

**BRAVE NEW BABIES:
Children's human rights
with respect to
their biological origins and family structure**

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Some old and new phenomena – adoption is old, new reproductive and genetic technologies and same-sex marriage are new – have recently thrown the issue of children's rights with respect to their biological origins, biological families and family structure into the public policy spotlight and public square debate.

Adoption has long challenged children's rights with respect to their biological families. Early in the 20th century, societally condoned sperm donation presented a similar challenge. In the last thirty years new reproductive and genetic technologies (NRTs) have brought, and will continue to bring, unprecedented challenges. And, most recently same-sex marriage has done so.

Over the millennia of human history, the idea that children – at least those born into a marriage – had rights with respect to their biological parents was taken for granted and reflected in law and public policy. And children's rights with respect to their biological origins was not an issue when there was no technoscience that could be used to manipulate or change those origins: a baby could only be conceived *in vivo* through sexual reproduction. But with NRTs that is no longer the case.

So, what are our obligations to children with respect to their biological origins and biological families? What protections do children need and deserve?

I propose that the most fundamental human right of all is a child's right to be born from natural biological origins and that children have human

rights with respect to their biological parents and families and that these rights must be recognized. The articulation of human rights is an ongoing process. Children must move from being the “voiceless citizens” to becoming the new kids on the human rights block and nowhere is that more important than with respect to rights regarding their biological origins and biological families.

NEW RIGHTS FOR CHILDREN

Whatever the broad impact on society of NRTs, these technologies result in children being born: What do we owe those children ethically? So far, we have largely failed to address this question. Our ethical focus on NRTs has been almost entirely on adults’ rights to access these technologies to found a family. But as the first cohort of children born as a result of NRTs reaches adulthood and connect with one another through the Internet, they are changing our focus. We are now asking, what are their rights with respect to the nature of their genetic heritage and knowledge of what that heritage is?

Issues of children’s rights with respect to their genetic identity, their biological families and the nature of their genetic origins arise, in one way or another, in the contexts of adoption, the use of new reproductive technologies, and same-sex marriage. The connection among these contexts is that they all unlink child-parent biological bonds¹. Each context raises one or more of three important issues: children’s right to know the identity of their biological parents; children’s right to both a mother and a father, preferably their own biological parents; and children’s right to come into being with genetic origins that have not been tampered with.

Children’s Rights to Know the Identity of their Biological Parents...

It is one matter for children not to know their genetic identity as a result of unintended circumstances. It is quite another matter to deliberately destroy children’s links to their biological parents, and especially for society to be complicit in this destruction. It is now being widely recognized that adopted children have the right to know who their biological parents are whenever possible, and legislation establishing that right has become the norm. The same right is increasingly being accorded to children born through gamete (sperm or ovum) donation. For instance, the United Kingdom has recently passed laws giving children this right at eighteen years of age.

The impact of NRTs on children born through their use, other than that on their physical health, has been largely ignored; it has been readily assumed that no major ethical or other problems arise in creating children from donated gametes, and that opposition to the creation of these children is almost entirely based on religious beliefs. Such assumptions have been dramatically challenged in the last two years as the first people born through the use of these technologies reach adulthood, become activists, and call for change. They describe powerful feelings of loss of identity through not knowing one or both biological parents and their wider biological families, and describe themselves as “genetic orphans.”ⁱⁱ They ask, “How could anyone think they had the right to do this to me?”

