The Impact of the Child Welfare Principle on Access to Assisted Reproductive Technology

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Abstract

Assisted Reproductive Technology has, in the last 40 years, raised numerous ethical questions. One of these ethical questions has been whether or not children born as a result of Assisted Reproductive Technology treatments may be harmed as a consequence of being brought into existence in this way. Harm caused to children is quite rightly a serious concern for society and society expects the State to intervene to protect children from parents who pose a significant risk to their children. Towards this end section 13(5) of the Human Fertilisation and Embryology Act 1990 requires licensed infertility treatment clinics to 'take into account the welfare of the child who may be born as a result of treatment' when considering whether or not to provide a woman with treatment services.

This thesis will argue that section 13(5) of the Human Fertilisation and Embryology Act 1990 should be amended as it is acts as nothing more than an arbitrary and unjustified infringement on an individual's right to reproductive liberty; is an ineffectual means of promoting the welfare of the child who may be born as a result of treatment; is philosophically incoherent; and is inconsistent with the law as applied in so-called 'wrongful life' cases. The argument that section 13(5) of the Human Fertilisation and Embryology Act 1990 should be amended will be grounded upon the contention that an individual's right to reproductive liberty should be accorded particular respect. This thesis will argue for a right to reproductive liberty which encompasses a negative right of the individual to be free from unjustified interference by the State when making reproductive choices.

The pervasive influence of the child welfare principle as applied in the context of decisions directly impacting upon them has, it will be argued, played a significant part in the inclusion and retention of section 13(5) within the Human Fertilisation and Embryology Act 1990. This thesis will examine the way in which the child welfare principle as applied to children has grown in influence and how

an unquestioning adherence to this worthy principle has led to an incongruous version of it being applied at the pre-conception stage. While the State have a solid mandate to protect the welfare of children this thesis will argue that that mandate cannot realistically be extended to apply to future children, when to refuse an individual access to Assisted Reproductive Technology has the effect of preventing the child whose welfare is to be taken into account from being brought into existence in the first place.

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Authors Declaration

I declare that, except where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature.....

Printed Name.....

Date.....

Abbreviations

- AC — Appeal Cases
- AID — Artificial Insemination by Donor
- All ER — All England Law Reports
- ART — Assisted Reproductive Technology
- ChD — Law Reports, Chancery Division
- CSOH — Court of Session Outer House
- ECHR — European Convention on Human Rights
- ECtHR — European Court of Human Rights
- EHRR — European Human Rights Review
- Eng Rep — English Reports
- EWCA Civ — England and Wales Court of Appeal (Civil Division)
- EWHC Fam — England and Wales Court of Appeal (Family Division)
- EWHC — England and Wales High Court
- Fam — Law Reports, Family Division
- Fam LR — Family Law Review
- FLC — Family Law Court
- FLR — Family Law Reports
- HC Deb — House of Commons Debate
- HFE Act 1990 — Human Fertilisation and Embryology Act 1990
- HFE Act 2008 — Human Fertilisation and Embryology Act 2008
- HFEA — Human Fertilisation and Embryology Authority

- HL Deb House of Lords Debate
- HRA Human Rights Act
- ICSI Intra-Cytoplasmic Sperm Injection
- IUI Intrauterine insemination
- IVF *In vitro* Fertilisation
- LJ Lord Justice
- NIQB Northern Ireland Queen's Bench
- PGD Pre-implantation Genetic Diagnosis
- QB Queens Bench
- SC Session Cases
- SCt Supreme Court
- SLT Scots Law Times
- UKHL United Kingdom House of Lords
- UKSC United Kingdom Supreme Court
- UNCRC United Nations Convention on the Rights of the Child
- UNUDHR United Nations Universal Declaration of Human Rights
- WLR Weekly Law Reports

CHAPTER ONE – INTRODUCTION

1.1 Introductory Remarks

Today in the UK when patients attend a licensed treatment clinic[1] seeking any regulated fertility treatment[2] it is presumed that if the treatment results in the birth of a child they will be 'supportive parents in the absence of any reasonable cause for concern that any child who may be born, or any other child, may be at risk of significant harm or neglect'.[3] Nonetheless it is a statutory requirement of the treatment clinic's licence that it carries out a child welfare assessment prior to offering treatment.[4] Section 13(5) of the Human Fertilisation and Embryology Act 1990 (HFE Act 1990) as amended by the Human Fertilisation and Embryology Act 2008 (HFE Act 2008) currently reads:

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

This thesis will examine the purported rationale for the inclusion of the welfare of the child assessment as a licensing requirement for clinics offering fertility

[1] Licences are granted to clinics by the Human Fertilisation and Embryology Authority (HFEA) under authority granted to the HFEA in terms of sec. 9 of the Human Fertilisation and Embryology Act 1990 (HFE Act 1990) to grant, vary, suspend and revoke a licence. The HFEA 1990 has been amended since enactment, most notably by the Human Fertilisation and Embryology Act 2008 (HFE Act 2008). All references to the HFEA 1990 are to the provisions of the Act currently in force unless specifically stated or the context demands otherwise.

[2] Sec. 2 (1) of the HFE Act 1990 defines 'treatment services' as meaning medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children. This includes in vitro fertilisation (IVF), intra-cytoplasmic sperm injection (ICSI) and Intrauterine insemination (IUI).

[3] Human Fertilisation and Embryology Authority Code of Practice, 8th Edition, First Published 2009, Revised April 2010, April 2011, October 2011, April 2012 and October 2013, para. 8.11, available at http://www.hfea.gov.uk/clinicalstaff.html (accessed on 1 November 2010) (henceforth, HFEA Code of Practice, 8th Edition).

[4] In terms of sec. 13(5) of the HFE Act 1990.

treatment services governed by the HFE Acts and ask whether or not its inclusion can be justified on the ground that it operates to fulfil a State duty to protect children from the risk of significant harm or neglect.

In 2010 the Human Fertilisation and Embryology Authority (HFEA) produced a pro forma entitled 'Welfare of the child: patient history form'[5] which the HFEA recommends clinics use to carry out the child welfare assessment 'in order to determine whether the prospective child is likely to face serious medical, physical or psychological harm.'[6] The patients[7] are therefore required to answer the following questions before they will be considered as suitable candidates for fertility treatment:

1. Do you have any previous convictions related to harming children?
2. Have any child protection measures been taken regarding your children?
3. Is there any serious violence or discord within your family environment?
4. Do you have any mental or physical conditions?
5. To your knowledge, is your child at increased risk of any transmissible or inherited disorders?
6. Do you have any drug or alcohol problems?
7. Are there any other aspects of your life or medical history which may pose a risk of serious harm to any child you might

[5] A copy of this form can be downloaded at http://www.hfea.gov.uk/1414.html (accessed on 12 December 2014). The original form issued in August 2010 was updated in June 2013.

[6] See HFEA Website: Welfare of the Child Assessment at http://www.hfea.gov.uk/1414.html (accessed on 12 December 2013).

