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Children's human rights and unlinking child–parent biological bonds with adoption, same-sex marriage and new reproductive technologies

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ABSTRACT

The link between same-sex marriage, adoption and new reproductive technologies (NRTs) is that all of them unlink the child–parent biological bond. This article explores some of the implications of that unlinking for children's human rights. Two unprecedented developments – that of new reproductive technologies and the legalization of same-sex marriage in some jurisdictions – especially in combination, pose unprecedented challenges to children's fundamental human rights with respect to their biological origins (their very coming into being); their rights to knowledge of these origins; their rights to be reared within their immediate and wider biological families; and their rights to a parent of each sex. Yet, in Canada, including in the courts and Parliament, almost all of the public debate that resulted in the legalization of same-sex marriage failed to consider its impact on children's human rights.

Marriage is a compound right: the right to marry and to found a family. That means marriage functions at the societal level to establish and institutionalize not only one adult's relationship to another adult, but also those adults' relationship to the children born to them. Over millennia marriage has institutionalized natural parenthood and the mutual rights and duties with respect to parents and children that flow from that. Same-sex marriage changes the nature of marriage and, in doing so, the nature of parenthood and, with that, children's rights. Giving same-sex couples the right to found a family, as same-sex marriage automatically does, unlinks parenthood from biology. In other words, it radically changes the primary basis of parenthood from natural or biological parenthood to legal (and social) parenthood. Same-sex marriage breaks, at the institutional level, the automatic link between biological and legal parenthood established by traditional marriage. That has major impact on the societal norms, symbols and values associated with parenthood. The nature and extent of the resulting change might not be readily apparent at first glance, because some impacts will be more distant, less direct and outside the immediate context of same-sex marriage.

Margaret Somerville

I propose that the most fundamental human right of every person is the right to be born from natural human origins that have not been tampered with by anyone else. Children's human rights also include the right to know their biological parents and, if at all possible, to be reared by them within their immediate and wider biological family. If marriage involved only adults there is no good reason to oppose same-sex marriage. But, for the sake of children, I propose that marriage should remain the union of one man and one woman. If, however, same-sex marriage is legalized, we must specifically enact legislation setting out children's human rights with respect to their biological origins and families.

Keywords: children's human rights; new reproductive technologies; bioethics; same-sex marriage; adoption; natural biological origins; genetic identity

Almost all of the debate in the public square on same-sex marriage has focused on the rights of individual adults in relation to their intimate, committed relationships. But marriage is also an institution that functions at the societal level and is relevant to children and their rights. Marriage institutionalizes not only one adult's relationship to another adult, but also those adults' relationship to the children born to them – that is, over millennia it has institutionalized natural parenthood and its rights and duties. Same-sex marriage changes the nature of marriage as a societal institution and in doing so changes the nature of parenthood, as the *Civil Marriage Act* (2005),[1] the legislation that establishes same-sex marriage in Canada, expressly recognizes.

In the same-sex marriage cases[2] that led to the *Civil Marriage Act* (2005), the Canadian courts ruled that the human rights of same-sex couples not to be discriminated against on the basis of their sexual orientation (that is, their rights against discrimination) were breached by the law (that is, state action) that restricted marriage to a man and a woman. Consequently, they held that restriction was constitutionally invalid as a breach of homosexual people's human rights under the *Canadian Charter of Rights and Freedoms* (1982), which is part of the Canadian Constitution. In response to these courts' decisions, the Canadian Parliament legislated to legalize same-sex marriage. But both the courts and Parliament largely failed to consider the impact of same-sex marriage on children's human rights with respect to their biological parents.

Marriage is a compound right: the right to marry and to found a family.[3] Giving same-sex couples the right to found a family, as same-sex

1. Civil Marriage Act: An Act respecting certain aspects of legal capacity for marriage for civil purposes, Assented to on July 20, 2005; hereafter referred to as the *Civil Marriage Act*.
2. Reference re Same-Sex Marriage, Neutral citation: 2004 SCC 79, [2004] 3 S.C.R. 698, (2004), 246 D.L.R. (4th) 193; Canada (Attorney General) v. Hislop, Neutral citation: 2007 SCC 10 (regarding the defintion of 'spouse' in the Modernization of Benefits and Obligations Act, S.C. 2000); Catholic Civil Rights League v. Hendricks, 2004 CanLII 20538 (QC C.A.), (2004), 238 D.L.R. (4th) 577; Halpern v. Canada (Attorney General) (2003), 225 D.L.R. (4th) 529, (2003), 65 O.R. (3d) 161(Ont. C.A.; Barbeau v. British Columbia, 2003 BCCA 406 (CanLII), (2003), 107 C.R.R. (2d) 51 (BC C.A.); Dunbar & Edge v. Yukon (Government of) & Canada (A.G.), 2004 YKSC 54 (2004), 122 C.R.R. (2d) 149 (Yuk. S.C.).
3. Most notably this right is enshrined in Article 16 of the Universal Declaration of Human Rights. But Article 16 restricts the right to marry and found a family to men and women and, at the time it was adopted, only contemplated a right to found a natural family – in the 1940's reproductive technologies such as we have today were unknown.

marriage automatically does, unlinks parenthood from biology. In doing so, it unavoidably takes away children's right to both a mother and a father and their right (unless an exception is justified as being in the best interests of that particular child, as in adoption), to know and be reared within his own biological family. (As an aside, in contrast, because civil unions do not carry the right to found a family, they avoid this problem.) 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. The exception to biological parenthood, which used to be allowed for through adoption law, becomes the norm.

Same-sex marriage advocates argue that children do not need both a mother and a father, and 'genderless parenting' is just as good or even better than opposite-sex parenting, including because all children are wanted children and don't come into existence by 'accident'. Research is increasingly indicating, however, that men and women parent differently (Lamb, 2004; Grossmann, Grossmann, Fremmer-Bombik, Kindler, Scheuerer-Englisch & Zimmermann 2002; Rohner & Veneziano 2001; Swain, Lorberbaum, Kose, & Lane 2007; Wilcox, 2005, 2007). In addition, epigenetic studies that focus on the interaction of genes and the environment, (e.g. Weaver et al. 2004) show that certain genes in young mammals are imprinted (activated) by parental behaviour, but shut down for life if not imprinted within a very limited critical window period. At the least, then, an ethical precautionary principle means those arguing same-sex families are just as good for children should have the burden of proof.

In other words, the *Civil Marriage Act* radically changes the primary basis of parenthood from natural or biological parenthood to legal (and social) parenthood. That change breaks the automatic link between biological and legal parenthood at the institutional level and, consequently, has major impact on the societal norms, symbols and values associated with parenthood. The nature and extent of the resulting change might not be readily apparent at first glance, because some impacts will be more distant, less direct and outside the immediate context of same-sex marriage.