The ethical doctrine of anticipated consent is relevant in deciding what we owe ethically to children brought into being through NRT’s. Anticipated consent requires that when a person seriously affected by a decision cannot give consent, we must ask whether we can reasonably anticipate they would consent if able to do so. If not, it’s unethical to proceed. So, ethically, we must listen to what donor-conceived adults are saying about gamete donation to decide whether we can anticipate consent to it. They – and adopted children – tell us of their profound sense of loss of genetic identity and connection. They wonder: Do I have siblings or cousins? Who are they? What are they like? Are they “like me”? What could I learn about myself from them? These questions raise the issue of how our blood relatives help each of us to establish our human identity. Humans identify closely with their close genetic family, and it seems that we also identify with traits in our family members that we like (and we try to develop the same ones in ourselves), and that we dislike (and vow not to be like that – the positive power of negative identification)ⁱⁱⁱ. In short, from what many donor conceived adults tell us we cannot anticipate consent to anonymous gamete donation – or, indeed, to gamete donation itself.

Ethics, human rights, and international law – as well as considerations such as the health and well-being of adopted and donor-conceived children – all require that children have access to information regarding their biological parents. And it is not just these children who have this right, but their future descendants as well. Children deprived of knowledge of their genetic identity – and their descendants – are harmed physically and psychologically.

Respect for children’s rights in these regards requires that the law should prohibit anonymous sperm and ova donation, establish a donor registry,

and recognize children's rights to know the identity of their biological parents and, thereby, their own biological identity.

It is a further question whether gamete donation itself is ethically acceptable. Many of us have come to see it as acceptable for couples who do not regard it as immoral. But some donor-conceived adults adamantly disagree. Whether it should be available to same-sex couples or single women is a much more contentious issue.

Children's rights to both a mother and a father...

This right brings us to the issue of same-sex marriage, which has been legalized in Canada^{iv} and some other countries. Under both article 16 of the United Nations *Universal Declaration of Human Rights* and domestic law, marriage is a compound right: the right to marry and to found a family.

Giving same-sex couples the right to found a family unlinks parenthood from biology. In doing so, it unavoidably takes away all children's right – not just those brought into same-sex marriages – to both a mother and a father and their right to know and be reared within their own biological family. It does so because marriage can no longer establish as the norm the natural, inherently procreative relationship between a man and a woman, and the rights of children that flow from that norm, in particular, the rights of children to both a mother and a father, who are their own biological parents unless an exception is justified as in the “best interests” of a particular child, as in adoption.

The primary rule becomes that a child's parents are who the law says they are, who may or may not be the child's biological parents. That is, the exception to biological parenthood, which used to be allowed for through adoption law, becomes the norm. In other words, same-sex marriage radically changes the primary basis of parenthood from natural or biological parenthood to legal (and social) parenthood as the Canadian *Civil Marriage Act* expressly legislates^v. That change has major impact on the societal norms, symbols and values associated with parenthood.

The same issue of children's rights to both a mother and a father is raised by society's involvement in intentionally creating single-parent households, for example, by funding single women's access to artificial insemination.

Same-sex marriage advocates argue that children don't need both a mother and a father, and "genderless parenting" is just as good, or even better than opposite-sex parenting, because all children are wanted children. Research is showing, however, that men and women parent differently^{vi} and other research that certain genes in young mammals are activated by parental behaviour (epigenetics – the interaction of genes and environment)^{vii}. Science may well show us that complementarity in parenting (having both a mother and a father) does matter for children's well-being in ways we have not previously understood.

One argument against same-sex marriage raised in the Canadian cases was that same-sex couples could not found a family naturally and, therefore, marriage was not an appropriate way to publicly recognize their committed relationship. The Court of Appeal of Ontario^{viii} responded, however, that these couples could use reproductive technologies to found a family. The common thread between same-sex marriage and reproductive technologies is that both disconnect procreation from sexual intimacy between two humans: Same-sex marriage involves sexual intimacy with no possibility of procreation; reproductive technologies involve procreation with no sexual intimacy.

The debate on legalizing same-sex marriage in Canada focused almost entirely on adults and their right not to be discriminated against on the basis of their sexual orientation. The conflicting claims, rights, and needs of children were barely mentioned. It's worth noting that legally recognizing civil unions, unlike the recognition of same-sex marriage, does not negate children's right to both a mother and a father, because it does not include the right to found a family. For that reason, it represents the most ethical compromise between respect for the rights of homosexual people not to be discriminated against and the rights of children with respect to their biological families.