[7] The form states that: 'This form should be completed by each patient requesting any fertility treatment regulated by the HFEA, including IUI. In surrogacy arrangements, both the commissioning couple and the surrogate (and her partner, if she has one) should complete this form'.

> have or anything which might impair your ability to care for such a child? [8]

The licensed clinic is also asked to contribute to the form by addressing the question of whether there is any concern that 'the prospective parents may not be supportive parents (i.e., that they show a lack of commitment to the health, well being and development of the prospective child)'.[9] If the answer to this question is 'yes' then the licensed clinic 'must specify if and how the wider family and social networks within which the child will be raised have been taken into account'.[10] Further, if additional information was sought by the clinic they 'must specify: a) grounds for seeking information, b) type of information sought and c) source of information (GP, social services etc.)'.[11] The clinic must then record any response received, any further action taken, the final decision, their grounds for refusal and inform the patients of any circumstances that may enable the clinic to reconsider its decision.[12] This is all part of what the HFEA call 'the welfare of the child assessment process'.[13]

In UK family law the assessment of the welfare of the child is *the* guiding principle to be applied by the courts when making decisions which impact upon the lives of the children concerned.[14] It will be argued that any question of

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[8] See fn 5.

[9] See fn 5.

[10] See fn 5.

[11] See fn 5.

[12] HFEA Code of Practice, 8th Edition, paras. 8.17 (c)

[13] HFEA Code of Practice, 8th Edition, paras. 8.2 – 8.9.

[14] In relation to England and Wales sec. 1(1) of the Children Act 1989reads:- When a court determines any question with respect to— (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration. In relation to Scotland sec. 11(7) of the Children (Scotland) Act 1995 reads:- In considering whether or not to make an order under subsection (1) above and what order to make, the court shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all.

whether the welfare of the child assessment process as applied to assisted reproductive technology (ART) is justified cannot be properly assessed without a full analysis of the scope, purpose and rationale behind the child welfare principle as applied in family law. It is clear that concerns about child welfare have influenced decisions about access to ART treatment from the fact that there exists a statutory requirement that treatment clinics take into account the welfare of the child to be born prior to offering treatment.[15] However it is the nature of this principle and its applicability to such treatment that will be examined in this thesis.

What this thesis will explore in greater detail is whether the two situations: requiring courts to treat the welfare of the child as the paramount consideration when making decisions which affect the life of an existing child in cases brought before them[16] and requiring treatment clinics to take into account the welfare of a child that might be born when deciding whether to grant access to treatment under the HFE Act 1990, are conceptually sufficiently similar to justify the use of the same approach. This thesis will argue that they are not and that section 13(5) should be amended to remove this specific requirement. However, the thesis is not seeking to call for the repeal of section 13(5) in its entirety.

The argument that section 13(5) should be completely repealed has been made by various authors in the past. Emily Jackson has stated that there is 'no satisfactory justification for its retention'.[17] Jackson's arguments for repeal are three fold. Firstly, that section 13(5) is ineffective because it is difficult to distinguish between adequate and inadequate parents particularly when the

[15] See fn 4.

[16] See for example, In re G (children) (FC) [2006] UKHL 43, para. 2 Lord Nicholls of Birkenhead: - 'In this case, as in all cases concerning the upbringing of children, the court seeks to identify the course which is in the best interests of the children. Their welfare is the court's paramount consideration'.

[17] E. Jackson, Conception and the Irrelevance of the Welfare Principle, The Modern Law Review, 2002, 65, 2, 176 - 203, 203..

assessment is carried out in a perfunctory way; secondly, that section 13(5) is unfair because it discriminates against the infertile; and thirdly, section 13(5) is incoherent because its application supports the premise that it might not be in a child's best interests to be born. Alghrani and Harris have also stated that 'we believe that the welfare provision contained in section 13(5) of the HFE Act should be removed from the legislation'.[18] Their position is rather differently framed as they argue that 'The HFE Act, which determines who may be granted access to assisted conception services based on a speculative judgment as to their potential to parent, is a clear and unjustifiable violation of reproductive liberty.'[19]

This work will be looked at in more detail in later chapters, but it is worth noting at this stage that these authors have made arguments for repeal having examined a number of specific aspects of section 13(5), such as the child welfare issues arising from the practice of pre-implantation diagnosis (PGD) and the creation of 'saviour siblings'. 'Saviour siblings' is a term which has arisen in the context of treatment governed by the HFEA Acts 'whereby embryos are selected with the same tissue type as an existing sibling who is suffering from a disease, so that when born, he or she can then donate umbilical cord stem cells or bone marrow to help treat the existing sibling'.[20] This context of course raises the question of the welfare of an existing child in addition to that of the welfare of the yet to be conceived child and a number of matters arising from the intentions of the parents and duties owed to all their children. While some of the ideas and discussion provided by this commentary are therefore of importance to this thesis, the centre of attention here differs.

This thesis will focus instead on the parental environment aspects of the child welfare assessment, as applied by section 13(5), concerning the possible

[18] A. Alghrani and J. Harris, Reproductive liberty: should the foundation of families be regulated?, Child and Family Law Quarterly, Vol 18, No 2, 2006, 1 - 18, 5.

[19] Ibid., 7.

[20] Ibid., 9.

conception of a child, without consideration of benefit or burden to existing children of the family. What is meant by the term 'parental environment' in this thesis is the environment within which the child is expected to be raised.

As will be demonstrated, the child welfare principle when applied in family law is used by the courts to determine what course of action is appropriate in respect of matters brought before them under the Children Acts.[21] While the circumstances in which such cases may arise are varied and include matters such as whether medical treatment may proceed in the event of disagreement between parents, children and healthcare practitioners, they are particularly frequently concerned with considering the risks posed to a child if it was to remain within a particular parenting environment. Cases examining questions of residence, contact and State protection of children which will be examined in more detail in Chapter Four are the leading examples of where parenting environment is the principal focus. The comparison draw between section 13(5) and the adoption process which will be examined in greater detail in Chapter Five is another area where parental environment in the sense used above takes centre stage. Further, the questions set out in the child welfare assessment pro forma of the HFEA, with the exception of question 5, all relate to parental environment and are thus typical of the matters which a family court tasked with carrying out a child welfare assessment would ask when considering an individual child's welfare. The link between the child welfare principle as applied in family law and the section 13(5) child welfare assessment is therefore particularly strong when examining the parental environment.

A focus on this particular aspect of section 13(5) will add to the body of knowledge in this area by concentrating on the impact of the child welfare principle as applied in the family courts on access to ART. Whilst previous authors have taken a more broad-brush approach to looking at a number of aspects of section 13(5), this thesis will solely be concerned with the issues pertaining to the welfare of the child to be born as far as they relate to being

[21] Children Act 1989; Children (Scotland) Act 1995

born into a supportive parenting environment. This will enable a detailed comparison of the appropriateness of applying the child welfare principle developed in one context of making decisions about children to what, it will be argued, is quite another.

