

## A Right to Reproduce?

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## A Right to Reproduce?\*

### Abstract

*How should we conceive of a right to reproduce? And, morally speaking, what might be said to justify such a right? These are just two questions of interest that are raised by the technologies of assisted reproduction. This paper analyses the possible legitimate grounds for a right to reproduce within the two main theories of rights; interest theory and choice theory.*

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### Introduction

How should we conceive of a right to reproduce? And, morally speaking, what might be said to justify such a right? These are just two questions of interest that are raised by the technologies of assisted reproduction. Despite the wide range of academic commentary on the right to reproduce, discussions have tended to focus on the implications of such a right and its scope. Conspicuously missing are those addressing the question of the legitimate grounding of the right in a moral sense. This paper aims to address this lacuna.

That these questions are of more than mere academic interest can be seen by the appearance of rights claims in legal cases on reproductive matters. Most recently the cases of *Evans v The United Kingdom*,<sup>1</sup> *R (on the Application of Mellor) v Secretary for State for the Home Department*,<sup>2</sup> and *Dickson v The United Kingdom*<sup>3</sup> all delivered judgements in which it was recognized that the debate at least includes the concept of a right to reproduce. Much has been written about these cases to date and, as such, a full rehearsal of the facts is not warranted here.<sup>4</sup> However, what can be said

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\* I would like to thank Charles Erin, Kimberley Brownlee, the participants of Society for Applied Philosophy Annual Conference 2007, and the reviewers for their insights and comments.

<sup>1</sup> Application No 6339/05. Judgment of 7 March 2006; [2006] 1 FCR 585.

<sup>2</sup> [2001] 3 WLR 533, C.A.

<sup>3</sup> Application No. 44362/04. Judgement of 4 December 2007 (Grand Chamber).

<sup>4</sup> For a small selection of articles discussing the *Evans* case see S. Sheldon. Case Commentary *Evans v Amicus Healthcare; Hadley v Midland Fertility Services – Revealing Cracks in the ‘Twin Pillars’?* *Child and Family Law Quarterly* [Child Fam Law Q] 2004; 16(4): 437-52; C. Lind. *Evans v United Kingdom – Judgments of Solomon: Power, Gender and Procreation.* *Child and Family Law Quarterly* 2006; 18(4); T. Annett. *Balancing Competing Interests Over Frozen Embryos: The Judgment of Solomon?* *Medical Law Review* [Med Law Rev] 2006; 14; A. Alghrani. *Deciding the Fate of Frozen Embryos.* *Medical Law Review* 2005; 13(1): 244-256; C. Morris. *Evans v United Kingdom: Paradigms Parenting.* *Modern Law Review* [MLR] 2007; 70(6): 992-1002; L. Zucca. *Evans v United Kingdom: Frozen Embryos and Conflicting Rights.* *Edinburgh Law Review* 2007; 11: 446-449. For a selection of articles discussing the *Mellor* and *Dickson* cases see H. Codd. *The Slippery Slope to Sperm Smuggling: Prisoners, Artificial Insemination and Human Rights.* *Medical Law Review* 2007; 15: 220-235; H. Codd. *Regulating Reproduction: Prisoners’ Families, Artificial Insemination and Human Rights.* *European*

is that the concept of reproductive liberty, entailing claims not only about the freedom to exercise one's reproductive preferences, but also about the rights and duties which might ensue, is at the very heart of these cases. As we will see below, in addition to a general right against interference with reproductive matters, the assisted reproductive technologies have opened the door to claims of a positive right to procreate or to raise children, and to assistance therewith.

While it is probably uncontroversial to say that rights are seen as providing important protections for individuals (or groups of individuals), it is not always clear what underlying justifications for the varying purported rights might be. Therefore, it seems appropriate to examine the possible justifications for a right to reproduce. It is for this reason that this paper analyses the concept of a right to reproduce within the two main theories of rights: interest theory<sup>5</sup> and choice theory.<sup>6</sup> These two theories each represent a different conception of the function of rights and, as such, different justifications underpin the existence of rights. Interest theory would justify a right to reproduce on the grounds of overriding interests, while choice theory, would justify it on the grounds of the necessity to protect personal autonomy. Each of these, interests or autonomy, leads us to a different conception of the right and the right-holder.

I believe that the tension between the two approaches to rights can be aptly illustrated by looking at the debate on the right to reproduce between John Robertson<sup>7</sup> and Bonnie Steinbock.<sup>8</sup> While neither author (to the best of my knowledge) has aligned their reasoning with a particular theory of rights, it is my contention that the manner in which each of them deploys their arguments demonstrates an affinity with one of the theories. For this reason, their positions can be used as a starting point for analysing the cogency of a right to reproduce and its possible justifications within the two main rights theories. Consequently, this paper utilizes their arguments as a framework for analysing what the legitimate grounds of a right to reproduce might be.