Children's rights to be born from natural biological origins...

In the more than twenty-five years since Louise Brown, the first "test tube baby," ushered in the brave new world opened up by NRTs, advances in the technologies have made more and more previously impossible interventions possible. Those "advances" make it necessary to formulate new rights for children in relation to their biological origins that would have been unimaginable until very recently.

A child's right to be conceived with a natural biological heritage is the most fundamental human right and should be recognized in law^{ix}.

Children have a right to be conceived from untampered-with biological origins, a right to be conceived from a natural sperm from one identified, living, adult man and a natural ovum from one identified, living, adult woman. Society should not be complicit in – that is, should not approve or fund – any procedure for the creation of a child, unless the procedure is consistent with the child's right to a natural biological heritage.

The addition of the words man and woman in defining the right to a natural biological heritage, rather than simply referring to sperm and ovum, as would be more common, is not superfluous. It is theoretically possible to create an embryo with the genetic heritage of two women or two men, including by making a sperm or ovum from one of the adult's stem cells and using a natural gamete from the other person, or making an "ovum" from an enucleated egg fused with a sperm and fertilizing it with another sperm, or perhaps by using two ova. The word "natural" excludes an opposite-sex couple using this technology to make an artificial sperm from an infertile man or artificial ovum from an infertile woman.

The requirement that the gametes come from adults preempts the use of gametes from aborted fetuses; it prevents children being born whose biological parent was never born. And the requirement that the donors be living excludes the use of gametes for *postmortem* conception. The right to bear children should not include the right to deny children at least the chance, when being conceived, of meeting their biological parents. Conceiving children with gametes from a dead donor, as an Australian court recently authorized^x, denies them this opportunity. In that case, as is so often true, the judge considered only the rights and wishes of the adults involved.

"DESIGNER CHILDREN" AND SOCIETAL VALUES AND INSTITUTIONS

I will not explore, here, the extensive literature on the ethics of designing our children by genetically altering – whether to enhance or disenchant – them when they are embryos. Rather, I want just to mention some important philosophically based objections to doing that, which have not been widely discussed.

Because creating “designer children” involves genetic manipulation of human embryos, it destroys the essence of their humanness and, ultimately, the essence of the humanness of all of us^{xi}. Genetic manipulation interferes with the intrinsic being of a person – with their very “self.” As philosopher Søren Kierkegaard puts it, the designed person is not free to fully become themselves, which is the essence of freedom.

The power to fully become oneself requires that the person has non-contingent origins – they need to have a sense that they can go back and start again to remake or actualize their very self, and, in order to have that, they must not be preprogrammed or designed by another. German philosopher Jürgen Habermas^{xii} agrees that designed persons no longer can own themselves, which is necessary to make their being and their lives fully their own – they are not free in their intrinsic being. They are deprived of the liberty that comes from the fact that no one has interfered with the essence of their being and that, as a result, their genetic makeup has come into existence through chance. Moreover, because these children are not equal to the designer, they are deprived of equality.

This loss of liberty and equality affects the humanness of all of us because, first, we would all be complicit in such manipulation by not prohibiting it. And second, because tampering with some people’s origins destroys a necessary condition for establishing a moral base for a secular society – that all people must be free from others’ interference in their intrinsic being, if they are to have the capacity to take part in the human interaction from which a shared morality arises^{xiii}.

The injustice of one generation imposing its will over another generation (if the first generation designs its own children) would also result in other losses that have implications far beyond those directly affected and the present. The use of these technologies by one generation challenges the basic human rights of equality and freedom of future generations. And because the liberty and equality of all citizens is at the heart of democratic societal institutions and of the values which democratic societies promote, to create people who are neither free nor equal undermines those institutions and values. In short, not prohibiting “designer children” undermines the very foundations of our Western democratic societies.