For the same reason, this thesis will also not concern itself with child welfare concerns arising out of the increased risk of transmissible or inherited disorders to any child that might be born as a result of treatment. The development of the practice of Pre-implantation Genetic Diagnosis (PGD) now means that embryos free of the genetic inherited disorder can be tested, selected and implanted in a patent to ensure that the child to be born will not suffer from that particular inherited disorder. This has led to a great deal of analysis of how such a practice may impact upon the welfare of the child to be born.[22] Two particular objections have been posed. Firstly that 'it is wrong to choose traits of offspring, no matter how well intentioned'[23] because children would be harmed if 'manufactured' in this way. Secondly, that PGD is a move towards eugenics which would create children 'valued more for their genotype than for their inherent characteristics'.[24] Whilst these studies are fascinating in their own right, this thesis will not examine them in detail as they do not relate to questions of parenting environment but pertain to the 'type' of child to be born which is an question exclusive to the practice of ART and not a child welfare issue raised in the family courts.

As this thesis will come on to argue in more detail it was largely the influence of the widely applied and respected child welfare principle in family law which led to the introduction of section 13(5) in the first place. Examining the way in which parental environment concerns are addressed in family law and in the restriction of access to treatment by section 13(5) will enable the argument to

[22] See for example, J. A. Robertson, Extending preimplantation genetic diagnosis: the ethical debate Ethical issues in new uses of preimplantation genetic diagnosis. Human Reproduction, 2003, Volume 18, Number 3, 465 - 471.

[23] Ibid., 466

[24] Ibid.

be made that the simple adoption of this principle in the HFE Act 1990 has been inappropriate. It will be proposed that its retention in its present form is unjustified in so far as it has the potential to prevent access to ART on the grounds of the welfare of a yet-to-be-born 'child' being at risk from 'inadequate parenting'.

Whilst section 13(5) also requires clinics to take into account the welfare of any other existing child of the family before offering treatment, this thesis will not seek to examine that aspect of the licensing requirement in detail nor to make recommendations concerning it since the thesis takes the position that the welfare assessment of existing children is conceptually similar to the child welfare principle as it is applied in family law. What this thesis means by conceptually similar is that in both cases there is a child in existence whose welfare can actually be assessed. In both cases if the child is old enough their views can be taken into account. Even if the child is an infant the question of the adequacy of parenting is not a speculative assessment when there is an existing child. Further, the major difference between taking into account the welfare of the child to be born and the welfare of the existing child is that refusing access to treatment on these grounds will not prevent the child to be born coming into existence at all. The focus of this thesis is to argue that the child welfare test as understood by family law cannot appropriately be applied to considerations of the welfare of a child to be born due to the inherent problems with carrying out a child welfare assessment in the absence of an as yet unconceived child. The question of the impact allowing access to treatment may have on existing children does not raise these particular problems.

This thesis does aim to provide an update of the contention that section 13(5) is an unjustified interference in individuals' and couples' right to procreative liberty. The majority of the work in this area pre-dates the passing of the HFE Act 2008 which amended section 13(5) by changing the words 'the need of that child for a father' to 'the need of that child for supportive parenting'. Therefore, a great deal of the work, particularly around the time of the changes introduced by the HFE Act 2008, focused on the 'need for a father' requirement

and how this impacted upon access to ART for single women and lesbian couples.[25] As a result of the amendment, this is now a debate which is largely, though not entirely, resolved and the focus of this updated work will be whether the requirement to consider the welfare of the child that may be born as a result of treatment under the HFE Acts, in terms of parenting environment, remains justified.

In conclusion, what this thesis seeks to do is to make the argument that taking account of the welfare of the child to be born in so far as the concerns relate to the parental environment in which the child is to be raised is conceptually incoherent. In addition, assessing whether potential parents will be supportive parents will be contended amounts to unjustifiable discrimination and is in any event such a speculative enterprise that it is worthless in terms of providing meaningful judgements. What will be proposed is that section 13(5) should be amended so as to remove reference to 'the need for supportive parenting' in relation to 'the child to be born' as part of a child welfare assessment. As noted, a number of the arguments which will be made in support of an amended section 13(5) also apply to an argument for full repeal, but as the child welfare principle as applied in family law is principally concerned with parenting environment and it is the impact of this on access to ART which this thesis focuses on, then the argument will be that child welfare concerns relating to the parenting environment cannot justifiably restrict access to ART.

1.2 The Child Welfare Principle

The impact of the child welfare principle on access to ART cannot properly be understood or evaluated without a thorough analysis of how the child welfare principle developed into the legal concept enshrined in legislation and used in

[25]See for example, J. McCandless and S. Sheldon, "No Father Required"? The Welfare Assessment in the Human Fertilisation and Embryology Act 2008, Feminist Legal Studies, December 2010, Volume 18, Issue 3, 201-225.

courts in the UK, how it is applied in practice, why its application to decisions which affect children is justified and what its limitations might be.

The importance we place upon the welfare of children in our global society is well-illustrated by the fact that the United Nations Convention on the Rights of the Child (UNCRC)[26] is the most widely ratified human rights treaty in history. The UNCRC has been ratified by some 191 out of the 193 countries of the world.[27] The UK signed the convention in April 1990 and it came into force in January 1992.[28] While the UK does not incorporate the UNCRC directly into domestic law the government will seek to ensure that the principles of the UNCRC are given effect to within domestic legislation. However, the Human Rights Act 1998 did incorporate the European Convention on Human Rights (ECHR) [29] directly into domestic law. This means that whilst the UNCRC is not directly enforceable in UK courts, the ECHR is. The rights within the ECHR are applicable to all persons within the European Union, although unlike the UNCRC, the ECHR is not a child specific convention. As will come on to be discussed in Chapter Four, the inter-relationship between Article 3.1 of the UNCRC,[30] Article 8(1) of the ECHR[31] and domestic law is important when defining the extent of the courts' duty to take into consideration the best interests of the child when making decisions which affect the life of a child. Article 3.1 of the UNCRC is one

[26] A full copy of the UNCRC is available at http://www.unicef.org/crc/ (accessed on 25 October 2013).

[27] The United States of America and Somalia are the only two countries in the world who have not ratified the UNCRC.

[28] Department of Education, Children and Young People, United Nations Convention on the Rights of the Child, https://www.gov.uk/government/publications/united-nations-convention-on-the-rights-of-the-child-uncrc-how-legislation-underpins-implementation-in-England (accessed on 12 December 2013).

[29] A full copy of the ECHR is available at: http://www.echr.coe.int/documents/convention_eng.pdf (accessed on 15 July 2011).

[30] Article 3.1 of the UNCRC reads 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

[31] Article 8(1) of the ECHR reads 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

of the guiding principles of the UNCRC and in practical terms requires parents, policy makers, law makers and other adults to think about how their decisions will affect children and to endeavour to do what is best for them. The ratification of the UNCRC by the UK set the standard which public authorities should strive to achieve when making decisions which impact upon the lives of children, although individuals cannot enforce rights set out under it.

