founding a family (whether through reproduction or not). The hypothesis to be tested in this chapter is whether individuals also have certain *rights* regarding reproduction and founding of a family which may support the claim to have access to artificial reproductive methods. This chapter, therefore, will examine what rights, if any, people have, in reproduction and founding of a family, which may support this claim.

(2) JUSTIFICATIONS OF USING RIGHTS-LANUGAGE

The justifications for using rights-language are both general and specific. Generally, rights-talk has been an extremely useful tool in the struggle for human liberty, freedom and respect. A classic example of this can be seen in the moral discourse of the seventeenth and eighteenth centuries in which rights were frequently used to assert what were the minimum socio-political arrangements necessary to, and compatible with, human existence.[112] To that extent, and as will be seen later, the concept of rights, denoting liberty and freedom, can be very useful in the areas of reproduction and foundig of a family.

More specifically, rights-talk in relation to procreation and founding of a family has been prevalent especially in American literature.[113] During the last few decades, the concept of rights has set the scene for debates in women's struggles for

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112. For the importance and values of the concept of rights, see Fineburg, Joel, "The Nature and Values of Rights", in Fineburg, Joel (ed.), Rights, Justice and the Bounds of Liberty, Guildford, Princeton-Hall, 1980, p. 148.
113. Coleman, Phyllis, "Surrogate Motherhood: Analysis of the Problems and Suggestions for Solution", (1982) 50 Tennessee Law Review, 71; Rushevsky, Cynthina, "Legal Recognition of Surrogacy Gestation," (1982) 7 Women's Rights Law Reporter, 107.

reproductive control and freedom,[114] and in issues relating to population control.[115] It can also be valuable as a means of analysing contemporary issues. Advances in medical technology and knowledge have expanded the parameters of reproductive choice and freedom (and thus their importance) on the one hand, and, on the other hand, have created conflicting interests which have hitherto not been encountered. For instance, individuals may have interests in using medical technology to control certain aspects of reproduction (such as the sex of children). Yet, this may conflict with interests of the community as a whole. One of the ways of analysing and balancing these conflicting interests is in terms of rights. To that extent, conflicts of interests regarding the use of artificial reproductive methods may be so analysed.

The terminology of rights, however, is mainly employed by American jurists and the European Convention on Human Rights. It is rarely used in the British context. What underlies the British legal system and social thinking, in general, is that anything that is not specifically prohibited is

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114. See Gordon Linda, Woman's Body, Woman's Right, Harmondsworth, Penguin Books Ltd., 1977.
115. See Bayles M.D., "Limits to a Right to Reproduce", in O'Neil, Onora and Ruddick, William (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, Oxford, Oxford University Press, 1979, p. 13.

permissible. But as will be seen later,[116] in the areas of reproduction and founding of a family, the British judicial and social approach of according considerable freedom to individuals is very similar to that of American judicial thinking, and the legal philosophy of the European Convention on Human Rights. To that extent, the language of rights can be the short-hand for denoting a set of common values in the West in the areas of reproduction and founding of a family.

Nonetheless, specifics rights are not the starting premise of this chapter. Rather, endeavours will be made to demonstrate that fundamental values are involved justifying the claim that certain rights do exist and should be vindicated in the areas of reproduction and founding of a family.

Clearly, any discussion of freedom and choice in reproduction and founding of a family is bound to have global implications, and issues such as overpopulation, poverty and starvation will therefore arise. These issues, however, are beyond the ambit of this thesis, but have been thoroughly discussed elsewhere.[117]

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116. See infra. pp. 59-66.
117. See eg. Hardin, Garrett, "The Tragedy of the Commons", in Bayles, M.D. (ed.), Ethics and Population, Cambridge, Mass., Schenkman, 1976; Bayles, M.D., "Limits to a Right to Reproduce", and O'Neil, Onora, "Begetting, Bearing and Rearing", in Having Children, op. cit., pp. 13 & 25.

This thesis is concerned with an examination of the claim of the infertile to use artificial reproductive methods to found a family (whether through reproduction or not). Currently, this is only an issue in affluent societies which have the resources and techniques for artificial reproductive methods. Nonetheless, what is argued here will have equal applications when artificial reproductive techniques are available in other countries in the future.

It may be well to mention here that classification of rights is an issue which has been extensively debated by philosophers and jurists.[118] Since the purpose of this thesis is to analyse what rights, if any, an individual has in the areas of reproduction and founding of a family, a streamlined picture of the kinds of rights which are commonly used suffices.

One classification of rights is to use the term 'claim rights' to denote a right-holder having control over others' duties. The term 'liberty rights' denotes a right-holder having control over his or her own acts through freedom from imposed duties, and

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118. See eg. Hart, H.L.A., "Bentham on Legal Rights", in Simpson, A.W.B. (ed.), Oxford Essays in Jurisprudence, 2nd Series, Oxford, Clarendon Press, 1973, p. 170; MacCormick, D.N., "Rights in Legislation", in Hacker, P.M.S. & Raz, J., Law, Morality and Society, Oxford, Clarendon Press, 1977, p. 139.

'power rights' refers to powers of a right-holder exercisable at his or her discretion.[119]

As will be seen,[120] the concept of claim rights is significant in this thesis, thus it is worth noting the two possible aspects of this concept. A positive claim right entails a right-holder having control over others' duties to do someting; whereas a negative claim right involves controlling others' duties not to do something. For instance, if X has a positive claim right to education, others' have the obligations to provide it. If X has a negative claim right to education, the obligations of others would be not to interfere with X's educational pursuits.

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119. MacCormick, Neil, H.L.A. Hart, Hondon, Edward Arnold (Publishers) Ltd., 1981, chapter 7, p. 88.
120. See infra. pp. 51-88.

(3) THE RIGHT TO REPRODUCE

One major difficulty with this topic is: what does one mean by the right to reproduce? Writers of existing literature on the subject are relatively unmindful of the importance of a working definition, even though it will affect one's view as to whether or not there is such a right, and if so, what is its nature and scope. As Suzanne Uniackes said:

> "...hardly anyone would agree that the right to have children means that infertile people have a right to be supplied with children to adopt, or that someone has a right to participation of another, non-consenting person as a co-parent, or that a couple has a right intentionally to reproduce without incurring any subsequent responsibility for their offspring."121

What emerges from this quotation is that there may be confusion regarding the meaning of the right to reproduce, in the sense that it may denote three different concepts. First, it may mean the right to bring one's biological children into the world (whether by natural or artificial means). Second, it may refer to the right to parenting, that is, the bringing up of children. Finally, it may refer to a combination of these two aspects rights.

The right to reproduce, including the right to parenting, is the broadest concept of the three.

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121. "IVF and The Right to Reproduce", (1987) 1 Bioethics. (Forthcoming).

Consequently, considerations which may be relevant in defining the nature and scope of this right may be extensive.[122] Conversely, the right to reproduce (as referring to simply reproduction) or the right to parenting, are both narrower concepts.

However, the combination of these two rights makes up the fullest explanation of the right an individual may have in the areas of reproduction and founding of a family. Still, each of these rights may be said to be separate and distinct entity. For example, a woman may reproduce (that is have a baby) but be deemed in certain circumstances not to have the right to be a parent.[123] Conversely, appeal to the right to reproduce (which is generally taken to include the converse - that is, not reproducing)[124] may be used as a means to validate a choice not to be a parent.

In this chapter, and throughout this thesis, the term the 'right to reproduce' is used to denote the bringing of one's biological children into the world or not. To that extent, one is clearly distinguishing the concepts of reproduction and founding of a family, the latter of which is concerned

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122. See O'Neil, Onora, "Begetting, Bearing and Rearing", in Having Children, op. cit., p. 25.
123. See Re D (a Minor), The Times, 5 Dec., 1986, p. 15, a case which will be discussed latter, see infra., pp. 227-228.
124. McLean S.A.M., "The Right to Reproduce", in Campbell, T.D., et al. (eds.), Human Rights: From Rhetoric to Reality, Oxford, Basil Blackwell, 1986, p. 80.

with the right to parenting. Nonetheless, this in no way implies that the two concepts, reproduction and founding of a family, are inevitably totally unconnected.

From the literature on the subject of the right to reproduce, there seems to be a consensus that it is primarily perceived as a negative claim right demanding that an individual's procreative activity should not be unwarrantedly interfered with. Indeed, this interpretation is supported by the American and British judiciaries. And, as will be seen later,[125] one can also infer that such a right exists in Article 12 of the European Convention on Human Rights.[126]

American Judicial Recognition of The Right to Reproduce

In the USA, the right to reproduce has only relatively recently been given judicial support. It was first promulgated in the landmark decision of Skinner v. Oklahoma[127] where there were suggestions that procreation was a fundamental individual right.

In this case, an Oklahoma statute provided for

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125. See infra., p. 82.
126. "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."
127. 316 U.S. 535 (1942).

the sterilisation of persons who had been convicted for larcency three times. However, the statute specifically exempted persons convicted of embezzlement, although the crime was often the same in nature and attracted the same punishment. The Supreme Court struck down the statute on the ground that it violated the equal protection clause of the Fourteenth Amendment. In other words, the statute was held to be unconstitutional because differential treatments of different classes of people were based on criteria wholly unrelated to the objectives of that statute.

The Court, nonetheless, recognised the significant nature of sterilisation operations which generally deprived people their reproductive capacities. Mr. Chief Justice Stone, utilising the broad concept of liberty, talked of compulsory sterilisation as "an invasion of personal liberty".[128] More importantly, Mr. Justice Douglas spoke of the statute as one which "touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race - <u>the right to have offspring</u>."[129]

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128. ibid., 544.
129. ibid., 536. (emphasis mine)

The clear implication of this statement is that there is a right not to have one's procreative capacities interfered with. The judge, thus, perceived the fundamental value of freedom in relation to procreation and the personal decision as to whether to procreate or not. A statute which compulsorily deprived an individual of the opportunity of exercising this right would need to be stringently justified. This judgment marked a distinct move in American judicial attitude, since, in a number of eariler cases, the right to reproduce received little or no attention or credibility.[130] As a result, Skinner has often been considered the milestone in claims that it was appropriate to discuss procreation in terms of human rights.

This attitude has continued to pervade subsequent American decisions, and has formed a significant part of debates relating to many aspects of reproductive choice. Procreation is offered protection as a penumbra right to the wider constitutional rights of liberty and privacy. Thus in Griswold v. Connecticut,[131] a state statute which made the use of contraceptives a criminal offence was

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130. See eg. the American judicial attitude towards the right to reproduce in the case of Buck v. Bell 274 U.S. 200 (1927). See generally Meyers, D.W., The Human Body & the Law, Chicago, Aldine Publishing Company, 1970, chapter 2.
131. 281 U.S. 479 (1965).

held to be unconstitutional on the ground that it violated the right of marital privacy. Mr. Justice White (concurring) said:

> "...the liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home and bring up children'...there is a 'realm of family life which the state cannot enter' without substantial justification."[132]

Although Griswold was decided on the ground of marital privacy, the right to make one's own choice as to whether to procreate (or whether to use contraceptive devices) is not restricted to married couples. It is the right of an individual, the deprivation of which requires the existence of a compelling state interest.

Thus, it was said that "Skinner...did not guarantee the individual a procreative opportunity; it merely safeguarded his procreative potential from state infringement."[133] In other words, the right to reproduce was significant even where it attached to a single person who had no opportunity to exercise it. This view was restated in the judgment of Eisenstadt v. Baird,[134] in which the Supreme Court held a Massachusetts statute, banning the distribution of contraceptives to unmarried persons,

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132. ibid. 502.
133. Poe et. al. v. Gerstein et. al. 517 F. 2d, 787, 795 (1975).
134. 405 U.S. 438 (1972).

unconstitutional. The Court held that the statute violated the equal protection clause of the Fourteenth Amendment by providing dissimilar treatment for married and unmarried persons who were in similar situations. Mr. Justice Brennan, delivering the opinion of the Court, said:

> "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as to the decision whether to bear or beget a child..."[135]

The decision of Roe v. Wade[136] extended the individual's right to privacy in procreation a step further. In this case, the majority of the Court took the view that the right of privacy encompassed a woman's right to decide whether or not to terminate her pregnancy during the first trimester. Mr. Justice Blackmun, delivering the opinion of the Court, said:

> "...the right [of personal privacy] has some extension to activities relating to marriage, procreation, contraception, family relationships and child rearing and education...[W]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest'...and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[137]

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135. ibid., 453.
136. 410 U.S. 113 (1973).
137. ibid. 152-155.

The series of cases from Skinner[138] to Roe[139], therefore, demonstrate two essential points. First, the essence of the right to reproduce is based on the constitutionally protected concepts of liberty and privacy. The application of these concepts to procreation protects an individual's freedom to choose, free from unwarranted governmental interference.[140] The right to reproduce, therefore, is a negative claim-right.[141]

Moreover, the right to reproduce applies to individuals, irrespective of marital status. In other words, if liberty to choose in relation to procreation is valued, such freedom has the same value regardless of one's marital status.[142]

The appeal to constitutional freedoms, couched in terms of human rights, has, therefore, significantly clarified the extent and nature of the

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138. supra cit.
139. supra cit.
140. But there is no right to federal funding of abortion, see Harris v. McRae, 488 U.S. 297 (1980), see generally, Petersen, K.A., "Public Funding of Abortion Services: Comparative Developments in the United States and Australia", (1984) 33 International Comparative Law Quarterly, 158.
141. For an argument that the right to reproduce may be a positive claim right that demands public funding to assist one to reproduce, see infra. chapter 8, pp. 243-245.
142. A woman's right to abortion as established in Roe is irrespective of marital status. See Planned Parenthood Association v. Danforth, 428 U.S. 52 (1976).

right to reproduce in the United States. The freedom to make reproductive choices is the basis against which derogation is tested, and courts have subsequently been obliged to justify in strong terms any denial of this right.[143]

British Judicial Attitude

Although there are no British cases which analyse in detail the concept of the right to reproduce,[144] the attitude of English judges, from what evidence is available, seems to incline towards according considerable freedom to individuals in relation to procreation.

There is no British law directly prohibiting or interfering with the free choice of individuals, whether married or not, in relation to procreation. However, some restriction is applied in situations where competing values are taken to have priority. For example, unlike the situation in Roe v. Wade,[145] no absolute rights are given to women in terminating pregnancies under the Abortion Act 1967, at any stage

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143. See Re Eve (1986) 31 DLR (4th) 1.
144. The concept of the right to reproduce has been briefly considered in two English cases, Re D (Minor) (Wardship: Sterilisation), [1976] 1 All E.R. 326; Re B (a Minor) (Sterilisation), The Times, March 17, 1987, p. 35 (Court of Appeal) & The Times, May 1, 1987, p. 37 (House of Lords), see infra. pp. 62-66, for a fuller discussion of the case. See also the recent case of T. v. T., The Times, July 11, 1987, p. 36.
145. supra cit.

in the pregnancy.[146] Indeed, this Act was not framed in terms of rights at all, but was based, rather partly on a more pragmatic concern to ensure that, where terminations were carried out, they were done so safely and competently, thus reducing the toll in terms of human life.[147] Other restrictions, such as provisions which stipulate the age at which women may laefully consent to sexual intercourse and the prohibition of incestuous relationships, strike at the sexual act rather than at the right to reproduce.

Whether the general assertion that an individual is free to make various choices in relation to procreation is further qualified by the recent House of Lords decision in Re B (a Minor) (Sterilisation)[148] will be considered below.[149] Leaving the case aside for the moment, in general an individual may choose to have one child, many or no children. The decision not to procreate is no longer confined to the deliberate choice of celibacy or abstinence. The spacing and timing of procreation can, in most cases, be controlled according to one's

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146. For a discussion of another aspect of the Abortion Act 1967, see infra., chapter 8, pp. 221-6.
147. H.C., Vol. 732, Col. 1067-1077.
148. Re B (a Minor) (Sterilisation), The Times, March 17, 1987, p. 35 (Court of Appeal) & The Times, May 1, 1987, p. 37 (House of Lords).
149. See infra., pp. 64-66.

preferences, and by the use of various contraceptive devices, voluntary sterilisation and abortion (within the ambit of the law).[150] What is, therefore, taken to be central to rights in reproduction is an individual's freedom to decide whether, when, and how often one should reproduce. The freedom to choose regarding reproduction is accentuated by Peter Pain, J. in Thake v. Maurice, where he said,

> "The policy of the state, as I see it, is to provide the widest freedom of choice. It makes available to the public the means of planning their families or planning to have no family. If plans go awry, it provides for the possibility of abortion. But there is no pressure on couple either to have children or not to have children or to have only a limited number of children. Even the one-parent families, whether that exists though choice or misfortune, is given substantial assistance."[151]

A further example demonstrating this attention to freedom of choice, being derivative from, and descriptive of, the right of an individual to make autonomous choices, can be seen in the recent growth in, and recognition of, wrongful conception claims.[152] This type of claim accepts that there

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150. For further discussion, see Skegg, P.D.G., Law, Ethics and Medicine, Oxford, Clarendon Press, 1984, chapter 1.
151. [1984] 2 ALL E.R. 513, 526. (emphasis mine) Other aspects of the case were considered in the Court of Appeal, see [1986] 2 ALL. E. R. 497.
152. See eg. Sciuriaga v. Powell (1980, unreported), CA transcript 597; Emeh v. Kensington, Chelsea & Fulham Area Health Authority [1984] 3 ALL. E.R. 1044; Udale v. Bloomsbury Area Health Authority [1983] 2 ALL.E.R. 522; Thake v. Maurice [1986] 2 ALL. E. R. 497.

is a wrong to parents where, as a result of a defendant's (usually a physician's) negligence, they are not given an opportunity to consider all possible options regarding procreation or non-procreation. Compensation is thus given for the wrong done to the parents.[153]

In sum, although the British courts have never attempted to elaborate on the concept of the right to reproduce (as exhaustively as the American judicary have done), the underlying assumption is that individuals should be given the widest possible choice regarding procreation, and that invasion of what may be called one's right to self-determination or autonomy requires careful considerations and considerable justification.[154]

A decision that may be cited as reinforcing the point is the case of Re D (Minor) (Wardship: Sterilisation).[155]

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153. See generally, Hilliard Lexa, "'Wrongful Birth': Some Growing Pains", (1985) 48 M.L.R. 224; Taylor Ann Spowart, "Compensation for Unwanted Children", (1985) 5 Fam. Law 147; Brahmas Diana, "Damages for Unplanned Babies - A Trend to be Discouraged?", (1983) 133/1 N.L.J. 643.
154. See Lord Hailsham in Re B (a Minor) (Sterilisation), where he stressed that this case is not to be taken as a precedent in all cases relating to the mentally handicapped, The Times, May 1, 1987, p. 37.
155. [1976] 1 ALL E.R. 326.

In this case, an 11-year-old minor suffered from a rare condition known as Sotos syndrome.[156] Her I.Q. was about 80. She had the capacity to marry and could possibly have a reasonable family life. A proposal to sterilise her to avoid an unwanted pregnancy was successfully challenged. Heilbron, J. in the Queen's Bench Division said that the operation involved the deprivation of a basic human right (that is, the right of a woman to reproduce).[157] The judge also mentioned the girl's prospect of marriage and having children. Because the judge's reference to the right to reproduce was interchanged with the concept of the right to marry and founding a family,[158] it is difficult to identify whether the decision was a vindication of the girl's right to reproduce or right to found a family or both. In other words, the court made no serious distinction of the concepts of reproduction and founding of a family, which as will be seen later,[159] can be very important in the context of the infertile.

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156. This involved, amongst other symptons, epileptic seizures, clumsiness, dull intelligence, precocious growth and personality problems.
157. [1976] 1 ALL E.R. 326, at p. 332.
158. See Article 12 of the Convention on Human Rights which says:- "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."
159. See infra., pp. 72-75.

Re D was distinquished in the recent House of Lords decision in Re B (a Minor) (Sterilisation)[160], where the Court exercised its wardship jurisdiction and ordered a 17-year-old mentally retarded girl, with a mental age of 5, to be sterilised.[161]

It may be argued that this decision is getting dangerously close to suggesting that a particular group of people do not have the right to reproduce,[162] and consequently, that it is a step towards narrowing the application of the concept. However, as the Lords stressed, the decision involved no general principle of public policy, and was concerned solely with what was in the best interests of the ward.

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160. The Times, May 1, 1987, p.37.
161. The Law Lords unanimously came to the decision after considering that the evidence in the case had demonstrated that there was an unacceptable risk of pregnancy which could only be obviated by sterilisation in order to prevent childbirth in circumstances of uncomprehending fear and pain and risk of physical injury.
162. "But [the right to reproduce] was only such when reproduction was the result of informed choice of which the ward in the present case was incapable...To talk of the 'basic right' to reproduce of an individual who was not capable of knowing the causal connection between intercourse and childbirth, the nature of pregnancy, what was involved in delivery, unable to form any materal instincts or to care for a child, appeared to his Lordship wholly to part company with reality." per Lord Hailsham, L-C., the Times, May 1, 1987, p.37. Again, in the Court of Appeal, Justice Dillon said that the minor would remain incapable of giving informed consent to sterilisation, abortion or marriage, and she would not be capable of looking after a baby. If she became pregnant, the pregnancy would have to be terminated. In effect, she has no right to

Since the right to reproduce of the mentally handicapped involves complicated issues,[163] consideration of the merit of this decision is outside the ambit of this thesis which is rather concerned with rights of individuals, particularly the infertile, to use artificial reproductive methods to found a family (whether through reproduction or not).

In any event, the decision does not affect the conclusion drawn so far regarding the right to reproduce, since British judges and society clearly recognise the fundamental importance of freedom to procreate. For this reason, there was considerable anxiety concerning the implications of Re B.[164] In other words, the whole episode of Re B[165] can buttress the conclusion arrived at earlier that the right to reproduce means that one's reproductive capacity should not be unwarrantedly interfered with unless compelling interests dictate.

Moreover, even were the decision in Re B[166] to be taken as having wider implications in respect of the right to reproduce, it must be borne in mind that,

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reproduce (and/or to found a family). See the Times, March 17, 1987, p. 35.

163. Cf. the Canadian approach in the case of Re Eve (1986) 31 DLR (4th) 1, where the court concluded that sterilisation should never be performed for non-therapeutic purposes under the parens patriae jurisdiction.
164. The Times, May 1, 1987, p. 37.
165. supra. cit.
166. supra. cit.

in reality, even the most fundamental of human rights may be subject to exceptions. Thus, the right to life may be denied, eg. after due process of law.[167] Equally, the court has declared that a decision to sterilise a mentally handicapped girl can be taken only after consideration by the appropriate court.[168] The fact that the right to reproduce may not be extended to all individuals in every situation, is not fatal to the claim that the right exists, nor to the assertion of its fundamental significance.

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167. Article 2(1) of the European Convention on Human Rights says, "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which his penalty is provided by law." See generally Jacobs, F.G., The European Convention on Human Rights, Oxford, Clarendon Press, 1975.
168. See Re B, supra. cit.

(4) THE RIGHT TO REPRODUCE AND ARTIFICIAL REPRODUCTIVE METHODS

So far, the right to reproduce in the Anglo-American legal context has been analysed. It may be said that the right to reproduce, as a negative claim right, denotes freedom of choice relating to whether and when to procreate only. Consequently, it will have no implication or bearing on the use of artificial reproductive methods, since those matters relate essentially to how to procreate.[169]

Nonetheless, if the right to procreate raises a strong presumption against interference unless it is proved to be warranted, this presumption applies equally in respect of people's freedom to choose to use artificial reproductive methods. In other words, the right to reproduce does not have to be justified, or argued for, whenever a new situation arises. The burden of proof is for those who argue against freedom and choice. Two points follow on from this premise. One concerns the use of artificial reproductive methods in general, not specifically relating simply to the infertile. The other concerns the use of artificial reproductive methods, in particular, by the infertile.

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169. Coleman Phyllis, "Surrogate Motherhood: Analysis of the Problems and Suggestions for Solutions", (1982) 50 Tennessee Law Review, 71.

The possibility of using artificial reproductive methods to procreate can increase the range of choices available to those whose fertility is not in question. For instance, a couple may prefer artificial, as oppose to natural, reproduction for reasons such as pure fascination with artificial techniques. If freedom to choose is the essential aspect of the right to reproduce, interference with people's options can only be justified by a compelling state interest.

This libertarian philosophy underlies what the judge had in mind in the Baby M case.[170] He considered the Supreme Court cases on procreation and privacy, and said that, although those decisions do not address non-coital procreation,

> "it must be reasoned that if one has a right to procreate coitally, then one has a right to reproduce non-coitally. If it is the reproduction that is protected, then the means of reproduction are also to be protected...This court holds that the protected means extends to the use of surrogates."[171]

In other words, from the perspective of an individual, he or she should have the choice to resort to artificial reproductive methods for procreation. From the point of view of a surrogate, for example,

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170. See Hornblower, Margot, "Judge Awards 'Baby M' to Her Biological Father", The Washington Post, April 1, 1987.
171. ibid.

the concepts of liberty and privacy, as exemplified by Roe v. Wade,[172] would be wide enough to encompass a woman's choice to be a surrogate even although that may entail merely the use of her gestation function.[173]

To put the matter in another way, if an individual has the right to reproduce, then the services of those who may facilitate the exercise of that right must be inextricably linked with that right. Thus, even in situations where the surrogate makes no genetic contribution to the embryo, it could be argued that to prohibit surrogacy interferes with the right to reproduce of the other individual(s). Where the surrogate is genetically linked to the child, then the freedom to reproduce of both the surrogate and that of the other individual would equally be restricted were surrogacy to be outlawed.[174] In other words, the right to reproduce, would include the right to choose how to procreate. Consequently, only if other, and compelling, values compete, would restrictions on artificial reproductive methods be consistent with

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172. 410 U.S. 113 (1973).
173. See Carey v. Population Services International, 431 US 678 (1977), where the Court spoke of "individual autonomy in matter of child-bearing" and said that "the teaching of Griswold is that the Constitution protects individuals' decision in matters of child-bearing from unjustified intrusion of the state." ibid., 687.
174. See chapter 6 for further discussions on the acceptability of surrogacy.

validation of the right to reproduce as described here.

For present purposes, however, it is essential to establish in greater depth what relevance, if any, the existence of this right to reproduce has to the infertile.

The fact that those whose procreative capacities which are unimpaired can validly demand their protection (with the limited exclusions noted above),[175] may not necessarily seem directly relevant to the position of those who have no such capacity or those whose capacity is impaired for one reason or another.[176] The significance of the judgment in the Baby M case[177] is that it seemed to extend the right to reproduce beyond the mere capacity to procreate. It contemplated the right as including access to artificial assistance. The question remains, however, as to the extent to which capacity is a pre-requisite for the exercise of the right.

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175. See supra., pp. 63-66.
176. see supra., chapter 2.
177. Hornblower, Margot, "Judge Awards 'Baby M' to Her Biological Father", The Washington Post, April 1, 1987.

(5) THE RIGHT OF THE INFERTILE TO REPRODUCE

The initial hypothesis of this chapter was that once the nature and scope of the right to reproduce was explored and unravelled, the concept may provide a satisfactory justification for the claim of the infertile to use artificial reproductive methods. This is correct only up to one level of enquiry. If the view taken in the Baby M case[178] is adopted, then the right to reproduce may be taken to imply an incorporation not simply of the right to decide whether or not to procreate, but also of the right to choose how to procreate. As with all other human rights, a compelling justification would be needed if the exercise of the right is to be interfered with.

This formulation of the right to reproduce, however, is inadequate in respect of the infertile in two aspects. First, it fails to accommodate the claim of some infertile people. Second, the right to reproduce, as a negative claim right, will clearly not advance any claim of the infertile to state funding of artificial reproductive techniques, without which the right may be meaningless. This latter claim can only be understood by reference to the notion of a positive claim right to reproduce. Questions of state responsibility will be considered in more depth later.[179] For the moment, however, the situation

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178. See supra.cit.
179. See infra. chapter 8.

of the infertile people will be considered.

In the case of a sterile individual, any claim that there is a right to use artificial reproductive methods to have a child so that he or she can found a family would obviously not be covered by the concept of the right to reproduce. The individual's interest here is not in reproduction, but rather in founding a family.

However, the inability to reproduce may relate to circumstances other than the lack of capacity of a given individual. This is of particular importance, since references to 'infertility' often encapsulate the infertile couple, even although one of the parties may have unimpaired procreative capacity. Such a person within that relationship lacks the natural opportunity to vindicate his or her right to reproduce. Nonetheless, the right to reproduce, as explicated here, provides protection for the individual's freedom to choose not only whether or not to exercise that capacity, but also <u>how</u> to exercise it.

Indeed, if the right to reproduce did not include the right to have access to artificial reproductive methods, the right to reproduce of individuals who are in the situation described above, would be rendered nugatory. This is so because the choice confronting them is either not to

procreate,[180] or to engage in sexual relations, outside the relationship, with a fertile partner. This latter option, whilst it would allow the exercise of the right to reproduce, may be regarded as immoral or unacceptable in itself. Indeed, much of the debate concerning artificial reproduction has centred on similar questions as to the morality of the techniques.[181].

If the right to reproduce is of value, then it would be strange indeed were its vindication to depend on an individual being forced to indulge in activities which could be regarded as immoral.

In other words, unless artificial reproductive methods are themselves sufficiently immoral so as to amount to a compelling justification to limit their accessibility in order to vindicate the right to reproduce, it would seem that where a husband is sterile, his wife's right to reproduce includes the right to choose to employ AID, without unwarranted governmental interference. Similarly, in a case where a wife is sterile and wombless, the husband has a right to choose partial surrogacy in order to procreate, without unwarranted interference.

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180. As the state is not obliged to provide a sexual partner, nor presumably to provide a fertile sexual partner, see Poe et. al. v. Gerstein et. al., supra. cit. at p. 795.
181. See infra. chapter 4.

Yet, to describe these couple's interests in artificial reproductive methods purely in terms of an individual right to reproduce - even technically correct and impeccable - may not reflect all, or may only reflect a fragment, of the interests involved. The claim to use artificial reproductive methods in those cases may not be related entirely to the wife's or the husband's claim to exercise an individual's right to reproduce. It may additionally, and as importantly, reflect the interests of these couples in founding a family. Indeed, the interest of a couple in founding a family (rather than in procreation) may be fundamental in some cases. For instance, in a case of a couple both of whom are sterile, their claim to use donated embryo surrogacy can hardly be a claim to reproduce by the couple. Rather, it is a claim reflecting their interests in founding a family.

Implicit in this analysis is that individuals who do not have the capacity to reproduce (because of sterility) cannot be in a position meaningfully to claim a right to reproduce.[182]

Having said that an individual's right to reproduce may be too narrow a concept to encapsulate one crucial element of the interests of some infertile

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182. Unless the concept of the right to reproduce includes the right to be rendered fertile. This is clearly incompatible with the notion of a negative claim right. See infra, chapter 8 for a discussion on the positive claim right to found a family.

couples in founding a family, it does not necessarily follow that an individual's right to reproduce is totally inapplicable and inappropriate when one is dealing with an infertile couple. Thus, both the right to reproduce and the interest in founding a family co-exist in a case where a couple is childless because the female partner has blocked fallopian tubes. Here, both partner can seek to vindicate both their individual right to reproduce, and their interest (as a couple) in founding a family. In other words, functional incapacity which is not irremediable is not a bar to the application of the right to reproduce.

Obviously, an individual, as well as a couple, may have interests in founding a family. Thus, in the case of a single person, he or she may claim an individual right to reproduce. Additionally, he or she may claim an interest in founding a family.

The above discussion, therefore, demonstrates that reproduction and founding of a family can be seen as distinct concepts, albeit that they are often inextricably connected. For instance, although an individual who has the right to reproduce may also claim an interest in founding a family, not all those who can claim the latter may be in a position meaningfully to claim the right to reproduce, which depends on capacity. The distinctiveness of the two

concepts is reinforced by the fact that families can be founded by means other than through biological procreation, for instance, by adoption and step-parenting.[183] The necessary corollary being that reproduction may not always be followed by founding of a family.[184]

There are two points which emerge from this discussion and which can be recapitulated here. First, that the right to reproduce extends to an individual who has capacity to reproduce, but is unable to exercise that capacity because of the infertility of his or her partner. In practical terms, the use of the language of rights in such a case may seem to point to the desirability of allowing access to artificial reproductive methods in order that the person having the right may vindicate it.

Second, it has also been noted that the claim of the infertile to have access to artificial reproductive methods is not always based solely on the right to reproduce. In some cases, it may be based also on the interest in founding a family, which will be the sole claim of a couple both of whom are

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183. Eg. the Commission on Human Rights noted that, "...adoption of a child and its integration into a family with a couple might, at least in some circumstances, be said to constitute the foundation of a family by that couple. It is quite conceivable that a 'family' might be 'found' in such a way." Dec. Adm. Com. Ap. 7229/75, 12 Dec 1977. D & R 12 p.32 (34-35).
184. See eg. where children are given up for adoption.

sterile. It is important, therefore, when discussing the rights of the infertile in respect of the use of artificial reproductive methods, to consider in more depth what is the strength of this interest, and its place and consequences in the catalogue of rights.

(6) ARTICLE 12 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE RIGHT TO FOUND A FAMILY

As has been noted, the claim of some infertile people to use artificial reproductive methods may be based on the interest in founding a family, an interest that is identified in, and elevated to the position of a right by, the European Convention on Human Rights. In this section, the nature and scope of the right and, the values it protects will be analysed.