Before beginning this analysis I want to note my particular take on rights. My arguments should not at any point be taken to mean that I am equating moral rights with morality itself. They are human constructs that help us to conceptualize the way we should act towards the holders of those

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*Human Rights Law Review* 2006; 1: 39–48; J. Williams. Have the Courts Got it Right?–The Queen on the Application of *Mellor v. Secretary of State* for the Home Department. *Child and Family Law Quarterly* 2002; 14:218–228; P. Proctor. Procreating from Prison: Evaluating British Prisoners' Right to Artificially Inseminate their Wives under the United Kingdom's New Human Rights Act and the 2001 Mellor Case. *Georgia Journal of International and Comparative Law* [Ga J Int Comp Law] 2003; 31(2): 459–492.

<sup>5</sup> J. Raz. On the Nature of Rights. *Mind* 1985; XCIII: 194-214.

<sup>6</sup> H.L.A. Hart. Are there any Natural Rights. *Philosophical Review* [Phil Rev]1955; LXIV: 175-191. Reprinted in 1984. *Theories of Rights* J. Waldron., ed. Oxford : Oxford University Press: 77-90.

<sup>7</sup> J. Robertson. 1994. *Children of Choice - Freedom and the New Reproductive Technologies*. Princeton; Princeton University Press.

<sup>8</sup> B. Steinbock. A Philosopher looks at Assisted Reproduction. *J Assist Reprod Genet* 1995; 12: 543-51.

rights. They can only exist within a more extensive moral reasoning; and I believe they do this as the intermediate conclusions between justification and duties.<sup>9</sup> Taking this into consideration I am going to examine some possible moral bases of a right to reproduce.

### **A Right to Reproduce: Two Approaches**

In *Children of Choice*, Robertson maintains that the right to reproduce or procreate is derived from the right to procreative liberty.<sup>10</sup> He says that, in its simplest terms, 'procreative liberty is the freedom to either have children or to avoid having them'.<sup>11</sup> Additionally, he asserts that:

[It] should enjoy presumptive primacy when conflicts about its exercise arise because control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life.<sup>12</sup>

For him, any right to reproduce necessarily consists of two components: the liberty to reproduce, and the liberty not to reproduce. The freedom to avoid reproduction will involve 'sexual abstinence, contraceptive use, or refusal to seek treatment for infertility . . . [and] termination of pregnancy'.<sup>13</sup> Conversely, the freedom to reproduce will include other freedoms, such as being 'free to marry or find a willing partner, engage in sexual intercourse, achieve conception and carry a pregnancy to term, and rear offspring'.<sup>14</sup> Here, both of these interpretations of the right to reproduce are negative rights. They are rights against the interference of other individuals (or the State) in one's reproductive decisions. However, for Robertson, the right to reproduce does not imply a positive right to intervention in order to exercise one's reproductive liberty.<sup>15</sup>

Of the two components of the right, it is the right to reproduce, rather than the right not to reproduce, that is to be the focus in this investigation. To this end, both Robertson and Steinbock would agree that the right to reproduce can involve genetic reproduction and child-rearing.<sup>16</sup> Thereafter, however, their opinions diverge. This is because Robertson generally speaks of the right to reproduce 'in the genetic sense, which may also include rearing or not'.<sup>17</sup> Thus any right to reproduce can be interpreted in its broadest terms to include a right to non-coital collaborative

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<sup>9</sup> For more on the role of rights as part of morality see R. Dworkin. 2000. *Taking Rights Seriously*. London; Duckworth: 150-183; J.L. Mackie. Can There Be a Right-based Moral Theory? In Waldron, *op. cit.* note 6.

<sup>10</sup> We will see later that this itself could be seen as deriving from a general right to liberty.

<sup>11</sup> *Ibid*: 22.

<sup>12</sup> *Ibid*: 24.

<sup>13</sup> *Ibid*: 26.

<sup>14</sup> *Ibid*: 30.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid*;. Steinbock. *op. cit.* note 8.