For instance, the change from natural to legal parenthood is relevant to the use of new reproductive technologies (NRTs). Frequently the use of those technologies involves donated gametes (sperm and ova) which mean children are disconnected from their biological parents. Recognizing same-sex marriage could increase the use of these technologies, because same-sex couples are never naturally fertile as a couple and often resort to them to bring children into their relationships. Might they also be more likely to want children if they are married? Recent newspaper reports document the increased use of NRTs and surrogate motherhood by gay couples (Bellafante 2005). A large 'fertility industry', including brokerages and agencies with a focus on gay parenting, has sprung up around these technologies. A dominant feature of that industry is that it is commercially based. That means that the transmission of human life can be seen as or becomes just one more commercial opportunity. In the United States alone, it is reported to be a $3 billion(US) per year industry (Spar 2007). For commercial reasons, the industry is also a very strong advocate of payment of gamete donors and of 'genetic anonymity', that is, the non-identification of gamete donors. That raises the issue of children's rights to know the identity of their biological parents, which is relevant not only to children conceived through NRTs, but also to adopted children.

An even less tangible, more general and wider impact of NRTs is that children are produced (through reproduction), not created (through procreation). That means children, in general, move towards being desirable objects or products – not unique subjects – the ultimate trophies, rather than simply being the unconditionally loved miracles of life going forward. Future possibilities in the same vein are 'designer children' whose genetic characteristics are chosen by their

parents or the even more radical possibility with 'synthetic biology' of designing a child from the genes up – constructing the child gene by gene. The danger is that moving away from a basic norm of naturally conceived children who are brought into being and reared in their own biological family opens up precedents that carry serious risks and harms for all children.

This article examines the link between same-sex marriage, adoption and NRTs. That link is that all of them unlink the child–parent biological bond. It then explores some of the implications and likely outcomes of that unlinking.

LESSONS FROM NEW REPRODUCTIVE TECHNOLOGIES

The unrecognized child ...

A relatively recent article on 'egg-sharing' (which critics regard as a euphemism for a practice more accurately described as egg-trading[4]), demonstrates some of the ethical concerns raised by NRTs. In summarizing their forthcoming article, Simons and Ahuja (2005a)[5] observed:

> Egg-sharing is an arrangement that enables qualifying women to receive subsidised IVF treatment, in return for anonymously donating an agreed proportion of their eggs to paying recipients [Note that since Simons and Ahuja's article was published, anonymous gamete donation has been prohibited by law in the United Kingdom[6]]. In our paper for the *Obstetrician and Gynaecologist*,[7] published on 19 April 2005, we conclude that egg-sharing is ethically and legally sound, minimizes risk and should be the only form of egg donation permitted in the UK, as is the case in some other countries.
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> The first successful case of egg-sharing was reported by our centre in 1992, and although the treatment was legal, it was viewed as controversial for several reasons:
>
> 1. Women who were not paid might be manipulated into giving away eggs needed for their own treatment;
> 2. The collected eggs might be split in a way that favoured the paying recipient;
> 3. Unsuccessful donors might be psychologically affected if they believed that their recipients might have succeeded [in having a child] from the donated eggs.

Many of the advantages of egg-sharing – such as the shortening of waiting lists for donor eggs and the avoidance of exposing volunteer egg donors to unnecessary surgery and ovarian stimulation [and so on] ... were often lost in the heated debates that followed our announcement. However, following a painstaking review of the ethics, practicalities and patient attitudes towards egg-sharing, in 1998 the Human Fertilisation and Embryology Authority (HFEA) announced their support for this practice. Clearly defined regulations were made available in 2000, which were comprehensively expanded in the sixth HFEA Code of Practice. IVF treatment with donor

4. It has recently been suggested that the possibility of 'egg donation' should be included in sex education classes for high school students. People concerned about the practice of egg donation think the goal might be to familiarize young girls with the practice, persuade them to see it as altruistic, and encourage them to donate at a later date when they are adults (Global Egg Donation Resource, 2005).
5. Eric Simons is Clinical Director of the Cromwell IVF and Fertility Clinic; Kamed Ahuja is the Clinic's Scientific and Managing Director. The quote comes from the authors' pre-release comment on their forthcoming publication in *The Obstetrician and Gynaecologyst*.
6. The UK Human Fertilization and Embryology Authority (Disclosure of Donor Information) Regulations 2004 enable a donor-conceived person aged 18 or older conceived following gamete or embryo donation taking place after April 2005 to request the identity of their donor from the Human Fertilization and Embryology Authority. The regulations provide no rights to donors or recipients to learn the identity of each other, either at the time of donation or subsequently. (The *Human Fertilisation and Embryology Act 1990* c. 37 establishes the UK Human Fertilization and Embryology Authority.)
7. See Simons and Ahuja (2005b).

> eggs has increased over the following years, due largely to the increasing acceptability of egg-sharing.[8]

Notice anything about this statement? There is not a single mention of the primary person affected by such arrangements and the technologies they employ – namely, the resulting child. That is not unusual – indeed, it has been the norm since 1978 when NRTs burst onto the scene in the blaze of media attention that surrounded the birth of Louise Brown, the original 'test tube' baby, the first child born from an embryo conceived outside a woman's body through *in vitro fertilization* (IVF).

Yet, the first question raised by NRTs should be whether it is ethical to use any particular one of them to bring children into the world, in particular, ethical vis-à-vis the resulting child – a question that is rarely addressed with respect to the use of NRTs in general. Rather, it is simply assumed that their use is justified, although there are some exceptions, such as reproductive cloning, where it is clear that such justification would be at least very difficult or, many people believe, impossible to establish. Then, if the use of NRTs is justified, one must ask under what conditions and subject to which legal safeguards and restrictions is that so? To respond ethically to that question we must explore the impact of NRTs on children born through their use. Yet, except for the possible impacts of NRTs on children's physical health, there has been an almost total failure to take into account other impacts of them on children.

But that is changing and that change is largely being precipitated by 'donor conceived adults' who only very recently, as the first NRTs babies reach adulthood, have spoken out and initiated an on-going public debate. Narelle Grech, an Australian, is one such adult. She replied to Simons and Ahuja (2005a) as follows:

> I am a 22 year old donor-conceived adult. I am completely appalled and upset about this supposed solution to shortages in donor eggs. To think that, in the 21st century, humans are trading eggs and sperm for money and children really saddens me.
>
> In the article, there is NO mention of the affects such programs will have on the person born as a result of such deals. That is what they are – deals; we are bargaining and trading human beings here as though they are items on supermarket shelves! Creating donor conceived people who all of these consenting adults know will be unable to trace their biological mothers is, to me, ignorant and cruel.
>
> I feel as though donor conceived people are the last to be thought of in these trade deals; only adults, including clinics, doctors and wannabe parents are mentioned, and this statement [of Dr. Simons] is completely false: 'However, even if the numbers of patients opting for such treatment drop, this would not constitute a criticism of egg-sharing itself, a practice that provides clear benefits to all participants and to society.'
>
> Clear benefits to all participants and society? This is a joke, right? So, the purpose of these programs – the person being born as a result – is obviously then not seen as someone of worth if you can ignore the effects these agreements will have on them!
>
> Have we, as a society, learnt absolutely nothing from such movements as adoption? To say and imply that everyone will be a-ok with this situation is naive. What about the person being born as a result who has no say in this intentional separation from their biological mother and their maternal family?? What about their half siblings possibly created from the same women's egg donations, and her children that she may go on to have? What about the questions that the child/person may

8. Simons and Ahuja (2005a), http://www.bionews.org.uk/commentary.lasso?storyid=2534 (accessed April 25, 2005).

have as they grow up that their parents will never be able to answer?

Little bits of non-identifying information will not substitute for the real person: that person's family! You are not only encouraging people to intentionally separate people from their families, you are going to be the cause of people who have to question their identity, and no one on this earth should ever have to do that.