Since procreation is generally so closely linked with founding of a family - and the state has only a limited power to negate a parent's claim to bring up his or her child[185] - one may deduce that, given that there is a negative claim right to reproduce, there is also a negative claim right to found a family. In other words, western societies not only value non-interference in reproduction, but also what is usually consequential upon the exercise of the right to reproduce. In fact, this has been accepted by the Anglo-American cases discussed earlier on the right to reproduce. For instance, the American cases talked of personal privacy extending to activities of marriage, procreation, family relationships and child rearing.[186] And the

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185. See Re D (a Minor), The Times, 5 Dec., 1986, p. 15.
186. See Eg. Mr. Justice Blackmun in Roe v. Wade 410 U.S. 113, 152-5 (1973), loc. cit.

British cases talked of freedom of choice regarding founding of a family.[187] In this section, the meaning of Article 12 of the European Convention on Human Rights which guarantees the right to found a family will be compared with the Anglo-American concept.

The importance of family units to society has been recognised in a number of international agreements. For instance, Article 16(3) of the Universal Declaration on Human Rights (1948) states that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State...".[188] Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms says:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."[189]

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187. See Eg. Peter Pain J. in Thake v. Maurice [1984] 2 All. E.R. 513, 526, loc. cit.
188. See also similar provisions in Article 10(1) of the International Covenant on Economic, Social and Cultural Rights, and Article 23(1) of the International Covenant on Civil and Political Rights.
189. Similarly, Article 16(1) of the Universal Declaration on Human Rights (1948) says, "Men and women of full age...have the right to marry and found a family...". A similar article appears in Article 23(2) of the International Covenant on Civil and Political Rights.

Minimum Guarantee

Article 12 is subject to limitations "according to the national laws governing the exercise of this right". This does not mean that national laws governing the exercise of the right to marry and to found a family cannot amount to a breach of Article 12, otherwise, the very purpose of the Convention, which was to guarantee certain minimum rights irrespective of national laws, would be defeated.[190] Limitations regarding Article 12, therefore, must relate to legitimate purposes, such as prevention of polygamy or incest.[191] In other words, the protection of Article 12 could extend to situations even where there was a breach of national laws.

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190. In relation to the right to marry, it was said that "...although the right to marry is thus to a large extent subjected by A12 itself to the domestic legislation,...this reference to the domestic law cannot authorise States completely to deprive a person or category of persons of the right to marry." Op. Com., 1 March 1979, Van Oosterwijck Case, Publ. Court B, Vol. 36 pp. 27. See Jacobs, F.G., The European Convention on Human Rights, Oxford, Clarendon Press, 1975, p. 162.

191. Lord Kilbrandon, for example, suggests that "it might well be...that the European Court would not condemn 'national laws governing the exercise of' the right to found a family if these laws were designed to prohibit the wilful transmitting of genetic defects. Such laws would stand on exactly the same footing as those which, for genetic reasons, forbid marriage and punish sexual intercourse between persons of particular degrees of consanguinity." in "The Comparative Law of Genetic Counselling", in Hilton, B., et al. (eds.) Ethical Issues in Human Genetics, New York, Plenum, 1973, p. 254.

The Right of the Unmarried to Found a Family

Regarding the content of Article 12, the Court of Human Rights said in one case that,

> "...although marriage and the family are in fact associated in the Convention and in domestic legal systems, there is nothing to support the conclusion that the capacity to procreate is an essential condition of marriage or even that procreation is an essential purpose of marriage."[192]

Therefore, it could be argued that Article 12 contains two separate rights: namely, the right to marry and the right to found a family.

Nevertheless, the two rights appear to be extremely closely linked. In one case, for example, the Commission on Human Rights expressed its opinion that "the right to found a family...attaches indissolubly to the right to marry."[193] In another case, it was said that "the provision does not guarantee the right to have children born out of wedlock. Article 12, in fact, foresees the right to marry and to found a family as one simple right."[194] It appears, therefore, from these statements that Article 12, in itself, does not confer the right to found a family on the unmarried.

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192. The Van Oosterwijck Case, supra. cit., at p. 28.
193. The Van Oosterwijck Case, supra. cit., p. 28.
194. Dec. Adm. Com. Ap. 6482/74, 10 July 1975. D & R 7 p. 55(77).

Notwithstanding this, a state cannot prohibit, or unwarrantly interfere with, the procreational activity of the unmarried without incurring responsibility under the Convention.[195] This is so because Article 8 of the Convention protects the "private and family life" of an individual from unwarranted interference of public authorities. In effect, it has been held that Article 8 protects a woman's decision as to whether to terminate a pregnancy (that is, whether to procreate and whether to found a family) within certain legal limits.[196]

Thus, even if the interpretation of Article 12 needs to be confined to the provision of the right to found a family only following a valid marriage, the provisions of Article 8 apparently recognise the right of a woman to make reproductive choices (whether or not to reproduce and/or to use her gestational function). Implicit in this, and in the terminology of this Article which refers to 'private and family life' is the right of the individual (whether married or not) to found a family. This right has its roots in the concepts of privacy and liberty, expressing the

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195. There is only one case on sterilisation that has been considered by the Commission. It was in the context of Articles 2 & 3, which concern deprivation of life and inhuman and degrading treatment respectively, see Application 1287/61.
196. Op. Com., 12 July 1977, Case of Bruggemann and Scheuten, D & R 10 p. 100 (116-7).

same values as that recognised by the Anglo-American judges.

Minimum State Assistance

So far it has been established that there is a right to found a family recognised by the European Convention on Human Rights even if the recognition may seem somewhat oblique. It applies to both the married and the unmarried, and it essentially protects an individual against unwarranted interference by the state, that is, it is essentially a negative claim right. The state, therefore, is not obliged to assist people in the exercise of this right, except to the extent of doing what is the minimum necessary - for example, by providing a minimum framework and facilities (register of marriages and births) whereby people can establish a legally recognised family relationship.

Thus, in one case,[197] the Commission on Human Rights found that the right to found a family, guaranteed by Article 12, did not include a right to found a family in a particular way which was not recognised by the national laws, eg. foreign adoption.[198]

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197. Dec. Adm. Com. Ap. 7229/75, 12 Dec 1977. D & R 12 p.32 (34-35).
198. There is no right to adopt guaranteed by Article 12 or by the Convention. See Dec. Adm. Ap. 6482/74, 10 July 1975. D & R 7 p. 75(77).

Conversely, a state is obliged to provide minimal state assistance to facilitate access to the right to found a family. This is supported by cases interpreting the right to marry in Article 12. Thus, it has been held that the right of prisoners to marry can require state assistance to the extent of making the necessary administrative arrangements enabling a prisoner to marry, where this causes only minimun inconvenience and there is no substantial conflict with the public interest.[199]

In other words, Article 12 does not oblige a state positively to assist people's endeavours in founding a family. It will not, for example, oblige a state to fund the operation of marriage agencies to pair up single people so that they can found a family. Nor will it obligate a state to fund people to have children. The right to found a family, as guaranteed by Article 12, like the right to reproduce, is a negative claim right protecting the liberty of individuals, married or otherwise, to found a family free from unwarranted interference.[200]

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199. See the Hamer Case, D & R 24 p. 5(14-16).
200. See infra. chapter 8 for an argument that there is, in fact, a positive claim right to found a family.

(7) CONCLUSION: THE RIGHT TO REPRODUCE, THE RIGHT TO FOUND A FAMILY AND ARTIFICIAL REPRODUCTIVE METHODS

In this chapter, the rights which people have regarding reproduction and founding of a family have been examined and analysed in the Anglo-American legal context, and in the context of the European Convention on Human Rights. It has been claimed that the right to reproduce can be separated from the right to found a family, and that there is no evidence that either of these rights need to be confined to those who are married. In fact, authority points clearly to the conclusion that marital status is not relevant to the protection of these rights.

Equally, it has been argued that both the right to reproduce and the right to found a family are negative claim rights. They are the penumbra rights of liberty and privacy. These rights essentially give individuals the widest possible freedom of choice in reproduction and founding of a family - including, it has been suggested, the choice to employ artificial reproductive methods, and a woman's decision to become a surrogate. In these terms, any unwarranted interference with the use of artificial reproductive methods will be an infringement of an individual's rights since it will have the effect of limiting people's choice.

But for those who are infertile, who may have either the right to reproduce, or the right to found a family, or both, limitations on the use of artificial reproductive methods can have more significant effects.

It may render the rights of some infertile people valueless and nugatory. For instance, prohibition of surrogacy will amount to an abrogation and a nullification of the right to reproduce of a woman who has had a hysterectomy, but is capable of ovulating.[201] Prohibition of IVF and AI will have the same effect respectively on a woman who has irremediably blocked fallopian tubes, and a man who, for example, suffers retrograde ejaculation. In any of the above situations, the infertile's right to found a family will also be severely restricted.

Given that the value of both these rights is accepted, consideration must also, however, be made of their relative status, and of the weight which can be attached to arguments which would deny the infertile a legitimate appeal to human rights in claiming access to artificial reproductive methods.

It should be clear that of the two rights discussed here, the wider is the right to reproduce. Although both rights may be in the same family of

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201. That is, who is capable of providing the wherewithal for procreation, but is not capable of carrying a child.

rights - that is, they are both negative claim rights - the right to reproduce seems to be less vulnerable to attack. The circumstances in which a state will consent to defeat the right to reproduce, for example, by authorising compulsory sterilisation are increasingly rare and narrowly defined. However, the circumstances in which the right to found a family may be interfered with seem to be wider. For instance, a state may deprive an individual of the right to parenting on the ground that one is not 'fit' to be a parent - a decision based on the balance of probabilities and substantially subjective.[202]

Although the right to found a family is narrower in scope than the right to reproduce, this does not invalidate the importance it has in this discussion, and in court decisions. Just as reproduction is regarded as value, so too is the family unit, and the freedom of citizens to establish such a unit. As the court noted in Re D,[203] the denial of rights which was being contemplated was not only of the right to reproduce, but was also the important right to found a family - a right on which the court placed apparently equal value.

The distinction drawn in this chapter between the right to reproduce and the right to found a family

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202. See eg. Re D (a Minor), The Times, 5 Dec., 1986, p. 15, see infra., pp. 227-8.
203. The Times, May 1, 1987, p. 37.

is of crucial importance in any consideration of the rights of the infertile, and the extent to which they may validly seek access to artificial reproductive methods. Whilst it is acknowleged that some infertile people cannot reasonably be in a position to claim the right to reproduce, it is submitted that it can and does make sense to talk of them having a right to found a family.

The implications of this are legion. Most notably, it is logical to claim that, unless there is something inherently immoral in artificial reproductive methods themselves, which would provide a compelling reason for denying access to them, then the right to found a family (whether through reproduction or not) should not be unnecessarily limited. It is to this question that discussion now turns.

CHAPTER 4

MORAL AND SOCIAL ACCEPTABILITY OF ARTIFICIAL REPRODUCTIVE TECHNIQUES

(1) INTRODUCTION

In chapter 2, reference was made to three possible artificial reproductive methods (AI, IVF and surrogacy) to which the infertile may have resort in order to found a family (whether through reproduction or not). The nature and use of these methods have been the subject of concern and have generated varying degrees of debate. Concern is understandable, because these are not purely medical techniques, as applied to reproduction and founding of a family, which exist in a vacuum without moral, social and legal implications.[204]

In this chapter, the question addressed is whether artificial reproductive techniques (AI, IVF and the use of donated gametes) which enable the infertile to found a family (whether through reproduction or not) are inherently objectionable, thus justifying certain types of interference, or prohibition, which would in effect abrogate the right to reproduce of some infertile people, and limit the right to found a family of the infertile.[205]

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204. See generally, Human Procreation, Ethical Aspects of the New Techniques, Report of a Working Party Council for Science and Society, Oxford, Oxford University Press, 1984, (hereinafter cited as Human Procreation, CSS, 1984).
205. The question of the use of these techniques in surrogacy arrangements poses additional problems. This question is, therefore, considered separately, see infra., chapter 6.

Analysis of some of the fundamental objections against AI & IVF indicates that they are profferred on the basis of commom and deep-rooted beliefs, which may be marshalled and appraised under the same headings. It is to these common features that the first section of this chapter will be directed. Following this, analysis of the arguments applicable uniquely to IVF will be considered. The acceptability of the use of donated gametes will be considered in the last section of this chapter.

(2) OBJECTIONS TO ARTIFICIAL REPRODUCTIVE TECHNIQUES: ARTIFICIAL INSEMINATION & IN VITRO FERTILISATION

Unnatural[206]

It has been argued that artificial reproductive techniques (that is, AI & IVF) are unacceptable because they are 'unnatural'. There are two ways of comprehending this argument.

First, artificial reproductive techniques may be considered by some to be 'unnatural' in the sense that the 'sacred process' of life is the prerogative of God and should not be interfered with.

This argument would suggest that the infertile should accept their condition rather than attempting to procreate against God's 'will' by using artificial reproductive techniques.[207] This line of argument is certainly vague. Would taking drugs to destroy a life-threatening bacterium be an interference with the 'sacred process' of life, and an usurption of God's prerogative? Further, the belief that procreation should be dictated by God's prerogative is clearly a belief not adhered to rigidly by those who are prepared to use artificial techniques to procreate, and there is no serious suggestion that these people's

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206. See generally Singer, P., & Wells, D., The Reproduction Revolution, Oxford, Oxford University Press, 1984.
207. See the Vatican's disapproval of artificial reproductive techniques, The Times, March 11, 1987, p.3.

view should be converted.

A second interpretation of the term 'unnatural' is based on the belief that these techniques contravene the 'natural law'. One theory of natural law is that the laws of nature can be discovered by reference to the ends of natural things.[208] That is, all things and all human beings have certain ends which constitute their flourishing and human acts have certain ends (or purposes) which define the appropriate way in which they should be performed.

The argument that AI & IVF are 'unnatural' goes like this: since the only natural and legitimate end of sex is procreation, modes of procreation, such as AI & IVF which sever such a link, are contrary to the natural law.[209] Notwithstanding the unpopularity

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208. A theory which owed much to Aristotle and the Stoics. See Singer, P., & Wells, D., op. cit. pp. 39-41.
209. See Report of the Committee of Inquiry into Human Fertilisation and Embryology, London, HMSO, Cmnd. 9314, 1984, paras. 4.3 & 5.6. (hereinafter cited as the Warnock Report). See also the Vatican's rulings on the impropriety of artificial reproductive techniques, The Guardian, 11 March, 1987.

of this procreational model of sex and the lack of credibility of its original basis,[210] it is unclear what useful purpose this argument serves regarding the acceptability of artificial reproductive techniques. As Singer & Wells have said,[211] even if procreation is the essential legitimation for sexual intercourse, it would not necessarily be wrong to achieve procreation in some other way when infertility prevents the achievement of this essential goal through sexual intercourse. This leads to the next objection to AI & IVF.

Natural Procreation

To some people, AI & IVF are wrong because 'true' procreation is achieved solely by a man-woman relationship. This argument turns the procreational model of sex on its head. In other words, instead of arguing that sex is for procreation, the contention here is that procreation should only be achieved naturally, that is, as a result of sexual

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210. See Blustein Jeffery, Parents and Children: The Ethics of the Family, Oxford, Oxford University Press, 1982, pp. 233-6; Cohen, Carl, "Sex, Birth Control, and Human Life", in Baker, Robert and Elliston, Frederick (eds.), Philosophy and Sex, New York, Prometheus Books, 1975, p. 150; Pope Paul VI, "Humane Vitae", in Philosophy and Sex, op. cit., p. 131.
211. Singer, P., & Wells, D., op. cit., at pp. 40-41.

intercourse. Thus, it has been argued that:

> The true character of procreation is secured by its belonging to the man-woman relationship...The procreative and relational aspects of marriage strengthen one another, and that each is threatened by the loss of the other. This is a knot tied by God, which men should not untie. It is clear that any attempt to convert begetting into making constitutes a lossening of that knot..."[212]

According to this view, AI & IVF are not 'true' procreation. Yet, defining one mode of procreation as 'true' or 'false' is rather extraneous to the main issue. Why is artificial procreation unacceptable?

The author seems to suggest that AI & IVF which separate the relational and procreational aspects of marriage, threaten the former.[213] However, there is no concrete or substantive evidence to support this assertion. Indeed, it may equally be argued that couples who resort to AI & IVF in order to have children demonstrate their love and commitment to each other, possibly even to a greater extent than some fertile couples.

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212. See O'Donovan, Oliver, Begotten Or Made, Oxford, Clarendon Press, 1984, pp. 17-8.
213. Nor is it true that it is necessarily less meaningful. "[F]ertilisation achieved outside the bodies of the couple remains by this very fact deprived of the meanings and the values which are expressed in the language of the body", see Vatican's ruling against artificial reproductive techniques, The Times, March 11, 1987, p.3.

To sum up, the 'unnatural' argument, and the argument that natural procreation should be the only mode of procreation, are based on fundamental personal beliefs and values. Consequently, individuals who ascribe to those view may legitimately eschew artificial reproductive techniques. These arguments, however, are not sufficient to establish by themselves that others, who do not share the same beliefs, should be prohibited from having the choice to use them in the exercise of their right to reproduce and to found a family. Consistent with Mill's[214] classic explanation of the justification for interference with others, these beliefs would be enforceable on others only if they represent harm to the general good.

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214. See Mill, John Stuart, "On Liberty", in Feinburg, Joel & Cross, Hyman (eds.), Philosophy & Law, California, Wadsworth Publishing Co., (2nd Ed.), 1980, p. 180.

(3) OBJECTIONS TO IVF

In the preceding section, fundamental objections common to both artificial reproductive techniques have been discussed. The conclusion is that they are not morally and socially unacceptable, and that these arguments cannot justify interference with their use on those grounds alone. However, some unique features of IVF may modify this conclusion in its respect.

Whereas certain objections may be common to both AI and IVF, the nature of the latter may provide a further source of debate for those who would advocate its use. The crucial distinquishing characteristic of IVF is that it involves more than simply the facilitation of a process which takes place naturally. Rather, it entails the extra-corporeal creation of a human embryo. The arguments already discussed may be applied to this extra-corporeal fertilisation, but they do not serve to render it universally immoral by themselves. The more subtle arguments raised in respect of IVF have, in fact, tended to concentrate on the way in which it is practised, and its potential to generate future (and admittedly speculative) harm.

Thus, even those who take the position that an embryo, from the moment of conception, ought to be treated with the respect accorded to a human being may accept that as long as it is given the chance to

fulfill its potential, IVF is not unacceptable.[215]

Consequently, debates on IVF usually centre on its practical use, and the many scientific possibilities it opens up, such as experiments on human embryos, freezing embryos, genetic studies and so on,[216] rather than on the acceptability of IVF per se. For instance, responding to moral concern regarding wastage of embryos during the selection and reimplantation process, the IVF centre in Norfolk, Virginia, has adopted the practice of fertilising eggs only if a woman wishes them to be transferred to her womb.[217] In Britain, the Unborn Children (Protection) Bill 1985[218] which generated much passionate debate on the moral status of embryos was essentially an attempt to ensure that embryos were

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215. See Johnstone, Brain, "The Moral Status of the Embryo: Two Viewpoints", in Singer, Peter & Walters, William (eds.), Test-Tube Babies, A Guide to Moral Questions, Present Techniques and Future Possibilities, Oxford, Oxford University Press, 1984, pp. 49-56.
216. See generally the Warnock Report and Harris, John, "In Vitro Fertilisation: the Ethical Issue", (1983) 33 Philosophical Quarterly, 217. For a brief survey of the debates on embryo experimentation, see the Warnock Report; Mary Warnock, "Absolutely Wrong", The Times, 30 May 1985; "Why Warnock is Wrong", The Times, 6 June, 1985; Editorial, The Times, 13 Feb. 1985; "The Birthright That Science Deserves To Lose', The Guardian, 6 June 1985; The Guardian, 16 Oct. 1985.
217. See supra. pp. 31.
218. The Unborn Children (Protection) Bill, Session 1984-5, H.C. Bill No. 23, and the Unborn Children (Protection) (No. 2) Bill, Session 1985-6, H.C. Bill No. 220.

created *in vitro* only for the purpose of enabling a woman to have a child.[219] In other words, IVF as a technique is not automatically regarded as unacceptable. Rather, anxieties are directed primarily to the way in which it is carried out.

Moreover, some may contend that, although IVF is not an unacceptable technique in itself, it becomes unacceptable in view of the possible consequences to which it may lead. This is called the slippery slope argument.[220]

For instance, it may be argued that, if IVF is allowed, it may be a step on the road to the Brave New World; a society in which genetic engineering enables human beings to be produced with certain characteristics in a state controlled laboratory for the benefit of the state. IVF, therefore, is unacceptable because its potential danger outweighs its possible benefits.

Opponents to IVF, therefore, argue that "if medicine turns to doctoring desires instead of medical

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219. Clause 1(1) states, "Except with the authorisation of the Secretary of State under this Act, no person shall...procure the fertilisation of a human ovum in vitro...". Clause 1(2) says that authorisation is allowed only for an IVF procedure to be carried our for the purposes of enabling a specific woman to bear a child.

220. See Govier, Trudy, "What's Wrong with Slippery Slope Arguments?", (1982) 12 Canadian Journal of Philosophy, 303.

conditions...is there any reason for doctors to be reluctant to accede to parents' desires to have a girl rather than a boy, blonde hair rather than brown, a genius rather than a Clout...".[221]

Although the slippery slope argument (a type of consequentialist argument) can often sound persuasive, it may also be inherently illogical. The thrust of the argument, in relation to IVF, runs like this: IVF is used to satisfy the desire of the infertile to have their own children and, if this is accepted, the principle of consistency will require the acceptance of other technical extensions, such as genetic engineering, to create, for example, a genius, if this is what parents desire. This will eventually lead us to the Brave New World.

Nonetheless, accepting IVF does not necessarily force acceptance of other technological extensions. The two situations mentioned above may be equated in the sense that both are concerned with satisfying people's desires, and thus, if these desires are accorded the same weight consistency will require acceptance of the latter situation if the former is permitted. Yet the two situations may not be identical, since one relates to a situation where people desire to have their own children, the other is where parents desire to have particular kinds of

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221. Ramsey, Paul, "Shall We Reproduce?", "Rejoinder and Future Forecast", (1972) 220 JAMA 1480, 1481.

children. The reasons for these different desires may not be equally acceptable, and hence, the two cases need not be treated as identical. Accepting the former does not necessarily oblige one, on the ground of consistency, to accept the latter. Moreover, the desire to have children is validated by acceptance of the right to reproduce and to found a family.[222] No such equivalent rights adhere to the wish for a particular kind of children.

In any event, technological advances alone will not lead to Aldous Huxley's Brave New World. This is because Huxley's society is one where not only has the state mastered genetic engineering and artificial human reproduction, but it is a society with a rigid caste system, intense brainwashing and human enslavement. Transformation of present society to that of the Brave New World could only be achieved if all these elements exist. Successes in genetic engineering alone are insufficient to achieve this.

Nonetheless, fear of potential abuse of genetic engineering techniques is not entirely unjustifiable. Even if the above scenario is unlikely, other more plausible consequences may follow from IVF techniques which may be equally unacceptable. A review of these possibilities led the Warnock Report to recommend the creation of a

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222. See supra. chapter 3.

statutory licensing authority, but not to recommend the outright banning of IVF and some of its consequential practices.[223] In the absence of legislative backing for this recommendation a voluntary licensing authority was set up in 1985 to monitor the activities of those who wish to carry out research involving human embryos and/or the treatment of IVF.[224]

In other words, objections regarding the practice of IVF, and the slippery slope argument are not persuasive grounds for the prohibition of all IVF. However, they do present a powerful case for the need to regulate the practice and its scientific extension.

In sum, IVF, like AI, is not in se an unacceptable technique. As the Warnock Report concluded, IVF is an acceptable means of treating infertility, and it should continue to be available subject to licencing.[225] Thus, it is accepted that the infertile should be allowed to resort to artificial reproductive techniques for reproduction and founding of a family, given that the problems identified here merely call for regulation of the

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223. See the Warnock Report, para. 13.3.
224. See Voluntary Licensing Authority for Human In Vitro Fertilisation and Embryology, First Report, London, Medical Research Council/Royal College of Obstetrician and Gynaecologists, 1986.
225. See para. 5.10.

practice of IVF and do not render it morally reprehensible. Indeed, the current position is that a number of centres in various countries are offering these techniques as part of their infertility services.[226] One may, therefore, conclude that the right of the infertile to reproduce and to found a family prevail, and have indeed been tacitly recognised by virtue of the fact that no prohibition of these techniques has been seen appropriate despite strong condemnation from some sections of the community. The balance of morality, therefore, may be said to favour the vindication of human rights over practical, but avoidable, problems which can arise in the attempts to facilitate access to these rights.

However, it must be noted that the arguments described above have been deliberately confined to the relatively straightforward situation where a couple are artificially assisted to reproduce and to found a family by the use of their own genetic gametes. Whilst the same arguments may be levelled against the use of donated ova and sperm, their characteristics may change. Equally, additional arguments may arise in this situation.

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226. Singer, P., & Wells, D., op. cit., p. 13.

(4) OBJECTIONS TO THE USE OF DONATED GAMETES

If AI & IVF are not unacceptable *in se* as means of reproduction and founding of a family, is the use of donated gametes which will enable the founding of a family (whether through reproduction or not) equally acceptable?

The Couple[227]

It has been argued that the use of donated gametes (whether sperm or ova) is unacceptable because it amounts to a third party intervention into a marriage relationship which is a covenant-relationship between a man and a woman to the exclusion of all others.[228] If this argument stands, it will rule out the use by married couples of donated gametes. Another argument against the use of donated gametes is the possible harm to a child when he or she comes to know about the circumstances of his or her conception. The effects of both of these arguments on the rights of individuals to found a family (whether through reproduction or not) will be examined in turn.

Since these arguments are normally raised in respect of the use of donated semen in AI (AID), the

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227. Note that the Warnock Report use this term to refer to all stable relationships except when discussing status of children, see para. 2.6.
228. See the Warnock Report, para. 4.10.

following discussion will refer to AID. However, what is said is equally applicable to the use of donated gametes in artificial reproductive techniques in general.

Third Party Intervention

The essence of this contention against AID is that, since donated semen of a person not party to a marriage is used for procreation, it amounts to a third party intervention into a marriage. It is comparable to an extra-marital relationship, and is therefore objectionable.[229]

AID has sometimes been equated with adultery.[230] However, such a comparison can hardly be justified. The nature, motive and elements of the

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229. See, for example, in 1949, Pope Pius XII condemned AI as immoral. "...Artificial insemination in marriage, but produced by the active element of a third party, is equally immoral... The husband and the wife have alone reciprocal right over their bodies in order to engender new life..." See Finegold, Wilfred J., Artificial Insemination, Springfeild, Illinois, Charles C. Thomas, 1964, p. 78.

230. In 1945, a commission set up by the Archbishop of Canterbury to consider the practice of human artificial insemination concluded by majority that "...the act both of a married donor, and a married recipient constitute adultery." According to the Commission, adultery involved the surrender of either reproductive powers or organs of generation whether capable of actual generation or not. (The Report was published in 1948, and reprinted in 1952 by S.P.C.K. under the title Artificial Human Insemination, p.37). See infra. chapter 5, pp. 129-132.

acts are totally different.[231] An adulterous relationship involves sexual intercourse between two people, often with emotional involvement; AID does not. The motives of the two acts, again, are not parallel. AID is used in the hope that conception will occur so that a couple can have a family.[232] This is not generally the case in an adulterous relationship which usually aims at the pleasure it will give, whereas AID is a means to an end.[233] The legal position seems settled. In Scots law, AID is not adultery even if it is undertaken without a husband's consent.[234] This is almost certainly the English position, although no English courts have considered the point.[235]

However, other arguments must also be considered. It has been suggested that the introduction of a third party into a marital relationship is undesirable because of the possible harmful consequences it may have; in that a husband will be reminded of his infertility by the existence of an AID child. Nonetheless, this is clearly something that a couple will have to assess for

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231. See the Warnock Report, para. 4.10.
232. See supra. chapter 2, pp. 21-24.
233. ibid.
234. MacLennan v. MacLennan, (1958) S.C. 105., See infra. chapter 5, p. 130.
235. See infra. chapter 5, pp. 129-132.

themselves.[236] Furthermore, the fact that some couples will be affected adversely by AID is not sufficient to exclude its use by others. In fact, this may merely serve to indicate the need for counselling for those contemplating using AID.[237]

In terms of a married couple, then, there may be some strength to the argument that AID is an intrusion into the marital relationship, since - at a practical level - there is the need for a donor. It is not clear, however, that intrusion which is designed to develop the relationship and which is effective in vindicating basic rights, need be viewed as a bad thing. In other words, it is not morally imperative that intervention in a marriage is in itself wrong, particularly where the aim and likely outcome of the intervention is to cement a relationship rather than to disrupt it. In some cases, the use of donated gametes will provide the only method by which individuals and couples may exploit their rights to reproduce and to found a family.

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236. See supra. chapter 3, pp.55-56, on marital privacy.
237. See Legislation on Human Infertility Services and Embryo Research - A Consultation Paper, HMSO, London, Cm. 46, 1986, para. 25 (hereinafter cited as the Consultation paper).

The Individual

The arguments used in respect of a married couple, do not, of course, automatically apply to single individuals, who - it has been asserted - may also claim the right to reproduce and to found a family.[238] Since no marriage exists, intrusion into a marriage cannot be used as an argument in an attempt to limit access to these techniques.

However, arguments can be adduced which relate specifically to the single individual, and which may seem to suggest that such techniques should not be made available to them. Most notably, it may be argued that - even accepting the practice of using donated gametes in some circumstances - the deliberate creation of a single parent family is sufficiently unacceptable to merit a restriction of access. Were such an argument to have priority, then it would seriously hinder the assertion that the single infertile also have rights to reproduce and to found a family.

In fact, courts in recent cases have been noticeably disinclined to disvalue the one-parent family,[239] and society seems less inclined to regard it as necessarily a bad thing. The general view,

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238. See supra. chapter 3.
239. See Thake v. Maurice, [1984] 2 All E.R. 513, at p. 516, per Peter Pain J., loc. cit.

therefore, may be less hostile towards single-parent families.[240]

Nonetheless, there is little doubt that the strongest arugment against exercising the right to reproduce and to found a family through the use of AID, may be found in consideration of the subsequent child. The rights of individuals and couples may be affected by competing rights of children.

Harm to an AID Child

One of the strongest objections to the use of AID is that an AID child may experience confusions of personal identity due to the circumstances of his or her conception.

At the moment, the practice in AID appears to be that some practitioners advise couples not to disclose to the child his or her circumstances of conception, whilst others apparently leave the decision as to whether to tell to them to the recipients:

> "...unless you decide to tell the child there is no reason for him (or her) even to know that he (or she) was conceived by AID. Whether or not you do so is entirely up to you."[241]

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240. Compare this with the Departmental Committee on Human Artificial Insemination, London, HMSO, Cmnd. 1105, 1960, para. 112, where the committee vehemently opposed the idea of AID to single women.
241. Artificial Insemination, Explanatory information booklet to parents, London, RCOG, 1979.

A study[242] has found that most AID couples intended never to reveal the circumstances of their conception to AID children. These children therefore may never know of their AID conception nor be informed of the donors' identities. Some, therefore, argue against AID on the ground that it is wrong to deceive a child regarding the circumstances of his or her conception.[243]

Despite the secrecy regarding AID in general, some AID children do discover the circumstances of their conception, either in the divorce proceedings of their 'parents', or indirectly from family conversation. The undesirable consequences of accidential disclosure have strengthened the case for openness with AID children regarding the circumstances of their conception.

The argument for openness and the debates relating to the extent of disclosure,[244] implicitly accept the use of AID, and considerations relate to what measures will best meet the needs of AID children taking into account interests of those who use and donate semen.[245]

Nonetheless, some may contend that possible harm to a child when he or she is told about his or

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242. See Snowden, R.S. & Mitchell, G.D., The Artificial Family, London, Unwin Paperbacks, 1981, pp. 82-5.
243. See Human Procreation, CSS, 1984, p. 47.
244. See infra. pp. 112-116.
245. See the Consultation paper, paras. 29-30.

her circumstances of conception is an important consideration against AID itself, and not merely a consequential issue. Those in favour of AID may seek to counter this argument by pointing out that the discovery by a child that his or her 'father' is in fact not genetically linked to him or her, does not necessarily entail greater distress than the discovery that one has been adopted. However, there are distinctions between the two situations which make this counter-argument of only limited value.

Although adoption is a situation where the child may suffer when he or she is told about his or her true origin, it is nonetheless often the best option for a child who has already been born. Consequently, adoption cannot be used as an example on all fours with the deliberate creation of a child, who may suffer as a result of his or her particular circumstances of conception.

Notwithstanding this, it is, however, difficult to contend with any strong conviction that such a child would have been better off not being born in the first place (which he or she would not have been but for the use of AID), and that, conversely, people have no right to use AID to found a family (whether through reproduction or not).[246] In fact, courts have been

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246. See generally, Liu, A.N.C., "Wrongful Life: Some of the Problems", (1987) 13 Journal of Medical Ethics, 69.

notably loath to accept that non-existence could ever be preferable to existence even with handicap.[247]

In sum, people's rights to found a family (whether through reproduction or not) prevail, despite the personal belief of some that third party intervention into a marriage is wrong, and that an AID child may suffer due to his or her particular circumstances of conception.

Given that the strongest argument against AID (whether for individuals or couples) seems to relate to the resulting child, it is worth at this stage considering whether any unfavourable impact on the child could be minimised. In particular, considerable concern centres on the question as to whether or not a child has a right to have access to certain information about the donor. If the distress which forms the basis of this argument against AID is real, there seem to be two options.