<sup>17</sup> Robertson, *op. cit.* note 7, pp. 22-23. Robertson actually uses the words 'freedom' and 'liberty' but states 'that 'liberty' as used in procreative liberty is a negative right', therefore I will take the terms to be synonymous for the purposes of this paper.

reproduction, such as is involved in the processes of gamete donation and surrogacy.<sup>18</sup> He maintains that this is the case even when a person's participation in these collaborative efforts does not involve the intention to rear.<sup>19</sup> In response to this, Steinbock contends that Robertson's take on the situation shows a lack of understanding of both 'the nature and value of the right to reproduce'<sup>20</sup> and that he is wrong to claim a right in relation to pure genetic reproduction where there is no intent to rear. This disparity in their positions could be seen as a fundamental difference about the function of rights in the context of reproduction.

As mentioned already, neither author has stated which conception of a right to reproduce they might subscribe to. The approach of each author is not necessarily hugely disparate; a closer look at the language each uses, however, and the manner in which the key concepts are deployed, seems to convey a different notion of a right. Steinbock seems to be concerned with the 'interests individuals may have in procreation'<sup>21</sup> and with delineating which of these interests are important enough to 'deserve the protection of a fundamental right'.<sup>22</sup> This could be seen as corresponding to the function of a right as understood on the interest theory of rights, where a right is justified only on the grounds of overriding interests.

Conversely, for Robertson the key element of the right is the *freedom* in the choices surrounding reproduction. It is clear from his arguments that he endorses a strong interpretation of reproductive liberty and the right to reproduce. Indeed, we have already seen that he advocates the 'presumptive primacy' of reproductive liberty.<sup>23</sup> Such a strong conception must surely and necessarily imply the premise that the protection of an individual's autonomy be considered as paramount. This seems to correspond to the choice theory of rights where a right is understood as existing to promote and protect an individual's autonomy and liberty. In this case, it would be their freedom with regard to their reproductive choices. It could be argued that the right here should actually be seen as protecting one's *interest* in liberty and autonomy.<sup>24</sup> Indeed, Robertson himself says that 'the freedom either to have or to avoid having them . . . is . . . an individual interest'.<sup>25</sup> As can be seen above, however, the language he uses is couched in terms that are almost synonymous with the concept of rights as protected choices: freedom and liberty. For this reason, and because the concept of an *interest* in liberty and autonomy is so similar to that of a right as a protected choice, it will be treated as such in this paper.

It now needs to be determined whether either of the positions outlined ought to be seen as grounding a right to reproduce. In order to do this, I

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Steinbock, *op. cit.* note 8, p. 548.

<sup>21</sup> Ibid: 547. cf. Raz., *op. cit.* note 5.

<sup>22</sup> Ibid.: 548-549.

<sup>23</sup> Robertson, *op. cit.* note 7.

<sup>24</sup> On a Razian view of rights, many claim-rights are justified on the grounds of protecting individual freedom and autonomy. My thanks to Kimberley Brownlee for pointing this out.

<sup>25</sup> Robertson, *op. cit.* note 7, p.22.

look first at reproductive interests and examine two possible candidates for interests that might justify a right to reproduce. Following that I examine the cogency of a right to reproduce grounded in considerations of autonomy and liberty.

## Reproductive Interests

One of the main proponents of the interest theory of rights, Joseph Raz, argues that an 'interest' in the relevant sense should be seen as an aspect of a person's well-being.<sup>26</sup> Furthermore, to ground a right, this interest must be 'a *sufficient reason* for holding some other person(s) to be under a duty'.<sup>27</sup> The use of the word 'sufficient' is important here, signifying that Raz does not consider all interests as equally engendering rights claims. It is the strength of the interests which determines the corresponding strength of the claims. On a Razian view, an interest, an aspect of a person's well-being, is seen as being capable of objective definition. I am not going to attempt to examine the cogency of this view save to say that, while it is not clear what this might mean in the context of reproduction, there are almost certainly reproductive interests which could be said to represent a strong aspect of well-being for some people. However, there are two difficulties with this. The first is in determining what comprises a reproductive interest, at least in any relevant sense, and the second is determining what counts as a sufficient reason. This latter difficulty is not specific to considerations of a right to reproduce; it is a general problem with any attempt to ground rights in interests. It seems like an almost impossible task to identify and quantify what constitutes a *sufficient* interest. I will not deal with this here, as I want to concentrate specifically on identifying and discussing reproductive interests which *might* ground a right to reproduce.

Of the reproductive interests which could arguably ground a right to reproduce, the two most likely candidates are those already identified by Robertson and Steinbock: (1) genetic reproduction, that is, an interest in passing on one's genes; and (2) child-rearing, that is, an interest in raising a child.<sup>28</sup> In addition to these two obvious candidates the possibility of a right to reproduce deriving from collective interests will be considered.