Article 9.1 of the UNCRC states 'Parties shall ensure that a child shall not be separated from his or her parents against their will, except when... such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents.'[32] Parental responsibilities to safeguard the welfare of their children and corresponding parental rights to be free to raise their children as they wish are generally regarded as fundamentally important aspects of any democratic society.[33] This is reflected in domestic law in the UK which gives parents certain rights and responsibilities in respect of their children.[34] However, these parental rights and responsibilities can only be exercised in the interests of the child.[35] In England and Wales 'when a court determines any question with respect to the upbringing of a child the child's welfare shall be the court's paramount consideration'.[36] In Scotland when considering whether or not to make an order in relation to parental rights or responsibilities 'the court shall regard the welfare of the child concerned as its paramount consideration'.[37] The so-called child welfare principle, or paramountcy principle, is routinely applied in family law courts when decisions are being

[32] See fn 17.

[33] J. Thomson, Family Law in Scotland, 7th edition, Butterworths/Law Society of Scotland, Edinburgh, 2014 , 192 (henceforth, Thomson, Family Law in Scotland).

[34] Children (Scotland) Act 1995 sec. 1 (1) (a)-(d) and Children Act 1989 sec. 3 (1).

[35] Children (Scotland) Act 1995 sec. 1 (1) and Children Act 1989 sec. 2(8).

[36] Children Act 1989 sec. 3 (1).

[37] Children (Scotland) Act 1995 sec. 11(7).

made which determine a child's future, including residence and contact[38], adoption[39] and child protection measures.[40] Article 9.1 of the UNCRC is reflected in domestic legislation such as the Children Act 1989 and the Children (Scotland) Act 1995, although the Children Act 1989 was enacted before the UK signed up to the UNCRC.

Likewise, it is accepted that the State has a responsibility to provide support and protection to children who are vulnerable to parental abuse or neglect.[41] This duty is set out in statute - section 17(1) of the Children Act 1989 (covering England and Wales) states: 'It shall be the general duty of every local authority to safeguard and promote the welfare of children within their area who are in need'. In Scotland the Children's Hearings (Scotland) Act 2011 retained provisions previously set out in the Children (Scotland) Act 1995 which allow local authorities to apply for an order removing the child to a place of safety if they can satisfy the requirement that they have reasonable grounds to suspect that the child has been or is being treated in such a way that the child is suffering or is likely to suffer significant harm or is being neglected and as a result of the neglect is suffering or is likely to suffer significant harm.[42] The State's responsibilities to protect children from serious harm provide it with a clear mandate to interfere with the rights of parents if there are reasonable grounds to believe that children are at risk.

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[38] Children (Scotland) Act 1995 sec. 11(2) (c) and (d) and Children Act 1989 sec. 8(1) - Child Arrangement Orders.

[39] Adoption and Children (Scotland) Act 2007 sec. 14(3) and Adoption and Children Act 2002 sec. 1(2).

[40] Children's Hearings (Scotland) Act 2011 sec. 37 and 38- Child Protection Orders and Children Act 1989 sec. 31 (1) - Care and Supervision Orders.

[41] In the case of A v United Kingdom [1998] 2 F.L.R. 959 the European Court of Human Rights held that as English Law put the onus on the prosecution to prove beyond reasonable doubt that the beating of a child went beyond the 'reasonable chastisement' of that child, English law as it stood failed to provide adequate protection for children, and the Government's failure in this respect constituted a violation of Article 3 of the ECHR. This case is a good example of where the courts have expressly stated that the State has a duty to protect children from parental abuse.

[42] Child Protection Orders – Children's Hearings (Scotland) Act 2011 sec. 37 and 38.

It is certainly the case that the welfare of the child is treated as an imperative consideration both in international treaties and domestic legislation. The question this thesis will explore is whether the great importance placed by society and the law on the welfare of the child and the State duty to protect children from the risk of harm and neglect has had an unnecessary and unjustified impact upon the requirements to be met before access to ART services in the UK is granted. Concerns about the welfare of the child have been raised in numerous areas pertaining to ART. They include the risk that prospective parents might pose to their children as a result of physical or sexual abuse, parental conflict and substance abuse.[43] These kinds of concerns are reflected in the questions asked within the 'Welfare of the child: patient history form' referred to above. The concerns expressed have also extended to questions surrounding the welfare of the child in same-sex couple families,[44] surrogacy arrangements,[45] pre-implantation genetic diagnosis (PGD),[46] sex selection,[47] and human cloning.[48] As will be discussed in Chapter Three, the inclusion of the licensing requirement to take account of the welfare of the child prior to granting access to treatment came about as a consequence of some of these concerns. Its inclusion has had an impact upon treatment providers and those seeking their services for a variety of reasons. It places a statutory duty on treatment providers to ask questions of their patients, to put their past conduct under scrutiny and to make judgments as to their present and future suitability to parent.

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[43] S. Golombok and J. Rust, The Warnock Report and single woman: what about the children? Journal of medical ethics, 1986, 12, 182-186, 186.

[44] G. Pennings, Evaluating the welfare of the child in same-sex families, Human Reproduction, 2011, Vol.26, No.7, 1609–1615.

45 E. Blyth, Children's Welfare, Surrogacy and Social Work, British Journal of Social Work, 1993, Volume 23, Issue 3, 259-275.

[46] S. Lavery, Preimplantation genetic diagnosis and the welfare of the child, Human Fertilisation, 2004, Dec 7(4), 295-300.

[47] J. Tizzard, Sex Selection, Child Welfare and Risk: A Critique of the HFEA's Recommendations on Sex Selection, Health Care Analysis, March 2004, Volume 12, Issue 1, 61-68.

[48] J. Burley and J. Harris, Human cloning and child welfare, Journal of Medical Ethics, 1999, 25, 108-113.

Given the fundamental importance placed upon the welfare of children in society and the need for the State to protect children from the risk of harm and neglect, on the face of it the child welfare assessment carried out by infertility clinics appears a sensible and worthwhile exercise. However, it cannot be ignored that this child welfare assessment has the potential to deny prospective parents the only opportunity they might have of conceiving a child. It also cannot be ignored that this child welfare assessment is not routinely applied to fertile couples. The fertile couple can generally reproduce without any State interference on that basis, no matter the potential risk they pose to the child as a consequence of previous convictions, child protection measures, serious violence or discord within their family environment, mental or physical conditions,[49] or substance abuse problems. There is a caveat to this in that the Courts have in the past ordered the compulsory sterilisation of mentally disabled women, however this is justified on the basis of the best interests of the woman rather than the welfare of the child.[50]

That said, as this thesis will come on to discuss in greater depth the merit of a system of parental licensing has been suggested in the past[51] and while such a scheme would be extremely difficult to implement in practice it might not be impossible. It certainly might be possible to dissuade people from, or encourage them not to, have children in circumstances which may give rise to the future child being exposed to a risk of harm. However, any attempt to actually curtail the reproductive choice of fertile couples would likely be strongly resisted. That is where lies one of the principal difficulties for those who seek to justify the requirement to take into account the welfare of the child in respect of ART– is it discriminatory to expect infertile couples to have to answer these questions

[49] See for example, In re ZM and OS (Sterilisation: Patient's Best Interests) [2000] 1 F.L.R. 523; In re X (Adult Patient: Sterilisation) [1998] 2 F.L.R. 1124.