CONCLUSION

All these rights of children are of the same basic ethical nature – obligations of non-maleficence, that is, obligations to *first do no harm*. Consequently, as a society, we have obligations to ensure respect for these

rights of children. It is one matter, ethically, not to interfere with people's rights of privacy and self-determination, especially in an area as intimate and personal as reproduction. It is quite another matter for society to become complicit in intentionally depriving children of their right to know and have contact with their biological parents and wider family, or their right to be born from natural biological origins. When society approves or funds procedures that breach these rights of children and, arguably, when it fails to protect such rights of children – for instance, by failing to enact protective legislation – society becomes complicit in the breaches of rights that ensue.

Those obligations extend also to future generations. We should clearly recognize that any genetic procedure that will turn out to be harmful to the future child or to a future generation, or contrary to their interests, is morally unacceptable and should be prohibited.

Knowing who our close biological relatives are and relating to them is central to how we form our human identity, relate to others and the world, and find meaning in life. Children – and their descendants – who don't know their genetic origins cannot sense themselves as embedded in a web of people, past, present and future, through whom they can trace the thread of life's passage down the generations to them. As far as we know, humans are the only animals who experience genetic relationships as integral to their sense of themselves.

We are learning now that eliminating that experience is harmful to children, biological parents, families, and society. We can only imagine how much more damage might be done to a child born not from the union of a man's natural sperm and a woman's natural ovum, but from "gametes" constructed through biotechnology.

In conclusion to summarize, children's rights with respect to their biological origins are:

For those origins to be natural;

To know the identity of the progenitors of those origins; and

To be in contact with those progenitors within a family structure – that is to be reared by their biological mother and father within their genetic family.

ⁱ MARGARET SOMERVILLE, Children's Rights and Unlinking Child-Parent Biological Bonds with Adoption, Same-Sex Marriage and New Reproductive Technologies, *Journal of Family Studies* 2007;13:179-201.

ⁱⁱ See, SKELTON, CHAD, "Searching for their genes: Family Ties." *Vancouver Sun*, April 22, 2006.

ⁱⁱⁱ DAVID J. VELLAMAN, "Family History", *Philosophical Papers*, 2005; 34:357-378

^{iv} *The Civil Marriage Act*, S.C. 2005, c.33

^v *Ibid.* Consequential Amendments sections 5-15.

^{vi} W. BRADFORD WILCOX, "Reconcilable Differences: What Social Sciences Show About the Complementarity of the Sexes & Parenting" www.touchstonemag.com/archives/article.php?id=18-09-032-f-34k –

^{vii} I.C.G.WEAVER, N. CERVONI, F.A. CHAMPAGNE, A.C. D'ALESSIO, S. SHARMA, J.R. SECKL, S. DYMOV, M. SZYF, M. J. MEANEY, *Nature Neuroscience* 2004;7 (8): 847-854

^{viii} *Halpern v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 529, (2003), 65 O.R. (3d) 161(Ont. C.A.).

^{ix} MARGARET SOMERVILLE, *The Ethical Imagination: Journeys of the Human Spirit*, House of Anansi Press, Toronto, 2006, pp.95-156; JÜRGEN HABERMAS, *supra* note ii; MARGARET SOMERVILLE, "The Importance of a Basic Presumption of Respect for the Natural", (2004) 13 *Sacred Web: A Journal of Tradition and Modernity* 113-135; 3

^x KERJAB, RICHARD, "Wife gets sperm of dead husband." *The Australian*, December 21, 2005, 3.

^{xi} MARGARET SOMERVILLE, *The Ethical Imagination: Journeys of the Human Spirit*, House of Anansi Press, Toronto, 2006.

^{xii} JÜRGEN HABERMAS, *The Future of Human Nature*. Oxford: Blackwell Publishing, 2003.

^{xiii} *Ibid.*