### *Genetic Reproduction*

We have already seen that Steinbock rejects the claim that pure genetic reproduction constitutes sufficient grounding for a right to reproduce. She does this because, in her view, it is not the primary aim of reproduction to create a genetically similar being. She argues that 'procreation is valuable because of its connection with the raising of children'.<sup>29</sup> To accept a *de facto* right to pass on one's genes would be, she thinks, to accept a right to create children but with no responsibility for bringing them up and taking

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<sup>26</sup> Raz., *op. cit.* note 5, p. 195.

<sup>27</sup> Ibid: 195. My emphasis.

<sup>28</sup> Robertson, *op. cit.* note 7; Steinbock, *op. cit.* note 8.

<sup>29</sup> Steinbock, *op. cit.* note 8, p. 549.

care of them. She believes such an acceptance to be intrinsic to Robertson's defence of reproductive liberty in the genetic sense, hence her rejection of it.<sup>30</sup> This reading of Robertson, however, is somewhat overdone. It is unlikely that he is advocating an unrestrained licence to breed. His endorsement is not so much for the right to genetic reproduction as for the liberty to engage in certain reproduction-related activities such as gamete donation and surrogacy. Indeed he admits that:

Recognition of the primacy of procreation does not mean that all reproduction is morally blameless, much less that reproduction is always responsible and praiseworthy and can never be limited.<sup>31</sup>

His purpose is more to highlight the importance of freedom in reproductive matters and to argue that a high threshold ought to be required for the denial of that freedom. Although this seems reasonable, his stance is not unproblematic.

His justification of a right to reproduce is based on his contention that 'whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life.'<sup>32</sup> Even though this may contain a large element of truth, to attribute this to the passing on of one's genetic material may be to overstate the case. Taking this to the extreme might lead to support for some morally problematic practices. For example, if a man were to say that passing on his genetic material was what established his identity, afforded him dignity, and imbued his life with meaning, we would find it highly questionable for him to claim a right to the unfettered distribution of his sperm.

Additionally, since Robertson's aim was to defend reproductive liberty for those engaged in practices such as surrogacy, where there is no intention to rear, it is doubtful in these cases that it is the genetic element which gives such practices 'meaning'. It seems more likely that the meaning and value of gamete donation and surrogacy derives from the participation in acts which help others.

One might also point out that the genetic component of reproduction in non-coital collaborative reproduction is rarely divorced from an interest in child-rearing; it is simply that the two interests are not always vested in the same person(s). For example, in the case of embryo donation the genetic component could be said to rest with the genetic progenitors, while the child-rearing element would rest with those who have ultimate responsibility for raising the child. As such, a genetic interest alone does not seem to provide adequate justification for a right to reproduce.

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<sup>30</sup> Ibid.

<sup>31</sup> Robertson, *op. cit.* note 7, p. 30.

<sup>32</sup> Ibid: 24.

### *Child-rearing*

If any interest is strong enough to ground a right to reproduce, then an interest in the actual rearing of one's own child ought to be it. The key component of a right to reproduce here would be the intention to rear. On this formulation, reproduction is valued not as a mechanism for passing on one's genes, but for the experiential significance of the child-rearing process. It recognizes that having and raising children is part of the definition of a good life for many people. This is key for Steinbock, who maintains that 'the right to reproduce is rather a right to have one's own children to rear.'<sup>33</sup> However, there is one important qualification to this. She maintains that any right to reproduce be restricted to those with an interest and the *ability* to raise the child.<sup>34</sup> Here, at least, she seems to have similar ideas to Robertson. They agree that if an individual is to have an interest in reproducing, that person should have the capacity to understand 'the meanings associated with reproduction'<sup>35</sup> and, if the intent is rearing, the ability to do so. A right to reproduce on this formulation, whether also connected to a genetic interest or not, would be intimately linked to the ability to raise a child. Presumably, therefore, only those who possess the requisite capabilities can be capable of having the right. However, if this is the case, how are we to assess such ability?

In the United Kingdom, the Human Fertilization and Embryology Authority (HFEA) appears to think that such an assessment is not only possible but also ethical. To this end, they have produced a set of guidelines for assessing the welfare of the 'potential' child.<sup>36</sup> The guidelines have arisen because the provisions of the Human Fertilization and Embryology Act 1990<sup>37</sup> effectively stipulates that prospective parents must be screened before any infertility treatment can take place. Specifically Section 13(5) says:

A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.<sup>38</sup>

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<sup>33</sup> Steinbock, *op. cit.* note 29, p.549.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Found in the HFEA's Seventh Code of Practice. See

[http://cop.hfea.gov.uk/cop/pdf/CodeOfPracticeVR\\_4.pdf](http://cop.hfea.gov.uk/cop/pdf/CodeOfPracticeVR_4.pdf). Last accessed 21 Nov 2008.