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[51] See for example, H. La Follette, Licensing parents, Philosophy and Public Affairs, 9, (Winter 1980), 182–197 and Licensing Parents Revisited, Journal of Applied Philosophy, Volume 27, Issue 4, 327 – 343, November 2010.

when any suggestion that fertile couples be required to do so would raise the prospect of strenuous objection?

This thesis will examine why the statutory requirement of the treatment clinic's licence that it carries out a child welfare assessment might be criticised on the basis that it infringes a fundamental right which is worthy of protection against State interference, namely, the right to procreative liberty. The rationale, basis and scope of a right to procreative liberty will be examined in greater detail within the body of the thesis as it is important to ask whether the State in requiring that the parental environment be taken into account as part of a welfare of the child assessment when a couple attends an infertility clinic is failing to accord the infertile the same recognition of a right to procreative liberty that the fertile enjoy.

1.3 The Importance of Procreative Liberty

This thesis raises the question of the extent to which a person's decision to seek to have a child through access to ART can be said to be worthy of protection by a moral or legal right which people can pray in aid if the State seeks to thwart that decision. In this thesis, the basis for State intervention is the legal regulation of access to ART through section 13(5) HFEA 1990, and the role of parental environment when assessing the requirement to consider the welfare of the child. This thesis will claim that there is a generally a right to respect for decisions that individuals make about procreation which mandates non interference with these decisions. It will use the term 'a right to procreative liberty' to express this concept. This thesis proposes that the extent of a right to procreative liberty is a negative right to non-interference which leaves people at liberty to make their own decisions provided that the consequences of these decisions do not result in significant harm to others. Given the focus of this thesis, on the regulation of access to ART, in this context a right to procreative liberty will be generally used to refer to that aspect of the right to procreative

liberty which people justifiably possess to have personal decisions to seek to have a child respected by non-interference in these decisions.

While the next chapter will set out the arguments for such a right framed in this way and why the thesis uses this rather than other proposed definitions of a right to reproduce, some preliminary points are worth making here. One leading academic in this field, John Robertson, has set out his understanding of what the right to procreative liberty entails in the following statement:

> The moral right to reproduce is respected because of the centrality of reproduction to personal identity, meaning and dignity. This importance makes the liberty to procreate an important moral right, both for an ethic of individual autonomy and for the ethics of community or family that view the purpose of marriage and sexual union as the reproduction and rearing of offspring. Because of this importance the right to reproduce is widely recognised as a prima facie moral right that cannot be limited except for very good reason.[52]

The central idea in Robertson's description of a right to reproductive liberty is that there is a need to respect an individual's autonomous decision-making authority and the important human values which are attached to reproduction. A person's right to make choices in relation to the very personal matter of reproduction is what must be protected.

In the above quote Robertson also uses the term 'right to reproduce' and although this and the term 'procreative liberty' are generally interchangeable both in his work and that of others Robertson does distinguish between procreative liberty which 'denotes freedom in choices related to procreation'

[52] J. Robertson, Children of Choice: Freedom and the New Reproductive Technologies, Princeton University Press, Princeton, 1994, 30 (henceforth, Robertson, Children of Choice).

and the mere playing of a 'reproductive role' by surrogates and donors who are not seeking to produce children that they will parent. A right to reproduce is therefore arguably a broader term than a right to procreative liberty because it can incorporate other justifications in support of such a right beyond autonomy and freedom of choice considerations such as the decision to act as a donor or surrogate. This thesis will use the term 'Procreative Liberty' as its focus is on regulation which potentially impacts upon a couple or individual's opportunity to have a child - to procreate. The thesis is not concerned with questions pertaining to the reproductive role of surrogates and donors who are simply passing on their genetic material to the next generation but are not involved in child rearing - the parenting environment. The term right to procreative liberty will be used throughout unless the context calls for a different terms to be used.

In addressing the question of whether or not child welfare concerns are being inappropriately applied to justify State interference with access to ART services, Chapter Two will examine further what it means to say that a person has a right to procreative liberty. If it can be said that a person does have a right to procreative liberty then what is the basis for such a right, what protection from State interference does it provide and what is its relevance to the question of allowing or prohibiting access to ART services? Chapter Two will examine the claim that given the vital importance of pregnancy, child-birth and child-rearing to both individuals and societies' value systems, a right to procreative liberty has to be treated with the utmost respect. This is a particularly important question to address given the history of State interference in the procreative liberty of fertile individuals in the past based on the idea that certain individuals or social groups were not fit to bring children into the world.[53]

Chapter Two will look at the eugenics programmes of a number of countries in the first half of the 20th century which aimed to improve society by the promotion of better genes through the sterilisation of individuals belonging to

[53] S. Trombley, The Right to Reproduce: A History of Coercive Sterilization, Weidenfeld and Nicolson, London 1988, 2.

certain social groups.[54] However, it is useful to introduce the discussion at this point. The word 'eugenic' comes from Greek and literally means 'well (eu) born (genos)' and is the theory of improving the human race through the eradication of 'poor' genes and/or the promotion of 'good' genes.[55] Eugenic programmes were implemented in a number of countries, in particular the USA and Germany between the 1900's and 1940's.[56] The thinking behind eugenics is best illustrated in the judgment delivered by Justice Holmes' in the 1927 U.S Supreme Court case of *Buck* v *Bell*[57] where he said:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes…Three generations of imbeciles are enough.[58]

Eugenic programmes were public policy initiatives designed to improve the genes of entire populations and have been criticised as being concerned with the welfare of society at the expense of the individual.[59] They were often used in the promotion of nationalistic, racial or discriminatory ideas, for example, many in the USA at the turn of the 19th Century were concerned with the dilution of the Anglo-Saxon gene pool as a consequence of large scale immigration from Southern and Eastern Europe, while Nazi Germany implemented eugenic

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[54] E. Jackson, Regulating Reproduction – Law, Technology and Autonomy, Hart Publishing, Oxford, 2001, 43 (henceforth, Jackson, Regulating Reproduction).

[55] K. L. Garver and B. Garver, Eugenics: Past, Present, and the Future, American Journal of Human Genetics, 49, 1109-1118, 1991, 1109.

[56] Ibid., 1110 and 1112.

[57] 274 US 200 (1927).

[58] 274 US 200 (1927), 207.

[59] K. L. Garver and B. Garver, Eugenics: Past, Present, and the Future, American Journal of Human Genetics, 1991, 49, 1109-1118, 1109.

programs in the name of 'racial purity'.[60] Eugenics as a viable social policy was largely discredited as a result of the Nuremberg Trials which exposed the Nazi atrocities of the Second World War.[61]

The conclusions of the Nuremberg Trials provided the incentive to draft the United Nations Universal Declaration of Human Rights (UNUDHR).[62] Amongst proclamations advocating the right to life, education and work, the UNUDHR declared 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'.[63] The later ECHR contained a similar provision that 'men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.[64] These international declarations also introduced the concept of a right to privacy and family life[65] and a right to be free from discrimination,[66] both of which have impacted upon the idea that procreation falls into the sphere of a fundamental human right.