How dare someone take away someone else's freedom to know themself! It is one of the most de-humanising experiences I have had to face in my life. To look in the mirror on a day to day basis and question so much is one of the worst feelings.

Anonymous donation is completely unethical and to suggest that everyone in society will be happy with this egg-sharing deal really strikes me as ignorant advertising by professionals and academics who should know better.

One day, the world will look back on these experiments with human lives in disgust – I am sure of it – and at the centre will be the clinics, doctors and 'professionals' who thought this was all a great idea ...

'If we don't stand for up for children, then we don't stand for much at all.' – *Marian Wright Edelman*

(Narelle Grech, Donor-conceived adult, used with permission of the author, *Tangled Webs*, Australia[9])

And Narelle Grech's response is not a one-off. Surveys of donor-conceived adults show the same feelings and beliefs she expresses. In particular, donor-conceived adults believe that they have the right to know who their biological parents are and that no one, particularly not society itself, can justify breaching that right (Skelton 2006). Yet some adults wanting to have children act deliberately to breach it.

Deliberately destroying children's biological links ...

One response to the British law prohibiting anonymous gamete donations and recognizing children's rights to know the identity of their biological parents has been to establish facilities that are not bound by the law (see for instance, the website Mannotincluded.com[10]). The law covers only frozen sperm, not fresh sperm, the latter of which, therefore, can be provided anonymously through unregulated internet sperm agencies. One such agency, *Man Not Included* (see Bellafante 2005), whose 'Diamond Extra Package' cost £4147.50(UK), made a special 'pitch' to both lesbians, who constitute around 40% of sperm recipients, and, much more unusually, to gay sperm donors. That such agencies are targeting lesbians and gay men might indicate that they are all likely to want anonymity with respect to genetic parentage, whether the person is the sperm donor, the sperm recipient (the other genetic parent) or the non-genetic social parent (the biological mother's woman partner). Once again, the rights and interests of the resulting child are not factored into the arrangements.

In contrast, rather than soliciting gay donors, the US Food and Drug Administration is implementing new rules that recommend 'that any man who has engaged in homosexual sex in the previous five years be banned from serving as an anonymous sperm donor ... [because] collectively they pose a higher-than-average risk of carrying the AIDS virus' (Associated Press 2005). The recommendation has been decried by gay rights activists as discriminatory and stigmatizing. In doing so, they do not mention the risks of HIV infection to the resulting child as a relevant consideration, and neither they nor the FDA raise the issue of the ethics of anonymous donation, which simply seems to be assumed to be ethical.

Sometimes, further scientific advances that raise ethical problems can cause us to see ethical

9. Used with permission of the author. See also www.tangledwebs.org.au
10. See for instance: http://www.mannotincluded.com/ (accessed April 25, 2005). Note. When this website was accessed on July 18, 2007, Mannotincluded.com was in liquidation.

problems in practices that, up to that time, we have accepted as ethical. Advances in NRTs have done that with respect to artificial insemination by donor (AID), in particular when the donation is anonymous. The relatively long-established societal view that AID, itself, and anonymous AID were ethically acceptable practices is now being challenged by people other than those who have always disagreed with it, mainly on religious grounds. It also merits noting, here, that sometimes scientific advances can solve rather than create ethical problems. For example, those relating to so-called 'spare' or 'left-over' embryos from IVF should be dramatically reduced now that unfertilized ova can be stored and embryos need only be created when they are to be transferred to a woman's uterus.

Ethically unacceptable biological links ...

But the possibility of freezing ova raises other ethical problems – including the opposite side of the coin of anonymous gamete donation, namely, identified problematic biological links – and also shows that the ethical issues raised by NRTs are not limited to their use by same-sex couples. Very recently, it was announced that a Montreal woman, Melanie Boivin, had undergone ovarian stimulation and had her ova (eggs) frozen for possible future use by her daughter, Flavie, who has Turner's syndrome and who will be infertile as a result. While Melanie's action was done entirely out of love for her child, if Flavie uses those ova she would give birth to her half-brother or half-sister, and the child would be the son or daughter and grandchild of Melanie. As well, it would be the child of Melanie and her daughter's husband (Somerville 2007).

Leaving aside for the moment the most fundamental question of whether any gamete donation is ethical, here's a sampling of some ethics questions I've been asked about this case: If a young man is infertile and his wife fertile and they belong to a cultural group in which genetic relationship is very important, is it acceptable for the man's father to donate sperm to inseminate his son's wife? This would result in the same genetic relationship on the male side as would result on the female side in the Boivin case. I would argue that both are ethically unacceptable, but if the male donation is seen as acceptable, consistency seems to require, at least at first glance, that the female donation be treated in the same way.

Is one problem here that it's a parent donating to a child? What about the other way around – a daughter donating ova to her mother who has experienced premature menopause? If we accept that gamete donation can be ethical in some circumstances, would it be ethical for a brother to donate sperm to a brother, or a sister donate ova to a sister? Or is any donation between close relatives unethical? An obvious case of such ethical unacceptability would be a brother donating sperm for his sister's use. This would not be incest, because that requires sexual intercourse, but the vast majority of people would see it as ethically wrong, quite apart from the genetic risk involved for the resulting child. But how should we view these other 'related donor' cases and do they all raise the same ethical issues? For instance, is a man donating sperm for his son's use ethically different from a woman donating ova for her daughter's use? The wider question that raises is: Are there ethically relevant differences between male and female donation of gametes? And the even wider one: Is gamete donation itself ethically acceptable?

Canada's inconsistent approach

In Canada, the use of donated gametes for creating children is legally recognized in the *Assisted Human Reproduction Act* 2004 (AHR Act)[11]

11. *Assisted Human Reproduction Act*, S.C. 2004, c. 2.

which regulates this practice Whether and under what conditions gamete or embryo donation is ethical is, however, a different question.

Children's rights to know their genetic identity ...

The right of children born through gamete donation or who are adopted to know the identity of their biological parents is a confused area in Canada. The approach taken with respect to honouring this right is inconsistent across the country and varies with the different ways in which fully or partially 'non-biological families' come about.

For instance, although some provinces have been giving people adopted as children access to information regarding their biological parents, Ontario has only recently enacted law that will allow them such access (a right that does not operate retrospectively). One of Canada's national newspapers, the *Globe & Mail* rightly applauded this development: 'Ethics, human rights and international law – as well as considerations of such children's health and well-being, and, ever-increasingly, what constitutes appropriate medical care – all require that adopted children have access to information regarding their biological parents' (*Globe & Mail*, 2004) And it is not just these children who have this right, but all their future descendants as well. *That means that as a society we have two obligations: not to be complicit in approaches that deprive adopted children of their right of access to knowledge of their biological parents and to establish systems that give them such access. Both of these obligations are of the same basic nature, ones of non-malfeasance – obligations not to do harm.*

But those obligations are owed not only to adopted children, but also to those born through the use of reproductive technologies – a group the *Globe* (whose editorial board strongly supports same-sex marriage) does not mention. Why was it not of equal concern to them that the *Assisted Human Reproduction Act* which was passed by Parliament only in 2004 when we were fully aware of children's claims to a right to know their biological parentage, breaches both these obligations? The Act does not enact a right for children born from donated gametes (sperm and ova) or who began life as a donated embryo to know who their biological parents are – to know through whom life, itself, traveled to them. On the contrary, at s. 18(2) the Act makes it a criminal offence, with possible consequences of a substantial fine (up to $250,000(C)) and imprisonment (for up to 5 years), to disclose such information without the consent of the donor(s) (s. 61(a)(b)). And, in using the law to make them 'genetic orphans' – choosing to give primacy to adults' preferences (that donor-conceived children not know who their biological parents are) over children's rights and needs – we all, as a society, become complicit in intentionally depriving these children of their right to know their lineage. Not giving a person the option of knowing their biological origins is harmful to them, which is the reason society should not, contrary to the current situation in Canada, approve, especially through law, or fund any procedure that results in any person not having access to knowledge about their biological origins.