<sup>37</sup> The Human Fertilisation and Embryology Act 2008 received Royal Assent on 13 Nov 2008. This Act will have a staged implementation but will be in full force by October 2009. The 2008 Act will amend the 1990 Act. As such section 14(2)(b) of the 2008 Act replaces the need for "a father" with the need for "supportive parenting" and section 23 of the 2008 Act similarly amends section 25(2). The HFEA will continue to be required to issue guidance.

<sup>38</sup> Section 13(5). Although it must be noted that the Guidelines themselves cannot be taken as an indication of the individual positions of members of the Authority. The past chair of the HFEA, Suzie Leather was notably critical of part of s13(5) of the Act. My thanks to one of the reviewers for bringing this to my attention.



Section 25(2) of the Act requires the HFEA to give guidance on this which it does through its Code of Practice. The 'welfare of the child' provision in the latest incarnation of the guidelines does not include the kind of checklist for determining parental suitability that the previous ones did but, as Alghrani and Harris point out, it still 'requires healthcare professionals to make what is essentially a speculative social judgement about a person's suitability for treatment'.<sup>39</sup> This effectively means morally evaluating potential parents and, in reality, such an evaluation is not going to be easily quantifiable or analysable. The provisions only impose restrictions on those who either cannot or choose not to reproduce in the normal manner. Therefore, whatever the injustice inherent in these guidelines, it is doubled by the lack of restrictions on those who do not need this kind of treatment.<sup>40</sup> This is tantamount to licensing those parents, and only those parents, who do not reproduce in the normal manner.<sup>41</sup>

The practical implications of a right to reproduce deriving from an interest in having and raising a child and formulated as Steinbock would want are apparent from the above look at the HFEA guidelines. Practically speaking fertile individuals might have a right to reproduce (or at least be able to exercise it), while infertile individuals might not. This is because the distinction between these two categories is not in the ability of the individuals to hold an interest in having and raising a child, but the practical ease of regulating the ensuing right. The 'welfare of the child' provision has proved controversial in the years since the implementation of the Act and is proving equally so in Parliamentary debate on the new Human Fertilization Embryology Bill.<sup>42</sup>

Leaving aside the injustice that this derivation of a right to reproduce might produce, the interest in rearing a child is a plausible interest of both the fertile and the infertile. However, how could a right, thus derived, account for the fact that interests change? There are two aspects to this. The first is that different people will have different interests. And the second is that the strength of those interests will vary between people, and over time. Given that this is true, are we to infer that a particular person, X, might have a right to reproduce, whereas another person, Y, might not, simply because, at this point in time, all else being equal, the comparative strength of Y's wish to rear a child is not great enough to constitute an interest of sufficient strength to ground the right in question? Or does it mean that

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<sup>39</sup> A. Alghrani, J. Harris. *Child and Family Law Quarterly* 2006; 18: 197.

<sup>40</sup> Harris, *op. cit.* note 16.

<sup>41</sup> For more on this, see P. Tittle, ed. 2004. *Should Parents Be Licensed* [Amherst, N.Y.] Prometheus Books; H. La Follette. *Licensing Parents. Philos Public Aff* 1980; 9: 182-197.

<sup>42</sup> The draft Bill passed through Committee Stage in the House of Commons from 19/05/08 to 12/06/08. One of the heavily debated aspects of the Bill related to the welfare of the child provision and was on whether there should be a statutory duty for clinics to consider the 'need for a father' for any children born as a result of IVF. The move to have a 'need for a father' clause included in the Bill proved controversial, as it was seen as a dubious social judgement on the suitability of lesbian and single mothers to be parents. The clause was rejected by MPs on 20/05/08. The draft Bill, its amendments, and transcripts of the Parliamentary debate can be found at <http://services.parliament.uk/bills/2007-08/humanfertilisationandembryology.html#2007-08>. [Accessed 18 Aug 08].

today Y does not have a right to reproduce because it does not represent a significant enough aspect of her well-being, but in five years when her interests have grown she will possess this right? This does not appear to be either a sensible or a plausible contention and, as such, cannot provide justifiable grounds for a right to reproduce.<sup>43</sup>

## Reproductive Choices

We saw earlier that for Robertson the key element of a right to reproduce is *freedom* in the choices associated with the right. This freedom of choice is a necessary part of each individual's autonomy. Thus, while Robertson himself does not make any claims regarding a particular rights theory, his view seems to fit with a right to reproduce based on the view of rights as protected choices. Such a right would be concerned with the promotion of the freedom or autonomy of the right-holder with regard to reproductive matters. This conception would derive a right to reproduce from a right to reproductive liberty, which in itself would be grounded in a more general right to liberty. But can a right to reproduce be derived from a general right to liberty?