These international declarations were intended to provide protection to vulnerable individuals from interference by the State into their marital sexual relations and procreative liberty. They were certainly not drafted with access to ART services in mind, having pre-dated the techniques by a couple of decades. However, the right to marry and to found a family, the right to respect for private and family life and the right to be free from discrimination, have been

[60] Ibid., 1112.

[61] Jackson, Regulating Reproduction, 43.

[62] E. Sutherland, Procreative Freedom and Convicted Criminals in the US and UK, Oregon Law Review, 2003, 82, 1033 - 1065, 1033.

[63] United Nations Universal Declaration Human Rights 1948, Article 16.1. A full copy of the UNUDHR is available at http://www.un.org/en/documents/udhr/ (accessed on 15 July 2011).

[64] European Convention on Human Rights 1950, Article 12. A full copy of the ECHR is available at http://www.echr.coe.int/documents/convention_eng.pdf (accessed on 15 July 2011).

[65] ECHR Article 8 and UNUDHR Article 12.

[66] ECHR Article 14 and UNUDHR Article 7.

used to argue for access to frozen embryos without the explicit consent of a deceased partner[67] and access to artificial insemination services for an incarcerated prisoner.[68] Human rights based arguments are therefore of importance when it comes to matters of procreation.[69] Chapter Two will examine the impact of the eugenic programmes and the impact of the human rights declarations which came about as a result of the discrediting of such programmes on the idea that people have a right to procreative liberty. The chapter will focus on the child welfare issues which were articulated as providing justification for eugenics and illustrate that the inappropriate application of apparent child welfare concerns is not an entirely new phenomenon. Chapter Two will also develop the argument that the right to procreative liberty is a negative right allowing the individual to be free from interference by the State, not a positive right entitling an individual to the provision of services enabling them to procreate. However, it will be argued that if ART services are being made available to some then the right to procreative liberty must be extended to all those seeking access to ART services unless there is sufficient justification for restrictions.

The development of ART services has certainly given rise to the consideration of a right to procreative liberty in an interesting and novel context. Despite the importance of a right to procreative liberty of fertile individuals being widely recognised in international human rights declarations and in decisions of the courts, the UK government felt it necessary to include a licence requirement that had the potential to deny patients access to certain kinds of fertility treatment. Chapter Three will look at the development of that legislation and why it has persisted without serious challenge despite the difficulties it raises as to its impact upon the right to procreative liberty of the infertile. The inclusion of section 13(5) into the HFE Act 1990 created considerable controversy at the

[67] Evans v United Kingdom (2006) 43 EHHR 21.

[68] Dickson v United Kingdom (2007) 44 EHRR 21.

[69] S. McLean, Modern Dilemmas Choosing Children, Capercaillie Books, Edinburgh, 2006, 17 (henceforth, McLean, Choosing Children).

time and its continued existence in its present form requires to be questioned.[70] This thesis will contribute to the questioning of the continued inclusion of section 13(5) HFEA 1990 in its present form by highlighting the difficulties it poses if applied to prevent people having children on grounds that they may be unsupportive or harmful parents to a child yet-to-be-born.

Before going any further it is necessary to point out as already alluded to above there are limitations on the arguments being made about the welfare of the child assessment under section 13(5). The focus of this thesis is upon welfare considerations in respect of the child potentially to be born as opposed to the welfare of any existing children, although this forms part of the section 13(5) welfare assessment. This is because the question to be addressed is about the justification surrounding the prevention of access to treatment which would potentially bring a child into existence. Whilst there are interesting issues surrounding the welfare of the existing child particularly with regards to the ethical questions surrounding 'saviour siblings'[71], no one argues that the mere introduction of a sibling into a family is ordinarily a welfare concern, except for examples where the potential parents may already have been found to have previously harmed an existing child or may be incapable of coping with the demands of additional childcare. So while this aspect of section 13(5) is interesting in its own right, when discussing child welfare this thesis will be concerned with children who may be born as a result of the treatment. Therefore this thesis is not a full examination of all aspects of section 13(5) and as a result will not be arguing for a repeal of the section in its entirety, but instead will be arguing for the removal of reference to and 'the need for supportive parenting' on relation to 'the child to be born' as part of a child welfare assessment.

[70] J. Gunning and S. Holm (Eds.) Ethics, Law and Society: Volume III, Ashgate Publishing Limited, Hampshire, 2007 - Chapter 9 - S. McLean, Assisted Reproduction and the Welfare of the Child.

[71] Children who are brought into existence using Preimplantation Genetic Diagnosis in order that they can act as a donor for an unwell sibling.

Procreative liberty incorporates both the choice to have children through 'natural' or assisted reproduction and the choice not to have children through the use of contraception and abortion. This thesis will be concerned with the choice to have children and the State control of that on parental environment grounds, so will not focus on choices to avoid reproduction, such as access to abortion or contraception. Therefore although Robertson uses the term 'a right to procreative liberty' when referring to both to the right to have and to not have children, this thesis uses the term only in the context of having children as that is what section 13(5) if applied prevents.

In recent years a further extension of procreative liberty, to make certain decisions about the conception of children based on their genetic make-up, has become possible through the development of PGD. The carrying out of a parental ability assessment as a part of the pre-conception child welfare assessment is a factor in PGD because PGD utilises *in vitro* fertilisation (IVF). However, this thesis will not be exploring the more specific issues which PGD gives rise to, such as the right of the genetically selected for child to an open future and the potential psychological impact of PGD on the future child.[72] These arguments will not be addressed because they are somewhat removed from the child welfare principle as they are most commonly applied in family law. What is meant by that is questions surrounding the psychological impact upon a child of genetic pre-determination for example are not questions which arise when issues of residence, contact and protection of children from abuse and neglect are addressed by the family courts.

This thesis will instead confine itself to the question of whether access to ART can justifiably be denied on the ground that it is contrary to the welfare of the child that might be born as a result of considering parenting ability and suitability. In focusing on this particular aspect of the child welfare issues as they relate to ART an argument for the full repeal of section 13(5) cannot be

[72] See for example, S. Wilkinson, "'Designer Babies", Instrumentalisation and the Child's Right to an Open Future' in N. Athanassoulis (ed.), Philosophical Reflections on Medical Ethics (Palgrave-Macmillan 2005) at 44-6 and J.R Botkin, Ethical Issues and Practical Problems in Preimplantation Genetic Diagnosis, Journal of Law, Medicine & Ethics, 16 (1998): 17-28.

made since this thesis does not seek to consider other aspects of child welfare assessment that may be made under this section.