On the one hand, the child could simply be deceived - a practice which is relatively common, but can be frwoned upon for several reasons.[248] On the other hand, the child could be told of the circumstances of his or her conception.

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247. See Zepeda v. Zepeda 41 Ill App 2d 240; Williams v. States of New York 18 NY 2d 481 (1966); McKay v. Essex Area Health Authority [1982] 2 All E. R. 771.
248. See infra. pp. 112-116.

There appear to be a number of reasons why AID children are not told the truth. Some fear that the truth will adversely affect the relationship already established between the child and the family. Some couples consider that there is no reason to tell because they regard the AID child as 'their' child. Others fear that AID status will stigmatise the child. In one study,[249] it was concluded that the main reason for secrecy was in fact an attempt to protect the feelings of husbands, and to avoid publication of the fact of male infertility.

Because of the secrecy which has surrounded AID, thorough follow-up studies of the impact on AID children when they are told of the circumstances of their conception have not been possible. But from limited data, Snowden & Mitchell[250] found that the fear that telling an AID child the circumstances of his or her conception would damage the 'father'-child relationship might not be entirely justified. Those children who had been told apppeared to be glad that their AID conceptions were not kept secret, and none found it a particularly traumatic experience. Some

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249. See Snowden, R., & Mitchell, G. D., Artificial Reproduction: a Social Investigation, Allen & Unwin, London, 1983, p. 106.
250. Snowden, R., & Mitchell, G. D., Artificial Reproduction: a Social Investigation, op. cit., pp. 97-123.

were surprised that their parents had found it necessary to keep AID secret. In some cases, the relationship between parents and child was enhanced rather than spoiled. Hence, it appears to be possible to tell a child about these circumstances without harming 'father'-child relationship.[251]

Moreover, secrecy may be harmful to family relationships and to the child. The positive and/or negative deception necessary to conceal the circumstances of a child's conception may blemish or destroy the relationship of trust which ideally exists within the family. If a child suspects his or her origin, secrecy may also be harmful to his or her mental health.

Here, an analogy may be made with adoption. It is generally accepted in adoption practice that an adopted person, in order to develop a proper sense of identity should know that he or she was adopted, and should be given this information in a way which takes account of his or her age and understanding.[252]

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251. ibid.
252. Clinical research suggests that in early adolescence, a genealogically bewildered child (that is, a child who either has no knowledge or only uncertain knowledge of one or both of his natural parents) will often begin searching for clues about his or her unknown parents from every direct or indirect shred of evidence. This sometimes amounts to an obssession. Genealogical deprivation may affect a child's sense of self-image, identity, belonging and

In recognition of this principle, a provision was made for England and Wales in the Children Act 1975 which gave an adopted person a right to ascertain his or her biological parentage at the age of 18.[253] In Scotland, an adopted person, on reaching 17, can go to Register House in Edinburgh and ask to see the original birth entry.[254]

In England and Wales, a person adopted before the statutory provision was enacted is required to be counselled before information is given which will lead them to their original birth record. The purpose of counselling is to assist the adopted person to understand some of the possible effects of his or her enquires. It was also thought that there should be some protection for the mother who gave the child up for adoption.

One may therefore argue that, by analogy with adoption, AID children should not be deceived about the circumstances of their conception, and that they

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security. The need to know one's biological origin is confirmed by a number of studies. See, for example, Sants, H.J., "Genealogical Bewilderment in Children with Substitute Parents", in Child Adoption, the Association of British Adoption and Fostering Agencies, London, p. 69. See McWhinnie, A.M., "Who Am I?", in Child Adoption, op. cit., p.104.

253. See Sections 26 & 27 of the Children Act 1975. See Generally, Cretney, S.M., Principles of Family Law, (4th Ed.), Sweet & Maxwell, 1984, pp. 473-5.

254. This provision was first made in Section 11 of the Adoption of Children (Scotland) Act 1930, now Section 45 of the Adoption (Scotland) Act 1978.

should have the right to know the identities of donors. If so, provisions similiar to those in adoption could be made enabling them to find out if they so wish.

Nonetheless, opinions are relatively divided as to whether an AID child should be allowed only limited information regarding the donor's ethic origin and genetic health,[255] or whether an AID child should have the right of access to the donor's identity, as does an adopted person. Here again there may be additional consequences following from full disclosure to an AID child, which may affect the desire of the community to encourage full and complete disclosure.

One major concern appears to be that disclosure of donors' identities may discourage semen donation. Available evidence on this is rather tentative at the moment.[256] Consequently, an AID child's right to know may be far from certain. But it is clear from the above discussion that openness with an AID child regarding the circumstances of his or her conception

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255. See the Warnock Report, para. 4.21.
256. The experience in Sweden suggests that fears of reduce in the frequency of semen donation proves to be groundless, see Surrogate Motherhood, Report of the Board of Science and Education, London, BMA, 1987, p. 19. The unpublished survey of Robyn Rowland in Victoria, Australia also supports this conclusion, see Singer, P., & Wells, D., op. cit., pp. 74-5.

is generally regarded to be desirable, and may avert the potential for harm associated with deception and accidential disclosure.

Consistent with this valuing of openness, is the conclusion that people who resort to AID should be counselled regarding the issues which they will have to confront later regarding a child's understanding of his or her circumstances of conception.[257] As will be seen later,[258] proper birth registration and recording of AID births will also permit access by AID to children certain information about donors.

As mentioned before,[259] the arguments concerning AID apply equally to situations where donated gametes are used for the founding of a family (whether through reproduction or not). Thus although the situation of a child born as a result of gamete donation is of great importance, the problems which can be identified are scarcely insurmountable. Their resolution depends on pragmatics, and, therefore, it is possible to conclude that even concern about possible harm to children is not a sufficient argument against the infertile having the ability to exercise their rights to found a family (whether through reproduction or not).

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257. See the Consultation paper, para. 25.
258. See infra. pp. 149-151.
259. See supra. pp. 103-104.

(5) CONCLUSION

In this chapter, some fundamental objections to the use of AI & IVF to reproduce and found a family have been examined. The arguments that these techniques are 'unnatural', and that natural procreation should be the only mode of procreation are essentially personal beliefs which do not have sufficient weight to defeat the claim of the infertile to exercise their rights to reproduce and to found a family.

Concerns relating to the practice of IVF, and the many scientific possibilities it opens up, are not insuperable. A voluntary licensing authority has been set up to monitor scientific developments in the area of research on embryos and IVF treatments,[260] and a statutory licensing authority will be considered by Parliament in the near future.[261]

The use of donated gametes for the founding of a family (whether through reproduction or not) may be rejected by some as an unacceptable intervention into a marriage by a third party. Neither this personal belief, nor the potential harm to a child, is sufficiently weighty, however, to defeat the claim of

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260. Voluntary Licensing Authority for Human In Vitro Fertilisation and Embryology, First Report, London, Medical Research Council/Royal College of Obstetrician and Gynaecologists, 1986.
261. A government Bill implementing the recommendations of the Warnock Report is just a matter of time, see H.L., Vol, 475, Col. 365.

those who are prepared to use donated gametes. The possibility of harm to a marriage may point to the need to counsel of potential users. The needs of children may indicate that the practice of AID should be more open, and that, for example, there should be proper recording of AID births, and counselling before access to AID birth records.

Current practice is consonant with these conclusions. AI, IVF and the use of donated gametes are all available either in the public or private sector. The intention of Parliament is to act on the recommendations of the Warnock Report concerning licensing and regulation of artificial techniques. One can infer here that an individual's right to reproduce, or to found a family, or both, are therefore being tacitly recognised and respected.

Although moral and social arguments against these artificial techniques do not seem to be sufficiently weighty to merit a denial of the rights of the infertile, there remain potential legal difficulties, which may affect this position. If the outcome of legal analysis is that the balance swings away from the rights of the infertile, then this will provide considerable support for the opponents of artificial reproductive techniques. It is to these matters, therefore, that attention must now be paid.

CHAPTER 5

LEGAL ISSUES IN FOUNDING A FAMILY BY ARTIFICIAL TECHNIQUES

(1) INTRODUCTION

It has been argued in the previous chapter that individuals should be free to resort to artificial techniques which will enable them to found a family (whether through reproduction or not), given that the problems identified merely indicate that the use of artificial techniques should be regulated and controlled.[262] Measures to that effect will be conducive to putting the use, and practice, of artificial techniques on a sound and proper footing. Nonetheless, certain potential difficulties are derivative from the law and can be resolved primarily by reference to legal change. The law, therefore, can have an important role to play in this context.

There are a number of legal issues relating to founding of a family by artificial reproductive techniques. For instance, what is the effect of artificial techniques on a marriage? Is the use of donated gametes adultery in law? As will be seen, these issues are relatively unambiguous today.

Issues concerning the legal status of children born as a result of artificial techniques are less exigent today.[263] The reason for this is that the

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262. See supra., chapter 4.
263. No British court has considered the legal status of an AID child. For the American cases which considered the question of legitimacy of AID children, see Cusine, D.J., "Artificial Insemination", in McLean, S.A.M. (ed.), Legal Issues in Medicine, Aldershot, Gower, 1981, p. 163.

policy of the law has recently been to remove, as far as possible, the legal disadvantages pertaining to children born out of wedlock. In England & Wales, this has been effected by the Family Law Reform Act 1987,[264] and in Scotland, by the Law Reform (Parent and Child) Act (Scotland) 1986 (LRPCA 1986). Since the Family Law Reform Act 1987 is still unpublished, references can only be made to the Family Law Reform Bill 1987 (FLRB 1987).[265]

Some may disagree with the approach of the FLRB 1987 and the LRPCA 1986 on the ground that they do not abolish the status of illegitimacy altogether.[266] If there was only one status for all children, then the question of parenthood in artificial techniques might be resolved by establishing a mechanism whereby parenthood might be acknowledged and registered. This could be accompanied by a separate register which could record a child's true parentage, enabling him or

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264. The Family Law Reform Act 1987 was very much influenced by the LRPCA 1986. The 1987 Act received its royal assent on the 16 May 1987. Neither of these Act are in force.
265. Family Law Reform Bill [H.L.], Session 1986-7, H.C. Bill, 70.
266. See the Law Commission's working paper on Illegitimacy, No. 74, London, HMSO, 1982, para. 3.16 (hereinafter cited as Law Commission's working paper, No. 74); Levin Jennifer, "Reforming the Legitimacy Laws", (1978) 8 Fam. Law, 35-9; Samuels Alec, "Illegitimacy: The Law Commission's Report", (1983) 13 Fam. Law, 87-90; Eekelaar, John, "Second Thoughts on Illegitimacy Reform", (1985) 15 Fam. Law, 261-3.

her to trace his or her origin.[267]

Regardless of the merits of one status for all children as opposed to the current policy of the law, the question of parenthood is still pertinent in the context of founding a family through the use of artificial techniques. First, as will be seen later,[268] the current concept of parenthood cannot satisfactorily be applied to artificial reproductive methods. Furthermore, since individuals resorting to artificial reproductive methods for the founding of a family are deliberately bringing children into the world for parenting, it is pertinent to ask who ought, at least, to have parental duties regarding such children.[269]

The issue of parenthood and registration of birth engendered by the use of artificial techniques will be explored, and proposed solutions will be examined, in this chapter. Since these questions

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267. See Cusine, Douglas, "Legal Issues Relating to AID", in Brudenell, M., et al. (eds.), Artificial Insemination, Proceedings of the Fourth Study Group of the Royal College of Obstetricians and Gynaecologists, RCOG, 1976, where the concept of "accepted children" was suggested, p. 163-70.
268. See infra. chapters 5 & 7, pp. 133-146, 231-238.
269. In natural reproduction, both English and Scottish law accord automatic parental rights and duties to married parents and unmarried mothers. Unmarried fathers have parental duties once paternity is established, and parental rights can be obtained through a court order. See Clause 4 of the FLRB 1987 and Sections 2 & 3 of the LRPCA 1986.

have been considered by the Warnock Report,[270] and its recommendations were intended to be applicable throughout the UK,[271] their recommendations will be referred to frequently.

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270. The Report of the Committee of Inquiry into Human Fertilisation and Embryology, London, HMSO, Cmnd. 9314, 1984, (hereinafter cited as the Warnock Report).
271. See para. 1.10.

(2) LEGAL ISSUES RELATING TO FOUNDING OF A FAMILY BY ARTIFICIAL REPRODUCTIVE TECHNIQUES[272]

Artificial Reproductive Techniques and Their Effect on Marriage

The legal effects of artificial reproduction (whether involving the use of donated gametes or not) on a marriage are relatively non-controversial today.[273] Nonetheless, it is worthwhile to mention them briefly, since they clearly concern founding a family and marriage. For instance, does AI amount to consummation of a marriage? Does it bar a decree of nullity? Is AID adultery? Although these issues are usually considered in relation to AI, and AID, and the following discussion will be conducted mainly in those terms, they have equal applications to IVF, and the use of donated gametes in general.

(a) Consummation of Marriage

One legal issue raised in connection to AI is the question whether or not it constitutes consummation of a marriage. In both English and

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272. Artificial reproductive techniques can raise many other legal issues, eg. the legal status of embryos in vitro, see Wright, Gerald, "The Legal Implications of IVF", in Test-Tube Babies, a Christian View, London, Unity Press, Becket Publications, 1984, pp. 39-44.
273. The Warnock Report did not discuss this legal aspect of artificial reproduction at all, except to mention that AID is not adultery in law, para. 4.10.

Scottish law, what is required to establish consummation of a marriage is intercourse which is "ordinary and complete" and not "imperfect and unnatural".[274] It follows from this definition that there is a clear distinction between consummation and conception. The former is achieved by sexual intercourse.[275] AI, therefore, cannot amount to consummation of a marriage. A number of English cases have considered this now settled legal issue.

In R.E.L.(otherwise R.) v. E.L.,[276] the wife was granted a decree of nullity on the ground of the husband's sexual incapacity, even though a child was born as a result of AIH. There was no consummation of the marriage.[277] Again, in Slater v. Slater,[278] AID was not considered to constitute consummation of a marriage. This was assumed in Q. v. Q..[279] In the Scottish case of A.B. v. C.B.,[280] there was no question that AIH constituted consummation of a marriage. Equally, therefore, IVF cannot in itself constitute consummation of a marriage.

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274. D. v. A. (1845) 1 Rob. Ecc. 279, at p. 299, per Dr. Lushington; Corbett v. Corbett [1971] P. 83; J. v. J. 1978 SLT 128.
275. A decree of nullity may be obtained on the ground of inability to consummate a marriage even if a child has been conceived by fecunatio ab extra, Clarke v. Clarke [1943] P. 1.
276. [1949] P. 211.
277. The wife's conduct in submitting to AIH was not held to have approbated the marriage, see infra., pp. 125-128, on a discussion of the doctrine of approbation of marriage.
278. [1953] P. 252, see infra. p. 126.
279. The Times, 12 May, 1960, see infra. p. 127.
280. 1961 SC 347, see infra. p. 128.

(b) Approbation of Marriage

Since AI or IVF cannot amount to consummation of a marriage, can they amount to approbation of a marriage, barring a decree of nullity?

The essence of the doctrine of approbation of marriage in both England and Scottish law has been explained in the following terms:

> "...that in a suit for the nullity of marriage, there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on and challenge it with effect."[281]

In England and Wales, the doctrine is now contained in S13(1) of the Matrimonial Causes Act, 1973, which provides that,

> "The court shall not...grant a decree of nullity on the ground that the marriage is voidable if the respondent satisfies the court:
> (a) that the petitioner, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so; and
> (b) that it would be unjust to the respondent to grant the decree."[282]

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281. See C.B. v. A.B. (1885) 12 R. (H.L.) 38, per Lord Watson at p. 45. Approved in A.B. v C.B. 1961 SC 347.
282. See Cretney S.M., Principles of Family Law, (4th Ed.), London, Sweet & Maxwell, 1984, p.84.

First, S13(1) puts the burden of proof on the respondent to satisfy the court that the conditions in the section are fulfilled. Second, the petitioner's conduct can only be a bar to nullity if he or she knew at the time that it was open to him or her to obtain the relief. In W. v. W.,[283] the marriage was not consummated owing to the incapacity of the wife. The couple adopted a child. Later, the husband petitioned for a decree of nullity. The Court of Appeal set aside the decree, holding that the marriage had been approbated. The Court held that although there was no issue that the husband knew of his remedies in nullity at the date of the adoption, he must be taken to have known of his remedy having regard to all the circumstances and the facts of the case.[284]

W. v. W. was distinquished in Slater v. Slater.[285] In that case, the Court of Appeal held that neither during the time of AID, nor at the date of the adoption of the child did the wife have knowledge

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283. [1952] P. 152.
284. Evershed, M.R. said, "A proceeding to adopt a child under the Adoption of Children Act, 1926, which was then in force, involved certain proposition and consequences. It involved that when two persons jointly adopted a child, they must proceed on the footing that they were spouses...The application was made on the footing that the applicants were parties to a valid marriage." ibid., p.158.
285. [1953] P. 252.

of her remedy in nullity. Therefore, neither of these events amounted to approbation of the marriage by the wife. A decree of nullity was granted to her. Again, in Q. v. Q.,[286] it was held that the fact that the wife had given birth to a child as a result of AID did not amount to approbation of the marriage by her, since at the time of receiving AID, she had no knowledge of the legal remedy open to her as a result of the husband's incapacity; a decree of nullity was thus granted.

The third requirement of S13 is that it would be unjust to the respondent to grant the nullity decree. For instance, in D. v. D.,[287] the parties adopted two children at a time when the husband knew that he could have the marriage annulled on the ground of the wife's wilful refusal to consummate the marriage. Dunn, J. held that the instant case was even stronger than that of W. v. W. because the husband knew of his remedies. However, a decree of nullity was granted because, in this case, there was no injustice to the wife in doing so.

In Scotland, as in England, an action for nullity on the ground of impotence may be barred if it is shown that the pursuer has, with full knowledge of the fact and the law, approbated the contract, or has

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286. The Times, 12 May, 1960.
287. [1979] 3 All E.R. 337.

taken advantages and derived benefits from the matrimonial relationship which it would be inequitable to permit him or her to treat as if it had never existed.[288]

Thus, in the case of A.B. v. C.B.,[289] a husband's action for nullity on the ground of the wife's impotence was dismissed. It was held that the husband had, with full knowledge of the facts and the law, approbated the marriage by co-operating in the wife's AIH, and agreeing to adopt a child.

In sum, although the doctrine of approbation in Scottish and English law is slightly different, a British court may refuse to grant a decree of nullity on the ground that the conduct of a spouse, in submitting to AI or IVF, has been such as to approbate the marriage. Each case, thus, depends very much on its own facts.

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288. C.B. v. A.B. (1885) 12 R. (H.L.) 36, per Lord Selbourne, approved in A.B. v. C.B. 1961 SC 347.
289. supra. cit.

(c) Adultery

One well-discussed legal issue in relation to AI is whether AID amounts to adultery.[290] In English law, the elements of adultery are clear. There must be voluntary or consensual sexual intercourse between a married person and a person (whether married or unmarried) of the opposite sex, not being the other's spouse.[291] In this context, some penetration, however slight, suffices.[292] Consequently, in English law, AID should, and would, almost certainly not be considered as adultery, although this point has never been directly examined by an English court.

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290. Tallin, G.P.R., "Artificial Insemination", (1956) 34, Canadian Bar Review, 1-27, 166-86, 628-31; Hubbard, H.A., "Artificial Insemination: A Reply to Dean Tallin", (1956) 34 Canadian Bar Review, 425-51; Bartholomew, G.W., "Legal Implications of Artificial Insemination", (1958) 21 M.L.R. p.236.
291. Accepted by Dennis v. Dennis [1955] P. 153.
292. See Dennis v. Dennis [1955] P. 153. "I do not think that it can be said that adultery is proved unless there be some penetration." ibid, at p. 160, per Singleton L.J. "...I can found no other sure ground upon which to base my decision...than that which was adopted by ...my Lord, namely, the test of penetration; penetration not necessarily complete, but some penetration in order that the physical fact of adultery may be proved either directly of indirectly by inference." ibid., at p. 163, per Hodson L.J.

In Scots law, AID is not adultery. This was decided in the case of MacLennan v. MacLennan,[293] where a husband petitioned for divorce on the ground that his wife had committed adultery. The wife denied adultery and explained that her child was born as a result of AID. The husband contended that this defence was irrelevant because AID without the consent of the husband amounted to adultery in law. It was held that, AID did not constitute adultery whether it was undertaken with or without the husband's consent.

Lord Wheatley came to this conclusion after holding that, for there to be adultery in a legal sense, there must be two parties of the opposite sex engaging in sexual act involving some degree of penetration. Consequently, AID cannot amount to adultery.

The decision in MacLennan is consistent with English law on the legal requirements necessary to establish adultery. From the point of view of common sense, as has been argued, it is sensible to distinquish between adultery on the one hand, and the use of donated semen in AI (AID) for the founding of a family, on the other hand.[294] These are acts of entirely different nature, and they have different intentions and intended consequences. Moreover, it

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293. [1958] SLT 12.
294. See supra. chapter 4. pp. 104-5.

would be implausible to argue that where a married couple resort to IVF which involves the use of donated semen, the wife is committing adultery. An interesting point in this context is that there has been no suggestion that ovum donation is adultery, even though some regard the surrendering of one's reproductive powers as sufficient to amount to adultery.[295]

Currently, the question as to whether donation and use of donated gametes amounts to adultery is largely academic. Section 1 of the Divorce Law Reform Act 1969 (applicable to England and Wales) and Section 1 of the Divorce (Scotland) Act 1976 have made irretriveable breakdown of a marriage the sole ground for divorce. Arguably, the conduct of a wife who undertakes AI without the consent of the husband, or that of a husband who donates semen without the consent of his wife, may be treated as intolerable conduct evidencing breakdown of the marriage, and thus, allowing a spouse to obtain a divorce.[296] However, the fact that divorce may be available is insufficient to challenge the techniques themselves.

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295. See supra. chapter 4, p. 104, on the view of the Archbishop of Canterbury's Commission on AID.

296. "It is almost trite to say that a married woman who, without the consent of her husband, has the seed of a male donor injected into her person by mechanical means in order to procreate a child who would not be a child of the marriage has committed a grave and heinous breach of the contract of marriage." per Lord Wheatley, in MacLennan, [1958] SLT 12, at p. 14.

If divorce is available in these circumstances, this is because of the manner in which the techniques were used and not due to the nature of the techniques themselves.

In the preceding section, the legal effects of AI, IVF and the use of donated gametes on a marriage have been considered. Consideration has been brief since they are relatively settled and non-controversial issues. One may conclude that AI or IVF cannot amount to consummation of marriage. Further, whether AI or IVF may or may not amount to approbation of a marriage is a question of fact in each case. Finally, donation and use of donated semen for the founding of a family cannot amount to adultery on the part of either a recipient or a donor in Scots law. This is certainly also the case in English law. However, the issue is largely otiose today since a divorce can be obtained by proving certain facts other than adultery. Consideration of these problems, therefore, may not any longer be the crucial focus of legal debate. However, a much more complex and potentially far-reaching area requires to be elaborated, that is, the question of parenthood. In the following section, the issue of parenthood in artificial techniques will be explored.

Parenthood and Artificial Reproductive Techniques: AI & IVF

The complexities of inter-personal relationships and legal standing following on the use of artificial reproductive techniques are such that some explanation is required of the way in which certain terms will be used. In the following discussion, 'parent', 'mother' and 'father' are terms used to denote a legal relationship between an adult and a child. The undernoted terms, however, are purely descriptive. 'Biological mother/father' refers to a woman/man who contributes an ovum/semen to the creation of a child. 'Ovum/semen donor' refers to a biological mother/father who donates her or his genetic gametes. 'Social mother/father' refers to a woman/man who intends to rear a child, regardless of her or his genetic link with the child.

In natural reproduction, the biological mother and father of a child, almost invariably also the social mother and father, are regarded by the law as parents. Both English and Scottish law attribute to them parental duties (as opposed to parental rights)[297] respecting the child. Thus, it has been said that the existing English (and Scottish) definition of parenthood is based on genetics.[298]

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297. See supra. p. 121.
298. Except in adoption, see Legislation on Human

This mode of attributing parental duties, using genetic factors will hereinafter be called the 'genetic mode'. Although the use of the 'genetic mode' in natural reproduction for the attribution of fatherhood is not disputed, whether this is also the real basis for motherhood can be questioned. This, nonetheless, does not affect the argument in this chapter.[299]

There is no doubt that the 'genetic mode' applies in cases where people resort to artificial reproduction (AI & IVF) to reproduce and found a family,[300] (that is, where neither donated gametes nor surrogacy is employed). This is so because the only difference between artificial and natural reproduction here is the way in which a child is

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Infertility Services and Embryo Research - A Consultation Paper, London, HMSO, Cm. 46, 1986, para. 33 (hereinafter cited as the Consultation paper). This appears also to be underlying assumption of the Warnock Report when it recommended that "where a woman donates an egg for transfer to another the donation should be treated as absolute and that, like a male donor she should have no rights or duties with regard to any resulting child." para. 6.8.

299. See infra., chapter 7, pp.236-8, on motherhood.

300. Neither the Law Commission Report on Illegitimacy, No. 118, London, HMSO, 1982, (hereinafter cited as the Law Commission Report, No. 118), nor the Warnock Report mentioned this, probably because it is not perceived to be an issue at all. See Appendix 1 for Lord Denning's move to amend Clause 1 of the Family Law Reform Bill [H.L.], Session 1986-7, H.C. Bill, 70.

conceived. The marital status of a person using AI or IVF is irrelevant; just as in natural reproduction, an unmarried couple who procreate will be the parents of the child. Therefore, if a male partner uses his semen to inseminate artificially his female partner, they are, and should be, regarded as parents of the resulting child, and consequently, they should have parental duties regarding the child. However, since the child may be born out of wedlock, the father's rights regarding the child differ from that of a married father.[301]

Where donated gametes (semen and/or ovum) are used in artificial reproduction, whether in AI or IVF, the obvious question is, who is the mother and/or father of a resulting child. Can the 'genetic mode' be applied here satisfactorily?

Since fatherhood is often discussed in the context of semen donation and its use in AI (AID), this will be examined first. The principle which applies there will be equally applicable to IVF where donated semen is used. The question of motherhood in the case of a donated ovum will subsequently be analysed.

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301. See Clause 4 of the FLRB 1987 and Sections 2 & 3 of the LRPCA 1986.

(a) Semen Donation and Fatherhood

Where a husband, for example, is sterile and the wife receives AID, the unsatisfactory nature of using the 'genetic mode' to attribute fatherhood is apparent. Current English (and Scottish) law, for example, regard a semen donor as the father of the resulting AID child. Such a child is in the same position as that of a child conceived outside marriage.

As a matter of legal theory, as the English Law Commission points out,[302] the donor may be liable as the child's father to maintain the child, and may indeed apply for access or custody.[303] As a corollary, the husband would have no parental rights or duties regarding the child. The social reality, however, is different. Because of the practice of keeping a donor's identity anonymous, neither the child nor the mother will be able to trace the donor. Hence, they will not be able to enforce any liability to maintain. The donor will know nothing about the child, and, he will therefore not be in a position to seek access or custody. For the same reason, it is unlikely that any intestate succession

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302. The Law Commission Report, No. 118, paras. 12.4-12.7.
303. See eg. A. v. C. (1987) 8 Fam. Law 170, High Court.

rights existing between the donor and the child will have effect. Even if the marriage between the husband and wife broke up, the husband would have treated the child as a child of the family and would thus effectively be under the same financial obligations to the child as if he or she were the husband's legitimate child.

This division between the law and social reality is caused by the inadequacies of present British law in dealing with the social reality of AID. In other words, there is no legal provision which recognises the legal rights and duties of a social father (the husband, as in the above case), and excludes a semen donor from having legal rights and duties regarding an AID child.

If an AID child is to be given protection and standing, as nearly as possible equivalent to those who are conceived by natural means, then the division between the law and reality must be resolved.[304]

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304. The resolution of this issues has been considered in more than one occasions. See the amendment (which was withdrawn) put down by Lord Kilbrandon to the Bill leading to the Children Act 1975: Hansard (H.L.) 20 Feburary 1975, Vol. 357, Cols. 511-522; and the AID Children (Legal Status) Bill which was given a First Reading in the House of Commons on 28 June 1977: Hansard (H.C.) Vol. 934, Cols. 276-279; the Law Commission Report, No. 118, para. 12.8.

Legal reform has been proposed by Clause 27(1) of the FLBR 1987, which accepted the Law Commission Report's recommendation,[305] and says:

> "(1) Where after the coming into force of this section a child is born in England & Wales as the result of the artificial insemination of a woman who-
> (a) was at the time of the insemination a party to a marriage (being a marriage which had not at that time been dissolved or annulled); and
> (b) was artificially inseminated with the semen of some person other than the other party to that marriage,
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> then, unless it is proved to the satisfaction of any court by which the matter has to be determined that the other party to that marriage did not consent to the insemination, the child shall be treated in law as the child of the parties to that marriage and shall not be treated as the child of any person other than the parties to that marriage."[306]

This provision (which will hereinafter be called the 'AID provision')[307] clearly reflects the wishes and intentions of both the semen donor and the married couple who resort to AID in order to found a family. A semen donor's intention is to help another to have children, and he intends that his part in procreation ends with the donation, and does not

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305. The Law Commission, No. 118, para. 12.8.
306. Similar provisions exist in some American states, Holland, Portugal and Switzerland. See Cusine, D.J., "Artificial Insemination", in McLean, S.A.M. (ed.), Legal Issues in Medicine, Aldershot, Gower, 1981, p. 163.
307. The LRPCA 1986 does not have a similar provision. Equally, the Act's forerunner, the Scottish Law Commission Report on Illegitimacy, No. 82, Edinburgh, HMSO, 1984, did not consider the issue relating to children born as a result of artifical techniques at all, see para. 1.2.

extend to parenting, nor to the responsibilities and legal duties which are associated with it. Conversely, the intention of the married couple is that the husband will undertake parental rights and duties regarding the resulting child. The rationale (which will hereinafter be called the 'donation rationale') underlying the 'AID provision', therefore, is to recognise and acknowledge the reality of semen donation and its use (at least within marriage)[308] by presuming a husband to be the father of an AID child where his wife undertakes AID and by attributing to him parental duties (and rights). The corollary to the 'donation rationale' is that a semen donor should have no rights or liabilities regarding an AID child (this will hereinafter be called the 'corollary provision').[309]

The 'AID provision' essentially represents an exception to the 'genetic mode', which is the general basis for attributing fatherhood, so as to reflect the reality of semen donation and its use. If the 'donation rationale' it is to achieve its real objectives, then a clear definition as to what amounts to gamete donation is necessary.[310] Otherwise, the

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308. On the question of fatherhood where AID is undertaken by the unmarried, see infra. pp.140-144.
309. See the Warnock Report, para. 4.22.
310. See the discussion of the position of a commissioning father, infra., chapter 7, pp.232-5.

wishes of the parties will be thwarthed rather than promoted.

(b) The Unmarried

The above discussion has concentrated on married couples, that is:- the attribution of fatherhood to a husband whose wife undertakes AID. What, however, about those unmarried people who may resort to AID, given that the right to reproduce and the right to found a family are rights of an individual (irrespective of one's marital status)?[311]

The Law Commission did not consider this issue in full. It merely said,

> "Where the woman undergoing AID is living in a stable union with a man who is not her husband (whether she is herself married or not), the question whether that man should be permitted to become father of the AID child by consenting to the treatment raises complex issues relating to the rights of unmarried cohabiting couples, which are outside the scope of this Report."[312]

Since the aim of the Law Commission was to remove the legal disadvantages associated with children born out of wedlock, it may be argued that the question of fatherhood of AID children was indeed outside the scope of the Law Commission's terms of reference.

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311. See supra. chapter 3.
312. Law Commission No. 118, paras. 12.9-12.10.

Nonetheless, since neither the Law Commission, nor the Warnock Report has considered this, the issue is an open one.

If one considers the situation as exemplified by the Law Commission, that is, where an unmarried couple resort to AID, one may argue that if the law and society may legitimately disapprove of the unmarried using AID, the conclusion in the preceding section that the law should reflect the reality of AID may not apply with equal force.

If, as the Law Commission suggested, it was unclear whether a male cohabiting partner could be permitted to become the father of an AID child, presumably the semen donor would be treated as the father. Yet, it will evidently be unfair to hold a semen donor liable to an AID child solely because a recipient woman is unmarried. Nor would it be fair to hold him liable to an AID child because some medical blunders have resulted in his semen being used for the artificial insemination of an unmarried woman.

According to an intuitive understanding of what is entailed in semen donation, as expressed by the 'donation rationale', the unmarried male partner should be regarded as father of an AID child if he consents to his partner undertaking AID, just as in the case where a husband consents to his wife's AID.

As was said above,[313] according fatherhood to such a person does not mean that he will have the same rights regarding the child as a married father. He will, however, at least, have parental duties regarding the child, and a semen donor will be excluded from having rights or duties in respect of the child. This will be in line with our sense of responsibility which an individual should, and ought to, have as relating to the use of artificial techniques for the founding of a family.

Indeed, the Warnock Report clearly envisaged the availability of AID to the unmarried and not simply to married couples.[314] If an AID child is not to be left in a legal vacuum, where his or her legal father is not his or her social father, then the existence or not of a legal marriage should not be permitted to effect the child's rights and expectation. In other words, extending the 'AID provision' to the unmarried will be in the best interests of children in that it will put an AID child born to the unmarried in the same position as one who is born to the married, at least in respect of who has parental duties.