In this context, it is interesting to consider the argument of advocates of same-sex marriage in favour of its legal recognition, namely, that even though not all same-sex couples will want to marry they have a right to have the option of doing so, and apply the same reasoning to children's rights to know their biological origins: Even though not all children conceived through donated gametes and NRTs will want to know their origins, they have a right to have the option of doing so.[12]

The most important and powerful lobby group arguing against the possible future prohibition of anonymous gamete donation, and also against the present prohibition in Canada of pay-

12. I am indebted for this insight to Professor Frank Brennan SJ, personal communication, May 5, 2005.

ment for gametes, embryos or gestational services, is the 'fertility industry'. That is true in both Canada and other countries where such services are offered. Diane Allen, President of the Canadian Infertility Network, says that, even with the legislative prohibition of payment in place in Canada:

> a real, enforced ban on payment to donors (and surrogates) beyond reimbursement for expenses directly related to the act of donation – the prohibition in [the *Assisted Human Reproduction Act*] ... – is just being ignored or creatively circumvented at present, and Health Canada seems unwilling/unable to do anything about it – they say people should 'call the RCMP' [The Royal Canadian Mounted Police – the Federal police force in Canada]. Yeah, right, can't you just imagine the reaction!
>
> (Personal communication, email, April 25, 2005)

That likely non-reaction can be compared with the likely reaction to the selling of tissues and organs for transplant, sales that are also legally prohibited. In a case that attracted substantial media attention, the Royal Victoria Hospital in Montreal refused to carry out a live organ donor transplant of a kidney from an allegedly altruistic donor from a developing country to a Canadian man. The reason: the hospital was concerned that there might have been some form of payment to the donor and that would be unethical (*The [Montreal] Gazette*, 2005).

New rights for children ...

The legal recognition of same-sex marriage in Canada not only raises new concerns about the negation of children's 'old' rights with respect to their biological origins – their rights to know who their biological mother and biological father are and, unless the contrary is indicated as being in the 'best interests' of a particular child, to be reared by those parents. But also, the combination of same-sex marriage and avant garde reproductive technologies now on the horizon raises further ethical issues in this regard, which could also be relevant to reproduction by infertile opposite-sex couples who use these technologies. Professor Jack Mahoney (2003: 737) postulated that '[a]ny 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.' In order to follow that advice, current advances in NRTs make it necessary to formulate a new right for children, whether they are being brought into same-sex or opposite-sex marriages, that would have been unimaginable until very recently.

Children have a right to be conceived with a natural biological heritage – that is, untampered with biological origins – in particular, 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, the man being, and being known as, the biological father of the child and the woman being, and being known as, the biological mother of the child. 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. *A child's right to be conceived with a natural biological heritage is the most fundamental human right* (Habermas 2003; Somerville 2004a, 2004b, 2006a, 2006b).

The rights to a natural biological heritage and to knowledge of their biological origins are natural rights of the human person in that they are not dependent for philosophical cogency on the positive or common law of the state. No matter what one's jurisprudential disposition, one cannot postulate a just law that denies either of these rights. Each of these rights is constitutive of the human person's self identity which precedes citizenship and which cannot be denied by other citizens or the state, even in the interests of other citizens who seek the prerogative to bear children without these rights. The right to found a family does not include the right to bear children

denied their natural rights of biological identity and knowledge.[13] The right to found a family is a negative content right, that is, a right not to be interfered with in conceiving and bearing children naturally. It is not a right to bear children, in particular, it is not a right to have access to reproductive technologies to do so – that is, a positive content right. However, people claiming such a right and, correlatively, arguing against the legitimacy of any restrictions on access to these technologies, propose that the right to found a family should be interpreted as a right to bear children and have access to NRTs to do so. I believe that access to such technologies is best conceptualized as a privilege, which means that access can be regulated and restricted, provided those restrictions are in accordance with the requirements of ethics and law.

Nor does right to found a family include denying children at least the chance, when being conceived, of meeting their biological parents. Conceiving children with gametes from a dead donor, as, for example, an Australian court authorized (Kerjab 2005), denies them this opportunity. In that case the judge considered only the rights and wishes of the adults involved. He canvassed the woman's rights to have access to her dead husband's sperm which had been taken at her request after he died and without his prior consent, and focused on what the man could be presumed to have wanted with regard to her using the sperm to conceive his child post mortem.

Moreover, one can reach the same conclusions in ethics without relying on principle-based ethical analysis. Even from a perspective of ethical relativism, because it is prima facie harmful to children to create them without a natural biological heritage or without the right to know their biological origins or knowing their biological parent is dead, doing so is unethical.

A right to a natural biological heritage or a definition of the term 'biological origins' was not necessary in the past, because there was no way this right could be breached and the term 'biological origins' could have only one meaning, the natural union of a man's sperm and a woman's ovum. Moreover, the addition of the words man and woman in defining the right, 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. Such practices must be prohibited and that requires that we recognize that all children have a right to be born of the union of a man's natural sperm and a woman's natural ovum. As well, 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.

In order to mitigate the harms to children that can be avoided, a statement of children's rights must be legislated. To summarize, these rights should include:

1. The right to be conceived with a natural biological heritage – that is, to have unmodified biological origins – in particular, to be conceived from a natural sperm from one identified living adult man and a natural ovum from one identified living adult woman;
2. The right to know the identity of one's biological parents.

And a prohibition on societal funding or support of any activities that contravene these rights of children should be enacted. I leave aside here the ethics of society's involvement in intentionally breaching a child's right to be reared by both a mother and a father – a right which same-sex

13. I am indebted to Professor Frank Brennan SJ for this formulation of children's rights with respect to their biological origins (personal communication, May 9, 2005).

marriage obviously conflicts with in the most fundamental way. Indeed, same-sex marriage legislates directly against this right of children.

The right to found a family ...