Freedom of choice in reproductive matters can be framed in two ways: (1) as a right to choose to have children; and (2) as a right to choose not to have children. Leaving aside the freedom to avoid having children, we are left with two possible interpretations of the liberty, or right, to choose to have children, hereafter referred to as the right to reproduce. Firstly, one could see it as a right to non-interference with one's choice once it has been made. This is a negative right,<sup>44</sup> manifestly, and requires nothing more than restraint or 'negative action' from others.<sup>45</sup> The second interpretation is that of a positive right, a right to the assistance required or necessary to have a child. This would entail the active intervention of others in order to fulfil the right.

In the negative account, the right would impose a duty on others to refrain from interfering with, or preventing a person having a child. This right, for example, would proscribe the use of compulsory contraceptives and enforced abortions. However, it would not entitle a person to resources or opportunities, only a freedom from coercion.<sup>46</sup> This negative version might sound like a good, succinct, and easily understandable formulation of the right to reproduce, however, as Copelon points out:

The negative theory of privacy is . . . profoundly inadequate as a basis for reproductive and sexual freedom because it perpetuates the myth that the ability to effectuate one's choices rests exclusively on the individual, rather than acknowledging

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<sup>43</sup> Of course, this problem might be resolved if we could draw up or identify a list of objective reproductive interests of the type that Raz and his proponents would support.

<sup>44</sup> This is the type of right described by R. Nozick. 1974. *Anarchy, State and Utopia*. Oxford: Basil Blackwell.

<sup>45</sup> P. Jones. 1994. *Rights*. Basingstoke: MacMillan: 15.

<sup>46</sup> R. Plant. 1986. Needs, Agency and Rights. In *Law, Rights and the Welfare State*. D.J. Galligan & C.J.G. Sampford, eds. London: Croom Helm.

that choices are facilitated, hindered or entirely frustrated by social conditions. In doing so negative privacy theory exempts the state from responsibility for contributing to the material conditions and social relations that impede, and conversely, could encourage autonomous decision-making.<sup>47</sup>

Conversely, the positive account of rights recognizes that factors external to oneself can influence our ability to make and carry out our decisions and, as such, would enforce a positive duty to provide an individual with the services and support required to have a child. This kind of right would, therefore, necessarily include a right to treatment with reproductive technologies such as *in vitro* fertilization (IVF).

Assuming that, in order to exercise their right to reproduce, a person requires IVF, denial of the relevant treatment would result in the imposition of restrictions on, and the limiting of, the decisions that a person can make within the confines of their reproductive liberty and regarding their life-plan. This could be as much construed as an infringement of a person's autonomy and liberty as any breach of the duty of non-interference. The person would effectively be prevented from exercising their right to choose because the opportunity to implement the relevant choice has been taken away from them.<sup>48</sup>

Plant, however, denies that such a positive right exists. He maintains that 'the absence of resources is not a restriction of freedom'<sup>49</sup> and draws a distinction between freedom and ability. He claims that 'there is a wide range of things which I am unable to do which it would be absurd to regard as infringements of my liberty',<sup>50</sup> including logical and episodic inabilities, physical impossibilities, and inabilities due to earlier choices.<sup>51</sup> While this might sound reasonable, it is not clear that the freedom/ability distinction holds in all situations. This is especially true in the case of physical inability. Indeed, if the distinction did hold up, it might have some dramatic implications for health care provision.

Plant's example of physical impossibility is: 'I cannot as a male bear a child'. While it currently remains true that men cannot bear children, this may not always be the case. New technology is being developed all the time, and, with the advent of womb transplants, it may become a possibility. Plant is correct in contending that, at the moment, it is absurd to consider his example in terms of an infringement of the liberty of men; however, it is no longer absurd once the technology has been developed. Once the technology is available, not providing those men who wish to bear children with the means to do so is to reduce their choice and, as such, can be seen to constitute an infringement of their liberty.

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<sup>47</sup> R. Copelon. Losing the Negative Right of Privacy: Building Sexual and reproductive Freedom. New York University *Review of Law and Social Change* [Rev Law Soc Change]1991; 18: 15-15: 46.

<sup>48</sup> It might be that these positive and negative rights are only one right, which generates both positive and negative duties.

<sup>49</sup> Plant, *op. cit.* note 45, p. 26.