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313. See supra. p. 135.
314. See para. 4.16. The term 'couple' is used in the Warnock Report to include all stable relationship, apart from questions of legitimacy, see para. 2.6.

The argument so far, therefore, is that a man should be regarded as the father of an AID child if he consents to his partner's AID. Thus, the 'AID provision' should be extended to unmarried couples as well as to married couples.

Extending the 'AID provision' to unmarried men does not necessarily have to be interpreted as an encouragement to the use of AID by the unmarried. (After all, as will be seen,[315] the Warnock Report's recommendations in respect of motherhood where a donated ovum is used made no distinction on the basis of the marital status of a woman.) It merely tackles certain possible undesirabilities of legislative inaction, which the law and society recognise and acknowledge.

As past experience has demonstrated, the use of AID was not curbed or restrained despite the division between legal theory of fatherhood and social reality. Legislative inaction has proved to be contributory to the undesirable state of affairs in which people were tempted to falsify birth registers and the secrecy surrounding the practice. Extending the 'AID provision' to unmarried men, therefore, will do away with the need to falsify the birth register and it may encourage openness.

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315. See infra. p. 144.

The implication of the 'AID provision', and its proposed extension to the unmarried, is that before an AID child could be rendered 'fatherless', proof would be needed to establish that a husband or male partner did not consent to a woman's AID. In other words, this presumption of consent would render a child fatherless in some situations, for example, where AID is undertaken by a woman without the consent of her male partner. This, however, as the Warnock Report noted was 'inescapable',[316] and the law would be "recognising what in many cases is already the de facto situation."[317]

(c) Ovum Donation and Motherhood

The Warnock Report recommended that when a child is born to a woman following donation of another's egg, the woman giving birth should, for all purposes, be regarded in law as the mother of the child, and the egg donor should have no rights or obligations in respect of the child.[318] This would be the case regardless of a woman's marital status.

This recommendation is widely accepted, and is apparently an application of the 'donation rationale', although as will be seen later, the real basis for motherhood may not be the 'genetic mode'.[319]

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316. para. 4.24.
317. para. 4.24.
318. para. 6.8.
319. See infra, chapter 7, pp. 236-8.

(d) Embryo Donation

Once the question of parenthood regarding donated gametes is resolved according to the 'donation rationale' and the 'corollary principle', parenthood in respect of a donated embryo is not complicated. Thus, the Warnock Report recommended that where a child is born to a married couple following embryo donation, the husband and the wife will be the parents.[320]

In a case where a woman is unmarried, she will be the mother.[321] However, the Warnock Report did not consider who would be the father.[322] Arguably, the man (if there is one) who consents to the mother having the embryo inserted in her womb should be regarded as the father, as this is similar to a man who consents to a woman undertaking AID.[323] In other words, the marital status of the parties should, as argued before, be regarded as unimportant for the purpose of parenthood.[324]

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320. See para. 7.6.
321. ibid.
322. ibid.
323. supra. pp. 136-144.
324. ibid.

(c) Summary

One can summarise this section by saying that the use of donated gametes in founding a family raises the question of fatherhood and motherhood. The effective resolution of this question is desirable since it will place children born as a result in the same legal position as children born through natural reproduction. This would also codify our intuitive understanding of the nature of gamete donation and its use, and reflect an individual's responsibility in founding a family through artificial techniques.

As discussed in the preceding section, where donated semen is used, the 'donation rationale' and the 'corollary principle' should apply irrespective of a man's marital status. To that extent, the 'AID provision' has only tackled the unsatisfactory application of the 'genetic mode' in attributing fatherhood in cases where a man is married. In cases where a man is unmarried, presumably, the semen donor remains legally the father of the resulting child. This same defect is evident in the Warnock Report's recommendation on fatherhood when donated embryo is used.[325] The proposal in the preceding section is, however, that the 'AID provision' should be extended. Consequently, a man (married or not) who

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325. See supra. p. 145.

consents to a woman's undergoing AI, IVF or receiving a donated embryo should be regarded as the father of the resulting child.

Legislative implementation of this proposal has several advantages, and it does not necessarily have to be regarded as an encouragement to the use of artificial techniques for the founding of a family by the unmarried. Indeed, the Warnock Report's recommendations on motherhood where donated ovum or embryos are used - which are widely accepted - do not take the marital status of a woman as an important factor.[326] In other words, legislation tackling comprehensively the question of parenthood, as proposed in this chapter, merely confronts some of the obvious problems which the law and society recognise and acknowledge consequential to the use of donated gametes.

For the purpose of this discussion, adequate resolution of the question of parenthood in artificial reproductive techniques, to remove the potential legal handicaps a child born as a result may face, may be significant for reasons other than mere pragmatism. For instance, it might be argued that the deliberate creation of a child whose position is subjected to legal and social disprecancies, and whose position is inferior to that of a child conceived naturally, may

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326. See supra. pp. 144-145.

render the use of artificial reproductive techniques socially and morally unacceptable. The argument being that the rights of the infertile have less significance than the rights or interests of children.

However, what is contended here is that a comprehensive resolution of the question of parenthood in artificial techniques, thus removing the discrepancies between the law and social reality regarding parenthood for a resulting child, is ideologically consistent with the assertion of the rights of the infertile. Thus, although concerns about the legal position of a child born as a result of artificial techniques may have weight, their resolution can be effected without interfering with the rights of the infertile.

How the Warnock Report's recommendations on motherhood, and the proposals in this chapter on fatherhood, can be drafted in a legislative form will be considered later.[327] Registration of birth as an ancillary legal issues where donated gametes are used for the founding of a family will be examined below.

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327. See infra, chapter 7, p. 240.

Registration of Birth

This issue again is often regarded as problematic in relation to AID. Consequently, the following discussion will be conducted in that context, but it can have equal application to ovum and embryo donation.

Given that a semen donor should not, as argued above, be regarded in law as the father of a resulting child, should the social father be allowed to register as such?

The current situation in AID is that both the mother and her husband will want the name of the latter to appear in the register as father of the child. But since the child's father is most likely to be unknown, in declaring that the husband is the child's father, one may contravene the Perjury Act 1911 which applies to England and Wales.[328] Section 4 of the Act provides that if any person wilfully makes a false answer to any question put to him or her by a registrar relating to particulars required to be registered concerning a birth with intent to have it inserted in a register of birth, such person shall be quilty of a misdemeanour.[329]

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328. Professor J.M. Thomson mistakenly thought that the Act applies also to Scotland, see Family Law in Scotland, London, Butterworths, 1987, p. 136.

329. No recorded cases have been decided under Section 4. Section 7 also provides that the offence

In Scotland, Section 53(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provides for a similar offence.

The 'AIL provision', when it comes into force, will allow a husband to be registered as father of the child who is born in England and Wales as a result of his wife undertaking AID without contravening Section 4 of the 1911 Act.

One major drawback to this 'AID provision' is that it involves a statutory authorisation to falsify birth registration, since in reality the donor is most probably the father of the child.[330] Nonetheless, the consensus of opinion is that the husband should be allowed to be registered as the father, and that an AID child should have a birth certificate which conceals the circumstances of his or her conception.[331]

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extends to person who aids and abets another person to commit the offence. This means that where doctors or counsellors advising one to enter the name of the husband as the father of the child may be liable to contravene the 1911 Act.

330. Lord Denning moved to amendment Clause 29 of the FLRB. H.C. Debates, No. 1352, Col. 544.

331. See the Consultation paper, para. 30. Two alternatives have been suggested which will avoid falsification of the birth register. Annotation of the birth register canvasses the idea that a husband's consent to his wife receiving AID in a prescribed form should have to be produced to the registrar who would then make a special note in the register to indicate that the entry of the husband's name as that of the father is by virtue

Currently, the Department of Social Security has canvassed the view that the husband should be allowed to enter his name on the birth register only if the entry could be linked by the Registrar General with a central record of AID births. This was thought to be essential to maintain the reliability of the birth register as a record of biological fact, and to ensure access, by a person born as a result of AID, to certain information about the donor. This option is presently in the consultation stage, but it appears to be the most satisfactory solution. If accepted, all that remains to be done is the working out of practicalities, and the establishing of mechanisms whereby these objectives could be achieved.

If the proposals in the previous section regarding parenthood where donated gametes are used for the founding of a family are accepted, social mothers and fathers (irrespective of marital status), rather than ovum and semen donors would be allowed to register as parents. If so, records of a child's true biological parentage should be maintained, as in AID, so as to facilitate access by children born as a result of gamete donation to certain information about their origins.

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of the 'AID provision'. Another alternative is to utilise some kind of adoption procedure. Neither of these alternatives appeared to be popular. See Law Commission, No. 118, para. 12.20 and Law Commission Working paper, No. 74, paras. 10.18-10.20.

(3) CONCLUSION

In this chapter, a number of legal issues relating to the use of artificial techniques for the founding of a family have been discussed. It has been said that as regards the use of artificial techniques, and their effects on a marriage, the legal issues are relatively settled.

On the question of parenthood and the use of donated gametes, the Warnock Report's recommendations on motherhood are acceptable. It's recommendations on fatherhood, however, are not completely satisfactory, since they fail to consider the issues which arise when donated semen is used by the unmarried. Here, the application of the 'genetic mode' would mean that a semen donor would legally be the father of the resulting child, and the division between the law and social reality persists.

As argued before, the right to reproduce and the right to found a family apply equally to the married and the unmarried. They are negative in nature. Consequently, they do not oblige a state to legislate to facilitate the founding of a family in a particular manner. For instance, it has been decided that the right to found a family did not mean that one has a right to have legal recognition of a foreign adoption.[332] By the same token, a state is not

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332. see supra. chapter 3, p. 83.

obliged to review, modify or resolve any unsatisfactory application of the current definition of parenthood to artificial techniques - for example by enacting the 'AID provision' - in order to accommodate the founding of a family by the married or unmarried. In other words, the failure of a state to deal with the issue of parenthood generated by the use of artificial techniques does not infringe the rights of adults wishing to use these techniques for the founding of a family.

Nonetheless, given that these techniques are currently used by both the married and the unmarried, and in some cases, funded by the state,[333] and that the present definition of parenthood is unsatisfactory when it is applied to artificial techniques for the founding of a family, there are strong arguments that the law should be brought in line with reality in a comprehensive manner, as proposed in this chapter.

Such an approach would codify society's intuitive understanding of what is involved in the donation, and use, of genetic gametes, and would clarify the rights and duties of the parties involved. A proper allocation of parental duties will also be consonant with the idea of an individual's responsibilities arising from the exercise of a right to found a family through artificial techniques.

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333. See infra, chapter 8, p. 254.

More importantly, legislative steps to remove the unsatisfactory application of the current definition of parenthood to artificial techniques will be consistent with the obligation of the state to act in the best interests of children born as a result of gamete donation. It would put children born as a result of artificial techniques in the same position as those born through natural reproduction, and would thus reduce the weight of the objection against the exercise of an individual's right to found a family (whether through reproduction or not) on the ground that it is inconsistent with interests of children.

In a later chapter, the question as to how parenthood in artificial reproduction may be satisfactorily and comprehensively resolved will be outlined, taking into account the Warnock Report's recommendations and their criticisms which have been outlined in this chapter.[334] Once the question of parenthood is comprehensively resolved, registration as parents will not be a problem. Nonetheless, once again, the best interests of children will require measures for the proper recording of births consequential to the use of donated gametes, and provisions for access to certain information.

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334. See infra. chapter 7, pp. 231-238.

CHAPTER 6

MORAL AND SOCIAL ACCEPTABILITY OF SURROGACY

(1) INTRODUCTION

In a previous chapter, the rights of an individual to reproduce and to found a family were established.[335] These rights, it has been argued, can be exercised through the use of artificial techniques which can, however, legitimately be subject to regulation.[336] It has also noted that these rights do not oblige the state to introduce legislative measures to remove the unsatisfactory nature of the present concept of parenthood as it applies to situations where donated gametes are used for the founding of a family. Nonetheless, there are valid reasons supporting legislative reform which will also be in the best interests of children.[337]

However, the methods by which rights are exercised, and the extent to which these methods should be accommodated by legal change, may remain uncertain. Perhaps the most contentious artificial reproductive method is that which involves the use of surrogacy.[338]

Since surrogacy may effectively be the only hope for some people who seek to exercise their right to the founding of a family (whether through reproduction

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335. See supra. chapter 3.
336. See supra. chapter 4.
337. See supra. chapter 5.
338. For a discussion on why surrogacy may be useful to some infertile people, see supra. chapter 2, pp. 35-8.

or not), its significance to these people cannot be denied. Thus, an examination of surrogacy is necessary, before a conclusion can be reached as to whether or not an individual's rights to reproduce and/or to found a family are sufficiently broad as to include freedom of access to surrogacy.

In Britain, surrogacy is not illegal or unlawful.[339] Since the publication of the Warnock Report,[340] and the Baby Cotton case,[341] surrogacy has been consistently, and often passionately, debated.[342] The Warnock Report, by a majority, rejected all forms of surrogacy,[343] asserting that "the weight of public opinion is against the practice."[344]

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339. See infra. chapter 7, pp. 215-216. Sections 2 & 3 of the Surrogacy Arrangements Act 1985 have criminalised the activities of commercial surrogacies and the advertising of or for surrogacy.
340. Report of the Committee of Inquiry into Human Fertilisation and Embryology, London, HMSO, Cmnd. 9314, 1984 (hereinafter cited as the Warnock Report).
341. Re A Baby, The Times, 15 Jan., 1985, p. 8.
342. See eg. Surrogate Motherhood, Report of the Board of Science and Education (hereinafter cited as Surrogate Motherhood, BMA, 1987); for the debates in other jurisdictions, see Report of the Disposition of Embryos produced by IVF, the Committee to consider the social, ethical, an legal issues arising from IVF, chaired by Professor Louis Waller, Victoria, Australia, 1984, (hereinatter cited as the Waller Report); and Report on Human Artificial Reproduction and Related Matters, 2 Vol., Ministry of the Attorney General, Toronto, 1985 (hereinafter cited as the Ontario Report).
343. para. 8.17.
344. para. 8.10.

Nonetheless, majority public sentiment is in itself inadequate as a ground justifying interference with an individual's liberty. As has been said,[345] individuals have the right to privacy, encompassing the right to reproduce and the right to found a family. These rights on the surface support the choice to use surrogacy to found a family (whether through reproduction or not), and a woman's choice to use her reproductive and/or gestational function, without unwarranted government interference.[346]

Although sentiment is insufficient to justify interference with rights, it is necessary to analyse the apparent public hostility to surrogacy in more depth, in order to assess whether or not fundamentally important reasons underlie it, and make interference into personal choice justifiable.

In discussing the acceptability of surrogacy, the form of surrogacy (partial or full) is largely irrelevant.[347] There are certain reasons to support this contention.

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345. see supra. chapter 3.
346. see supra. chapter 3.
347. For the distinction of full and partial surrogacy, see supra. chapter 2, pp.36-38.

First, the fact that in partial surrogacy, a surrogate is the biological mother of the child, and, in full surrogacy, she is not, is irrelevant to the thrust of the issue, which is:- is the idea that a woman should agree to carry a child to term, with the intention that she will surrender the child who will be brought up by a person or persons other than herself, objectionable?

A counter-argument to this, however, may be that whether the practice of surrogacy is objectionable depends precisely on the form of surrogacy in question. Accordingly, it may be suggested that partial and full surrogacy are different in that, a woman in partial surrogacy is carrying her own child, whereas in full surrogacy, she is carrying someone else's child.[348]

The essence of this counter-argument appears to be that in partial surrogacy, the surrogate is regarded (unquestionably and rightly)[349] as the mother of the child, and thus, surrogacy here may be questioned on moral, social and legal grounds;[350] whereas in full surrogacy, the situation is totally different because the surrogate is not the biological

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348. See Page, Edgar's "Book Reviews", (1986) 12 Journal of Medical Ethics, pp. 45-52.
349. See infra. chapter 7, pp. 236-238.
350. See infra. chapter 7, pp. 159-221.

mother of the child. A number of underlying assumptions can be detected in this counter-argument, all of which can be challenged.

In the first place, although it may be less arguable that the surrogate is the mother in partial surrogacy, it does not necessarily follow that the surrogate in full surrogacy is not.[351] Given that the question of motherhood is still not definitively settled in surrogacy,[352] an assumption of this kind should not be made too hastily. Indeed, as will be argued later, a biological link with a child is not crucial in determining motherhood.[353] Thus, partial and full surrogacy cannot, or need not, be distinquished on the ground of the biological link between the surrogate and the child.

In any event, if the alleged difference between the two cases on genetic ground is insisted upon, it can be blurred or removed if, for example, the surrogate in partial surrogacy agrees, before AI, to make a donation of her ovum so as to divest her of the rights and liabilities which she otherwise would have as a result of her genetic link with the child.[354]

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351. See Page Edgar, loc. cit., where he argues that in full surrogacy the commissioning parties are the child's parents.
352. See infra. chapter 7, pp. 236-238.
353. See infra. chapter 7, pp. 236-238.
354. See supra. chapter 5, pp. 136-140, on the 'donation rationale', and Page, Edgar's suggestion of <u>in utero</u> donation, loc. cit.

In the second place, the alleged distinction between the two cases may not be apparent, or vital, at all when one examines the arguments against surrogacy.[355] In other words, the arguments most commonly and most powerfully used against surrogacy centre rather on the agreement itself than on the genetic contribution made.

For the above reasons, the following appraisal of some of the most common objections against surrogacy will be regarded relevant irrespective of the form of surrogacy in question.

Given the possible demarcations, suggested above, regarding the different financial dimensions of surrogacy,[356] it is logical to discuss the acceptability of surrogacy in principle first, followed by surrogacy with reasonable compensation, and then surrogacy for a fee.

Obviously, objections applicable to surrogacy in principle apply also to surrogacy with reasonable compensation, and surrogacy for a fee, both of which differ from surrogacy in principle insofar as money payment is made. The converse, however, is not true because objections to money payment will not have any relevance to surrogacy in principle.

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355. See infra. pp. 161-198.
356. See supra. chapter 2, pp. 38-41.

(2) SURROGACY IN PRINCIPLE

Surrogacy in principle is usually undertaken between sisters and friends. Exceptionally, it may be between strangers.[357] Although some may regard surrogacy as merely a logical extension of technological development, and its practice as being simply a logical corollary of the rights to reproduce and/or to found a family, for others, it is entirely unacceptable. Existing literature, however, sometimes presents a somewhat confused picture of what it is about surrogacy that is objectionable.

For example, in the Warnock Report, the objection to surrogacy in principle[358] seems to be that it is wrong to treat others as a means to an end.[359] In A Question of Life, surrogacy is said to be wrong because of the possible harmful consequences to the child.[360] But in an article, by Mary Warnock, it was said that,

> '...[many] feel very differently if what they think of is surrogacy undertaken between sisters or friends. And this is because in such a case the mother who gives birth to the child, though she will

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357. See Keane, Noel, The Surrogate Mother, New York, Everest House, 1981.
358. The Warnock Report did not make a distinction between surrogacy in principle, surrogacy with reasonable compensation, surrogacy for a fee and commercial surrogacies.
359. Para. 8.17.
360. See Warnock Mary, A Question of Life: the Warnock Report on Human Fertilisation and Embryology, Oxford, Basil Blackwell, 1985, p. xii. (hereinafter cited as A Question of Life, 1985).

> not bring it up or count it as hers, will nevertheless be permitted to love it... The child himself, if...told that his aunt is his mother, will in some sense have gained, not lost. He will have two mothers instead of one. No one has rejected him. He was born out of love and charity, not out of greed. And so it is clear that what is really felt to be wrong is surrogacy not for love but for money."[361]

This quotation seems to suggest that surrogacy in principle (and perhaps even surrogacy with reasonable compensation) are not felt to be wrong at all. These confusions are in part due to the fact that, in discussing the acceptability of surrogacy, the often vital distinctions between the various financial dimensions of surrogacy are not clearly drawn.

In the following section, some of the arguments against surrogacy in principle will be identified and examined. Notably there are two main types of arguments. First, that surrogacy is unnatural practice, and second, that surrogacy is harmful to both surrogates and surrogate-born children.

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361. "Legal Surrogacy - Not For Love or Money?", The Listener, 24 Jan 1985, p.2. (emphasis mine)

Surrogacy as an Unnatural Practice

This argument, to a large extent, mirrors that which is used against AI & IVF.[362] However, its application here has been slightly modified. The roots of conceptual thinking here relate to preconceived ideas of what a woman's role in procreation ought to be, rather than being based on a claim that artificial techniques for conception are unnatural. In other words, the meaning of unnatural, as used in arguments about surrogacy, has been extended beyond that employed as an objection against artificial techniques.

Thus it may be said that surrogacy is unnatural, because it is contrary to a woman's natural post-maternal 'instinct' to part with a child after parturition.

However, it must first be pointed out that social scientists have indicated a number of reasons which cast doubts on this so-called 'instinct' as either natural or universal female behaviour.[363] Indeed, it has been argued that maternal behaviour is in fact

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362. See supra. chapter 4.
363. First, the widespread practice of infanticide for flimy reasons, such as, vanity, equalising the sexes and discipline, in some societies, makes it hard for one to maintain that post-maternal behaviour is a natural human female 'instinct' as such. See Casler, Lawrence, Is Marriage

a kind of socially conditioned 'sentiment', the expression of which thus may vary from individual to individual, time to time and society to society.[364]

Consequently, it may be an overstatement to suggest that surrogacy is 'unnatural' in the sense described above. In fact, surrogacy is an ancient practice.[365] One could, therefore, contend that the fact that it has long been practised makes it one of the most 'natural' (in the sense of common) and obvious ways of dealing with certain types of infertility.

Admittedly, both English and Scottish law render unenforceable agreements by parents to divest themselves of parental rights and duties,[366] except when transfer of parental rights and duties is achieved through judicial process, such as in the case of adoption or a court order. However, these

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Necessary? New York, Human Science Press, 1974, chapter 3. Anthropologists have also found that, in some societies, mothers were willing to part with their babies without a pang, Casler, Lawrence, op. cit. Moreover, the practice of aristocratic families in England and France during the eighteenth and nineteenth centuries of placing children out to wet nurses from the date of their births for a lengthy period, such as 4-5 years, throws profound doubt on whether maternal behaviour is 'instinctive'. See Badinter, Elizabeth, Myth of Motherhood: An Historical View of the Maternal Instinct, London, Souvenir Press, 1981.

364. See Badinter, Elizabeth, op. cit.
365. See supra. chapter 2, p. 36.
366. See infra. chapter 7, pp. 215-221.

provisions clearly are unconnected with the notion of maternal 'instinct' as such[367], and if surrogacy is objected to on the ground that it is a private agreement attempting to transfer parental rights and duties, legally regulated surrogacy would be the straightforward answer.

A variation of the argument that surrogacy is 'unnatural' may be based on the argument that it is a distortion of, and a threat to, the conventional pattern of child-bearing and child rearing.[368]

However, it has been argued above[369] that a woman's right to privacy is wide enough to exclude interference with her choice as to how to use her reproductive and/or gestational capacity simply on the ground that it deviates from an allegedly standard approach to pregnancy.[370]

Harm to Surrogates and Surrogate-born Children

One factor which may have important bearing on the moral and social acceptability of surrogacy in principle is the possible harm surrogacy may have on both a surrogate and a surrogate-born child. Thus, it

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367. Otherwise, there would have to be provisions to ensure that pregnant women care for their children.
368. See the Warnock Report, para. 8.11.
369. See supra. chapter 3, pp. 51-70.
370. However, a surrogate's right to privacy may be regulated, see infra. pp. 209, 219.

has been claimed that surrogacy is unacceptable because bonds exist between a surrogate and the foetus in utero and their separation will be harmful to both parties.

However, little is known about the effect of this alleged bonding on a child. Hence, it is prudent to avoid a conclusion one way or another as to whether, consequential to the separation of the surrogate and the child, either or both will be harmed. The Warnock Report, in fact, did not place great emphasis on this bonding theory in its conclusion against surrogacy.[371] (This theory, however, may be very important in a custody dispute.)[372]

Still, it may be unrealistic to suggest that a surrogate-born child will definitely not experience confusions of personal identity similar to those that are known to experience by adopted children.[373] A surrogate-born child may be just as anxious to know about the circumstances of his or her birth and/or his or her bearing and/or biological mother.

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371. Paras. 8.17-9.20. Cf. Mary Warnock's article in which it was said: "[t]here is a deep and widely held belief that the relation of a child and the woman who carries it and gives birth to it is different from the relation of that to its father. That is the centre of the moral objection to surrogacy." "Legal Surrogacy - Not For Love or Money?", The Listener, 24 Jan. 1985, p. 3.
372. See the Surrogacy Twin Babies case, The Daily Telegraph, 13, March 1987, p. 2. See infra.
373. See supra. chapter 4, pp. 113-114.

In a previous chapter,[374] the weight of this consideration as a factor against the use of artificial techniques for the founding of a family (whether through reproduction or not) was assessed. The conclusion was that the needs of children to know about the circumstances of their conception (and birth) can, and should, be facilitated by a policy of openness, proper record-keeping of births consequential to the donation of gametes, and counselling before access to birth records. The issue in surrogacy is very similar. Although it is not much debated, there is no apparent reason why a similar approach could not be adopted.[375]

Again, from the perspective of a surrogate-born child, it is hardly feasible to contend that he or she has been so badly harmed by the circumstances of conception and birth that he or she should not have been born.[376]

In many ways, therefore, the argument which relates to potential harm to a surrogate-born child can be defeated by reference to similar criteria as were used in respect of AI and IVF,[377] since it does

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374. See supra. chapter 4, pp. 108-116.
375. See Surrogate Motherhood, BMA, 1987, p. 17-22.
376. See supra. chapter 4, pp. 110-111.
377. See supra. chapter 4, pp. 108-116.

not seem to differ significantly from that which may arise from the employment of artificial techniques in general. Thus, a solution similar to that proposed in such cases may be employed in relation to surrogacy.

The issues which arise from the woman's perspective are twofold:- first, is she likely to be harmed by becoming a surrogate, and second, even if she is, ought there be interference with a woman's liberty to choose to become a surrogate, on paternalistic ground?

There is no direct evidence which establishes that psychological and emotional harm are the inevitable consequences for a surrogate who parts with the child. However, there is evidence to the effect that a woman may experience a deep sense of loss after giving her child up for adoption.[378]

But even if one concedes that a particular surrogate will be harmed by parting with the child, an individual's right to privacy and liberty would allow for voluntary assumption of that risk. Interference on paternalistic ground, therefore, is legitimate only when confined to cases of serious or irreversible

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378. See Surrogate Motherhood, BMA, 1987, p. 11.

harm.[379] Thus, harm to a surrogate may, in very limited cases, for example, where destruction of mental or physical health is anticipated, justify interference with a woman's choice to become a surrogate. In other words, where an individual voluntarily accepts a lesser risk, interference on paternalistic ground cannot be compatible with the right of a woman to use her reproductive and/or gestational function.

Consideration of the two groups of arguments against surrogacy does not, of course, exhaust the possible range of objections. It may be said, for example, that it is totally unacceptable for a woman to be treated as a machine for breeding purposes. Some may even go so far as condemning surrogacy on the ground that it resembles slavery. Since these two arguments are most commonly directed at surrogacy where money payment is involved, they will be considered in greater depth later.[380]

The contentions considered so far, however, have not shown that surrogacy in principle is morally or socially unacceptable, whereby justifying its

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379. See Dworkin, Gerald, "Paternalism", in Feinburg, Joel and Cross, Hyman (eds.), Philosophy and Law, California, Wadsworth Publishing Co., (2nd. Ed.), 1980, p. 230; see also Mill, John Stuart, "On Liberty", in Philosophy and Law, op. cit., p. 180.
380. See infra. pp. 171-198.

prohibition. Surrogacy in principle can be regarded as a noble undertaking, the essence of which is to help another to have a child. If this beneficent view is taken, then there need be no argument concerning the rights of an individual either to found a family (whether through reproduction or not) though surrogacy, or to use one's reproductive and/or gestational function. Where a willing surrogate is available, this method of generating life, and bringing it to fruition, cannot, therefore, be struck at. Moreover, although it is clear that a surrogate-born child may experience some disadvantages, and accepting the importance of this, the contention has been that the resolution of the problem - as with AI and IVF - lies not in banning surrogacy, but rather in regulating its use in a sensitive way.[381]

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381. See infra., pp. 188-202, for other reasons for regulating surrogacy.

(3) SURROGACY WITH MONEY PAYMENT

It has been noted that the two main arguments already outlined do not exhaustively cover the range of the debate about surrogacy. Although surrogacy need not entail money payment, in some cases, it may. The addition of this aspect of money payment serves to add contentious fuel to the fire.

The question to be posed is whether the involvement of money payment in a surrogacy arrangement changes the essential character of the agreement sufficiently to demand its condemnation. Even accepting that surrogacy in principle is not objectionable, might the introduction of monetary considerations render a surrogacy arrangement sufficiently morally reprehensible as to justify interference with an individual's freedom to found a family (whether through reproduction or not) by employing surrogacy, and a woman's use of her reproductive and/or gestational function?

When considering whether, and if so why, money payment is objectionable, it is important to distinquish two kinds of payments: surrogacy with reasonable compensation and surrogacy for a fee. As has been said, whether a particular case falls into a particular category depends on the nature of the payment and the facts of the individual case.[382]

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382. See supra. chapter 2, pp. 39-40.

Since the amount paid in a surrogacy arrangement may affect one's view as to its acceptability, in the following discussion, this distinction between the two categories of payment will be maintained. However, where such a distinction is not apparent or necessary, the term 'money payment' will be used.

Surrogacy With Reasonable Compensation

Surrogacy with reasonable compensation differs from surrogacy in principle only insofar as reasonable compensation is paid to a surrogate. Although some may argue that surrogacy with reasonable compensation is a less altruistic act than surrogacy in principle, this may not inevitably be so. The mere fact of financial compensation does not necessarily indicate that a surrogate acts less altruistically than some one who is willing to bear a child for no financial reimbursement.[383] It may be that the former cannot afford to become a surrogate without being compensated. Thus, a surrogate may only bear a child at her own expenses for the commissioning parties if she has the resources, for example, to pay for the costs of pregnancy, and to maintain herself during that period. In any event, since it is the

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383. See Adoption Application: Surrogacy case, The Times, 12 March, 1987, p.27. See infra. pp.

commissioning parties who want to have a child, it seems only fair and reasonable that they should bear the costs of the pregnancy.[384] To that extent, reasonable compensation may indeed facilitate the expression of altruism which may otherwise not be possible.

Consequently, it may be argued that surrogacy with reasonable compensation, like surrogacy in principle, is neither morally nor socially unacceptable. It's prohibition, therefore, which would deny the right to reproduce to some infertile people, limit the right to found a family of the infertile, and invade the right to privacy of potential surrogates, is not easily justified.

It is admitted, however, that the concept of 'reasonable compensation' may not be entirely lacking in complexity, but two points can be made here. First, the fact that out-of-pocket expenses are met by the commissioning parties has been argued not to affect the inherently altruistic nature of the arrangement. Thus, if surrogacy in principle is an acceptable method enabling the vindication of the rights of the infertile, then surrogacy with

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384. See infra. chapter 8 for the argument that people should bear the cost of having children and that generally a state has no obligation to fund people in doing so.

reasonable compensation must be too. Second, the problem as to what compensation is 'reasonable' need pose no fundamental difficulties for this assertion, since it is a matter which can be worked out to the satisfaction of the parties concerned, by the parties concerned.[385]

Surrogacy For a Fee

Although surrogacy with reasonable compensation may, therefore, be an acceptable method for founding a family, surrogacy for a fee often attracts strong moral condemnation.

The arguments against surrogacy for a fee, however, have not been well analysed. They tend to be no more than simple assertions of belief. For instance, in the Parliamentary Debates on the Surrogacy Arrangements Act 1985, it was said that "...a financial transaction to secure the lease of a woman's womb is repugnant."[386] Mr. Harry Greenaway said, "[i]t is a very doubtful moral proposition for a woman to be asked to carry a baby for financial gain."[387] No detailed reasoning was offered to

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385. See infra. p. 208 for the suggestion that a third party may participate in deciding reasonable compensation.
386. Peter Bruinvels, Official Report, H.C., Vol. 77, Col. 50.
387. Harry Greenaway, Official Report, H.C., Vol. 77, Col. 45.

support these contentions.

Nonetheless, one can identify two general arguments against surrogacy for a fee. First, it may be thought to be contrary to a woman's dignity, and second, it may be seen as resembling baby-selling or baby-buying. These arguments will be discussed below.

(a) Inconsistent With Human Dignity

It has been suggested that it is inconsistent with human dignity for a woman to lease her womb for a fee, and consequently to be treated as a machine for breeding.[388]

The first point which has to be made about this contention is that one must be cautious about the use of value-laden expressions which may preclude rational discussion as to what is inherently objectionable about surrogacy for a fee. 'Womb-leasing' and 'treating oneself or one's gestation function as a breeding machine' are expressions which are not purely descriptive of what surrogacy for a fee entails. Even if they were, no moral implications should, or could, be drawn at this stage about the rights and wrongs of the practice. Equally, no moral implication can be drawn if one chooses to describe, albeit highly unusually, decision-makers as primarily

388. See The Warnock Report, para. 8.10

leasing their brain power, or typists as essentially leasing their fingers.

The use of these expressions in respect of surrogacy for a fee is certainly value-laden, and indicates the underlying perception that it is worthy of moral condemnation. Yet, even although the decription may seem to pre-empt an alternative conclusion, the arguments as to why it is inconsistent with human dignity merit consideration.