I have written elsewhere about how legalizing same-sex marriage disconnects marriage from the inherently procreative relationship between one man and one woman and in doing so eliminates the societal level symbolism and values related to procreation, and the protections and rights of children with respect to their biological family that are established by the institution of marriage when it is limited to opposite-sex couples (Somerville 2004a, 2004 b). In the same chapter, I have also written about marriage being a compound right under international and national law – the right to marry and found a family. This right to found a family (which I have argued above should be limited by children's rights to have natural origins, know their genetic identity and be conceived with natural gametes from an identified living adult man and an identified living adult woman) automatically goes with marriage. It connects same-sex marriage with the extended development and more frequent use of reproductive technologies, because, as mentioned already, they are likely to be employed to bring children into same-sex relationships, that is, to exercise, in practice, the right to found a family. One way to describe 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 chief executive of one Sydney (Australia) clinic said in 2005: 'In the future you will have sex for fun, but when you want babies, you'll have IVF.'[14]

The Canadian *Civil Marriage Act* recognizes that same-sex marriage disconnects marriage from procreation and institutionalizes that unlinking. It does so by amending the term 'natural parent' in federal legislation such as the *Income Tax Act*, to read 'legal parent'. That corresponds to a change from the natural/biological family to the legal family as the norm and basic unit of society. Because same-sex couples cannot create a natural/biological family (at least they cannot do so naturally), such a change is necessary if their right to found a family is to have any reality in practice. Attributing the right, as marriage necessarily does, without providing for its exercise would be meaningless. It would be analogous to establishing a right to healthcare, but not providing any access to it. But the right of same-sex couples to found a family raises ethical and legal issues with impact well beyond same-sex marriage.

For example, it raises questions of the division of powers under the Canadian Constitution and issues of federal versus provincial constitutional jurisdiction. For instance, the Government of Quebec is presently in the Court of Appeal of Quebec challenging the constitutional validity of the AHR Act (2004) on the grounds that, because health is a provincial matter, the federal government had no authority to enact the AHR Act.

The right to found a family also raises new issues of constitutionally prohibited discrimination beyond that involved in excluding same-sex couples from marriage itself. Diane Allen, President of the Canadian Infertility Network, wrote:

> Lesbians/gays are planning a challenge to the AHR Act on the basis that the ban on payment to donors/surrogates discriminates against their right to 'found a family' as guaranteed under Article 16 of the United Nations Universal Declaration of Human Rights... which states that 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.' (A successful legal challenge could even require the government to pay for

14. http://www.theage.com.au/news/Opinion/Inside-the-secret-world-of-IVF/2005/05 (accessed May 18, 2005).

> surrogates and egg donors for gay men, and sperm donors for lesbian women, so that they have an equal right to form a family.)
>
> (Personal communication, email, April 24, 2005)

The concordance of interests between the Government of Quebec and gay rights advocates in pursuing such a case, although for different purposes, is an increasingly common phenomenon in relation to social–ethical values issues such as those raised by NRTs. Another such partnership has been between feminists opposed to NRTs as demeaning to women and men taking power over them, on the one hand, and, on the other, people who strongly object to NRTs on religious grounds.

In addition, because the Federal Government can only change the definition of the family with respect to federal law, there could now be inconsistency between who constitutes a family under federal law as compared with under provincial law.[15] As Lambert wrote:

> Basically, the question I am looking at is the following: if the definition of marriage is defined federally, and laws that are contrary to the Charter are of 'no force and effect', how is it that some provinces have continued to operate under one definition of marriage and others under another? How can we justify this? Does this mean that Canada has 'federal Ontario law', 'federal Quebec law', etc.? I don't have an answer to these questions and I'm not sure whether I want to argue in favour of uniformity or pluralism. Nevertheless, I am trying to find a justification for these solutions, and I am not satisfied with the argument that superior court rulings on federal law should be completely ineffective in other provinces.
>
> (Personal communication, May 10, 2005)

When the Americans were debating the definition of death, which is governed by state law, there used to be a joke that one could be dead in one state and alive again when moved to another state with a different definition and so on. Here people could be a family in one context governed by federal law, but not in another governed by provincial law, or even a family and not a family within the same general context – for example, the payment of federal taxes as compared with provincial taxes.

Changing from the natural to the legal family ...

The *Civil Marriage Act*, in eliminating the natural family (recognized by law) in favour of the (purely) legal family as the basis of family law, also results in a profound change in the legal theory under-pinning that law. Instead of the state using the law to recognize the natural reality of the biological bonds that exist between parents and children, as it does in the institution of traditional marriage, same-sex marriage means the state must use the law to constitute parental bonds, as it does in adoption. That is a move away from the use of the law to recognize innate, naturally based, fundamental human rights, in this case of children with respect to their parents and vice versa, to seeing the law as establishing those rights. The danger is that what the law creates, it can also take away. Rights established by law are far more fragile than those just recognized by law, because the latter exist independently of the law.

It is also interesting to consider whether the basic presumption of rights of 'family privacy' – the concept that the state must not interfere in the family unless it can show justification for doing so – will be changed by the *Civil Marriage Act's* change from natural parent to legal parent. As explained, parents' and children's natural rights vis-à-vis each other, which the state must justify infringing upon, will become legal rights created by the state. That means that the holder of the foundational right on which the family's rights are established and to which exceptions

15. For an interesting discussion of the impact same-sex marriage could have on Canadian constitutional law, in general, see Lambert (2005).

must be justified by persons or institutions breaching it, shifts from parents to the state. In other words, parents' rights over children and children's rights with respect to their parents will be derived from the state, not vice versa as at present. That means parents' and children's rights with respect to each other change from being first order ones to second order ones. That, in turn, means the ultimate rights with respect to deciding about what should or should not be done to children, for example, their medical treatment, rest with the state not the parents as is currently true; where that matters is when there is conflict between parents and the state about children's treatment. Although parents' decisions about children's medical treatment can, as the law presently stands, be overridden by courts, the basic presumption is that parents have a right to decide and contravening that right must be clearly justified. Making legal parenthood the foundational form of parenthood may change that.

A change from natural to legal parenthood is also consistent with some other approaches to parenthood that have been suggested from time to time in the past, and are surfacing again, for example, the proposal that people should have to obtain a state license that would permit them to have children (Wagner 2005).

But while the legal theory discussed above is important, and it would be a serious mistake to underestimate its powerful impact on practice, what really matters here is how the change from natural to legal parenthood will affect the rights and lives of real children in their day to day existence.

First, although biology is the only bond that cannot, in fact, be annulled, the change means that the law separates the bond between parents and children from biology (Adolphe 2005). That, in turn, means that children do not have a *prima facie* right to know and be reared by their own biological parents or a *prima facie* right to be brought up by both a mother and a father. Those rights are no longer the societal norm to which exceptions in individual cases must be justified. An old New Yorker Magazine cartoon, published just after new reproductive technologies became available, comes to mind. It shows a row of adults at a cocktail party, each holding a glass of champagne. A nurse and a little boy, who is holding the nurse's hand, stand in front of them with their backs to the reader. The nurse says to the child: 'This is biological mummy, biological daddy, gestational mummy, social mummy, social daddy, the lawyer who made all the arrangements, and your psychiatrist who will try to sort you out as you grow up!' The attributes of parenthood have been fragmented by NRTs, whereas previously they coalesced in two people, a female mother and a male father who were, as a general rule, the biological parents of the child. Same-sex marriage and the law that enacted it in Canada, the *Civil Marriage Act*, institutionalizes that fragmentation as the new societal norm.

Regrettably, Canada is not unique in enacting legislation that legitimates de-linking children from their biological parents and them – and all their descendants – from their wider biological family. How many other countries will do likewise remains to be seen.

Two or more legal parents ...