<sup>50</sup> *Ibid.* [p.26]

<sup>51</sup> *Ibid.* [p.26]

This example is equally applicable to those people who require other forms of assistance to have a child. Before we were able to offer treatment for infertility, it would have been 'absurd' to talk about an infringement of liberty in this respect, but this no longer holds true. If it is the case that physical inability does not restrict freedom and choice, and any rights thereof, then the existence of some aspects of the health service begin to seem pointless. Why, for example, would we bother to offer treatments for any lifestyle-restricting disease? After all, in this way of thinking, the person with heart disease would not be experiencing a restriction in their freedom and autonomy simply because they cannot engage in the normal activities of everyday life, so why should we make any treatment available to them? It seems to me that denial of treatment on this basis cannot be valid; if there are unwanted restrictions on one's choice and thus on the exercise of autonomy, due to health, social or financial restraints, then this surely counts as an infringement of liberty.

Plant would reject this because he does not view the forces of the free market as coercive to liberty. He thinks to view these forces as such is to say that it 'would require coercive action on the part of the state to remove poverty in order to secure liberty as a basic right.'<sup>52</sup> The problems he has with positive interpretations of a right to liberty are understandable. He correctly identifies the fact that arguments derived from a general right to liberty can end up in absurdity. To endorse a general right to liberty in its positive sense could have the effect that we end up with a right to any and all resources we require. A theory of rights which would allow this would simply not be sustainable; and, for that reason, a right to reproduce deriving from a general right to liberty cannot be the whole story.

## Equality of Liberty

John Rawls believes that what we are entitled to is not simply a right to liberty but an *equal* right to liberty.<sup>53</sup> This equal right to liberty, for him, entails not only a freedom from interference, but also:

[A]n equal right to those basic resources which are necessary for individual agency and which will secure an equal basic value for liberty between individuals.<sup>54</sup>

Similarly, Ronald Dworkin rejects a more general view of liberty<sup>55</sup> in favour of a theory of 'equal concern and respect'<sup>56</sup>, claiming that:

[T]he rights which have traditionally been described as consequences of a general right to liberty are in fact the consequences of equality instead.<sup>57</sup>

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<sup>52</sup> Ibid. [p.26]

<sup>53</sup> J. Rawls. 1999. *A Theory of Justice*. Oxford: Oxford University Press: 171-227.

<sup>54</sup> Plant, *op. cit.* note 45, p. 28.

<sup>55</sup> I. Berlin. 1958. Two Concepts of Liberty. In *Four essays on Liberty*. Oxford: Oxford University Press: 6-16.

<sup>56</sup> Dworkin. *op. cit.* note 9, p. 273.

<sup>57</sup> R. Dworkin. 1984. Rights as Trumps. In J. Waldron, *op. cit.* note 6, p. 167.

A general right to liberty cannot, on its own, account for any limits that might be placed on an individual's freedom. Unless some restriction is placed on each individual's rights, their rights would be in constant conflict with the rights derived from general liberty held by all other rights-holders. In the context of reproduction, a right to reproduce derived from a general right to liberty could imply a right to any and all resources required in order to reproduce. Such a conception would have grave resource implications, such that my unfettered right to X could act to infringe the same right to X held by other individuals. For that reason, it seems that each individual's rights must necessarily be limited by the demands of equality, and that the most each of us can claim is an *equal* right to certain liberties.

To this end, Dworkin proposes that:

Government must not only treat people with concern and respect, but with *equal* concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are more worthy of concern.<sup>58</sup> [My emphasis]

He holds that we can have rights to *distinct* liberties, but only when the right to equality demands these rights. This removes the conflict between liberty and equality. Thus individuals will each have an equal right to distinct liberties. We can only exercise these rights so long as we are not unequally or unjustifiably limiting the same rights in others by doing so. Any right to reproduce that could be said to exist must, therefore, operate within this constraint.

### *The Right to Beget Equally*

We saw earlier that a right to reproduce based on a theory of 'protected choices' would be said to exist to protect the freedom and autonomy of the rights-holder with regard to reproductive matters. We also saw, in the previous section, that if it is in fact the case that such a right exists, then it must be ascribed to everyone equally.<sup>59</sup> Applying this to the negative conception of a right to reproduce, that is a right to non-interference in reproductive matters, is not overly problematic. This is because, in some conceptions, a negative right requires nothing more than restraint from others. Formulated in this manner, the right would be the equal right of individuals to attempt to reproduce in a manner pursuant to their values. Additionally, it would entail a right not to be prevented from attempting to access reproductive technologies if that is what they wished to do. Such a formulation, however, would not imply an automatic right to reproduce, in the positive sense where such a right might involve the use of public resources. Such a right might exist but it would be contingent on the 'equality of liberty' constraint. Each individual's right to reproduce, and liberty in reproductive matters is necessarily limited by those self same rights and liberties of others. Therefore, claims on the resources that a

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<sup>58</sup> Dworkin, *op. cit.* note 9, pp. 272-3.