One argument which is not uncommon is that surrogacy for a fee is wrong because it is analogous to slavery.[389] Others argue that surrogacy for a fee is completely at odds with traditional female behaviour in relation to pregnancy and procreation, in that it is a situation where a woman allows the use of her gestational function in return for a fee.[390] Alternatively, surrogacy for a fee may be said to be degrading to a woman because it is thought to be a practice where she is being treated as a means to an end, that is, she is treated as a machine for the production of a child.[391] Finally, surrogacy for a fee may be considered wrong because it is potentially

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389. See Shelley Roberts, "Warnock & Surrogate Motherhood: Sentiment or Argument?", in Bryne, Peter (ed.), Rights & Wrongs in Medicine, King's Fund Publishing Office, London, 1986, p. 80.
390. See the Warnock Report, para. 8.11.
391. See the Warnock Report, para. 8.10.

harmful to the surrogate. The emphasis here will be on the first three arguments, as the last has already been discussed.[392]

(i) Slavery

Some may argue that surrogacy for a fee is unacceptable because it is analogous to slavery, in that a surrogacy arrangement will seek to exert an extensive control over the personal daily activities of a surrogate.[393] However, this analogy can easily be defeated. As will be seen later,[394] it is very unlikely that either the English, or the Scottish Courts, would enforce any of the essential parts of such an agreement. In effect, the surrogate can repudicate the agreement at any time. Yet, the argument may still be that the surrogate may not lawfully terminate the pregnancy.[395] However, the laws on abortion govern a surrogate in the same way as any other pregnant women. Consequently, if the inability of a woman to terminate a pregnancy lawfully is objected to, the complaint is directed at the abortion laws, not directly at surrogacy for a fee.

The argument from slavery may, however, take a more subtle form. Although it does not imply that a master-slave relationship exist in surrogacy for a

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392. See supra. pp. 165-170.
393. See Shelley Roberts, loc. cit.
394. See infra. chapter 7, pp. 215-230.
395. Shelley Roberts, loc. cit.

fee, in the sense that the master has the power of life and death over the slave, the substance of the slavery contention in surrogacy for a fee may be that since poor women are more likely to undertake paid surrogacy as a means of improving their finanical situations, decisions taken under such circumstances could hardly be regarded as voluntary.[396]

As will be seen later,[397] this argument is hardly consistent with the general acceptance by British society that people earn money, sometimes by undertaking jobs or tasks which they would not have chosen had there been other options. Furthermore, according to the libertarian principle espoused in this thesis, voluntary trade-offs between freedom of bodily function and the freedom which money may facilitate should not be prohibited unless there is something fundamentally and inherently objectionable about this particular type of trade-off. In other words, unless one distinguishs surrogacy for a fee with other trade-offs, or concedes that other paid jobs are also slavery, then the analogy of surrogacy for a fee with slavery may be difficult to sustain.

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396. Shelley Roberts, loc. cit. at pp. 88-90.
397. See infra. p. 185.

(ii) Gestation for a fee

To say that particular behaviour or conduct is degrading to a person denotes that the behaviour is, or should be, a source of shame to that person. That is, since one's self-esteem is vested in the competent exercise of certain capacities, behaviour which fails to live up to that is seen to be degrading and undignified and to result in a lower of status for the person. Surrogacy for a fee is said to be degrading to a woman because it is an activity which deviates from traditional and valued female behaviour in relation to pregnancy and reproduction.

Obviously, those who hold such a view need not participate in such transactions. The relevance of the debate, however, as to what extent the law should, and ought to, reflect and shape morality is limited in this context.[398]

Like prostitution and homosexuality, which some or most people may regard as a deviation from the traditional form of sexual behaviour, and as immoral, such views need not entail consequent illegality. Thus, under both English and Scottish law

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398. For debates on the law's involvement in enforceing morality, see Devlin, P.D.B., The Enforcement of Morals, London, Oxford University Press, 1965; Hart, H.L.A., Law, Liberty and Morality, Oxford, Oxford University Press, 1982. See also, Report of the Committee of Homosexual Offences and Prostitution, London, HMSO, Cmnd. 247, (1957).

prostitution per se is not illegal,[399] and homosexuality is not unlawful per se in English law.[400] Thus, there are strong precedents to support a cautious legislative approach in areas of reproduction and founding a family which essentailly are aspects of an individual's privacy and liberty.

In other words, whilst the morality or otherwise of surrogacy for a fee offers an interesting perspective and approach to the issue, consistent with the formulation of the right to reproduce, the right to found a family, and a woman's right to use her reproductive and/or gestational function, a compelling interest (other than that some people regard it as a

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399. Although prostitution is not criminal per se, the criminal law steps in where other compelling interests are regarded as overriding. For instance, it is criminal to encourage others to become prostitutes, to allow premises to be used for prostitution, to live on the earnings of prostitution and to loiter or solicit for the purposes of prostitution. See the Sexual Offences Act 1956, Street Offences Act 1959, the Sexual Offences Act 1985 and the Sexual Offences (Scotland) Act 1976. For a detailed discussion of offences relating to prostitution, see Gordon, G.H., The Criminal Law of Scotland, (2nd Ed.), Edinburgh, W. Green & Son, 1978, pp. 914-919; Smith J.C. & Hogan, B., Criminal Law, London, Butterworths, 1978, pp. 425-435.

400. Section 1 of the Sexual Offences Act 1967 provides that homosexual acts between consenting adults in private is not a criminal offence. Compare, section 7 of the Sexual Offences (Scotland) Act 1976 which provides that conduct of gross indecency between males in private is a criminal offence, see Gordon, G.H., op. cit., pp. 905-6.

practice that is immoral) must be demonstrated to justify it's prohibition. However, as will be seen later,[401] there may indeed be compelling reasons for the prohibition of surrogacy for a fee on other grounds.

(iii) Treating Another As a Means to an End and Exploitation

Some perceive surrogacy for a fee as an example of commissioning parties treating a surrogate as a means to an end. As noted earlier,[402] this argument is sometimes used even where no money payment is involved. For example, the Warnock Report, by a majority of 16:14, concluded against surrogacy as a means to circumvent certain causes of infertility, making the following comment:

> "That people should treat others as a means for their own ends, however desirable the consequences, must always be liable to moral objection."[403]

The philosophical position of the Warnock Report appears to reflect the Kantian principle that people ought to be treated as ends in themselves, rather than solely as a means to an end. The argument against surrogacy, therefore, is that, since

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401. See infra. pp. 188-202, for a discussion of the baby-selling argument.
402. See supra. p. 169.
403. Para. 8.17.

surrogacy, by its very nature, involves the use of a person (presumably the surrogate) as a means to achieve the ends of another, it is morally objectionable.[404]

Nonetheless, the principle that one should not treat another as means to an end is not an absolute one, otherwise, many accepted daily activities and transactions, such as using blood donors, will be regarded as immoral.[405]

The Warnock Report further concluded that where 'financial interests'[406] were involved, presumably in a case of surrogacy for a fee, the transaction became 'positively exploitative'.

> "Such treatment of one person by another becomes positively exploitative when financial interests are involved. It is therefore with the commercial exploitation of surrogacy that we have been primarily, but by no means exclusively, concerned."[407]

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404. The Warnock Report is unclear as to who it regards as being treated by whom as a means to an end. It may be that the commissioning parties are treating the surrogate or the potential child as a means to an end. Or, alternatively, it may be that the surrogate is treating the commissioning parties or the potential child as a means to an end.
405. See Marietta Don E., "On Using People", (1971-2), 82 Ethics, 232.
406. The Warnock Report did not distinquish the different financial dimensions of surrogacy, it is possible that 'financial interests' referred also to surrogacy with reasonable compensation. This however does not affect the argument made here.
407. See para. 8.17.

Is the quotation suggesting that activities which involve paying others to be a means to one's ends immoral? If so, it is two sweeping a statement.

Most activities which involve paying others to be a means to one's own ends are perfectly innocuous and acceptable. For instance, a passenger who pays a taxi driver for a ride can hardly be said to be acting immorally. Nor is the taxi driver likely to be considered as being exploited by the passenger.

In other words, not every situation in which payment is made by X to Y, for the purpose of X achieving something, and which involves Y in providing in return time, physical presence, skill and so on, need be regarded purely and simply as exploitative of either party. However, it may be that there is something about the nature of what is either offered or provided in surrogacy for a fee which renders this argument valid rather than specious. Moreover, if there is a real possibility of exploitation in this situation, then the question must be asked, who is being exploited? Further, if exploitation of any, or all, of the parties is identified, does this render the practice immoral? And if the practice is deemed immoral, does this demand legal condemnation? This last question has been briefly considered above,[408]

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408. see supra. pp. 179-181.

and so concentration here will be on the first two questions.

On the one hand, in a free market system, it is possible that the commissioning parties, desperate for children, may be subjected to demands for unconscionably high fees from surrogates. A corollary to this may be that those who wish to be assisted by a surrogate may find that surrogacy is not an option because they cannot afford to pay a fee. In these circumstances, it may be argued that, if exploitation is occurring, then it is the commissioning parties who are its victims.

On the other hand, the attraction of payment may mean that low-income women may be lured in to become surrogates for those who can pay. In one research study, it was found that 40% of volunteer surrogates in America were unemployed, or in receipt of welfare.[409] Here, money inducement may be so inviting to low-income women - who may have few, or no, equally attractive alternatives - that they will enter into surrogacy arrangements. Thus, the spectre of poor women carrying babies for the rich may then arise.

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409. See Winslade, W.J., "Surrogate Mothers - Right or Wrong?" (1983) 9 Journal of Medical Ethics, 153.

However, unless there is something inherently different about the use of gestational function from the use of other body parts, it may be argued that to offer a fee for services rendered is not only entirely consistent with capitalist economies, but that not to make such a payment is exploitative. Nor does the likelihood that women of limited financial means would most commonly volunteer to become participants in surrogacy for a fee transactions necessarily affect the morality of the transaction. Many men and women currently undertake dangerous and unpleasant tasks - which they would not have undertaken had other options existed - in return for (sometimes rather meagre) financial payment. Yet, it has not been suggested that society should ban, for example, coal mining, because people do it in order to earn an income.

From the perspective of the commissioning parties, it is perfectly possible that they are willing to enter into a surrogate agreement even though the payment to a surrogate is of what others may regard as an unconscionable amount.

Thus, making payments which to others may be regarded as excessive, in order to satisfy a strongly-felt desire and to vindicate a right, is a matter the status of which is to be assessed by the person choosing to do so. This view is by no means radical or unusual, since much of what is paid by

individuals in order to satisfy desires (for example, by purchasing a Picasso) is not susceptible to rational objective evaluation.

Two conclusions may be drawn at this stage. First, the Warnock Report has failed to establish why, and how, surrogacy for a fee is a 'positively exploitative' and unacceptable transaction. Condemnation of surrogacy for a fee, therefore, appears to have more to do with an in-built rejection of the practice rather than a conclusion arrived at after well-reasoned consideration of the issues involved.

Second, the potential danger of exploitation in surrogacy for a fee does not necessarily support prohibition. There are two main reasons for this. In cases where surrogacy for a fee is voluntary on both sides, prohibition would infringe the right of a surrogate to use her procreative and/or gestational function, and the right of the commissioning parties to found a family (whether through procreation or not).

In cases where surrogacy for a fee is potentially exploitative of either party, the right to procreate and/or to use one's gestational function, being negative in nature, does not require a state to ensure an environment which is non-exploitative, nor one which is favourable to the exercise of that right. The same conclusion applies as regards the commissioning parties' right to found a family.

Indeed, prohibition of surrogacy for a fee on the ground of possible exploitation can be regarded as totally gratituous and as serving no particular legitimate interests of either potential surrogates or commissioning parties, whilst defeating the rights of some of these individuals.

To sum up the preceding discussion on the acceptability of surrogacy for a fee, one can say that the arguments that surrogacy for a fee is inconsistent with a woman's dignity because it resembles slavery, or that it deviates from the traditional female activity in relation to pregnancy and procreation, or that it is the treating of a woman as a means to an end, are frail reasons for its prohibition. The possibility of exploitation of the parties when a fee is involved is a potential danger in many activities where people have strong desire for certain ends. Prohibition is in any event, not ideologically required, since both the right to found a family, and the right to procreate and/or to use one's gestational function, are essentially negative in nature, demanding merely non-interference with individuals' freedom and liberty to choose.

(b) Baby-selling

One major argument against surrogacy with money payment is that it is tantamount to baby-selling. This has been regarded as a major obstacle to its acceptability.[410] The analogy often made is with adoption. British adoption laws generally prohibit money payment in connection with adoption.[411] The distaste which would be generally felt were babies bought and sold is instrumental in shaping the prohibition of money considerations in adoption.

However, the question must be posed as to the extent to which this analogy can appropriately be used. If surrogacy is not entirely on all fours with adoption, then the value of the arguments against baby-selling could diminish. If, however, sufficient link is perceived between the payment of a fee in surrogacy, and money payment in consideration of adoption, then the former may be objected to on the ground of baby-selling and those commissioning parties who would wish to adopt a surrogate-born child in order to secure their relationship with the child could find that the adoption laws constitute a major legal impediment to this endeavour.

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410. See generally, Wright, Moira, "Surrogacy and Adoption: Problems and Possibilities", (1986) 16 Fam. Law, 109.
411. See infra. pp. 185-202.

Arguments about whether or not surrogacy with money payment equates to baby-selling have reached the British courts. In the first reported English case, A. v. C.,[412] a woman agreed, for a sum of £500, to be artificially inseminated using the semen of a man who wanted a child. The surrogate changed her mind during pregnancy, and after the birth of the child, the natural (biological) father started wardship proceedings to obtain custody of the child.[413] Comyn, J., in the High Court, described the contract as a "pernicious" agreement, saying that:

> "The agreement between the parties I hold as being against public policy. None of them can rely upon it in any way or enforce the agreement in any way. I need only to give one of many grounds for saying this, namely that this was a purported contract for the sale and purchase of a child."[414]

In the Court of Appeal,[415] Ormrod L.J. described the case as a "sordid commercial bargain".[416]

The primary reason for these adverse comments on the surrogacy arrangement appeared to be the

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412. (1978) 8 Fam. Law 170, High Court; (1984) 14 Fam. Law, 241, Court of Appeal.
413. The High Court granted access to the father, but not custody.
414. (1978) 8 Fam. Law, 170.
415. The mother appealed to the Court of Appeal against the High Court judge's decision to grant access. The Court of Appeal denied access on the best interests of the child.
416 (1984) 14 Fam. Law 241.

perception that it was equivalent to baby-selling. However, the strength of this argument, which essentially hinges on the contention that one is paid money for the surrendering of a child (whether in consideration of adoption or not), can be tempered if one views the £500 merely as reasonable compensation for the surrogate.

Nonetheless, where surrogacy is for a fee, then the baby-selling argument can be applied most effectively.

Those who oppose the baby-selling argument may contend that the payment of a fee to a surrogate is for her pregnancy services rather than for the surrendering of the child to the commissioning parties. Clearly, if the payment of a fee is seen in this light, one cannot simultaneously argue that it is for the buying and selling of a baby.

Nonetheless, the fee element in surrogacy may be perceived to be, and may indeed be, for the surrendering of a child, for the simple reason that, if the surrogate does not surrender the child, she will not be paid.[417]

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417. One can use this very argument to support the contention that surrogacy with reasonable compensation resembles baby-selling. For instance, the practice in the USA is that a surrogate will be paid, for example, $12,000 (which as suggested before, may be considered as

It may, thus, be difficult, if not impossible to avoid the perception that surrogacy for a fee is baby-selling.

Attempts to argue otherwise have not been particularly successful. One writer argues that:

> "...an agreement to have a baby for the purpose of giving up for adoption is functionally different from selling babies already conceived. What the couple are doing is buying the right to rear a child by paying the 'mother'. The 'purchasers' do not buy the right to treat the child as a commodity since the child abuse and neglect laws still apply."[418]

However, it is submitted here that this argument is rather incomplete and, to a certain extent, flawed. Although it is correct to point out that the commissioning parties are not buying babies as a commodity, and that they are outside the ambit of

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reasonable compensation to the surrogate). 10% of the money will be paid on confirmation of pregnancy, and the rest will be paid when she hands the child over. (See Parker, Diana, "Surrogate Mothering, An Overview", (1984) 14 Fam. Law, 140.) Since a surrogate may change her mind by refusing to hand the child over to the commissioning parties, the money could be seen as being paid in return for her consenting to hand the child over. In other words, one may argue that the surrogate is selling the baby, when she performs her part of the agreement in return for the commissioning parties performing their side of the agreement. This is a misconception of the concept of surrogacy with reasonable compensation. The point being that if the surrogate decides to keep the child, the whole idea of compensating her vanishes, since she did not bear a child for another, rather she has borne the child for herself.

418. Davies, Iwan, "Contracts to Bear a Child", (1985) 11 Journal of Medical Ethics, 61, at p. 62. (emphasis original).

the laws on child abuse and neglect, it seems unsound to suggest that the commissioning parties are merely buying "the right to rear a child by paying the 'mother'". Even if there is such a "right to rear a child", ought it be capable of being bought and sold? Will this be injurious to the interests of children?[419] In other words, there may be other fundamental values which conflict with such a view of surrogacy for a fee. Consequently, this approach scarcely leads one closer to what is really regarded to be objectionable about surrogacy for a fee.

Surrogacy, as a means of founding a family (whether through reproduction or not), may indeed be very close to the concept of adoption, except that adoption is usually the surrendering of a child in situations where parents find themselves unable or unwilling to undertake parental duties for one reason or another; whereas surrogacy is the deliberate creation of a child for the purpose of parenting by person or persons other than the surrogate. Nonetheless, if one examines the legal position of money payment in connection with adoption, it may give some insight as to why surrogacy for a fee is often connected with the baby-selling argument.

The present UK law, and many US states' laws, have reflected societies' disapproval of any

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419. See infra. pp. 188-213.

transaction that is seen as linked to baby-selling. Thus, Section 50 of the Adoption Act 1985,[420] and Section 51 of the Adoption (Scotland) Act 1978,[421] generally prohibit payment of money in consideration for surrendering a child for adoption. Equally, American legislative provisions in various states prohibit payment of money or other reward to parents in consideration for adoption.[422]

There are two main reasons why public policy is against money payment in connection with adoption. First, a state has a legitimate interest in protecting mothers from being, as was said on one case:

> "coerced, compelled, forced or pressured to feel constraint or obliged to yield up their infants whether by threats of violence, financial withdrawal, or derision regardless of how oblique or veiled the pressure might be."[423]

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420. For the terms of the section, see infra. p. 199.
421. The terms is the same as Section 50 of the Adoption Act 1958.
422. See Rushevsky Cynthina, "Legal Recongition of Surrogate Gestation", (1982) 7 Women's Rights Law Reporter, 107. In Doe v. Kelley, the Wayne County Circuit Court stated that: "Baby-selling is against public policy of this State and the State's interest in preventing such conduct is sufficiently compelling and meets the test set forth in Roe. Mercenary considerations used to create a parent-child relationship and its impact upon the family unit strikes at the very foundation of human society and is patently and necessary injurious to the community. It is a fundamental principle that children should not and cannot be bought and sold. The sale of children is illegal in all states." 6 Fam.L.Rep (BNA) 3011, 3013 (1980).
423. Galison v. Dist. of Columbia, 420 A 2d 1263, 1268 (D.C. 1979).

Similarly, in the case of surrogacy for a fee, a state has a legitimate interest in ensuring that surrogates are not pressured by a fee to hand the child over to the commissioning parties.

This state interest can be reconciled with the argument made earlier, that the right to found a family is narrower in scope than the right to reproduce and/or to use one's gestational function, and that a state does have the power to interfere more readily with founding of a family than in relation to an individual's right to procreate and/or to use one's gestational function.[424] In other words, although the right of a surrogate not to be coerced into pregnancy is negative in nature, and thus does not demand the removal of social conditions which may be potentially exploitative,[425] the state can legitimately protect her right to found a family in the face of monetary inducement to give up the surrogate-born child. The converse of this is that a state may have a legitimate interest in preventing the founding of a family by the commissioning parties through payment of a fee.

Additionally, the use of money for the creation of family relationships may not always be in the best interests of a child. A person may pay for a child

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424. See supra. chapter 3, pp. 86-88.
425. See supra. pp. 186-7.

even though he or she is is not suitable for parenthood. Admittedly, states do not generally intervene in natural reproduction to impose any conditions on fitness for parenting. Still, intervention is considered legitimate after birth if there is evidence, for example, of abuse. Thus, it could be argued that if a state recognises a certain method of founding a family (whether through reproduction or not) then it has an obligation in its regulation. The simple transfer of of a child from one person to another as in a private surrogacy transaction without regulation is scarcely satisfactory.

The policy of the state - recognising the undesirability of money in the creation of parent-children relationship - is one which prohibits, in general, money payment in people's endeavours to found a family.[426] At the same time, it regulates, through close supervision, these endeavours; ensuring protection of the interests of adults and children. Hence, English law prohibits agreements to transfer parental rights and duties, and both English and Scottish law render them unenforceable.[427] In the case of adoption, this state policy is expressed through stringent regulations and close supervision.

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426. See Section 50 of the Adoption Act 1958 which applies to England and Wales, and Sections 51 & 24 of the Adoption (Scotland) Act 1978.
427. See infra, chapter 7, pp. 215-221.

Consistent with this policy, the law can prohibit generally surrogacy for a fee. But since existing practice favours regulating people's endeavours in founding a family, rather than closing avenues to such endeavours altogether,[428] surrogacy should be regulated to ensure that (i) the children's best interests are not jeopardised, and (ii) that where surrogates surrender children to the commissioning parties, they are not coerced, especially by monetary considerations.

Indeed, judicial reactions to the recent English surrogacy cases may be cited as lending suport to this view.[429]

In these cases, judicial reaction towards surrogacy with money payment has been toned down. In the Baby Cotton case, (Re A Baby),[430] a surrogate agreed, for £6,500, to carry a child for an infertile couple. The case finally led to the speedy passage of the Surrogacy Arrangements Act 1985.[431] Latey J. refrained from commenting on the morality of such

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428. See supra. chapter 4 on the current practice of not prohibiting the use of artificial techniques which allow people to found a family.
429. See Re A Baby, The Times, 15 Jan., 1985, p. 8; Adoption Applicaton Surrogacy case, The Times, 12 March, 1985, p. 27, and Surrogacy Twin Babies case, Daily Telegraph, 13 March, 1987, p. 2. For further discussion of these cases, see infra. pp. 197-204.
430. The Times, 15 Jan, 1985. p.8.
431. See Sloman Susan, "Surrogacy Arrangements Act 1985", (1985) 135/2 N.L.J., 978.

an arrangement, considering that the best interests of the child were of paramount importance for the court in exercising its wardship jurisdiction.[432] The court ultimately granted the commissioning husband (also the biological father) care and custody of the child. In the Adoption Application: Surrogacy case,[433] Latey J. (again not commenting on the morality of the surrogacy arrangement) made an adoption order in favour of the commissioning parties. Again, in the Surrogacy Twin Babies case,[434] where the surrogate changed her mind, (the amount paid was not disclosed), Sir John Arnold in the Family Division said that there was nothing 'shameful' about the arrangement.

These cases, however, do not connote judicial acceptance of surrogacy with money payment. As Latey J. said in both cases, the morality and acceptability of surrogacy is a question for Parliament (which has

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432. He said that the "... moral, ethical and social considerations are for others and not for this court in its wardship jurisdiction." The Times 15 Jan, 1985, p. 8.
433. The Times, 12 March, 1985, p.27. There was no written agreement in this case. Nor were lawyers consulted. The agreement was one based on trust. Surrogacy was achieved through natural intercourse between the surrogate and the commissioning husband.
434. The Daily Telegraph, 13 March 1987, p.2.

not taken any definitive stance),[435] not the courts. The task of the courts is to decide in a particular case what is in the best interests of the child. Nonetheless, in all three cases, the judges did not castigate the arrangements as immoral or shameful. Hence, one may infer a possible acceptance by the judiciary of surrogacy with money payment as a viable and acceptable means of founding a family.

These cases additionally demomstrated two further points. First, the public policy argument against, and the legal difficulty of, surrogacy with money payment may be overcome. Second, the role of the courts in cases of performed surrogacy arrangements can be similar to that which they perform in adoption.

(i) Surrogacy and Adoption

In the Adoption Application: Surrogacy case,[436] money payment of £5,000 was made to compensate the surrogate's loss of earnings and expenses.[437] The surrogate handed the child

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435. See the Consultation Paper, para. 41-3.
436. The Times, 12 March, 1987, p.27.
437. The payment originally agreed between the commissioning married couple and the surrogate (who was married with two children and had to give up her job to have the child) was £10,000. The surrogate refused to accept the balance of £5,000 after the birth of the child on the ground that she had already made some money through publishing her story in a book. The payment of £5,000 was said by the judge to be an amount that did not in fact cover the surrogate's loss of earnings and expenses.

over to the commissioning parties as agreed, and the couple applied for an adoption order.

S50(1) of the Adoption Act 1958 says:-

> "Subject to the provisions of this section, it shall not be lawful to make or give to any person any payment or reward for or in consideration of - (a) the adoption by that person of an infant; (b) the grant by that person of any consent required in connection with the adoption of an infant; (c) the transfer by that person of the care and possession of an infant with a view to the adoption of the infant; or (d) the making by that person of any arrangements for the adoption of an infant."[438]

Statutory provision states clearly that the court shall not make an adoption order unless it is satisfied that the applicants have not contravened S50 of the Adoption Act 1958.[439]

Despite these provisions, the judge held that no payment had been made under S50(1), and he allowed an adoption order after considering that it would be in the best interests of the child.

The judge reasoned that "it was only after the payments had been made and the baby born that any of the [the parties] began to think about adoption and legalities...[N]o payment or reward had been made within S50."[440]

This reasoning appears to imply that if the

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438. Contravention of S50 is a criminal offence for which the local authority may prosecute, see SS50(2) and S54(2) of the Adoption Act 1958.
439. S22(5) the Children Act 1975.
440. The Times, 12 March 1987, p.27.

parties had not contemplated or intended the adoption of the child at the time of the payments, no payments had been made under S50(1). This is not, in fact, what S50(1) provides. It covers any payment in consideration for the surrendering of a child, or for the granting of consent for the adoption of a child. Hence, it would have been a more satisfactory decision had the judge stated why there had been no payments made for either, or both, of those purposes.

Although the judge did not attempt to explain this, one may find evidence in the case, which, if examined against the underlying rationale of S50, can, and will support the judge's conclusion that, in this case, no payments had been made within S50(1).

S50(1) was intended to tackle the problem of child trafficking, the possible objectionable features of which are (i) money inducement to mothers to give up their babies, and (ii) the possibility that the interests of the adults giving up or receiving children will take precedence over that of children's. Since the evidence in this case was that the surrogate was acting primarily for altruistic reasons, and that the payments were in fact for her loss of earnings and expenses - and were unconnected with payments for the surrendering of the child, or for granting of consent to the adoption of the child - it could legitimately be interpreted as not being a payment struck at by S50(1).

What is most interesting about the judgment is what was said obiter. The judge said that if he was mistaken about S50(1), that is, if there had been payment within S50(1), he considered that S50(3)[441] permitted the court, in the exercise of its discretion in each case, to authorise payment not only prospectively, but also, retroactively.

This again is consistent with the spirit of S50.[442] It is not intended to be a bar to an adoption order in a case where payment was innocently made, where there was no evidence of coercion of the mother to give up the child, or irrespective of the child's welfare. It would, however, have such an effect if S50 was construed as limiting authorisation solely to prospective payment.

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441. S50(3) says:- "This section does not apply to any payment...authorised by the court to which an application for an adoption order in respect of an infant is made."

442. A strict literal interpretation of S50 may support prospective but not retroactive authorisation of payments. S50(1) and S50(3), taken together, state plainly that payment is unlawful unless that being authorised by the court. Thus, payment cannot be lawfully received before obtaining the court's authorisation. An accompanying section in the Adoption Act 1958, S7(1)(c), supported this contention. It stated that before making an adoption order, the court should satisfy itself that, the applicant 'has not received' and that no person 'has made' to the applicant, any payment in consideration of adoption except such as the court 'may' sanction.

The decision of the Adoption Application: Surrogacy case[443] is clearly satisfactory; it has effected the best result for all the parties. This liberal interpetation, if followed, may allow adoption after surrogacy with money payment, whether the payment is for reasonable compensation, or for a fee. In other words, money payments in surrogacy may not necessarily be contrary to public policy as constituting baby-selling, nor need they constitute an inevitable obstacle to adoption.[444]

(ii) The Role of the Courts in Performed Surrogacy Arrangements

The decision, and the obiter dicta, in the Adoption Application: Surrogacy case[445] indicate a possible role for British courts in performed surrogacy arrangements.[446]

Where a surrogacy arrangement involves money payment, a court can assess the nature of the payment, and decide whether it was a case of surrogacy with reasonable compensation. If it was, as in this case,

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443. The Times, 12 March, 1987, p. 27.
444. For further discussions on other possible legal obstacles to adopting a surrogate-born child, and their possible solutions, see Wright, Moira, "Surrogacy and Adoption: Problems and Possibilities", (1986) 16 Fam. Law, 109.
445. supra. cit.
446. Although as will be seen in chapter 7, where a surrogacy agreement is breached, the law is not primarily competent in regulating the behaviour of the parties.

S50(1) will not apply, and an adoption order could be made in favour of the commissioning parties, providing that this is in fact in the child's best interests.

Where money payment to a surrogate is in fact a fee, that is, it is a payment within S50(1), the court may still exercise its discretion under S50(3) and authorise the payment retroactively, if and only if, adoption in the case is in the child's best intersts.

In the Surrogacy Twin Babies case[447], custody was granted to the surrogate on the ground that it was in the best interests of the children since they had established a strong bonding with her. These two cases indicate that the court can play an important role in deciding what is in the best interests of a surrogate-born child; a role that they have long played in making adoption orders.

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447. supra. cit.

(4) CONCLUSION

In this chapter, the acceptability of surrogacy as a means of founding a family (whether through reproduction or not) has been examined. The Warnock Report which is the major British government document examining the issue, by a majority, condemned it. However, the arguments favoured by the Report, that is, that surrogacy is a practice where one person treats another as a means to an end, and that it is positively exploitative, are largely rhetorical. Furthermore, the Warnock Report failed to distinquish the different possible financial elements of surrogacy.

As has been argued in this chapter, surrogacy in principle and surrogacy with reasonable compensation are not socially and morally objectionable practices. Consequently, individuals should be allowed to found a family (whether through reproduction or not) by employing these forms of surrogacy. Conversely, a woman should be free to choose to become a surrogate (whether for reasonable compensation or not). However, as indicated during the course of the discussion, the best interests of children will necessitate regulation of these practices, at least, along the line suggested regarding the use of artificial techniques. Regulation of the practice of surrogacy in principle

and surrogacy with reasonable compensation is compatible with one's right to found a family (whether through reproduction or not) and the best interests of children.

In relation to surrogacy for a fee, the contentions that it resembles slavery and that it deviates from traditional female behaviour are in themselves inadequate arguments for its prohibition. The objections that surrogacy for a fee is a practice that treats a woman as a means to an end, and that it is positively exploitative are unconvincing arguments for narrowing an individual's options in procreation and founding of a family. According to the libertarian approach which has been adopted in this thesis, the potential of adult participants being exploited in surrogacy for a fee does not require the prohibition or regulation of such a practice, since the right to found a family (whether through reproduction or not), and the right to use one's reproductive and/or gestational function, are negative claim rights. These rights do not require a government to ensure an environment which is non-exploitative in the exercise of these rights. State interference with the practice on that ground, therefore, serves no legitimate interests of the adult parties.

Baby-selling, however, is the strongest argument against surrogacy for a fee. The policy of the state against baby-selling has, indeed, been reflected in the adoption practice in the UK, which prohibits money payment in consideration of adoption. The legitimate state interest in prohibiting baby-selling is twofold. First, the state has an interest in preventing women from being coerced into giving babies up for adoption. In other words, a state has a legitimate interest in protecting the founding of a family by a woman in the face of money inducement to give up her baby (and conversely, in prohibiting an individual's endeavours in founding a family through money payment). Second, the state has a legitimate in ensuring that children are not bought and sold regardless of their best interests. For these same reasons, surrogacy for a fee can legitimately be prohibited as contrary to public policy against baby-selling.

Notwithstanding this, one may argue that regulating baby-selling may meet these two objections. In other words, agencies may regulate baby-selling transactions in order to ensure that payments do not significantly affect the voluntariness of a mother in giving up her baby for adoption, and stringent selection procedures for prospective adoptors may also be the answer in protecting the best interests of children.

The possibility of regulating baby-selling, and its non-adoption has alluded one to another possible, and perhaps more fundamental, objection against money payment for the creation of parent-child relationship. This is the contention that such practice may be totally at odds with our intuitive feeling that certain activities should not be the subject of market forces, which may have the effect of commodification of certain human relationships, for example, the child-parent relationship. This argument may also be the basis of opposition to prostitution, and payment of blood donors over and above that which represents reasonable compensation.

Nonetheless, the arguments of commodification, and baby-selling do not apply to surrogacy in principle and surrogacy with reasonable compensation. Given that the practice in the UK is to permit options in founding a family (through adoption or the use of artificial techniques), rather than restricting them unless a compelling interest is shown, the argument in this chapter is that these practices should be permissible subject to regulation aimed at securing the best interests of children and surrogates.