The New Zealand Law Commission (2005) published a report, 'New Issues in Legal Parenthood', which was immediately tabled in the New Zealand Parliament. The Report makes it explicit how radical the effects of changing from natural to legal parenthood – disconnecting parenthood from natural parenthood – are. The Minister in charge of the Law Commission described the report as follows:

> [It] focuses on how the law determines who is a parent, and is guided by principles including the child's welfare and best interests, and the desirability of clarity and certainty [about who is a parent] at the earliest possible time in the child's life. It also focuses on 'the need for individuals to access information about their genetic and gestational parentage; the desirability of

> autonomy and collaboration in parenting; and the equality of children regardless of the circumstances of their creation or family form'.
>
> One of the suggested legal reforms is to give donors of egg and sperm legal parenthood status which could mean that a child has 3 parents. Donors would be able to 'opt in' to legal parenthood after agreeing with the other two parents. The role of the donor parent would be defined within a pre-birth agreement and the 'third parent' would be as liable to child support as the other two parents. The Commission also wants there to be a section on the birth certificate of a child conceived using donor gametes or surrogacy that can indicate that 'extra information' is available about the person's parentage.
>
> (New Zealand Law Commission, 2005)

In other words, the number of parents a child has, if there is more than one, will be a matter of private agreement between two or more adults. Moreover, note that the child's 'best interests' are not paramount contrary to what has traditionally been true in family law; they are just 'included' as one of the principles, among others, that 'guided' the proposals made in the report.

The Government of New Zealand was obliged to respond to these proposals within 6 months. They did so agreeing with some, placing others under consideration subject to further consultation and research, and disagreeing with others (see New Zealand Ministry of Justice, 2006). The second largest opposition party in the parliament responded immediately, as reported in the same 2006 document: 'New Zealanders should be asking just where the politically correct madness and experimentation with our children's future is going to stop.' In contrast, the *New Zealand Herald* (2005) editorialized as follows:

> [W]hatever the cause for political trepidation, there is little in the Law Commission's suggestions that does not represent a reasoned response to societal change and developments in birth technology and DNA testing. In sum, they recognise that the law must protect children and make their welfare paramount.

It does not seem to occur to the editorialists to consider that it might be best for children if they were not brought into the world through means or in planned circumstances that will deprive them of having both a mother and a father, preferably their own biological parents, and of knowing their genetic identity and being able to live in such a way as to fully experience it. Moreover, their statement that children's welfare must be paramount seems to be at odds with the report's stance.

Multiple parents ...

The questions raised by the Law Commission's proposal range from the mundane, although far from unimportant for being so, to brave new reproductive world possibilities. For instance, birth certificates are used to enroll children in school, to apply for marriage licenses and so on, which raises questions of protection of privacy rights and issues of confidentiality for children with more than two parents as the New Zealand Law Commission recognized. One of their suggestions is that another 'certificate' could be designed for use for such purposes. What this example should alert us to, however, is the very widespread impact that disconnecting children from their natural parents would have on a broad range of everyday societal institutions.

Other possibilities are avant garde ones and take us back, once again, to the question, what are children's rights not to be brought into life in certain ways that are or will become possible with NRTs? Cloning (creating a child through asexual replication in contrast to sexual reproduction) has been banned in Canada (AHR Act 2004 s. 5 [1] [a]), although, as noted before, that ban might be challenged by couples in same-sex marriages. But a baby who has three genetic parents (the mitochondrial DNA of one ovum donor, the nuclear DNA of the gestational

mother's ovum and the DNA of the father's sperm) is likely to be born in the United Kingdom. The UK Human Fertilisation and Embryology Authority, has given permission for the creation of such a baby (Henderson 2007). The child's three parents could be registered on the proposed New Zealand birth certificate, if they lived in that country.

As mentioned previously, technologies on the horizon include making gametes from adult stem cells and an embryo from the gametes, or making an embryo from two ova or two sperm. Does the New Zealand proposal foreshadow not only two women, but also three or more women or, likewise, not only two men, but also three or more, or some combination of three or more men and women being the genetic parents of a child and being entitled to be registered as the child's parents? There has been valid concern that legally recognizing same-sex marriage could open up polygamy, because, unlike opposite-sex marriage, which links marriage to the primary inherently procreative relationship between one man and one woman, there is no inherent reason to limit same-sex marriage to only two people (Somerville, 2005a, 2005b). And if same-sex marriages can include more than two spouses, why should opposite-sex ones not be the same? Moreover, even when limited to two people, same-sex marriage opens up marriage for redefinition and, therefore, could set a precedent that makes multiple husbands or wives a possibility on the grounds that that is just a further redefinition of marriage. But so far the possibility of its opening up multiple parenting, especially multiple genetic parenting has not been on the radar screen. Indeed, for people who oppose same-sex marriage to have raised that as a risk, is likely to have been branded as 'hysterical scare mongering'. And yet there are cases that carry 'early warning' signs already being decided in Canadian courts, that should have made this possibility apparent even before the New Zealand report was released.

The Quebec Civil Code was amended in 2002 to provide for any two adults, who are neither married nor in a civil union, nor in an 'ascendant or descendant [relationship], nor a brother or sister', to enter into a civil union (see article 521.1). The Code also amended the law to recognize 'parental projects involving assisted procreation' (article 538). The spouse of the child's mother – whether a man or another woman – 'is presumed to be the father' (article 525). 'If both parents are women, the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child' (article 539). In short, the birth mother's civil union woman partner can be the father on the child's birth certificate.

In a Montreal case, the genetic father of a child born to two women in a civil union was seeking to be named as the father of the child on the child's birth certificate and to have parental rights. The birth mother was strongly in favour of granting him these rights, but her spouse objected. The women's civil union had broken down (Hanes 2004), and one can only speculate whether the birth mother wanted to exclude the other woman from access to the child.

In a London, Ontario case, three adults – two lesbian women and the genetic father of the child – were in agreement in seeking an order that they should all be registered on the birth certificate as the child's parents. One of the women had a child and listed the biological father on the birth certificate (he is a friend of the couple). The other woman then applied for a 'declaration of parenthood' from the court. Basically, rather than her adopting the child and the biological father giving up parental rights, they asked that three parents be recognized for the child.[16] The trial judge refused the order on the technical ground that he had no jurisdiction because the governing legislation did not allow for more than two people to be recorded as the parents, but he indicated that he would have made the order requested if

16. I am indebted to Janet Epp Buckingham (BA LLB, LLD, for information about this case and discussion of it).

legislation had not stood in the way and it had been a matter left to his discretion. The three plaintiffs appealed to the Ontario Court of Appeal on the grounds that the law limiting parents to two is discriminatory against gays and lesbians because they are specially situated and cannot have children with just the two of them.[17] The Court of Appeal used its discretionary power to act in the 'best interests' of the child and ordered that the three plaintiffs be listed as parents.[18]

As a final thought on this issue, might it be more ethical to include the biological parents on the birth certificate together with an additional parent or parents if the law recognizes the latter as such, than not to do so? If so, should including the biological parents be required by law?

The Convention on the Rights of the Child

Like married women, children did not exist as legal persons until the 20th century; hence neither could claim rights. Women's rights emerged early in the century; the idea of children's human rights is only now emerging. As one human-rights lawyer puts it, 'children are the newest kids on the human-rights block.'

The general nature of human rights has been a barrier to recognizing children's human rights. Traditionally, human rights have been negative content rights against the state (that is, rights against the state doing something to an individual). Children need positive content rights that individuals must fulfill (that is, rights to something which others must provide).