1.4 The Regulation of Assisted Reproductive Technology

The current HFEA Code of Practice provides a detailed definition of the term 'supportive parenting'. It states:

> Supportive parenting is a commitment to the health, well being and development of the child. It is presumed that all prospective parents will be supportive parents, in the absence of any reasonable cause for concern that any child who may be born, or any other child, may be at risk of significant harm or neglect.[73]

Section 13(5) has its roots in one of the conclusions drawn by the Committee of Inquiry into Human Fertilisation and Embryology,[74] widely referred to as The Warnock Committee after the report's principal author, when they assessed what the criteria for eligibility for treatment should be. The Warnock Committee stated that; 'we believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother.'[75] This conclusion was given statutory recognition by the original wording of section 13(5) which required treatment providers to take account of the welfare of the child including the need of that child for a father, although it did not form part of the original bill.

[73] HFEA Code of Practice, 8th Edition, para. 8.11.

[74] Report of the Committee of Inquiry into Human Embryology and Fertilisation (Warnock Report), London: Stationary Office, 1984, Cmnd 9314. (henceforth, The Warnock Report).

[75] The Warnock Report, para. 2.11.

It has been said in regards to section 13(5) that 'since it is presumably unlikely that parliamentary intent was that such a consideration should have no bearing on the decision whether to provide treatment, it seems obvious that the intention was that certain welfare considerations would lead to the refusal of such treatment'.[76] Section 13(5) stands therefore as a potential restriction on access to ART and therefore, this thesis will argue, amounts to interference in the right to procreative liberty. In proposing that section 13(5) should be amended this thesis will argue that the interference in the right to reproductive liberty on unsupportive parenting grounds is arbitrary and unjustified. In order to make that argument properly it will be necessary to examine in detail what the regulation says, how it operates in practice and the reasons behind its creation.

Chapter Three will examine the HFEA regulatory framework which underpins the provision of ART services in the UK and question whether it meets the criteria for good regulation. If people have a negative right to procreative liberty, to effectively be left alone to make their own autonomous decisions about whether they have children or not, yet the State feels it must still regulate in this area, then it is important to examine the quality of that regulation. It is not enough for the State simply to say that it is justified in regulating access to ART services given its mandate to ensure that children are protected from harm or neglect. The State must be able to show that the regulation which has been put in place is proportionate, accountable, consistent, transparent and targeted.[77] This is necessary so that those who are affected by the regulation are fully aware of the impact it may have upon them and are in a position to challenge its implementation if they feel aggrieved. The thesis will argue that section 13(5) is not achieving what it sets out to do and is not being applied fairly. It will argue that it is in essence regulation which is not fit for purpose.

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[76] C. Gavaghan, Defending the Genetic Supermarket: Laws and Ethics of Selecting the Next Generation, Routledge-Cavendish, London, 2007, 97.

[77] Better Regulation Commission Terms of Reference, See http://en.wikipedia.org/wiki/Better_Regulation_Commission (accessed on 23rd June 2011).

The original wording of section 13(5) was later amended by Parliament in recognition of the fact that the previous eighteen years had 'witnessed significant social change'.[78] The amendment was proposed in recognition of civil partnerships[79] and laws to outlaw discrimination on the grounds of sexual preference.[80] However, the child welfare provision itself survived the amendments to the HFE Act 1990 with the introduction of a supportive parenting requirement. The parenting environment the child was to be born into was considered to be of continued relevance above and beyond the arguably narrower issue of a child's need for a father. Chapter Three will examine the thinking behind the original inclusion of section 13(5) within the HFE Act 1990 which was prevalent within Parliament at the time and also the thinking behind its amendment to its current form. The comment which came from politicians during these debates illustrates the principal concerns of the times and allows the decisions to include and continue with section 13(5) to be put in context.

1.5 The Child Welfare Principle and Assisted Reproductive Technology

Section 13(5) places a requirement upon licensed clinics to assess the fitness of the potential parents. There is of course no child at the pre-conception stage. There is no child to be examined by medical practitioners for signs of injury or neglect, no parental-child bonding processes for social workers to monitor and no opinion of the child to take into account. On a practical level, then, the child welfare assessment at the pre-conception stage is a very different process from the child welfare assessment post-birth. All that a licensed infertility clinic can do at the pre-conception stage is look to the parents and ask if it thinks they will make sufficiently satisfactory parents.

[78] Alan Johnson then Secretary of State for Health at Hansard HC vol 475 col 1069 (12 May 2008).

[79] The Civil Partnerships Act 2004 gave same-sex couples rights and responsibilities which are comparable to civil marriage.

[80] Equality Act (Sexual Orientation) Regulations 2007 made under Part 3 of the Equality Act 2006.

While regulation governing access to ART services contains a reference to child welfare, it is not clear on the face of it whether this amounts to the application of the child welfare principle as applied in family law cases in a legal sense. There are important differences in the wording of the respective laws, the most relevant being the absence in the HFE Act 1990[81] of a requirement to make this factor the 'paramount consideration' compared with the relevant statutory provisions in the Children Acts.[82] This thesis will examine the nature of the child welfare principle as it applies to the regulation of ART and whether or not the omission of the words 'paramount consideration' makes the child assessment process at the pre-conception stage a significantly different process from that carried out in family law decisions.

However, the parenting ability and suitability assessment at the pre-conception stage does mirror the application of the child welfare principle in the context of family law in certain other important ways. When the court is taking decisions as to, for example who a child should live with or whether an adoption order should be granted, the question the courts invariably ask is – what is the optimal parenting environment for this child?[83] It is widely accepted that the ability of the parent to care for the child is pertinent to the question of what is conducive to the welfare of the child. This thesis will compare and contrast the way in which the child welfare principle is applied in these different situations in an effort to examine just how far child welfare concerns should impact upon the provision of ART and how much of an overlap there actually is between the two legal requirements.

The fact that there is no child to be assessed at the pre-conception stage also raises an important philosophical question as to the nature of harm which might or might not arise by a decision not to bring a child into existence at all. This is another fundamental difference between any child welfare assessment process

[81] See fn 62.

[82] See fns. 27 and 28.

[83]

at the pre-conception stage and post-birth stage. The decision taken at the post-birth stage can only be to remove the child from the harmful environment; the decision taken at the pre-conception stage is to prevent a child being brought into existence in the first place. The question which arises is therefore how a decision not to bring a child into existence can possibly be said to impact upon the welfare of that child. There is no child in existence and therefore no child to be harmed. As this is the case then 'taking into account the welfare of the child to be born' may appear to be devoid of any real meaning. Chapter Five will examine this 'non-identity problem'[84] in greater detail.

1.6 Conclusion

ART is a continually developing field of research where new advances in technology regularly throw up complex legal and ethical problems. It has been said that 'The interests or welfare of the child are rightly central to any discussion of the ethics of reproduction'.[85] What this thesis sets out to do is to add to the understanding of just how central the interests or welfare of the child ought to be when placed beside the interests of people who have a right to procreative liberty and to examine whether or not the concept of the child welfare principle as it is applied in a family law context to assessment of the parenting environment is really a suitable concept to apply in the context of access to ART regulated by the HFE Acts.