In other words, an individual's right to found a family (whether through reproduction or not), and a woman's right to use her reproductive and/or gestational function, should not be restricted in

relation to surrogacy in principle and surrogacy with reasonable compensation except insofar as is necessary in the best interests of children and surrogates.

Comments about morality in recent English surrogacy cases have become somewhat subdued. This may be interpreted as a possible acceptance by the judiciary of some forms of surrogacy in the founding of a family. Furthermore, the Adoption Application: Surrogacy case[448] has removed one major legal impediment to surrogacy with reasonable compensation. The court in effect held that surrogacy with reasonable compensation did not amount to payment in consideration of adoption of a surrogate-born child. In any event, the court said that if it was payment, the court could authorise it, and allow an adoption order in the best interests of the child. The decision indicates that money payment in surrogacy does not necessarily create a legal obstacle to the adoption of a surrogate-born child.

Yet, as the case has revealed, the courts, being the first and final safeguard regarding the propriety of surrogacy with money payment, cannot defeat the baby-selling argument. In other words, given that a court will make an adoption order if it is in the best interests of a child, and that the taint of impropriety in relation to money payment to a

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448. supra. cit.

surrogate may have to be ignored, the baby-selling argument continues to have some force. It is perhaps for this reason and to protect the best interests of children that proponents of surrogacy usually suggest the introduction of a regulatory scheme.[449]

Such a scheme is compatible with the argument in this chapter that surrogacy can be viewed as akin to adoption. Given that steps towards the creation of a parent-child relationship in surrogacy begin before a child is conceived, there is a strong case for the establishment of agencies - along the line of the present adoption agencies - which will assess the suitability of commissioning parties and surrogates and counsel and advise them to ensure that they understood the full implication of surrogacy. Such agencies can also regulate the question of payment to avoid the taint of baby-selling.

Again, by analogy with adoption, such agencies must have the skills necessary to deal with the issues involved in surrogacy, and should operate on a non-profit making basis. Legal prohibition of commercial surrogacies can be justified on the ground that their involvement in creating parent-child relationship has in the past proved to be deleterious to the interests of children and adult parties.[450]

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449. See the Warnock Report, "Expression of Dissent: A. Surrogacy", pp. 87-9.
450. See the Report of the Departmental Committee on

If the above regulatory proposal is accepted, then the state is limiting the right to found a family by surrogacy, and the right to use one's reproductive and/or gestational function, to that which is provided by state regulated agencies. In other words, these rights do not extend to using commercial surrogacies. Nor do they extend to the practice of surrogacy for a fee. This is not necessarily an unacceptable limitation of these rights, although whether an individual's freedom to do business, and make a profit is unreasonably restricted by this regulation is another matter outside the scope of this thesis.[451]

The suggestion that surrogacy should be regulated rather than banned has been made in other jurisdictions, for example, the Ontario Law Reform Commission's study of Human Artificial Reproduction and Related Matters proposes legislative recognition

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Adoption Services and Agencies, B.P.P., 1936-7, Cmnd 5499. para., 30 (or the Horsburgh Report) which highlighted the unsatisfactory state of the English adoption law caused by the operation of unregulated intermediaries which operated on either a profitable or non-profitable basis. Today, the operation of adoption agencies in the England and Scotland is strigently regulated by the Adoption Act 1958 (as amended) and the Adoption (Scotland) Act 1978 respectively.

451. Action, H.B., The Morals of Markets, London, Longman, 1971.

of surrogacy.[452] Again, in Michigan, a House of Representative Bill No. 5148 proposed detailed regulation of surrogacy.[453] The underlying philosophy of the regulatory approach is that not only do people have rights in the areas of procreation and founding of a family, but also that some of the problems associated with surrogacy can best be tackled by a regulatory scheme. In the words of the Ontario Report,

> "...given the relative accessibility of artificial insemination, prohibition would result in recourse to clandestine private arrangements that would realise the worst fears of those who oppose this practice. Dangers of exploitation of the weak by the powerful, pregnancies contracted by the irresponsible, and the introduction of infants into inappropriate, even dangerous circumstances would seem to be accentuated if the practice were driven underground. At the greatest risk would be the child whose place in society would be uncertain...Accordingly, we have rejected prohibition in favour of a form of regulation, in the belief that the latter best would protect the interests of all concerned..."[454]

A completely different approach to that advocated in this chapter was adopted by the state of Victoria, Australia. In response to the Waller

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452. Report on Human Artificial Reproduction and Related Matters, 2 Vol., Ministry of the Attorney General, Toronto, July 1985, p.232.
453. See Rushevsky, Cynthina, A., "Legal Recognition of Surrogacy Gestation", (1982) 7 Women's Rights Law Reporter, 107-142.
454. The Ontario Report, op. cit., p. 232.

Report,[455] S30 of the Infertility (Medical Procedures) Act 1984 makes surrogacy whether for a fee or not an offence. This is accompanied by a penalty for contravention.

According to the argument in this chapter, and throughout the thesis, prohibition of surrogacy whether for a fee or not is clearly an excessive reaction to the problems identified in surrogacy. Moreover, it would be an infringement of rights of individuals to found a family (whether through reproduction or not), and right of a woman to use her reproductive and/or gestational function. The effect is to restrict people's choice in the areas of reproduction and founding of a family. More importantly, it is to abrogate the right to reproduce of some infertile people, and restrict severely the right of the infertile to found a family.

Although a regulatory scheme is advocated in this chapter, this is not however to say that regulation is necessarily a straightforward task. Questions as to the validity and enforceability of surrogacy arrangements must be considered before one can assess the efficacious and satisfactory nature of surrogacy as a means for the founding of a family (whether through reproduction or not). It is to these question that the next chapter will turn.

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455. The Waller Report, op. cit; see generally, Current Topic, (1984) 58 The Australian Law Journal, p. 683.

CHAPTER 7

LEGAL ISSUES IN SURROGACY

(1) INTRODUCTION

It has been concluded, therefore, that the right to reproduce and the right to found a family can include the right to use surrogacy (even where money payment is involved) subject to the caveat that regulation will be needed to ensure that the interests of children and surrogates are adequately protected.[456] However, regulation also requires consideration of the legal difficulties which may face the interested parties, and their resolution may provide genuine access to surrogacy as a means to found a family.

In this chapter, two major legal issues relating to the use of surrogacy for the founding of a family (whether through reproduction or not) will be explored and examined. First, and this is a very important question, is such an arrangement lawful and enforceable? Second, it has been seen[457] that parenthood is an important issue in the founding of a family by artificial techniques, and there are arguments supporting legal reform which will remove the unsatisfactory nature of the current definition of parenthood as applied in the use of artificial techniques. The same arguments apply in respect of surrogacy. Consequently, in the second section of

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456. See supra. chapter 6.
457. See supra. chapter 5.

this chapter, the issue of parenthood in surrogacy will be considered, and proposals as to how problems can be resolved, will be made.

(2) VALIDITY AND ENFORCEABILITY OF A SURROGACY ARRANGEMENT

The 'Transfer Term'

The Surrogacy Arrangements Act 1985 which outlawed the operation of commercial surrogacies left the issue of the lawfulness of a surrogacy arrangement open. Section 1(9) of the 1985 Act states,

> "This Act applies to arrangements whether or not they are lawful and whether or not they are enforceable by or against any of the persons making them."

According to current English and Scottish law, a surrogate arrangement (whether for money payment or not) is not illegal or unlawful.[458] The Surrogacy Arrangements (Amendment) Bill 1986, clause 1 of which attempted to make a surrogacy arrangement unlawful, was lost through lack of parliamentary time.[459]

The objective of clause 1 was to ensure that money payment made in a surrogacy transaction was irrecoverable.[460] Thus, in the case of breach by a surrogate, the commissioning parties could not sue to recover money payment which had already been made to her. This would not be the situation if a surrogacy arrangement is merely void and unenforceable, which is taken by many to be the present English and Scottish

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458. See H.C. Vol. 79, Col. 118-9.
459. Surrogacy Arrangement (Amendments) Bill [H.L.] 1986, No. 169.
460. See the debates to the Surrogacy Arrangements (Amendment) Bill 1986, H.L., Vol. 473, Col. 160-164; H.L. Vol. 475, Col. 363-366.

law.[461]

Nonetheless, under both English and Scottish common law, an agreement to transfer or surrender parental rights and duties is contrary to public policy, and is certainly unenforceable.[462] Whether such an arrangement is also void is less certain,[463] but the point is largely academic today because of statutory provisions.

Currently, the English statutory provision which restates the common law rule can be found in S85(2) of the Children Act 1975, which says,

> "Subject to section 1(2) of the Guardianship Act 1973...a person cannot surrender or transfer to another any parental right or duty he has as respects a child."[464]

And Section 1(2) of the Guardianship Act 1973 says,

> "An agreement for a man or woman to give up in whole or in part, in relation to any child of his or hers, the rights and authority referred to in subsection (1) above shall be unenforceable, except [a separation agreement between husband and wife] ..."

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461. A surrogacy arrangement is often said to be void and unenforceable, but this may be so insofar as the 'transfer term' is concerned. Other terms in a surrogacy arrangement may be unenforceable, but not necessarily void. See infra. pp. for further discussions on this point.
462. See Appendix 2.
463. See Appendix 2.
464. S85(2) is to be considered with the background of adoption in mind. It cannot be taken literally, otherwise adoption could not exist.

The Scottish common law rule, like the English common law rule, has been put into statutory form, and Section 10(2) of the Guardianship Act 1973 is the Scottish equivalent of Section 1(2).[465] In other words, under both English and Scottish law, an agreement to transfer parental rights and duties is unenforceable.

The obvious legal problem arising from using a surrogacy arrangement to found a family, therefore, relates to one of its fundamental terms, which states that a surrogate is to surrender the child to the commissioning parties (this will hereinafter be called the 'transfer term').

The applicability of the law prohibiting an agreement to transfer parental rights and duties to surrogacy agreements, of course, depends on who is considered to be the mother, and therefore, who has parental rights and duties regarding a surrogate-born child in the first place. The 'transfer term' in a surrogacy arrangement will not contravene any statutory provisions, if (in the most unlikely eventuality) a surrogate is considered not to be the mother of the child. Most probably, however,

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465. Note: in Scotland, there is no statutory equivalent of S85(2) of the Children Act 1975. See Cusine, D., "'Womb-Leasing': Some Legal Implications", (1978) 128/2 N.L.J. 824, at p. 825.

a surrogate will be considered to be the mother. In such a case, the 'transfer term' in a surrogate arrangement will be void and unenforceable. Although no English or Scottish judicial decision[466] or legislative enactment[467] to this effect has been made, the consensus of opinion in various parliamentary debates[468] and academic writings[469] clearly support this view.

Evidently, if a dispute arises between a surrogate and the commissioning parties regarding the custody of a surrogate-born child, a decision will be made taking the child's best interests as the paramount consideration,[470] and the 'transfer term' in a surrogacy arrangement will never prevail over

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466. See the obiter in A. v. C., (1978) 8 Fam. Law, 170, where the trial judge Comyn, J. said that: "The agreement between the parties I hold as being against public policy. None of them can rely upon it in any way or enforce the agreement in any way."
467. An Amendment moved during the debates to the now Surrogacy Arrangements Act 1985 by Michael Meadowcrafts to make a 'transfer term' of a surrogacy arrangement unenforceable was withdrawn. See H.C. Vol. 79, Col. 115-9.
468. See H.L., Vol. 473, Col. 160-177; H.L., Vol. 475, Col. 363-6; H.C., Vol. 79, Col. 188-9.
469. See eg, Freeman's Annotation to the Surrogacy Arrangements Act 1985, S1(9), in Scottish Current Law Statutes, 1985.
470. See A. v. C. (1978) 8 Fam. Law 170, (1984) 14 Fam. Law 241; the Surrogacy Twin Babies case, Daily Telegraph, 13 March, 1987, p. 2; the Baby M case, Hornblower Margot, "Judge Awards 'Baby M' to Her Biological Father", the Washington Post, April 1, 1987.

that. Otherwise, the court would be allowing a contractual term to pre-empt its decision on the best interests of a child.

Given that the 'transfer term' in a surrogacy arrangement cannot be enforced, endeavours to found a family (whether through reproduction or not) by using surrogacy will be hazardous. Nonetheless, since the right to found a family (whether through reproduction or not) is essentially a negative claim right, there is no obligation on the part of the state, for instance, to ensure, either that a surrogacy arrangement is entered into only if there is a good prospect of performance, or to enforce it.[471]

However, as has been argued,[472] there is a case for regulating the practice of surrogacy. If the state is involved, it may seem illogical that it should participate in the initial process of surrogacy for the founding of a family by ensuring, for instance, the eligibility of commissioning parties, without also assessing the likelihood of the parties performing the agreement, through assessing their genuineness. This, nonetheless, is still far from

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471. Compare the approach of the Ontario Law Reform Commission which proposes statutory enforcement of a surrogacy agreement. See Report on Human Artificial Reproduction and Related Matters, 2 Vol., Ministry of the Attorney General, Toronto, July 1985, p. 252.
472. See supra. chapter 6.

suggesting enforcement of surrogacy arrangements.

Although unenforceability can be a substantial obstacle to the commissioning parties' endeavours to found a family (in the event of a surrogate refusing to surrender the child), surrogacy may still be regarded by some as realistic and meaningful way of founding a family.[473]

It has, therefore, been noted that a 'transfer term' in a surrogacy arrangement is void and unenforceable. Whether this conclusion is necessarily true with regard to other terms in a surrogacy arrangement is unclear, even though it has often been said that a surrogacy arrangement is void and unenforceable.[474]

In the debates on the Surrogacy Arrangements Act 1985, it was said that "...it is almost certain that most aspects of a surrogacy arrangement would be regarded as unenforceable by the courts as being contrary to public policy."[475]

It is submitted here that other important terms in a surrogacy arrangement are not necessarily

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473. Since the late 1970s, some 500-600 children have been born through surrogacy arrangements. Out of these cases, there had been three reported incidences where surrogates changed their minds. See "The Lessons From Baby M", The Economist, 21 March, 1987, p. 18.
474. See for example Parker, Diana, "Surrogate Mothering: An Overview", (1984) 14 Fam. Law, 143.
475. Mr. Kenneth Clarke, Hansard: H.C., Vol. 79, Col. 118-9.

contrary to public policy and void, although their enforceability is seriously doubted.

In a surrogate agreement, a surrogate will usually agree to carry a child to term, (this will be referred to as the 'carrying term'), and to seek proper medical attention to ensure foetal health, (this will be referred to as the 'pre-natal care term'). These are clearly vital aspects of a surrogacy arrangement. It is, however, unclear why these terms should be regarded as void and contrary to public policy.

A promise to have a child, and to ensure a foetus' pre-natal health, must be in accordance with public policy emphasing pre-natal care, unless, of course, the very existence of the foetus is objected to. Nonetheless, as has argued before,[476] it is difficult to envisage a situation where it is feasible to make such a contention.

Notwithstanding this, the question of whether or not the commissioning parties could enforce these terms through judicial process is certainly problematic.

The 'Carrying Term'

Where a surrogate wishes to abort the foetus, contrary to the 'carrying term', the interests which

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476. See supra. pp. 110-111.

the commissioning parties have in the surrogate's non-abortion appear to be insufficient to prevent the operation.

In Paton v. British Pregnancy Advisory Service Trustees,[477] the English courts first came across a case where the plaintiff (a husband and father) sought an injunction to restrain his wife from having an abortion to be carried out under the Abortion Act 1967, without his consent. Sir George Baker P. held that, in law, the husband has no legal right to stop his wife from having an abortion.

> "The Abortion Act gives no right to a father to be consulted in respect of a termination of a pregnancy...The husband therefore has no legal right enforceable in law or equity to stop his wife having this abortion."[478]

Paton was considered in C. v. S.[479] where a father sought an injunction to prevent his girlfriend's termination of an eighteen to twenty-one weeks' pregnancy. Although, the case was not based on the right of a father to be consulted about an abortion - a point which was not argued[480] - it has

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477. [1979] Q.B. 276.
478. ibid., at p. 281. Note that the 1976 Act gives no right to a mother either. Compare, "but the Abortion Act 1967 has given mothers the right to terminate the lives of their unborn children and made it lawful for doctors to help to abort them." per Stephenson L.J. in McKay v. Essex AHA [1982] 2 All. E.R., 771 at p. 780e.
479. The Times, 24 Feburary, 1987, p. 25.
480. The father's argument in C. v. S. was based on the interpretation of the term "capable of being born alive" in the Infant Life (Preservation) Act

nonetheless revived the whole debate in Britain.[481] Consequently, whether the present sound and unambiguous state of the law on this point will be changed remains to be seen.

American cases since Roe v. Wade[482] are also clear on whether a husband-father has a right to prevent his wife's abortion. Thus, in Planned Parenthood of Central Missouri v. Danford A-G.,[483] the Supreme Court held that,

> "[the state] may not constitutionally require the consent of the spouse...as a condition for abortion during the first twelve weeks of pregnancy...Since the state cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the state cannot delegate authority to any particular person even the spouse to prevent abortion during that same period."[484]

1929. The Court of Appeal upheld the interpretation of Justice Heilbron, in the High Court, that the proposed abortion was not in contravention of the 1929 Act in that the foetus was not "capable of being born alive". The House of Lords, at an emergency appeal committee, decided unanimously not to allow a challenge to the Court of Appeal's decision because there was "no arguable point of law". See Guardian, 25 Feb., 1987, p. 1; C. v. S., The Times, 26 Feb., 1987, p. 24.

481. See the Guardian, 25 Feb., 1987, p. 12 (Editoral Comments), and the introduction of the Infant Life (Preservation) and Paternal Rights Bill 1987, H.C. Bill 113. Clause 2 of the Bill proposed to amend Section 1(1) of the Abortion Act 1967 by inserting after S1(1)(b) the words- "(c) that the father of the unborn child had been consulted about the mother's intention to terminate the pregnancy and that, where he is the mother's husband his consent as to the termination has been obtained."

482. 410 U.S. 113 (1973). See supra. pp. 57-59.

483. 428 U.S. 52 (1976).

484. ibid., at p. 69.

The Supreme Court decision emphasises a woman's right to decide whether to terminate a pregnancy and her right to self-determination. That is, since it is the woman who physically bears the child, and since she is most directly affected by the pregnancy, she should have, within certain limits, the final decision.[485]

A similar decision was arrived at in the Australian case of K. v. T.,[486] Williams, J. of the Supreme Court of Queensland held that a de facto father has no legal right to restrain the wife from having an abortion. On Appeal to a full court of the Supreme Court of Queensland, three judges upheld that decision.[487]

If a father-husband or a father cannot prevent a woman from having an abortion, it is difficult to envisage that the commissioning parties should be able to prevent a surrogate from having an abortion by reason of a surrogate agreement.

The Abortion Act 1967, which applies to England, Wales and Scotland, lays down the

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485. Compare Teo, Wesley D.H., "Abortion: the Husband's Constitional Rights", (1974-5) 85 Ethics, 337.
486. [1983] 1 Qd. R. 386.
487. Attorney General (ex rel Kerr) v. T., [1983] 1 Qd. R. 404. Note that judges in both cases consider their decisions as in accordance with legal principles rather than concerning themselves with the conflicting moral and religious views on abortion. See Paton, supra. cit., at p. 278; K. v. T., supra. cit., at p. 397.

circumstances under which an abortion can be legal. As long as an abortion is legal, that appears to be the end of the matter.[488]

In America, since a woman has a limited right to abortion, the question may be whether a surrogate can waive her (limited) right to abortion by an agreement, and further, whether such a waiver should be irrevocable.

This question should not, however, overshadow a more important issue: how can the commissioning parties enforce this waiver without unacceptably infringing the liberty of a surrogate to decide whether or not to continue with the pregnancy?[489] Furthermore, should the commissioning parties have the right to enforce a surrogate's waiver? Given the importance of a woman's freedom to choose in relation to procreation and/or the use of her gestational function, it appears extremely unlikely that a court would hold that a surrogate has legally bound herself to continue her pregnancy.

Consequently, where a surrogate wishes to have an abortion within the ambit set by the law, no other party can prevent her. The 'carrying term' in a surrogate agreement, therefore, cannot be

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488. On the abortion law in England and Wales and Scotland, see Mason, J.K. & McCall Smith, R.A., Law and Medical Ethics, London, Butterworths, 1983. chapter 5.

489. See supra. chapter 3 on the right to privacy and the right to reproduce.

contractually enforceable.

The 'Pre-natal Care Term'

The enforceability of a 'pre-natal care term' through the judicial process, again, is questionable.

The principles governing contractual equitable remedies in the British courts are that specific performance of a personal service contract will not be ordered, not only because it may amount to an unacceptable infringement of one's liberty, but also because such an order may also be futile (in that involuntary performance may result in something that is far from satisfactory). Nor will the courts issue a decree of injunction if the result is directly or indirectly to order the specific performance of a personal service contract.[490] Thus, it appears extremely unlikely that a court will use its equitable remedies to order a surrogate to adhere to the 'pre-natal care term'.

However, since the 'transfer term' is unenforceable, the question really is, will a court uses its equitable remedies to enforce a contractual term to undertake pre-natal care?

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490. See generally, Treitel, G.H., "Specific Performance and Injunction", in Chitty on Contract, General Principles, Vol. 1, (24th Ed.), London, Sweet and Maxwell, 1977, p. 1631; Walker, D.M., The Law of Contract and Related Obligations in Scotland, (2nd Ed.), London, Butterworths, 1985, pp. 540-544.

There are no British precedents suggesting that the court would be willing, or ought, to take on such a task irrespective of contract.[491] In the recent English case of Re D (a Minor)[492], the House of Lords upheld the care order of Berkshire Social Services respecting a heroin addict's baby who was born with drug withdrawal symptons. The decision was based on the interpretation of "is being" in S1(2) of the Children and Young Persons Act 1969, which says:-

> "If the court before which a child...is brought...is of opinion that any of the following conditions is satisfied...(a) his proper development is being unavoidably prevented or neglected or his health is being unavoidably impaired or neglected or he is being ill-treated:- and and that he is in need of care and control...then...the court may if it thinks fit make such an order..."

It was held that, in deciding whether any of the conditions in Section 1(2) was satisfied, the justices were entitled to have regard to the fact that the mother had taken drugs during her pregnancy. Furthermore, in this context, the court could take into account the hypothetical future of the situation.[493]

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491. Some American cases do suggest that the court may intervene in some extreme circumstances in the interests of the child, but not continuing supervision of the progress of a pregnancy to ensure foetal health, see Weinberg, S.R., "A Maternal Duty to Protect Fetal Health?" (1983) 58 Indiania Law Journal, 531.
492. The Times, 5 December, 1986, p. 15.
493. That is, would the condition that had existed have been likely to continue had the move of protecting the child not been commenced.

To that extent, the case is primarily concerned with what are the relevent factors in determining one's suitability for parenting.[494] It may have an indirect impact on the behaviour of pregnant women, but it is far from suggesting that the courts supervise, or will supervise, the conduct of a pregnant woman. Consequently, the 'pre-natal care term' in a surrogacy arrangement is unlikely to be enforceable in courts.

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494. It has been a controversial decision in this respect. See Guardian, 9 December, 1986, p. 12.

The preceding discussion obviously is of very little practical significant if the 'transfer term' in a surrogacy arrangement is unenforceable. Nonetheless, it has demonstrated that it may be too sweeping a statement to say that a surrogacy arrangement is void and unenforceable, since clearly, there are terms in a surrogacy arrangement that may not necessarily be void as contrary to public policy, albeit that their enforceability is highly questionable. Enforcement of the 'pre-natal care term' is too invasive to an individual's liberty, and the British Abortion Act 1967 lays down the circumstances under which abortion is lawful. Consideration such as contract, therefore, is irrelevant.

As noted above,[495] the fact the 'transfer term' and other essential terms in a surrogacy arrangement are unenforceable, does not defeat the right to found a family (whether through reproduction or not). If this is so, the more important issue may relate to the position of a surrogate-born child. Who are the parents of a surrogate-born child? Clarification of this issue will clearly be in the best interests of a surrogate-born child.

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495. see supra. pp. 215-231.

The Warnock Report considered the question of motherhood (but not fatherhood),[496] notwithstanding its recommendation which, if accepted, would render criminal, "actions of professionals and others who knowingly assist in the establishment of a surrogacy pregnancy."[497]

In the following section, the question of parenthood in surrogacy will be considered. The following terms will be used very often, and therefore, the adopted definition is important. 'Parent', 'mother' and 'father' are used to denote a legal relationship between an adult and a child. The undernoted terms, however, are purely descriptive, 'Biological mother/father' refers to a woman/man who contributes an ovum/semen to the creation of a child. 'Ovum/semen donor' refers to a biological mother/father who has donated her or his genetic gametes. 'Social/commissioning mother/father (or parties) refers to a woman/man who intends to rear a child regardless of her or his genetic link with the child. 'Surrogate/bearing mother' refers to a woman who bears a child regardless of her genetic link with the child. As will be seen,[498] a commissioning father who is also a biological father will not be regarded as a semen donor.

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496. para. 8.20.
497. para. 8.18
498. see infra. p. 234.

(3) PARENTHOOD AND SURROGACY

As has been noted,[499] the question of parenthood in natural procreation, is based on genetics:- a biological mother and father are parents of a child, and are accorded at least parental duties regarding the child.

Surrogacy, as implemented by artificial reproductive techniques, is a completely novel concept, and one major legal problem it engenders is:- who are the parents of a surrogate-born child (and thus have parental duties, at least, regarding the child)?

Who is the father? Is he the commissioning father (who may or may not be the biological father), or is he the semen donor? Is the mother the commissioning mother (who may or may not be the biological mother), the surrogate (who may or may not be the biological mother), or the ovum donor? Since all these permutations are technically possible, it should be clear that an attempt to rationalise the situation is needed.

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499. See supra. chapter 5, p. 133.

Fatherhood

A surrogate-born child has two possible candidates as his or her father; the semen donor (where, for example, the commissioning father is sterile), or the commissioning father (who may be the biological father, as in the case of partial surrogacy).

As has argued before,[500] according to the 'donation rationale' a donor should have no rights or liabilities regarding a resulting child. The 'donation rationale', as exemplified by the 'AID provision', which suggests that where a wife receives AID the husband should be considered the father of the child unless non-consent is proven, and that a semen donor will have no rights or liabilities regarding the child born as a result, can however cause at least two problems in partial surrogacy.

For instance, in California, the AID law deems a husband irrefutably to be the father of an AID child.[501] This can have application to partial surrogacy, where a surrogate has a husband, and she undertakes to be artificially inseminated using the semen of the commissioning father. The result will be that a surrogate-born child will be regarded, irrefutably, as the child of the surrogate and

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500. See supra, chapter 5.
501. See Parker, Diana, "Surrogate Mothering: An Overview," (1984) 14 Fam. Law, 140, 141.

her husband, even if the husband had nothing to do with the surrogate arrangement, and the purpose of the surrogacy is to enable the commissioning parties to have a child. This result is undesirable for a number of reasons.

First, the husband becomes the father for no logical reason. Fatherhood is attributed to him on a purely fortuitous basis; that is, he happens to be the husband of the surrogate. Second, this is totally contrary to the intention of the parties.

Even if an AID law is framed in a less rigid form, (for example, if it allows a husband to prove his non-consent to his wife's AID, and consequently, he is not regarded, by the AID law, as the father of the resulting child),[502] may the commissioning father, who is the biological father, be excluded by the 'corollary princple' as a semen donor?[503] If so, who is the father?

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502. See Syrkowski v. Appleyard 420 Mich. 367 (1985). In this case, a married surrogate was artificially inseminated using semen from the commissioning father. The AID statute in Michigan was similar to the 'AID provision', (see supra, chapter 5). The surrogate's husband had signed an affidavit of non-consent to his wife's AID. The Supreme Court of Michigan held that the circuit court had jurisdiction under the Paternity Act to identify the father of a surrogate-born child despite the statutory presumption of the AID statute.
503. In fact, the 'corollary principle' cannot exclude the commissioning father because by the very definition of the term used here, he is not a semen donor, see supra. p. 230.

This discussion shows that if an 'AID provision' is not to have unintended consequences in partial surrogacy, it has to be very carefully framed.

Where the commissioning father is the biological father, for instance, in partial surrogacy, he should be distinquished from a semen donor, since - unlike the standard case of semen donation - he never intends to divest himself of his responsibilities and liabilities regarding a surrogate-born child born as a result of a surrogate's artificial insemination using his semen. Consequently, he should not be excluded from being the father of a surrogate-born child by use of the 'corollary principle'.

In the case where the commissioning father is not the biological father of a surrogate-born child, the 'donation rationale' should apply since an anonymous semen donor should not be regarded as the father. As argued before,[504] the 'donation rationale' which is an exception to the 'genetic mode', when applied will regard a man who is not the biological father, as the father of a child, where he consents to a woman's pregnancy through AI or IVF.

The same principle could equally apply in surrogacy, although the nature of the consent in respect of the two men involved has to be distinquished. In the case of the commissioning

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504. See supra, chapter 5, pp. 136-141.

father, his consent is to a surrogate's carrying a child using semen from a donor so that he can found a family. Where a surrogate has a husband, his consent will relate to the wife's participation in surrogacy. This distinction is necessary to avoid the situation of attributing fatherhood to the surrogate's husband, and depriving the commissioning father of fatherhood; a result which would be totally contrary to the intention of all parties.

In sum, in surrogacy, where a commissioning father is the biological father, he should be regarded as father of a surrogate-born child. In other words, he is not a semen donor. Where he is not the biological father, he should be regarded as father on the ground that he has consented to the surrogate's pregnancy, whether through AI or IVF, for the founding of a family by him. Here, his consent should be distinquished from that of a surrogate's husband (if she has one). A surrogate's husband should not be regarded as father of a surrogate-born child, because if he had consented to his wife's pregnancy, the nature of his consent would relate only to his wife's surrogacy. This caveat should apply equally to a surrogate's male partner who consents to her surrogacy if what has been argued previously about extending the application of the 'AID provision' to unmarried couples is accepted.[505]

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505. See supra. chapter 5, pp. 140-143.

Motherhood

The Warnock Report, as has been noted,[506] recommended that when a child is born to a woman following donation of another's egg, the woman giving birth should, for all purposes, be regarded in law the mother of the child, and that the egg donor should have no rights or duties in respect of the child.[507] Similarly, it recommended that a woman carrying a donated embryo should be regarded as the mother of the child.[508] These recommendations are apparently the results of a consistent application of the 'donation rationale'.[509]

In relation to surrogacy, the Warnock Report recommended that whether in a case of partial or full surrogacy, (that is, irrespective of whether the surrogate is the biological mother), the surrogate should be regarded as the mother of the child.[510] This will hereinafter be called the 'surrogacy recommendation'. The Report considered that the two types of surrogacy could be covered by its recommendations regarding egg and embryo donation, even though it acknowledged that "the egg or embryo has not been donated".[511]

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506. See supra. chapter 5, p. 144.
507. See para. 6.8.
508. See para. 7.6.
509. See supra. chapter 5, pp. 136-139.
510. See para. 8.20
511. para. 8.20.

This 'surrogacy recommendation', although widely accepted, is rather curiously expressed.[512] If there is no donation of ovum or embryo to a surrogate, why then should a surrogate become the mother in a situation where she is not the biological mother, given that the 'genetic mode', presumably, is the basis for motherhood?

Analysis of the issue of motherhood in surrogacy reveals that the real basis for attributing motherhood is that a woman has borne a child - which will hereinafter be called the 'bearing factor' - rather than the use of the 'genetic mode'.

The 'bearing factor' as a basis for defining motherhood is, in fact, consonant with the attribution of motherhood in both natural and artificial procreation. For instance, although motherhood in cases of natural procreation, AI and IVF (whether donated ovum is used or not) may be explained, as it has been,[513] in terms of the 'genetic mode' and the 'donation rationale', there is no one case where the application of these principles does not invariably

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512. The 'surrogacy recommendation' is widely accepted. See eg. Lord Denning's attempt to amend the Surrogacy Arrangements Bill 1985 to make a surrogate mother of the child whom she has borne. Hansard, H.L. Vol. 465, Col.927. See also the Surrogacy Arrangements (Amendment) Bill 1986, sponsored by the Earl of Halsbury. Clause 2 seeks to make a surrogate the mother of the child.
513. See supra. chapter 5, pp. 133-145.

accord motherhood to a bearer of a child.[514]

The 'bearing factor' as a basis for motherhood is entirely different from the 'genetic mode' for fatherhood. Nonetheless, they can both be logically justified according to the different role men and woman play in natural and artificial procreation.

The 'bearing factor' suggests that bearing a child is both a necessary and a sufficient condition of the attribution of motherhood. The role played by the woman who carried and gave birth to a child is so significantly different from the role played by the male partner that the 'genetic mode' has less significance in determining motherhood.

Summary: Parenthood in Surrogacy

According to what has been said above, a carrying woman should always be regarded as the mother of the child. This conclusion is the same as that of the 'surrogacy recommendation'. Equally, a commissioning father should always be regarded as the father of a surrogate-born child, either because he is the biological father (not a semen donor), or because he has acquired the liabilities of a father through consenting to the surrogate's pregnancy, with the ultimate aim of his founding a family.

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514. See supra. chapter 5. pp. 133-145.

(4) CONCLUSION

In this chapter, two major legal issues concerning the founding of a family through surrogacy have been examined. According to the present UK law, a surrogate arrangement is not illegal or unlawful. Nonetheless, a 'transfer term' in a surrogacy arrangement is void and unenforceable. In a dispute about the custody of a surrogate-born child, the best interests of the child will dictate the outcome. Other terms in a surrogacy arrangement, such as the 'carrying term' and the 'pre-natal care term' are unenforceable, rather than void, on the ground that they are contrary to public policy.