The most widely adopted international convention in history – every country in the world, except the United States of America and Somalia has ratified it – the *Convention on the Rights of the Child*[19] is the most prominent and powerful statement of children's human rights. Are the current developments in Canada with respect to children's rights, outlined throughout this article, consistent with the requirements of the convention to which Canada is a signatory?

I will leave aside the complex legal issue of the impact of international law on domestic law when they are not consistent with each other and are both applicable, on their face, to the facts before the court, except to say that Canadian courts have taken international law into account in deciding domestic cases.

The *Convention on the Rights of the Child* establishes children's human rights to know and be raised in their birth families. *Article 7* provides that the child has 'from birth ... as far as possible, the right to know and be cared for by his or her parents'. *Article 8* gives the child the right 'to preserve his or her identity, including nationality, name and family relations as recognized by law'. And *Article 9* imposes a duty on the state to 'ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'. The convention expressly recognizes the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both on a regular basis, except if it is contrary to the child's best interests. And it provides that 'where such separation results from any action initiated by a State Party, ... that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child'. Could that obligation be interpreted to give children born from gamete donation that is supported

17. AA v. BB and CC, Ontario Court of Appeal File No. C39998, Court File No. FD 200/03.
18. A.A. v. B.B., 2007 ON CA 2, DATE: 2007/01/02, DOCKET: C39998.
19. *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, *entry into force* 2 September 1990, in accordance with article 49.

with state funds, or born into same-sex marriages which are authorized by the state, rights to state assistance to know their biological families?

As I have explained previously, legalizing same-sex marriage, which gives same-sex couples the right to found a family, overtly contravenes those rights of the child set out in the convention, if the words in the convention are given their usual meaning, which I propose is the correct interpretation. When the convention was drafted, same-sex marriage and its impact on children's rights to know and be reared in their birth family were not in contemplation.

It merits noting that the state parties to the convention have a duty to implement the rights of the child that it establishes. It goes without saying, therefore, that there is a duty not to intentionally contravene these rights as legalizing same-sex marriage necessarily does. Children's human rights were almost entirely neglected in the court cases and public and Parliamentary debates that resulted in Canada's *Civil Marriage Act*, which legally implemented same-sex marriage. Indeed, raising the issue was seen as highly inflammatory, as I can attest from personal experience.

Ethical considerations

So what ethical principles should guide us in deciding on children's rights in this area?

Consent ...

The only people who do not participate voluntarily in their creation, and who do not give their informed consent to the arrangements agreed upon, are the children. They are also the ones most profoundly affected by the way in which they come into being. Ethically, those factors indicate that when children's claims to know their genetic origins and adults' claims to privacy conflict, the children should prevail, that is, their rights should take precedence. Adopted children and children born from donated sperm, ova or embryos want to know their biological identity. (See their letters published in the Infertility Network Newsletters[20] in 2005 and 2006). Ethically, we must ensure that their right to do so is respected.

The emerging ethical doctrine of 'anticipated consent' is also important in this context. That requires us to try to stand in the shoes of the person affected by our decision and to ask: 'Can I reasonably anticipate that if the person were able to be asked, they would consent to what I want to do that will affect them?' What might we reasonably assume that a future child would consent to if they were able to make their wishes known? Evidence is starting to come in: 'Donor-conceived adults' 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'. They believe society was complicit in a serious wrong done to them in the way they were conceived and ask, 'How could anyone think they had the right to do this to me?'

Favour most vulnerable persons ...

The same result is reached in applying the ethical principle of a preference in favour of the most vulnerable persons. Children are among the most vulnerable citizens. Homosexuals are also a vulnerable group, but as adults their claims take second place to children's needs and rights. Moreover, in upholding children's rights we are acting in the best interests of all children, whether their sexual orientation later proves to be straight or gay, and of all citizens, because, at one stage, all of us are children.

Experimentation on children ...

The word experiment is a loaded one and should be used cautiously because of that, but in ethics it is sometimes appropriate to apply it, in its neutral, simply descriptive, non-judgmental sense, for the insights that doing so can provide. Recognition of same-sex marriage can be seen as an unprecedent-

20. The Infertility Network is a registered Canadian charity.

ed experiment on children, in general, in terms of the known and unknown risks and harms it presents for them by unlinking children from their biological parents. The ethical guidelines governing experimentation on human subjects are most strict with respect to those who either cannot give informed consent to their participation or are members of a vulnerable population. Children qualify in both categories, so attract the greatest degree of protection. Consequently, those who would subject children to such an experiment must show that they are clearly justified in doing so. No such justification has been presented in the case of same-sex marriage.

It merits noting here that it has been proposed that women who are egg donors should also be considered as human medical research subjects in order to give them the protections they need. Ethics researchers found that the risks of physical discomfort of egg donation were not adequately disclosed and those of infertility, or even death, not mentioned. Likewise, the psychological risks that exist for egg donors, regardless of whether the eggs are used for research or to help another woman conceive, were not considered (Stanford University Medical Centre, 2005).

Chance differs ethically from choice ...

There is also an ethical difference between a situation occurring by chance and intentionally creating the same situation. Some children conceived naturally may not be able to identify their genetic father. But to intentionally create a situation that makes identifying either or both genetic parents impossible – and for Parliament and society to ensure that is the case, as has happened with the prohibition in the AHR Act (2004 s. 18 (2), s. 61 (a)(b)) of the disclosure of gamete donors' identities without their consent – is deeply unethical. We have obligations not to deliberately create genetic orphans. Obligations not to impose the deep suffering and loss of identity that results from loss of a sense of connection to an individual–human–family past – a sense of connection to those who gave us life. It is paradoxical that in an era of sensitivity to individual human rights and 'intense' individualism, we are prepared to wipe out for others one of the most important bases on which we found a sense of individual identity.

Recognize a right to genetic identity ...

Sandra Walters, a person adopted as a child, now a lawyer and founder of an adopted persons' support group, the *Forget Me Not Society*, to whom I sent a draft copy of this article, in her response puts the case for children's rights to know their genetic identity far more powerfully than I can. She writes:

> I am glad that you could sense the grief in my writing [to you]. Adoptees are generally not permitted to express these emotions [about their loss of knowledge of and contact with their biological parents] as they are seen as ungrateful, and it is one way that we have been silenced (not doing today's donor-conceived adults any favours).
>
> I believe we need to examine the full extent of how, as you state in your paper, 'not knowing their biological origins is harmful to children'. It is only when the harm is fully acknowledged that we can look at adoption and other forms of legal constructs of 'parenthood' as an exception to the ideal (children knowing of and raised by a biological mother and father), to be resorted to cautiously and sparingly. There are alternatives to adoption where the biological parents are physically incapable of caring for their offspring: kinship care or guardianship is preferred in many countries as encouraging the child to remain connected to her family of origin.
>
> Your use of the term 'genetic orphans' hit home with me, as it also applies to those of us who have come out of the closed adoption system, with closed records remaining in many provinces and most states today. As you point

out in your paper, it is the 'fertility industry' which is a powerful lobby group which would seek to trivialize the import of the biological connection. Documented research is needed to demonstrate in a noticeable way the story of pain and loss that we hear every month at the Forget Me Not Society and which you have read in letters sent to you (and which is surely the tip of an enormous iceberg) ... In my view, there's something wrong if we, as a society, are not learning from our past mistakes. But first we need to acknowledge them as such; that's a message that I believe needs to be communicated.