<sup>59</sup> Or at least to those individuals that are capable of being rights-holders on choice theory.

society has to offer an individual in this regard this should be permitted to the extent that access to them does not infringe the liberties of other people. Conversely, access to these should be restricted to the extent that such access would infringe upon the liberties of other people.

We have established that in a society based on the Dworkinian conception of equality all citizens must be treated with 'equal concern and respect'. According to Dworkin, the relevant sense of equality is:

[T]he right to treatment as an equal. This is the right, not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the *political decision* about how these goods and opportunities are to be distributed.<sup>60</sup> [My emphasis]

If people choose to have children, it follows that all individuals in a society ought to have an equal right to 'concern and respect' in the political decisions about the 'goods and opportunities' that a society has to offer regarding this. These 'goods and opportunities' will not only include access to pre-natal care and labour facilities. In a society that can offer such treatment, the assisted reproductive technologies (ARTs) are necessarily included.

However, there are many competing claims on a society's health care resources besides the provision of ART. Funding the infertility services necessarily means that there are less healthcare resources available in other areas. A society could, therefore, come to the conclusion that funding these services through public money infringes other more important liberties. If this is the case, then it may be legitimate for a society to not provide such services from public money.

Nevertheless, in societies such as the UK, where such services are publicly funded, their may be a positive right to reproduce. This right would not be the guarantee of a child, or even of access to ART in an attempt to have one, but of equal concern and respect in the political decisions that govern such access. This translates as the requirement for non-discriminatory criteria, regulations, and procedures for determining who gets treatment and who does not. It means giving everyone an equal shot at the prize, regardless of age, gender, sexual orientation, etc. In the UK, it is doubtful that the Human Fertilisation and Embryology Act 1990, or the consequent HFEA guidelines can be considered to meet the equality condition,<sup>61</sup> but a discussion of that is outside the scope of this paper.

## Conclusion

This paper set out to examine the oft purported right to reproduce and to ask what might serve as a legitimate grounding for such a right in the moral sense. The two main theories of rights, interest theory and choice theory, were used to try and identify possible bases for this right. Looking first at

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<sup>60</sup> Ibid: 273.

<sup>61</sup> Or indeed the new draft Bill.

reproductive interests, two possible candidates for interests that might justify a right to reproduce, genetic reproduction and child-rearing, were examined. Neither of these has been found to form a sufficiently robust basis for the grounding of a right. This is based on the argument that the genetic element of reproduction, that is an interest in passing on one's genes, is not what gives reproduction meaning. This holds true even with practices such as gamete donation and surrogacy. Similarly an interest in child-rearing as a basis for the right is problematic. The first reason for this is the seemingly incoherent end-point of a right derived from such an interest; that fertile individuals would possess the right while the infertile would not. The second reason is that the comparative strength of the interest may vary both between people and over time, meaning that whether or not a right is present could also be seen as varying between people and over time.

If a right to reproduce exists at all, the protection of an individual's liberty and autonomy with regard to reproductive matters would seem to be the proper basis of such a right. However, the right does not derive from an *unrestricted* general right to liberty. A right to reproduce derived thus would work well within a narrow interpretation where the right is only a negative right of non-interference in reproductive choices rather than a positive right to the help and resources needed to reproduce. The distinction, though, between negative and positive rights in this area seems to be a dubious and artificial one, since a lack of resources, such as *IVF*, can be seen as an infringement of reproductive liberty.

A right to reproduce as derived from liberty, however, would simply not be sustainable if no limits were put on it. For that reason it must necessarily be curtailed by the selfsame right of other individuals. If the right is to be construed as a right in the positive sense, where individuals might have a claim on the resources that a society has to offer in order to fulfil their reproductive goals, then each individual's claim can only be permitted to the extent that it does not infringe the same right held by other individuals. This would not necessarily mean a right to an equal amount of resources. What it would require, however, would be 'equal concern and respect' in the political decisions surrounding the distribution of those resources. Where it is the case that there is a scarcity of the goods and opportunities needed to fulfil the right, as with *ART*, then a just system of access needs to be in place. If this can be done, then we can be sure that, with regard to an individual's right to reproduce, they are being treated with 'equal concern and respect'.