Since an individual's right to found a family (whether through reproduction or not) is negative in nature, there is no obligation on the part of the legislature or the courts to enforce the 'transfer term' in a surrogate arrangement, (nor would such a step be compatible with the argument in the previous chapter that a state's interest is to ensure that mothers are not coerced into surrendering their children).[515] Consequently, those who choose surrogacy as a means to found a family do so at their own peril.

The argument that an individual's right to found a family (whether through reproduction or not)

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515. See supra. chapter 6, pp. 193-194.

does not oblige a state to review and modify the unsatisfactory applications of current definitions of parenthood in respect of artificial reproductive techniques applies equally to surrogacy. Thus, legislative reform would codify our understanding of what is entailed in gamete donation, and would equate to our sense of responsibility in the use of donated gametes for the founding of a family. More importantly, it is compatible with the best interests of children.

If the unsatisfactory nature of the current concept of parenthood as applied to artificial reproductive techniques and surrogacy, and the proposed solutions are accepted, the inherent problems can be removed by several legislative provisions modifying the concept of parenthood respecting artificial reproductive methods.

Such changes may take the following form:- first, that a woman who bears a child is deemed to be the mother of that child. Second, fatherhood: refers to <u>either</u> (i) a biological father who uses his semen for the AI of the mother, or the creation of an embryo which is inserted into the womb of the mother; <u>or</u> (ii) where donated semen is used for the above purposes, a man who consents to such a use. This last possibility excludes a male partner of a surrogate who may have consented to her surrogate pregnancy.

This recommendation in respect of fatherhood is

realistic. It reflects the intention of semen donors, and men who wish to found a family through the use of donated semen. As suggested earlier, if the 'donation rationale' operates to negate the parental rights and duties of a man who donates semen, cases of donation must be distinquished from cases where there is no donation of semen. The importance of this can clearly be seen by reference to the position of a commissioning father in partial surrogacy. In the case of a woman, the 'bearing factor' determines motherhood. Consequently, the question of ouvm donation has no real importance.

In the foregoing chapters,[516] the acceptability of artificial reproductive methods for the founding of a family (whether through reproduction or not), and some of the major legal difficulties associated with them, have been examined and considered. The conclusion so far is that they should be acceptable means for the founding of a family, because an individual's right to found a family (whether through reproduction or not) has not been defeated by any compelling reasons. The problems identified in the foregoing chapters merely justify regulation which may restrict the scope of an individual's right. In the penultimate chapter of this thesis, the question of funding of artificial reproductive techniques will be considered.

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516. chapters 4-7.

CHAPTER 8

STATE FUNDING OF ARTIFICIAL TECHNIQUES

(1) INTRODUCTION

It has been argued here that the two negative claim rights (to reproduce and to found a family) support the claim of the infertile to use artificial reproductive methods to found a family (whether through reproduction or not).[517] Nevertheless, these rights do not address the issue of state funding of artificial techniques. Yet the question of funding may have important implications for the practicalities of access to these techniques, and thereby will play a role in the extent to which at least some of the infertile may vindicate their rights.

If a case for public funding is to be made, two possible forms of argument could be adopted. First, it could be asserted that both the right to reproduce and the right to found a family are in fact positive claim rights, despite what has been said earlier.[518] Alternatively, one could employ utilitarian arguments for funding.

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517. See supra. chapter 3.
518. See supra. chapter 3.

(2) ARGUMENT FROM RIGHTS

Here the argument is that the right to reproduce and the right to found a family are positive claim rights, thus justifying state funding to assist the infertile to found a family (whether through reproduction or not). Clearly, the argument that the right to reproduce is a positive claim right specifically relates to the provision of positive assistance to enable reproduction. The right to found a family, as a positive claim right, would involve a more general contention. Thus, to accommodate such a right, a state might have an obligation to, for example, encourage non-abortion in order to increase the number of babies available for adoption and/or providing funding for artificial reproductive techniques.[519]

Since the suggestion that the right to reproduce and the right to found a family are positive claim rights is relatively novel, arguments on this proposition, to a large extent, are relatively unexplored, and have to be constructed.

Right to Reproduce As a Positive Claim Right

When considering the argument that there is a

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519. See Herbenick, Raymond M., "Remarks on Abortion, Abandonment and Adoption Opportunities", in O'Neil, Onora & Ruddick, William (eds.), Having Children, Philosophical and Legal Reflections on Parenthood, New York, Oxford University Press, 1977, p. 52.

positive claim right to reproduce, it may be useful to have some rough idea as to the extent of public assistance which may be demanded if the right is established. Although, AI is a relatively cheap technique, when compared to IVF, it may become more expensive because of the necessity of screening semen for, for example, the AIDS virus. The birth of a recent 'test-tube' baby was said to have cost £5,000.[520] This, however, is not the average cost for a successful IVF baby. IVF treatment has a relatively low success rate, and some couples may need to go through a number of treatments without successfully becoming pregnant. Thus, the cost of artificial reproductive techniques to assist people to reproduce could present a substantial demand on public resources, even if confined to assisting those who have physical impediments which prevent reproduction.

When sterile people are considered, a positive right to reproduce can represent an even heavier demand on public resources. For instance, the sterile could claim state funding to render them fertile, or state funding of research to that end. A positive claim right could also mean that the state has a duty to provide a partner for those who are single, for procreational purposes.[521]

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520. See the Times, 24 April 1987, p. 3.
521. Thus, flying in the face of current legal understanding of the concept of the right to reproduce, see supra. chapter 3, pp. 51-70.

To that extent, the claim that the right to reproduce is a positive claim right is weak and its implications likely to be unacceptable. Indeed, it is not often presented in this way. A positive claim right to found a family may, however, seen to be a more feasible proposition, perhaps, because some may consider that family units are more important both to society and to individual development, than is procreation per se. In the following section, some arguments for and against the assertion of a positive claim right to found a family will be considered.

Right to Found a Family as a Positive Claim Right

One obstacle to the suggestion that there is a positive claim right to found a family is the contention that British society currently does not assist people to found a family either through reproduction or adoption (except for infertility treatments, such as, hormone injections, tubal surgery, AI and IVF).[522] State funding in relation to pregnancy and childbirth can be explained and defended on grounds other than that the state - in recognition of the existence of a positive claim right to found a family - is obliged to assist people to found a family through reproduction.[523]

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522. See infra. pp. 252-254.
523. See Uniacke Suzanne, "IVF and the Right to Reproduce", (1987) No. 3, Bioethics, (forthcoming).

For instance, unpaid maternity leave may be defended on the ground that it is consistent with the belief that a mother should not be penalised for her family commitments, in the sense, for example, that without protection she would have to find another job after childbirth. Although paid maternity leave may be partly defended on the ground that having children is regarded unquestionably as fundamentally good to the individuals concerned and to society, it may also be defended on the ground that it will be in the interests of the mother (and indirectly in the interest of the child), in that the mother does not have to worry about finances during and after pregnancy. Family allowances also may be defended, on the grounds that the prevalent social attitude is that having children should not be confined to the wealthy, and that families should be assisted to attain a certain standard of living.

In other words, public assistance to people who make commitments to founding a family through reproduction can be explained in terms other than that the state has a positive duty to fund a right to found a family. It has, therefore, been argued that the state has no obligation to fund people for having children.[524]

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524. See Richards, J.R., The Sceptical Feminist: A Philosophical Enquiry, Harmondsworth, Routledge and Kegan Paul, 1983, Chapter 9.

Similarly, public spending in relation to adoption and ancillary services can be explained on the ground of the state's obligation to children.[525] That is, it is recognised that children's best interests can be served by being adopted by competent adults. Additionally, the state will benefit financially if obligations regarding children in its care are transfered to adults wishing to be parents. In other words, there does not appear to be any strong argument that the right to found a family is a positive claim right.

Notwithstanding this, one typical claim for state funding of artificial reproductive techniques is that, since the infertile suffer a great deal of distress, state funding should follow. The strength of this contention is, however, minimal. In a similar vein, it would be difficult to argue that one has a positive claim right to state funding for an activity, for example, being a successful dancer, merely because one's inability to pursue that privately will generate deep distress.

Sometimes, the claim for state funding to found a family is framed in terms of the fundamental human desire and need to have a family. This claim is

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525. See Article 12 which does not guarantee the right to adopt, see supra, chapter 3, pp. 78-84.

sometimes supported by citing the European Convention on Human Rights.[526]

Clearly, to suggest that Article 12 alone sustains the case that founding of a family is a fundamental human desire and need is no more than an appeal to the authority of the Convention. Nonetheless, Article 12 does endorse the generally unchallenged perception that the founding of a family is considered good, not only for the individuals concerned, but also for the continuing existence of society. As a matter of fact, the majority of adults do found families. Thus founding of a family may inevitably be regarded as a fundamental aspect of human existence.

Yet, as said before,[527] this conclusion only justifies no unwarranted interference with people's activity in founding a family. The claim that the pursuit of founding a family should be satisfied and fulfilled by collective sacrifices, not only in a minimal manner, but also in a rather substantial way, is a proposition that has not yet been satisfactorily demonstrated. Consequently, it is difficult to argue that there is a positive claim right to found a family.

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526. See, for example, Edwards, R.G., "Fertilisation of Human Eggs In Vitro: Morals, Ethics, and the Law", (1974) 49 The Quarterly Review of Biology, 3, at p. 10.
527. See supra. chapter 3, pp. 78-84.

(3) UTILITARIAN ARGUMENTS

As has been said,[528] people can have a passionate and fervent desire to have children. The inability to do so, which affects a sizeable proportion of the population, can cause an enormous amount of human suffering.[529] Given this, there may be a prima facie utilitarian-based argument that artificial reproductive techniques should be part of a state funded medical service. Further, infertility may cause serious psychological and mental illnesses. It may, therefore, be irrational to treat the symptoms rather than dealing with the causes at an earlier stage, for example, by the use of artificial techniques to alleviate infertility. Essentially, the case for state funded treatment of the infertile can thus be anchored to utilitarian considerations.

Nevertheless, utilitarian considerations for state funding of artificial reproductive techniques may not be simple. There are two aspects to this. In the first place, assuming that state funding of artificial reproductive techniques is the best option to alleviate the distress caused by infertility, artificial reproductive techniques may not also be the best long term solution to the problem. A more

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528. See supra. chapter 2.
529. See supra. chapter 1.

cost effective strategy in spending public resources to tackle distress caused by infertility may be to reduce the prevalance of infertility, for example, by prevention and education.[530] If so, utilitarian arguments may merely support temporary, rather than permanent, state funding of artificial reproduction.

In the second place, there may also be utilitarian arguments against state funding on a temporary basis. For instance, state funding of artificial reproductive techniques may be anti-utilitarian, if the expectations of infertile couples are raised and consequently dashed because of the low success rate of IVF. The degree of disappointment, of course, may be less intense if, for example, infertile people are warned about this. Nevertheless, one may argue that since infertility treatments can be highly taxing emotionally, money spent on these treatments may be more cost effectively employed in assisting people to cope with the fact of infertility, and assisting them to develop and pursue other interests. Futher, utilitarian arguments may rather support spending what limited public resources there are in areas which cause more accute distress

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530. Given that a substantial number of people become infertile as a result of avoidable damage. See Uniacke Suzanne, "IVF and the Right to Reproduce", (1987) No. 3, Bioethics, (forthcoming).

and suffering than that caused by infertility, for exapmle, in improving provisions for the handicapped and those suffering from kidney failure. Additionally, the possible harmful consequences to future children, and the legal uncertainties which artificial reproductive methods may create, may also form part of the utilitarian equation.[531] In other words, utilitarian arguments for state funding of artificial reproductive techniques may be less conclusive than it sometimes seems.

Obviously, utilitarian arguments may also be used against state regulation of the use of artificial reproductive methods, since time and resources will be needed. However, the resources required are for the satisfaction of rights of people to found a family (whether through reproduction or not) which can only be overriden by compelling consideration.

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531. See supra. chapters 5 & 7.

(4) CONSISTENT HUMANITARIANISM

In the preceding section, it has been suggested that there may be no arguments to support the assertion of positive claim rights to reproduce and to found a family. However, the claim of the infertile to state funding of artificial reproductive techniques to found a family (whether through reproduction or not) may be advanced by using another type of argument. The strength of this consistent humanitarian argument, as will be explained below, may be augmented by utilitarian considerations in favour of state funding.

The consistent humanitarianism argument has two aspects. First, it may be contended that an affluent society, like Britain, does not, and should not, ignore the plight of the infertile. This argument appeals to the humanitarian attitude which prevails in affluent societies.

Indeed, when the claim to state funding of artificial techniques is compared with (i) current spending on treatments that alleviate other causes of distress,[532] and (ii) current spending on non-artificial infertility treatments, some expenditure on artificial techniques does not seem entirely out of place.[533]

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532. Such as provisions of psychiatric treatment, plastic surgery, and dental services.
533. See Singer, P. & Wells, D., The Reproduction Revolution, Oxford, Oxford University Press, 1984, pp. 64-66.

For instance, the NHS currently spends a certain amount of its budget on various kinds of infertility treatments, from relatively inexpensive hormone injections, to expensive surgery aimed at re-opening blocked fallcpian tubes. These non-artificial treatments clearly facilitate founding of a family (through reproduction) by restoring reproductive capacity or removing impediments that prevent reproduction.

One may, therefore, argue that existing expenditure on non-artificial treatments support funding of artificial techniques which will assist couples and individuals to found a family through reproduction. The outcome could therefore be equated. This support would include techniques such as, AIH, AID, IVF & ER, IVF & ET and surrogacy (full and partial).

However, this argument from current spending on non-artificial infertility treatments will not support funding for the use of donated embryos, or donated embryo surrogacy:- that is, they do not equate where artificial reproductive techniques are used to create a child with no genetic connection with an individual, or a partner of a couple, for the founding of a family. This is reconcilable with the fact that the state does not fund individuals, or couples, in their endeavours to have a family through adoption.

The consistent humanitarianism argument, thus, does support some funding for a wide variety of artificial techniques, including some forms of surrogacy. Indeed, limited funding is currently available for AI & IVF.[534] Since the acceptability to society of surrogacy is so uncertain at the moment, it is unlikely that funding will be made available in the near future. The argument, however, is that since surrogacy is not necessarily unacceptable, and that it can achieve the the same end as some of the artificial techniques, it should not be discriminated against where funding is available.

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534. However, the extent of funding is a question of the allocation of medical resources which is beyond the scope of this thesis. For further discussion, see Brand, Ian, "Allocation of Health Care Resources", in Brumby, M.N. (ed.), Proceedings of the Conference In Vitro Fertilisation: Problems and Possibilities, Victoria, Australia, Monash Centre for Human Bioethics, 1982; "Don't Strain the NHS, Test-Tube Baby Team Told", The Guardian, 13 June, 1987, p. 5.

(5) CONCLUSION

It has been argued that the rights to reproduce and to found a family are not positive claim rights obliging a state to fund artificial reproductive techniques for the founding of family (whether through reproduction or not). The claim for funding on utilitarian grounds may be indecisive. But utilitarian reasons in favour of funding can augment the argument of consistent humanitarianism for state funding of some artificial techniques, enabling an individual to reproduce and to found a family. But the consistent humanitarian argument does not apply to the founding of a family by an individual.

The question as to who is entitled to funding is complex, and must be linked with the issue of eligibility and availability of resources. But according to the arguments in this chapter, certain people will definitely be excluded.

For instance, a woman may wish to use IVF & ET surrogacy in order to reproduce and found a family, because she does not want pregnancy to interrupt her career.[535] A homosexual may wish to use partial surrogacy in order procreate and found a family by avoiding the necessity of compromising his or her sexual preference.

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535. This is sometimes called surrogacy for convenience. It may be argued that it is a value-laden term.

Their claim for state funding is extremely weak. First, there is great doubt as to whether humanitarianism applies to these cases where individuals have deliberately chosen not to reproduce and found a family for personal reasons.

In the case of a career woman, her case for funding of IVF & ET is that an alternative to surrogacy may be that she herself will have to become pregnant which will be detrimental to her career. The essence of her argument, therefore, amounts to suggesting that the rest of the community should pay to achieve a situation which is regarded as necessary for career success, namely, a career life uninterrupted by pregnancy.

In a similar vein, the argument of the homosexual amounts to saying that since compromising one's sexual preference is personally so undesirable, the rest of the community should provide for an alternative means of procreation and founding of a family. In other words, the rest of the community should pay for the consequences of one's sexual preference. Both of these claims appear less than exigent.

Secondly, these claims are inconsistent with the conclusion that the right to reproduce and the right to found a family are essentially negative claim rights. That is, having children essentially is, and should be, a chosen way of life, and that individuals

do not generally have a claim against the state in respect of their endeavours to have children.

For those who are entitled to state funded artificial techniques, preference may be given to some for certain reasons. For instance, first preference may be given to couples, both of whom have the right to reproduce and the right to found a family. This will be so in the case of a couple who are infertile because there are physical impediments to reproduction and founding of a family. This preference may be justified on the ground that such a treatment is most cost effective in that it can satisfy four rights (the rights of the couple to reproduce and to found a family).

In the case of a couple where one partner is sterile, (eg. where the husband is sterile), three rights can be satisfied through administering AID to the wife. This example may be given priority over a case of a single woman with blocked fallopian tubes, because in the latter situation, the IVF technique will only satisfy the single woman's right to reproduce and to found a family.

Nonetheless, one may question preferences in state funded treatment on the basis of maximising rights. For example, in the above two cases, both women have the right to reproduce and the right to found a family. Any preference given to the wife on

the basis of the fortuitous fact that treating her will also satisfy the right to found a family of her husband may be somewhat dubious. However, a more plausible reason for distinquishing the two cases may be based on the best interests of children; the general belief of society is still that two-parent family is better for children.

It must be concluded, therefore, that the nature of rights to reproduce and to found a family - as negative claim rights - require a policy of non-interference rather than compelling active legal or financial support from the state. This conclusion, of course, has implications for the practical value of the rights. On the one hand, unless otherwise open to well-reasoned and convincing charges of immorality, artificial reproductive methods capable of vindicating these rights should not be banned by the state. To do so would be an unwarranted intrusion into the rights of individuals. However, the same approach will justify non-funding of artificial techniques, since the state equally is not obliged by the nature of the rights actively to support or facilitate the use of artificial reproductive methods. Taken simply, therefore, the conclusion could be that artificial methods should be available, but that they will be

pragmatically available only to those who can afford them.[536]

However, the implications of this last conclusion need not be so stark. Once a state does make funding available, then - although it may be doing more than that to which it has an obligation - the focus changes from the question as to whether funding should be made available to become how much and to whom. The final decisions here will, however, require complex assessments, which are outwith the scope of this thesis.

536. See Richards, Tessa, " IVF Update", (1986) 292 British Medical Journal, 1156. Today, there are 25 medical centres in Britain offering IVF treatment. Of these, only one is operated on the NHS.

CHAPTER 9

CONCLUSION

Infertility is a significant human problem which can cause distress and suffering. Artificial reproductive methods, AI, IVF and surrogacy, have been developed which can assist the infertile to found a family (whether through reproduction or not), and thus alleviate some of the unpleasant and distressing consequences of infertility. The use of artificial reproductive methods, however, raises a number of complex moral, social and legal issues. Yet, debates on the subject have often been conducted in a vacuum in which no specific conceptual position is referred to. In attempting to fill this gap, the rights-based approach has been tested for its values and efficacy in this discussion.

Viewing infertility and its circumvention from such a perspective has several merits. First, such discourse is often used to validate claims which individuals feel to be particularly significant, and the circumvention of infertility is indeed perceived as a legitimate and strongly felt human interest. Furthermore, rights-talk is popular in issues fundamentally affecting one's private life such as reproduction and founding of a family. Rights-talk, thus, is the benchmark against which derogation is tested. To that extent, rights-talk is a useful tool whereby competing interests (between that of individuals, children and society) can be assessed and weighed. The question, therefore, as to whether the

claim of the infertile to use artificial reproductive methods to found a family (whether through reproduction or not) can be justified, and the setting of limits on the kinds of intervention into an individual's liberty which are justifiable, can be discussed by reference to rights, and the identification and exposition of any rights can have important implications for society, medicine and the law.

In this thesis, it has been claimed that what permeates Western judicial thinking in the areas of reproduction and founding of a family is libertarian philosophy which supports the rights to reproduce and to found a family, both of which are negative claim rights. In other words, it is perceived that individuals (fertile or otherwise) should be given the widest possible freedom of choice in those areas. Consequently, any interference must be justified if rights are to be taken seriously. This applies to a fertile person's choice to use artificial reproductive methods, and a woman's choice to become a surrogate. An individual, therefore, does not only have a right to choose <u>whether</u> and <u>when</u> to reproduce and to found a family, but also, in certain circumstance, <u>how</u>.

In the context of the infertile, a distinction between the rights of reproduction and founding a family is vital to the understanding of what it is about the rights of the infertile that is truly

significant. Thus, some infertile people can only be said to have a right to found a family, and are not in the position to claim the right to reproduce in a meaningful way.

The implication of this thesis for the right to reproduce and to found a family is that any unwarranted interference with their vindication through the use of artificial reproductive methods is an infringement of rights. The effect of this varies. Where an individual's reproductive capacity is unimpaired, infringement of an individual's right to reproduce and to found a family has the effect of limiting freedom of choice. In the context of the infertile, since their means of founding a family (whether through reproduction or not) are very limited, unjustifiable interference with the use of artificial reproductive methods can have the serious effect of abrogating the right to reproduce, and severely limiting the right to found a family.

As has been argued in this thesis, there are no compelling moral and social reasons against the use of artificial reproductive techniques and surrogacy (whether in principle or with reasonable compensation) for the founding of a family.

The problems relating to AI, IVF, and the use of donated gametes, indicate that they should be regulated in order to put these practices on a socially acceptable basis, but do not justify banning

them. Thus, there should be counselling serivces for those contemplating using artificial techniques. In the best interests of children born as a result of the donation of gametes, society should encourage openness with these children regarding the circumstances of their conception. Regulation should also extend to proper record keeping of births consequential to the donation of gametes, and counselling of children before providing access to birth records.

Current social practice is one which recognises the right to found a family (whether through reproduction or not) by interfering as little as possible in the use of artificial techniques. In other words, the rights of the infertile to reproduce and to found a family have been tacitly accepted and recognised.

Surrogacy, in comparison with artificial techniques, is a more controversial issue. A thorough analysis of the arguments against surrogacy (whether for money payment or not) reveals that some of the vehement opposition to the practice does not stand up to close scrutiny, and that others are of insufficient weight to defeat the rights to reproduce and to found a family. Notwithstanding this, there is indeed a major obstacle to the complete validation of surrogacy with money payment - this is the analogy with baby-selling. In other words, it is recognised that the state does have a legitimate interest in

regulating the means used to found a family, and that the involvement of money payment in that respect is not always acceptable.

However, it has been argued that not all cases of surrogacy with money payment should be equated with baby-selling. It is only in the case of surrogacy for a fee that this analogy can be most vigorously drawn. Thus, although surrogacy for a fee can be prohibited by the law, surrogacy in principle and surrogacy with reasonable compensation cannot. Furthermore, it has been argued that certain problems which are associated with these two types of surrogacy can be overcome, minimised or averted by regulation, just as adoption is currently regulated.

In other words, complete prohibition of surrogacy would be an excessive reaction by the law to the problems identified in surrogacy. Moreover, it would be an infringement of the right to privacy, incorporating the rights of individuals to reproduce and to found a family. A proper regulatory scheme for surrogacy is not, however, inconsistent with the vindication of individuals' rights. Such a scheme would improve the current British position in which, although courts can act in the best interests of surrogate-born children, they are powerless to regulate the propriety of money payment so as to avert the taint of baby-selling.

The conclusion of this thesis, therefore, is that regulating the use of artificial reproductive techniques and surrogacy (whether in principle or with reasonable compensation) is reconcilable with the rights of individuals to found a family (whether through reproduction or not), given that their use can generate a number of legitimate concerns. Regulation is also consonant with the view that artificial reproductive methods are essentially means for the founding of a family, and a state has legitimate interests in ensuring the best interests of children who are the end products of these endeavours. Consequently, some kind of eligibility test is acceptable.

Given that artificial reproductive methods should be acceptable means for the founding of a family, certain legal issues become patently important.

The effects of artificial techniques and the use of donated gametes on marriage are non-issues today. However, the attribution of parenthood in artificial reproductive methods is not only an issue of general importance, but it is also vital in the founding of a family. As has been argued, a state is not obliged to review and modify the current definition of parenthood with the aim of reflecting the reality of artificial reproductive methods for the

founding of a family. Nonetheless, considerations from the perspective of pragmatism, individual responsibility, and most importantly, the best interests of children indicate the desirability of legislative reform on this issue.

Attempts, thus, have been made to demonstrate why the 'AID provision', and the Warnock Report's recommendations in respect of parenthood, are inadequate in comprehensively tackling the issue of parenthood in artificial reproductive methods. Proposals have been suggested for an alternative legislative approach.

Once the question of parenthood in artificial reproductive methods is clarified and settled, registration of parents will not be problematic, and the argument from the needs and interests of children would require that there should be proper record keeping of children born as a result of gamete donation, and possibly surrogacy, so as to facilitate future access to information by the person concerned.

The acceptance of some forms of surrogacy raises the further question of the enforceability of a surrogate arrangement. As argued, the 'transfer term' in a surrogacy arrangement is unenforceable, as are other essential terms in such an arrangement. Nevertheless, surrogacy may still be practically feasible for some individuals as a means of founding a family (whether through reproduction or not). Since

the right to found a family is negative in nature, there is no obligation on a state to enforce a surrogate arrangement. However, given that regulation of surrogacy is desirable, then some kind of assessment regarding the likelihood of performance would be appropriate.

Notwithstanding that the right to reproduce and the right to found a family are essentially negative claim rights, which primarily demand no unwarranted interference with an individual's use of artificial reproductive methods for the founding of a family (whether through reproduction or not), a case can be made for state funding of some artificial techniques on the basis of consistent humantarianism. That is, society should not, and does not, ignore the plight of the infertile.

This argument supports funding of artificial techniques which will enable an individual to reproduce and to found a family, but not the founding of a family without reproduction by an individual. Thus, embryo donation or embryo donation surrogacy for a sterile couple or individual need not be state funded. Nor would state funding be available to cases of a less exigent nature where an individual deliberately chooses not to reproduce and found a family for personal or social reasons. Nonetheless, all these people would have the option of resorting to artificial reproductive methods through private means.

Since the acceptability of surrogacy to society at large is still uncertain, it is not envisaged that state funding will be available to implement some forms of surrogacy (which will assist an individual to reproduce and to found a family). Nonetheless, according to what has been argued in the thesis - that surrogacy is not necessarily unacceptable, and that society already spends a certain amount on artificial techniques for certain purposes - some forms of surrogacy should also be part of the state funded infertility treatments.

To put it very simply, an individual should be allowed to resort to artificial reproductive methods for the founding of a family subject to certain provisions regulating their use. However, the exercise of the right to found a family (whether through reproduction or not) may effectively depend upon one's ability to pay for the use of artificial techniques.

It is clear, therefore, that artificial reproductive methods can raise many moral, social and legal issues. It is, therefore, hoped that the approach adopted in this thesis has made a valuable contribution to the subject, and will generate further theoretically consistent debates on issues in the field of artificial reproduction.

Appendix 1

Lord Denning moved an amendment to clause 1 of the Family Law Reform Bill 1986 (see Weekly Hansard, Vol. 484, No. 1352, Col. 522). The amendment says:

> "In this Act, unless the contrary intention appears -
> "father" means the biological father, that is to say, the man by the use of whose semen insemination took place either naturally or artificially, or conception took place by the embryo insertion that resulted in the birth of the child."
> "mother" means the carry mother, that is to say, the woman who begins to carry the child at the time of the insemination, or, as the case may be, embryo insertion that results in her carrying the child."

This amendment was withdrawn. On the question of motherhood, this amendment is acceptable.

On the question of fatherhood, this amendment is consonant with the 'genetic mode'. It merely re-states what is not generally doubted. For instance, where an artificial technique (AI or IVF) is used for reproduction and founding of a family by a couple (that is, where no donated gametes or surrogacy is employed) the couple are clearly the parents.

This amendment would not, however, comprehensively deal with the unsatisfactory application of the 'genetic mode' to other variants of artificial reproductive methods.

Similar comments can be made regarding Lord Kilbracken's amendement to clause 1 of the Family Law Reform Bill 1986 (see Weekly Handard, Vol. 484, No. 1352, Col. 526). It states,

> "In this Act:-
> (a) references to the mother of a child shall be taken as being reference to the woman who gave birth to that child; and
> (b) references to the father of a child shall be taken as being references to -
> (i) the husband of that child's mother in the case of a man who was a party to a marriage that subsisted during all or part of that child's gestation and was not ended by dissolution or divorce before the child's birth; and
> (ii) the genetic father in all other cases."

On the question of motherhood, this amendment has the same effect as Lord Denning's amendment.

On the question of fatherhood, however, it is unsatisfactory even in the context of the Act. It would mean that a child born to an adulterous relationship would be regarded as the child of the mother's husband. In relation to AID, Clause 27, merely creates a presumption that a husband will be the father of a child born as a result of the wife's AID. The provision in (i) above has the effect of making him the father regardless of the rebuttable presumption of consent. Further, the husband of a surrogate would be deemed to be the father of a surrogate-born child. In cases where AID is used by the unmarried, the donor is the father.

Appendix 2

The English common law rule on agreements to transfer parental rights and duties

It has been said that an agreement to transfer parental rights and duties in English common law is contrary to public policy and hence void and unenforceable.[537] Although the unenforceability of such an agreement is not disputed, there may be some doubt that such an agreement is void.[538]

The English common law rule can be traced back to some seventeenth centuries cases. In Walrond v. Walrond,[539] a husband agreed that the child of the marriage should remain with the wife. This was held to be "void as being contrary to the public policy of the law."[540] The court referred to two cases to support this. They were Vansittart v. Vansittart[541] and Hope v. Hope.[542] In both of these cases, the courts, however, merely said that the agreements were contrary to public policy as

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537. See eg., Bromley, P. M., Family Law, (5th Ed.), London, Butterworths, 1976, at p. 310, where it was said that "any agreement which a parent purports to assign the custody of his minor child to another is contrary to public policy at common law and therefore void." See also Cusine, D.J., "'Womb-Leasing': Some Legal Implications", (1978) 128/2 N.L.J. 824.
538. In the sense that it is an agreement that produces no legal effects whatsoever, and that neither party is able to sue the other on the contract.
539. (1858) Johns 18.
540. ibid., at p. 27.
541. (1858) 2 De G. & J. 249.
542. 8 De G.M. & G. 731.

they interfered with the due discharge of the fathers' duties with respect to their children.[543]

In more recent cases, for example, in Re Andrews,[544] a guardian appointed under the father's will was held to be able to demand the custody of the father's child regardless of an ante-nuptial agreement between him and his wife. Archibald, J. held in favour of the guardian and said that,

> "The courts of common law, however, have always declined to give effect to any mere arrangement or consent on the part of the father disposing of the custody of his infant child..."[545]

In R v. Smith,[546] an agreement, by a father of a child that she should live with her uncle was held to be a mere consent. The father could revoke it.

In relation to an illegitimate child, the mother at common law is the sole guardian. Thus, an agreement by her to transfer parental rights is certainly unenforceable. In Humphrey v. Polak,[547]

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543. Lord Justice Turner said, "By article 1 of the agreement one of the children is to remain under the care of the plaintiff the mother...[A]s I apprehend, [it] is in contravention...of the settled law and policy of the country. The law of this country gives to the father the custody of the children and the control over them, and it gives him that custody and control not for his own gratification, but on account of his duties with reference to the public welfare." Hope v. Hope, 8 De G.M. & G. 731, at p. 744.
544. (1873) L.R. 8 Q.B. 153.
545. ibid., at p. 157 (emphasis mine).
546. (1853) 22 L.J. (Q.B.) 116.
547. [1901] 2 K.B. 385.

the plaintiff, mother of an illegitimate child, sued the defendants for damages (expenses in maintaining her child) for breach of contract. It was alleged that the defendents agreed to keep the child as their own. In the Court of Appeal, it was held that the contract could not be enforced.[548]

Thus, except in Walrond[549], agreements to transfer parental rights and duties at common law are merely unenforceable. Indeed, it has been suggested that such agreements are not necessarily void. If they are made for good consideration, they may not be unenforceable.

> "I do not say that there might not be an agreement by which a parent who was going abroad, or for some other reason was unable to take care of a child, might contract with other persons that they should take care of it, and that, if such a contract was made for good consideration, it might not be enforced in the event of a breach of it."[550]

In other words, an agreement transfer parental rights and duties may not be void, although all the cases do suggest that in English common law rule such an agreement is unenforceable.[551] Scottish cases on

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548. Vangham Williams L.J. said, "...as the promise the breach of which is complained of...I am clearly of opinion that such a promise as that cannot be enforced in a court of law." ibid. at p. 388 (empahsis mine).
549. supra. cit.
550. [1901] 2 K.B. 385, per Vangham Williams L.J., at p. 388.
551. See Chitty on Contracts, General Principles, Vol.

this point offer a clearer picture as to what this means.

Agreements to transfer parental rights and duties in Scottish common law

The Scottish common law position on an agreement to transfer parental rights and duties is that such an agreement is unenforceable.