(Personal communication, used with permission of Sandra Walters, May 10, 2005)

Recognize harms and ethical problems ...

I would like to emphasize a point made by Walters that constitutes a type of harm to children that needs to be recognized: Adopted children must repress their grief about their loss of genetic identity or be seen as ungrateful. Donor-conceived children born through NRTs face an even more complex trade-off in this respect as their very existence is inextricably entwined with that grief. Without the use of donor gametes and NRTs and the losses to them that way of coming into being entails, they would not exist. The theoretical choice for them (because they cannot have such a choice in fact) is existence with the loss of connection to their genetic family that entails or non-existence.

'First do no harm' ...

Powerful existential and ethical reasons, such as those outlined above, against concealing biological parents' identity condemn the practice even before we think of practical reasons that lead us to the same conclusion. As the genetic basis of medicine rapidly becomes more important, knowing about one's ancestors and siblings, or even other close relations, can be crucial to our health and well-being. Anonymous data on sperm and ova donors, given at a certain date, will be nowhere near as extensive and complete as what could be learnt at a later time, especially after those related to us have had children or grown older. As well, we are becoming increasingly aware, as discussed throughout this article, of the psychological harm caused to children who are denied access to their genetic identity – knowing that identity is integral to a person's sense of self.

There is a saying in ethics that 'good facts are essential to good ethics'. In a different sense than the one in which that maxim is usually used (that we need the facts of any given situation to identify, analyze and deal with the ethical issues it raises) making sure that children have all the facts about their biological parents is an ethical requirement.

'Birth rights/non-birth rights' ...

Litigation involving alleged 'birth rights' (or more accurately, 'rights to non-birth') of children and their parents, based on novel legal claims, has increased dramatically in the last fifteen or so years (Crockin 2005). At the same time as we are seeing claims to rights to live one's life with one's genetic identity intact, we are seeing also an increasing number of cases claiming damages for 'wrongful life' – a disabled child sues for having been born alleging that but for the negligence, usually of a physician or geneticist, he or she would never have been conceived or would have been aborted.[21] In claims for 'wrongful birth', the parents claim damages for negligence (for example, a failed sterilization or abortion, or negligent genetic advice), that resulted in the child being born when it would not otherwise have been, giving rise to their parental obligations to the child, especially the additional costs of providing for a disabled child. In both types of situation the rights of children in relation to their birth are in

21. *Arndt v. Smith* (1997) 148 D.L.R. (4th) (S.C.C.).

play, as are the rights of adults with respect to reproduction and having control and choice about the children they do or do not have.

In 'wrongful life' cases the child's allegation that, but for the negligence, she would not have been born, raises an existential problem for the courts, because, if not born, the child would not be present as a plaintiff. The vast majority of courts have rejected such claims on the grounds that life is better than no life – that one is not 'better-off dead'. But claims by a child for deliberately creating her 'genetically disconnected life' are not subject to the same problem. Moreover, not only healthcare professionals, but also parents could be subject to such claims.

Conclusion

So what are – or should be – all children's human rights with respect to their coming into being and knowledge of their parents? I believe that, arguably, the most fundamental human right of all is the right to born from natural human origins that have not been tampered with by anyone else: That the essence of one's very being is naturally human and un-designed. Those fundamental rights also include the right to know one's biological parents and if at all possible to be reared by them within one's wider biological family. Traditional marriage establishes these rights for children as the societal norm.

Same-sex marriage, which is advocated by its supporters with the best of intentions towards adults, will have the effect in law and at the level of societal norms, values and institutions, of setting children adrift genetically. In taking away children's right to a mother and a father, preferably their own biological parents, which same-sex marriage unavoidably does, we, as a society, are guilty of wiping out affected children's day to day experience of their genetic identity through interactions within their biological family and, with anonymous gamete donation, their genetic identity itself. These children – and their descendants – cannot sense themselves as embedded in a web of people, past, present and in the future, through whom they can trace the thread of life's passage down the generations to them.

Experiencing that embedding and the sense of connection it generates, is probably essential for experiencing an even larger one, described powerfully by Joseph Conrad in the preface to his book, *The Nigger of the 'Narcissus'* (1897). Speaking of the role of artists he says:

> [The artist] appeals to our capacity for delight and wonder, to the sense of mystery surrounding our lives; to our sense of pity, and beauty and pain ... and to the subtle but invincible conviction of solidarity that knits together the loneliness of innumerable hearts, to the solidarity in dreams, in joy, in sorrow, in aspirations, in illusions, in hope, in fear which binds men to each other, which binds together all humanity – *the dead to the living and the living to the unborn.*

Having access to knowledge of their extended biological family is the primary way in which each person can feel bound to both the dead and the unborn.

Our most recent experience of people's loss of genetic identity resulting from deliberate action on the part of society is with children born from donated gametes using NRTs, but, while only of 25 years' duration, it can provide important lessons about loss of genetic identity and of knowledge about and contact with one's biological parents. The same is true with respect to our much more long-standing experience with adoption. The conspiracy of silence that has surrounded adoption and is now being broken, provides an equally strong message to the identical effect. Donor-conceived and adopted children tell us that 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? That raises the issue of how our blood relatives help each of us to establish our human identity.

As far as we know, humans are the only animals where experiencing genetic relationship is

integral to their sense of themselves. What we know of the effects of eliminating that experience, is that doing so is frequently harmful to children, biological parents, families and society. It is true that sometimes unlinking children from their biological parents is unavoidable and the least harmful option available. But to set out to create such situations, and for society to be complicit in facilitating them, is unethical. The difference is easily understood by comparing adoption when that results from an accidental pregnancy and is seen to be in the 'best interests' of the child, and surrogate motherhood where the intention in becoming pregnant is to give away the child, that is, to separate the child from his or her biological mother. Society rightly allows and facilitates adoption, where it is justified, and just as rightly prohibits surrogacy and penalizes the people involved in any aspect of it.

NRTs challenge children's rights to natural biological origins and to know and experience their genetic family and heritage in their lives. Including same-sex marriage in the legal institution of marriage augments that challenge. Through same-sex marriage we are formally severing the genetic ties between children and their parents and, thereby, their extended biological/genetic family of siblings and other blood relations, and institutionalizing that severance at a societal level. In doing that, we take away the rights of all children (not just those brought up by same-sex couples) to know and experience their genetic heritage in their lives and withdraw society's recognition of its importance to them, their wider family and society itself. It is because of this change that same-sex marriage advocates are wrong when they claim, as they often do, that same-sex marriage does not affect opposite-sex marriage. Marriage is the institution that has been used by societies for thousands of years to establish fundamental human rights of children. Same-sex marriage eliminates these rights for all children.

As explained, because the right to marry includes the right to found a family, same-sex marriage also puts in jeopardy children's rights to natural genetic origins, which is arguably the most serious risk of all in light of the unprecedented powers over human reproduction introduced with NRTs. It's true that these technologies could also be used by opposite-sex couples, but legal prohibitions on their doing so are less likely to be classified as discrimination, and therefore invalid, than in the case of same-sex married couples none of whom can reproduce naturally.

If marriage involved only adults there is no good reason to oppose same-sex marriage. But for the sake of children, marriage should remain the union of one man and one woman.

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