In MacPherson v. Leisham,[552] a mother of an illegitimate child agreed to hand over the child to the custody of the father. It was held that the mother was not bound by the agreement.[553]

In Kerrigan v. Hall,[554] a mother of an

1, (24th Ed.), London, Sweet & Maxwell, 1977, "A contract by a parent to transfer parental rights and liabilities to another is against public policy. At common law a father had custody of his legitimate child and could not by contract bind himself to give up the control of...his children, or their custody." para. 960. (emphasis mine)

552. (1887) 14 R. 780.

553. "[The agreement] is not binding on the mother, because it is an interference with the legal right...even had there been an express stipulation that the arrangement should be permanent I should have entertained very great doubt whether the mother could be held to have effectively bound herself." (1887) 14 R. 780, at p. 782. Even in a case where the court rejects a petitioner's claim for the return of the child on the ground that it would be in the child's best interest to stay with the respondent, the court will not sanction any agreement between the two parties to the effect that the child should permanently stay with the respondent. See Sutherland v. Taylor (1887) 15 R. 224; Campbell v. Croall (1895) 22 R. 869, Kerrigan v. Hall (1901) 4 F. 10.

554. (1901) 4 F. 10.

illegitimate child (the petitioner) agreed to have her child boarded with the respondent. The rate of aliment was being paid for by the mother. When the mother demanded the return of the child, the respondent alleged that there was an agreement that the child should stay permanently with the latter. Such a defence was rejected by the court.[555] Lord McLaren said,

> It may often be necessary for the parents of a child...to enter into an arrangement with a stranger for its board. Such a contract is enforceable in law, subject to the qualification that the law will not specifically enforce a contract where an order of specific performance would interfere with personal liberty...if a person makes a bargain to board in a certain home the law will not compel him to remain in the house in order that the lessor may earn the board, but will leave the lessor to seek relief in the form of damages."[556]

Lord Adam said,

> "I can only say that I am not disposed to hold that the Court will enforce an agreement by which a woman is bound to permanently give up the custody of her child, though she might liable in damages as for breach of contract."[557]

In other words, the agreement may be good for the purpose of supporting a pecuniary claim. Thus,

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555. "It would...be very dangerous to allow a proof of such an agreement as this, as it would come very near to sanctioning the sale of a child by its parent. I am therefore satisfied that this defence cannot be sustained." ibid., at p. 13.
556. ibid., at p. 16.
557. ibid., at p. 15 (emphasis mine).

the respondent in Kerrigan could use the agreement as the basis for a claim for aliment had there been any arrears (although it could not be used for claiming the custody of the child). Conversely, the mother could sue on the basis of the agreement for any pecuniary loss she has incurred as a result of the respondent's breach (for example, if she has already paid for the boarding of the child for a specific period, and the respondent breach the agreement before the end of that period), though not for damages for maintaining the child in the future.[558]

558. see Humphreys v. Polak supra. cit.

BIBLIOGRAPHY - ARTICLES AND BOOKS

"Is Buying Babies Bad?", The Economist, 12 Jan., 1985, p. 12.

"Judges Press For Guidelines", The Times, 2 April, 1987, p. 8.

"The Future of Baby M", The Daily Telegraphy, 3 April, 1987, p. 15.

"The Lessons From Baby M", The Economist, 21 March, 1987, p. 18.

"The Scars Left by Baby M", The Observer, 5 April, 1987, p.11.

Action, H.B., The Morals of Markets, London, Longman, 1971.

Annas, George J. & Elias Sherman, "In Vitro Fertilisation and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family", (1983) 17 Family Law Quarterly, 199.

Appleton, S.F., "Beyond the Limits of Reproductive Choice: the Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis", (1981) 81 Columbia Law Review, 718.

Arditti, Rita, Klein, R.D., Minden Shelley, Test-Tube Women, What Future for Motherhood? London, Pandora Press, 1984.

Atkinson, K.F., Sexual Morality, London, Hutchinson & Co. Ltd., 1965.

Atkinson, Stanley B. "Life, Birth, and Live-birth", (1904) 20 Law Quarterly Review, 134.

Badinter, Elizabeth, Myth of Motherhood: An Historical View of the Maternal Instinct, London, Souvenir Press, 1981.

Bartholomew, G.W., "Legal Implications of Artificial Insemination", (1958) 21 M.L.R. p.236.

Bayles, M.D., "Limits to a Right to Reproduce", in O'Neil, Onora and Ruddick, William (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, Oxford, Oxford Univeristy Press, 1979, p. 13.

Bentil, J.K., "Rejection of Husband's Claim to Stop Wife's Abortion", (1984) 128 Solicitors' Journal, 288.

Blustein, Jeffery, Parents and Children: The Ethics of the Family, Oxford, Oxford University Press, 1982.

Bondeson, W.B., Abortion and the Status of the Fetus, Boston, D. Reidel Hingham, 1983.

Brahams, Diana, "Damages for Unplanned Babies - A Trend to be Discouraged?", (1983) 133/2 New Law Journal, 643.

Brahams, Diana, "The Legal and Social Problems of In Vitro Fertilisation: Why Parliament Must Legislate - 1", (1983) 133/2 N.L.J., 869.

Brand, Ian, "Allocation of Health Care Resources", in Brumby, M.N. (ed.), Proceedings of the Conference In Vitro Fertilisation: Problems and Possibilities", Victoria, Monash Centre for Human Bioethics, 1982.

Brody, B.A., Abortion and the Status of Human Life: a Philosophical View, London, MIT Press, 1975.

Bromley, P. M., Family Law, (5th Ed.), London, Butterworths, 1976.

Campbell, D.T., The Left and Rights, London, Routledge adn Kegan Paul, 1983.

Campbell, T.D. & McKay, A.J.M., "Antenatal Injury and the Rights of the Foetus", (1978) 28 Philosophical Quarterly, 17.

Casler, Lawrence, Is Marriage Necessary? New York, Human Science Press, 1974.

Chitty on Contracts, General Principles, (24th Ed.), London, Sweet & Maxwell, 1977.

Clive, E.M., The Law of Husband and Wife, (2nd Ed.), Edinburgh, W. Green and Son Ltd., 1982.

Cohen, Carl, "Sex, Birth Control, and Human Life", in Baker, Robert and Elliston, Frederick (eds.), Philosophy and Sex, New York, Prometheus Books, 1975, p. 150.

Coleman, Phyllis, "Surrogate Motherhood: Analysis of the Problems and Suggestions for Solution", (1982) 50 Tennessee Law Review, 71.

Cotton, Kim & Winn, Denise, Baby Cotton: For Love and Money, London, Kindersley, 1985.

Cowan, M.G., Children Acts (Scotland), Edinburgh, William Hodge and Co. Ltd., 1933.

Cranston, Maurice, What are Human Rights?, New York, Taplinger Publishing Company, 1973.

Cretney, S. M., Principles of Family Law, (4th Ed.), Sweet & Maxwell, 1984.

Current Topic (1984) 58 Australian Law Journal, 683-5.

Cusine, D. J., "Artificial Insemination", in McLean, S.A.M. (ed.), Legal Issues in Medicine, Aldershot, Gower, 1981, p. 163.

Cusine, D. J., Modern Reproductive Techniques, Aldershot, Gower, (Forthcoming 1988).

Cusine, D.J., "'Womb-Leasing: Some Legal Implications", (1978) 128/2 New Law Journal, 824.

Cusine, D.J., "Artificial Insemination with the Husnband's Semen After the Husband's Death", (1977) 3 Journal of Medical Ethics, 163.

Cusine, D.J., "Legal Issues Relating to AID", in Brudenell, M., et al. (eds.), Artificial Insemination, Proceedings of the Fourth Study Group of the Royal College of Obstetricians and Gynaecologists, RCOG, 1976.

Davies, Iwan, "Contracts to Bear a Child", (1985) 11 Journal of Medical Ethics, 61.

Davies, Iwan, "Fabricated Man: The Dilemma Posed by Artificial Reproductive Techniques", (1984) 35 Northern Ireland Legal Quarterly, 354.

Davies, Seabourne D., "Child-Killing in English Law", (1937) 1 Modern Law Review, 203.

Davies, Seabourne D., "The Law of Abortion and Necessity", (1938) 2 Modern Law Review, 126.

Devlin, P.D.B., The Enforcement of Morals, London, Oxford University Press, 1965.

Dickens Bernard, M., Medico-Legal Aspects of Family Law, London, Butterworths, 1979.

Dickens, Bernard M., "The Control of Living Body Materials", (1977) 27 University of Toronto Law Journal, 142.

Digest of Strasbourg Case-law relating to the European Convention on Human Rights, Vol. 3, Carl Heymanns Verlag KG, Bonn, 1984.

Downie, R.S. & Telfer, Elizabeth, Respect for Persons, London, George Allen & Unwin Ltd., 1969.

Dunstan, G.R., "The Moral Status of the Human Embryo: a Tradition Recalled", (1984) 10 Journal of Medical Ethics 38.

Dworkin, Ronald, Taking Rights Seriously, London, Duckworth, 1978.

Dworkin, Gerald, "Paternalism" in Feinburg, Joel and Cross, Hyman (eds.), Philosophy and Law, California, Wadsworth Publishing Co., (2nd. Ed.), 1980, p. 230.

Edwards, R.G., "Fertilisation of Human Eggs In Vitro: Morals, Ethics and the Law", (1974) 49 Quarterly Review of Biology, 3.

Edwards, R.G., & Steptoe, P., A Matter of Life, London, Hutchinson & Co. Ltd., 1980.

Eekelaar, John, "Second Thoughts on Illegitimacy Reform", (1985) 15 Fam. Law, 261-3.

Eekelaar, John, Family Law and Social Policy, London Weidenfeld & Nicolson, 1978.

Fineburg, Joel, "The Nature and Values of Rights", in Fineburg, Joel (ed.), Rights, Justice and the Bounds of Liberty, Guildford, Princeton, 1980, p. 148.

Fineburg, Joel, Social Philosophy, New Jersey, Prenctice-Hall, 1973.

Finegold, Wilfred J., Artificial Insemination, Springfield, Illinois, Charles C. Thomas, 1964.

Gary, E. & Clifton Perry, "Can Claims for 'Wrongful Life' be Justified?', (1983) 9 Journal of Medical Ethics, 162.

Gewirth, Alan, Human Rights: Essays on Justification and Applications, University of Chicago Press, Chicago, 1982.

Glover, Jonathan, Causing Death and Saving Lives, Harmondsworth, Penguin Books, 1984.

Glover, Jonathan, What Sort of People Should There Be? Harmondsworth, Penguin Books, 1984.

Gordon, Linda, Woman's Body, Woman's Right, Harmondsworth, Penguin Books Ltd., 1977.

Gordon, G.H., The Criminal Law of Scotland, (2nd Ed.), Edinburgh, W. Green & Son, 1978.

Govier, Trudy, "What Should We Do About Future People?" (1976) 16 American Philosophical Quarterly, 105.

Govier, Trudy, "What's Wrong with Slippery Slope Arguments?", (1982) 12 Canadian Journal of Philosophy, 303.

Hall, Martha, "Rights and the Problem of Surrogate Parenting", (1985) 35 Philosophical Quarterly, 414.

Hann, Judith, The Perfect Baby, London, George Weidenfeld & Nicolson Ltd., 1982.

Hanscombe, Gillian, "The Right to Lesbian Parenthood", (1983) 9 Journal of Medical Ethics, 133.

Hardin, Garrett, "The Tragedy of the Commons", in Bayles, M.D., (ed.), Ethics and Population, Cambridge, Mass., Schenkman, 1976.

Harris, John, "In Vitro Fertilisation: the Ethical Issues", (1983) 33 Philosophical Quarterly, 217.

Harris, John, Value of Life, London, Routlegde & Kegan Paul, 1985.

Hart, H.L.A., "Bentham on Legal Rights", in Simpson, A.W.B. (ed.), Oxford Essays in Jurisprudence, 2nd Series, Oxford, Clarendon Press, 1973, p. 170.

Hart, H.L.A., Law, Liberty and Morality, Oxford, Oxford University Press, 1982.

Herbenick, Raymond M., "Remarks on Abortion, Abandonment and Adoption Opportunities", in O'Neil, Onora & Ruddick, William (eds.), Having Children, Philosophical and Legal Reflections on Parenthood, New York, Oxford University Press, 1977, p. 52.

Higgs, Roger, "Lesbian Couples: Should Help Extend to AID", (1978) 4 Journal of Medical Ethics, 91.

Hilliard, Lexa, "'Wrongful Birth': Some Growing Pains", (1985) 48 M.L.R. 224.

Hilton, B., Ethical Issues in Human Genetics, New York, Plenum, 1973.

Hollinger, J. H., "From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction", (1985) 18 University of Michigan Journal of Law Reform, 865.

Hornblower, Margot, "Judge Awards 'Baby M' to Her Biological Father", The Washington Post, April 1, 1987.

Hubbard, H.A., "Artificial Insemination: A Reply to Dean Tallin", (1956) 34 Canadian Bar Review, 425-51.

Iglesias, Teresa, "In Vitro Fertilisation: the Major Issue", (1984) 10 Journal of Medical Ethics, 32.

Ingram, Miranda, "Adopting the Unadoptable", New Society, 9 August, 1985, p. 206-7.

Jacobs, F.G., The European Convention on Human Rights, Oxford, Clarendon Press, 1975.

Johnstone, Brain, "The Moral Status of the Embryo: Two Viewpoints", in Singer, Peter & Walters, William (eds.), Test-Tube Babies, A Guide to Moral Questions, Present Techniques and Future Possibilities, Oxford, Oxford University Press, 1984, pp. 49-56.

Joyce, D.N., "Recruitment, Selection and Matching of Donors", in Brudenell, M., et al. (eds.), Artificial Insemination, Proceedings of the Fourth Study Group of the Royal College of Obstetricians and Gynaecologists, RCOG, 1976, pp. 60-69.

Kant, I, "Duties to the Body and Crimes Against Nature", in Verene, D.P. (ed.), Sexual Love and Western Morality: a Philosophical Anthology, New York, Harper and Row, 1972.

Kass, Leon, R., "Babies by Means of In Vitro Fertilisation: Unethical Experiments on the Unborn?" (1971) 285 New England Jounral of Medicine, 1174.

Keane, Noel & Breo D. L., The Surrogate Mothers, New York, Everest House, 1981.

Kennedy, Ian & Edwards, R.G., "A Critique of the Law Commission Report on Injuries to Unborn Children and the Proposed Congenital Disabilities (Civil Liability) Bill", (1975) 1 Journal of Medical Ethics, 116.

Kerr, M.G. & Rogers, C., "Donor Insemination", (1975) 1 Journal of Medical Ethics, 30.

Kirby, M.D., "Bioethics of IVF - State of the Debate", (1984) 10 Journal of Medical Ethics, 45.

Lafollette, Hugh, "Licensing Parents", (1980) 9 Philosophy and Public Affairs, 182.

Lane, Margaret, I., "In Virto Fertilisation: Hope for Childless Couples Breeds Legal Exposure for Physicans", (1983) 17 Univeristy of Richmond Law Review, 311.

Law & Ethics of AID and Embryo Transfer, CIBA Foundation symposium, London, Associated Scientific Publishers, 1973.

Levin, Jennifer, "Reforming the Legitimacy Laws", (1978) 8 Fam. Law, 35-9.

Liu, A.N.C., "Wrongful Life: Some of the Problems", (1987) 13 Journal of Medical Ethics, 69.

Lockwood, M, Moral Dilemmas in Modern Medicine, Oxford, Oxford University Press, 1985.

Lynn, S.M., "Technology and Reproductive Rights: How Advances in Technology Can Be Used to Limit Women's Reproductive Rights", (1982) 7 Women's Rights Law Reporter, 223.

MacCormick, D. N., "Rights in Legislation", in Hacker, P.M.S. & Raz, J. (eds.), Law, Morality and Society, Oxford, Clarendon Press, 1977, p. 139.

MacCormick, D.N., H. L. A. Hart, London, Edward Arnold (Publishers) Ltd., 1981, chapter 7, p. 88.

Maidment, Susan, "DNA Fingerprinting", (1986) 136/1 N.L.J. 326.

Marietta, Don E., "On Using People", (1971-2), 82 Ethics, 232.

Mason, J.K. & McCall Smith, R.A., Law and Medical Ethics, (2nd Ed.), London, Butterworths, 1987.

Matthew, Paul, "Whose Body? People as Property", (1983) 36 Current Legal Problems, 193.

McLean, S.A.M., "Ante-Natal Injuries", in McLean, S.A.M. (ed.), Legal Issues in Medicine, Aldershot, Gower, 1981, p. 150.

McLean, S.A.M., "The Right to Reproduce", in Campbell, T.D., et al. (eds.), Human Rights: From Rhetoric to Reality, Oxford, Basil Blackwell, 1986, p. 80.

McLean, S.A.M. & Campbell, T.D., "Sterilisation', in McLean, S.A.M. (ed.), Legal Issues in Medicine, Aldershot, Gower, 1981, p. 176.

McLean, S.A.M., & Maher, G., Medicine, Morals and the Law, Aldershot, Gower, 1985.

McNeill, P.G.B., Adoption of Children in Scotland, Edinburgh, W. Green adn Son Ltd., 1982.

McWhinnie, A.M., "Who Am I?", in Child Adoption, the Association of British Adoption and Fostering Agencies, London, p.104.

Menning, B.E., "The Infertile Couple: a Plea for Advocacy", (1975) 54 Child Welfare, 454.

Mill, John Stuart, "On Liberty", in Feinburg, Joel and Cross, Hyman (eds.), Philosophy and Law, California, Wadsworth Publishing Co., (2nd. Ed.), 1980, p. 180.

Morgan, Derek, "Legislation", (1986) 49 Modern Law Review, 358.

Moss, Peter and Lav, Geraldine, "Mothers Without Marriages", New Society, August 9, 1985, p. 207.

Meyers, D. W., The Human Body & the Law, Chicago, Aldine Publishing Company, 1970.

Nijs, P., Rouffa, L., "AID Couples: Psychological and Psychopathological Evaluation", (1975) 7 Andrologia 187.

Notes, "Reproductive Technology and the Procreative Rights of the Unmarried", (1985) 98 Harvard Law Review, 669.

O'Donovan, Oliver, Begotten Or Made, Oxford, Clarendon Press, 1984.

O'Neil, Onora, "Begetting, Bearing and Rearing", in O'Neil, Onora and William, Ruddick (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, Oxford, Oxford Univeristy Press, 1979, p. 25.

Packer, Herbert, The Limits of Criminal Sanction, London, Stanford, 1969.

Page, Edgar, "Book Reviews", (1986) 12 Journal of Medical Ethics, pp. 45-52.

Parker, Diana, "Surrogate Mothering: An Overview", (1984) 14 Fam. Law, p.143.

Parker, Philip, "Motivation of Surrogate Mothers: Initial Findings", (1983) 140 American Journal of Psychiarty, 117.

Paton, G.W., Jurisprudence, (3rd Ed.), Oxford, Clarendon Press, 1964.

Pepperill, R. J., Hudson, B., Wood, C., The Infertile Couple, Edinburgh, Churchill Livingston, 1980.

Petersen, K.A., "Public Funding of Abortion Services: Comparative Developments in the United States and Australia", (1984) 33 International Comparative Law Quarterly, 158.

Plant, Raymond, "Gift, Exchanges and the Political Economy of Health Care", (1977) 3 Journal of Medical Ethics, 166; (1978) 4 Journal of Medical Ethics, 5.

Pope Paul VI, "Humane Vitae", in Baker, Robert and Elliston, Frederick (eds.), Philosophy and Sex, New York, Prometheus Books, 1975, p. 131.

Ramsey, Paul, "Shall We Reproduce?", "Rejoinder and Future Forecast", (1972) 220 JAMA 1480, 1481.

Raymond, A. Belliotti, "Morality and In Vitro Fertilisation", (1980) 2/1 Bioethics Quarterly, 6.

Reilly, Philip, Genetics, Law and Social Policy, London, Harvard University Press, 1077.

Rex, Martin & Nickel, J.W., "Recent Work on the Concepts of Rights", (1980) 17 American Philosophical Quarterly, 165.

Richards, David, A., "Commercial Sex and the Rights of the Person: a Moral Argument for the Decriminalisation of Prostitution", (1979) 127 University of Pennsylvania Law Review, 1195.

Richards, J.R., The Sceptical Feminist: A Philosophical Enquiry, Harmondsworth, Routledge and Kegan Paul, 1983.

Rushevsky, Cynthina, "Legal Recognition of Surrogacy Gestation," (1982) 7 Women's Rights Law Reporter, 107.

Russell, Scott, The Body as Property, New York, The Viking Press, 1981.

Ruut, Veenhoven, "Is There an Innate Need for Children?", (1975) 4 European Journal of Social Psychology, pp. 495-501.

Samuels, Alec, "Illegitimacy: The Law Commission's Report", (1983) 13 Fam. Law, 87-90.

Sants, H.J., "Genealogical Bewilderment in Children with Substitute Parents", in Child Adoption, the Association of British Adoption and Fostering Agencies, London, p. 69.

Scarllet, B.F., "The Moral Status of Embryos", (1984) 10 Journal of Medical Ethics, 79.

Shattuck, J.H.F., Rights of Privacy, Illinois, National Textbook Co., 1977.

Shelley Roberts, "Warnock & Surrogate Motherhood: Sentiment or Argument?", in Bryne Peter (ed.), Rights & Wrongs in Medicine, King's Fund Publishing Office, London, 1986, p.80.

Singer, P. & Wells, D., The Reproduction Revolution, Oxford, Oxford University Press, 1984.

Singer, P., & Wells, D., "IVF: the Major Issues", (1983) 9 Journal of Medical Ethics 192.

Singer, Peter & Kuhse, Helga, "The Moral Status of Embryo: Two Viewpoints", in Singer, Peter & Walters, William (eds.), Test-Tube Babies, A Guide to Moral Questions, Present Techniques and Future Possibilities, pp. 57-63.

Skegg, P.D.G., Law, Ethics and Medicine, Oxford, Clarendon Press, 1984.

Sloman Susan, "Surrogacy Arrangements Act 1985", (1985) 135/2 N.L.J., 978.

Smith J.C. & Hogan, B., Criminal Law, London, Butterworths, 1978.

Snowden, R. & Mitchell, G. D., The Artificial Family, London, Allen & Unwin, 1981.

Snowden, R. & Mitchell, G. D., The Artificial Reproduction: a Social Investigation, Allen & Unwin, London, 1984.

Snowden, R., & Mitchell, G. D., Artificial Reproduction: a Social Investigation, Allen & Unwin, London, 1983.

Spowart, Ann, "Compensation for Unwanted Children", (1985) 15 Fam. Law, 147.

St. John-Stevas, N., The Agonising Choice, Birth Control, Religion and the Law, London, Eyre & Spottiswoode, 1971.

Sumner, L.W., Abortion and Moral Theory, Princeton, Princeton University Press, 1981.

Tallin, G.P.R., "Artificial Insemination", (1956) 34, Canadian Bar Review, 1-27, 166-86, 628-31.

Taylor Ann Spowart, "Compensation for Unwanted Children", (1985) 5 Fam. Law 147.

Taylor, Richard, "Persons and Bodies", (1979) 16 American Philosophical Quarterly, 67.

Teff, Harvey, "The Action for 'Wrongful Life' in England and The Unitied States", (1985) 34 International and Comparative Law Quarterly, 423.

Teichman, Jenny, The Meaning of Illegitimacy, Cambridge, Englehardt Books, 1978.

Teo, Wesley D.H., "Abortion: the Husband's Constitional Rights", (1974-5) 85 Ethics, 337.

Thomson, J.M., Family Law in Scotland, London, Butterworths, 1987.

Titmuss Richard, The Gift Relationship, George Allen & Unwin, London, 1970.

Treitel, G.H., "Specific Performance and Injunction", in Chitty on Contract, General Principles, Vol. 1, (24th Ed.), London, Sweet and Maxwell, 1977, p. 1631.

Tunkel, Victor, "Modern Anti-Pregnancy Techniques and the Criminal Law", (1974) Criminal Law Review, 461.

Uniacke, Susan, "IVF and The Right to Reproduce", Bioethics, Vol 1, No. 3, 1978. (Forthcoming).

Waldron, Jeremy, Theories of Rights, Oxford, Oxford University Press, 1984.

Walker, D.M., The Law of Contract and Related Obligations in Scotland, (2nd Ed.), London, Butterworths, 1985, pp. 540-544.

Warnock Mary, A Question of Life: the Warnock Report on Human Fertilisation and Embryology, Oxford, Basil Blackwell, 1985.

Warnock, Mary, "Legal Surrogacy - Not For Love or Money?", The Listener, 24 Jan 1985, p.2.

Wassertrom, R.A., Today's Moral Problems, London, Collier Macmillian Pubs., 1979.

Weinberg, S.R., "A Maternal Duty to Protect Fetal Health?" (1983) 58 Indiania Law Journal, 531.

Weir, Tony, "Wrongful Life - Nipped in the Bud", (1982) Cambridge Law Journal, 225.

Wellings, K., "Sterilisation Trends", (1986) 292 British Medical Journal, p. 1029.

Williams, Glanville, Sanctity of Life and the Criminal Law, London, 1958.

Winslade, W.J., "Surrogate Mothers - Right or Wrong?" (1983) 9 Journal of Medical Ethics, 153.

Wright, Gerald, "The Legal Implications of IVF", in Test- Tube Babies, a Christian View, London, Unity Press, Becket Publications, 1984, pp.39-44.

Wright, Moira, "Surrogacy and Adoption: Problems and Possibilities", (1986) 16 Fam. Law 109.

CASES

A. v. C. (1978) 8 Fam. Law 170; (1984) 14 Fam. Law, 241.

A.B. v. C.B. 1961 SC 347.

Adoption Application: Surrogacy AA211/86, The Times, 12 March, 1987, p.27.

Attorney General (ex rel Kerr) v. T. [1983] 1 Qd. R. 404.

Buck v. Bell 274 U.S. 200 (1927).

C. v. S. The Times, 24 Feb., 1987, p. 25.

C.B. v. A.B. (1885) 12 R. (H.L.) 36.

Campbell v. Croall (1895) 22 R. 869.

Carey v. Population Services International, 431 U.S. 678 (1977).

Clarke v. Clarke [1943] P. 1.

Corbett v. Corbett [1971] P. 83.

D. v. A. (1845) 1 Rob. Ecc. 279.

Dec. Adm. Ap. 6482/74, 10 July 1975. D & R 7 p. 75(77).

Dec. Adm. Com. Ap. 6482/74, 10 July 1975. D & R 7 p. 55(77).

Dec. Adm. Com. Ap. 6564/74, 21 May 1975. D & R 2 p. 105 (106).

Dec. Adm. Com. Ap. 7229/75, 12 Dec 1977. D & R 12 p.32 (34-35).

Dennis v. Dennis [1955] P. 153.

Eisenstadt v. Baird 405 U.S. 438 (1972).

Emeh v. Kensington, Chelsea & Fulham Area Health Authority [1984] 3 ALL. E.R. 1044.

Galison v. Dist. of Columbia, 420 A 2d 1263, 1268 (D.C. 1979).

Griswold v. Connecticut 281 U.S. 479 (1965).

Harris v. McRae, 488 U.S. 297 (1980).

Hope v. Hope 8 De G.M. & G. 731.

Humphrey v. Polak [1901] 2 K.B. 385.

J. v. J. 1978 SLT 128.

K. v. T. [1983] 1 Qd. R. 386.

Kerrigan v. Hall (1901) 4 F. 10.

MacLennan v. MacLennan, (1958) S.C. 105.

MacPherson v. Leisham (1887) 14 R. 780.

Maher v. Roe 432 U.S. 464.

McKay v. Essex Area Health Authority [1982] 2 All E. R. 771.

Op. Com., 1 March 1979, Van Oosterwijck Case, Publ. Court B, Vol. 36, p. 27.

Op. Com., 12 July 1977, Case of Bruggemann and Scheuten, D & R 10 p. 100.

Paton v. British Pregnancy Advisory Service Trustees [1979] Q.B. 276.

Planned Parenthood Association v. Danforth, 428 U.S. 52 (1976).

Poe et al. v. Gerstein et al. 517 F. 2d, 787 (1975).

Q. v. Q. The Times, 12 May, 1960.

R v. Smith 22 L.J. (Q.B.) 116.

R.E.L.(otherwise R.) v. E.L. [1949] P.211.

Re A Baby The Times, 15 Jan, 1985. p.8.

Re Andrews (1873) L.R. 8 Q.B. 153.

Re B (a Minor) (Steriliation) The Times, May 1, 1987, p.37.

Re B (a Minor) (Steriliation) The Times, March 17, 1987, p. 35.

Re D (Minor) (Wardship: Sterilisation) [1976] 1 ALL E.R. 326.

Re D (a Minor), The Times, 5 Dec., 1986, p. 15.

Re Eve (1986) 31 DLR (4th) 1.

Roe v. Wade 410 U.S. 113 (1973).

Sciuriaga v. Powell (1980, unreported), CA transcript 597.

Skinner v. Oklahoma 316 U.S. 535 (1942).

Slater v. Slater [1953] P.252.

Surrogacy Twin Babies case The Daily Telegraph, 13 March 1987, p.2.

Sutherland v. Taylor (1887) 15 R. 224.

Syrkowski v. Appleyard 420 Mich. 367 (1985).

T. v. T The Times, 11 July, 1987

Thake v. Maurice [1984] 2 ALL E.R. 513, & [1986] 2 ALL. E. R. 497.

The Hamer Case, D & R 24 p. 5(14-16).

Udale v. Bloomsbury Area Health Authority [1983] 2 ALL.E.R. 522.

Vansittart v. Vansittart (1858) 2 De G. & J. 249.

W. v. W. [1952] P. 152.

Walrond v. Walrond (1858) Johns 18.

Williams v. States of New York 18 NY 2d 481 (1966).

Zepeda v. Zepeda 4111 App 2d 240.

REPORTS

"Interim Report on Human In Vitro Fertilisation and Embryo Replacement and Transfer", (1983) 286 British Medical Journal, 1594.

Departmental Committee on Human Artificial Insemination, London, HMSO, Cmnd. 1105, 1960.

Human Procreation, Ethical Aspects of the New Teachnique, Report of a Working Party Council for Science and Society, Oxford, Oxford University Press, 1984.

Law Commission Report on Illegitimacy, No. 118, London, HMSO, 1982.

Law Commission Report on Injuries to the Unborn Children, No. 60, London. HMSO, Cmnd. 5709, 1974.

Law Commission Report on Illegitimacy (Second Report), No. 157, London, HMSO, Cmnd. 9913, 1986.

Law Commission's working paper on Illegitimacy, No. 74, London, HMSO, 1982.

Legislation on Human Infertility Services and Embryo Research - A Consultation Paper, HMSO, London, Cm 46, 1986.

Peel Committee, "Report of the Panel on Human Artificial Insemination", (1973) 2 British Medical Journal, Suppl., Appendix V, p. 3.

Report of the Commission, Human Artificial Insemination, published in 1948, reprinted in 1952 by S.P.C.K..

Report of the Committee on One Parent Families, London, HMSO, Cmnd. 5629, 1974.

Report of the Committee of Inquiry into Human Fertilisation and Embryology, London, HMSO, Cmnd. 9314, 1984.

Report of the Committee on the Adoption of Children, HMSO, Cmnd. 5107, 1972.

Report of the Committee of Homosexual Offences and Prostitution, London, HMSO, Cmnd. 1957.

Report of the Street Offences Committee, London, HMSO, Cmnd. 3231, 1928.

Report on Human Artificial Reproduction and Related Matters, 2 Vols., Ministry of the Attorney General, Toronto, 1985.

Report on the Disposition of Embryos produced by IVF, the Committee to consider the social, ethical an legal issues arising from IVF, chaired by Professor Louis Waller, Victoria, Australia, 1984.

Scottish Law Commission Consultative Memorandum on Illegitimacy, No. 53., Edinburgh, HMSO, 1982.

Scottish Law Commission Report on Illegitimacy, No. 82, Edinburgh, HMSO, 1984.

Scottish Law Commission Report on Liability for Ante-natal Injury, No. 30, London, HMSO, Cmnd. 5371, 1973.

Scottish Law Commission on Illegitimacy, No. 82, Edinburgh, HMSO, 1984.

Surrogate Motherhood, Report of the Board of Science and Education, London, BMA, 1987.

Voluntary Licensing Authority for Human In Vitro Fertilisation and Embryology, First Report, London, Medical Research Council/Royal College of Obstetrician and Gynaecologists, 1986.

STATUTES

Abortion Act 1967.

Adoption (Scotland) Act 1978.

Adoption Act 1958.

Adoption of Children (Scotland) Act 1930.

Children Act 1975.

Congenital Disabilities (Civil Liability) Act 1976.

Divorce (Scotland) Act 1976.

Divorce Law Reform Act 1969.

Family Law Reform Act 1987.

Family Law Reform Bill [H.L.], Session 1986-7, H.C. Bill, 70.

Guardianship of Minors Act 1971.

Infant Life (Preservation) and Paternal Rights Bill 1987, H.C. Bill 113.

Law Reform (Parent and Child) Act (Scotland) 1986.

Matrimonial Causes Act 1973.

Sexual Offences (Scotland) Act 1976

Sexual Offences Act 1967

Surrogacy Arrangement (Amendments) Bill [H.L.] 1986, No. 169.

Surrogacy Arrangements Act 1985.

Unborn Children (Protection) Bill, Session 1984-5, H.C., No. 23.

Unborn Children (Protection) (No. 2) Bill, Session 1985-6, H.C. Bill 220.