This thesis raises questions as to the suitability and fairness of section 13(5) of the HFA Act 1990 and the restriction of access ART to certain people who, but for this licensing requirement, would be provided with treatment. It will argue that section 13(5) should be amended for a number of reasons which will be examined as the issues are developed. In looking at these issues the thesis will

[84] D. Parfit, Reasons and Persons, Oxford University Press, Oxford, 1984. The Non-Identity Problem is that if someone lives a life that is worth living, then existence can never be worse than non-existence.

[85] J. Harris, The Welfare of the Child, Health Care Analysis 8: 27–34, 2000, 27.

seek to raise some further questions as to how all this may impact upon the right to reproductive liberty of infertile, and indeed fertile, individuals.

As noted, a crucial concept to establish for this thesis is to define what is actually meant by the term 'a right to procreative liberty'. It is important to tackle this issue first because there is little value in arguing that a right is being unjustifiably interfered with by the State without a full understanding of what that right actually is. The next chapter will examine all the possible sources for a right to procreative liberty and explain why this thesis prefers the exposition of such a right in these particular terms. It will also examine in greater detail the history of State interference in a right to procreative liberty in an effort to highlight the dangers which can result when the State fails to properly respect this right. It is important to highlight this history as it brings into focus the importance of respecting a right to procreative liberty in the ART context. Finally the chapter will examine the important role human rights law plays in an understanding the scope of a right to procreative liberty. Once it is understood what this thesis argues for in regards to the scope of a right to procreative liberty it will be possible to set out the argument that section 13(5) as it stands represents an unjustified interference in the right.

CHAPTER TWO – THE RIGHT TO PROCREATIVE LIBERTY

2.1 Introduction

In examining the question of whether or not child welfare concerns arising from parental ability are being inappropriately applied to justify State interference in procreative liberty, it is necessary first to consider whether procreative liberty is of such significance as to warrant particular protection from State interference. In other words, is there a right to procreative liberty that mandates non-intervention by the State as the default position? It is important, of course, to address the question of what is meant by the term 'a right to procreative liberty'. Alghrani and Harris are of the view that:

> When people express their choices about procreation and about founding a family they are claiming a controversial but sustainable 'fundamental right'. This right or entitlement is often discussed in terms of 'reproductive liberty' or 'procreative autonomy'. The right or entitlement to reproductive liberty has a number of different sources and justifications. Some see it as derived from the right to reproduce per se, others as derivative of other important rights or freedoms. Certainly there is no widespread agreement as to the nature and scope of this right; however, it is clear that it must apply to more than conventional sexual reproduction and that it includes a range of the values and liberties which normal sexual reproduction embodies or subserves.[1]

This chapter will examine in more detail the different sources and justifications for a so-called right to procreative liberty. In addressing this question an attempt will be made to clarify the various aspects of the right, and what is meant by the term in the context of the thesis. The chapter will then go on to

[1] A. Alghrani and J. Harris, Reproductive liberty: should the foundation of families be regulated?, 18, 2006, Child and Family Law Quarterly, 191 – 210, 191.

examine situations where the State has seen fit to interfere in the exercise of procreative liberty both in an historical context and in the context of assisted reproduction. The justifications given for these State interventions tell us a great deal about both the genesis and status of the so-called right to procreative liberty. This chapter will pay particular attention to how child welfare concerns have influenced, and continue to influence, decisions on the part of the State to intervene in the procreative liberty of its citizens to seek infertility treatment. The chapter will then conclude with an examination of the impact international declarations of human rights, in particular the European Convention of Human Rights (ECHR), has had on the concept of a right to procreative liberty.

The chapter will begin with examining how the development of ART has redefined what is understood to be involved in 'reproduction' and 'parentage'. The questions of who has actually reproduced and who is to be treated as the parent(s) of the child are relevant to the question of what it is about procreation that is actually being protected by the claim to a right to procreative liberty. The development of ART has significantly widened the definition of what might traditionally be thought to be understood by procreation, namely the pregnancy of a woman brought about by sexual intercourse between a heterosexual couple. It has also altered thinking about the child-parent relationship beyond the traditional 'biological' mother and father model as the potential roles of the genetic, gestational (mothers), social and legal parent in a child's life have been opened up for greater discussion and analysis. These changes are significant because of their relevance to the question of whose right to procreative liberty the State might be interfering with in requiring that a parental suitability assessment be carried out, why the State believes that it is justified in doing so in certain situations and what aspects of parenthood are important to the definition and scope of a right to procreative liberty.

2.2 Procreation and Parentage

Clearly the vast majority of children are still conceived the 'natural' way by their parents engaging in sexual intercourse. However, for some, either for reasons of biology or sexual preference, this 'natural' source of human procreation is not available. Since the birth of Louise Brown in 1978, as at July 2012, there have been an estimated five million births worldwide as a result of *in vitro* fertilisation (IVF) and intra-cytoplasmic sperm injection (ICSI) treatments.[2] Although still a very small percentage of all births worldwide these figures are not insignificant, particularly given the fact that the development of ART has opened up a wide range of procreative choices to potential parents who otherwise would have been unable to have children.[3] At the same time it has introduced certain ambiguities into the concept of procreation[4] and therefore legal parentage also.

A person does not become a legal parent of course until the birth or adoption of their child. The legal rights and responsibilities accorded to parents are not *in situ* at the pre-conception stage when a couple are seeking access to ART. However, in requiring that clinics ask questions of patients such as are there any aspects of their life which may pose a risk of serious harm to any child they might have, or is there anything which might impair their ability to care for such a child, the application of section 13(5) amounts, in part at least, to an assessment in advance, of the patient's abilities to fulfil their legal rights and responsibilities towards the future child. Leaving aside until later the question of whether or not this is appropriate, this section will set out who the legislation accords parental status to on the birth of a child utilising ART as these rules are relevant to the reasons why section 13(5) was introduced in the first place.

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[2] European Society of Human Reproduction and Embryology, The world's number of IVF and ICSI babies has now reached a calculated total of 5 million, Press Release 1st July 2012, see http://www.eshre.eu/Press-Room/Press-releases/Press-releases-ESHRE-2012/5-million-babies.aspx (accessed on 5 April 2013).

[3] McLean, Choosing Children, 9 - The author describes this development as 'a revolution in reproductive choice'.

[4] Robertson, Children of Choice, 22.

Further, the changes that were introduced in the Human Fertilisation and Embryology Act 2008 (HFE Act 2008) which will be set out highlight the ways in which societies attitudes to family and parenthood have changed and how that has weakened further the arguments for the retention of section 13(5).

Procreation can be understood in a genetic sense where half our genes come from our *biological* father and half from our *biological* mother. Procreation can also be understood in a gestational sense in that it involves the woman undergoing a pregnancy and giving birth.[5] In 'natural' procreation the *biological* mother always procreates in the genetic and gestational senses. However, the development of IVF has allowed for the separation of the female genetic and gestational aspects of procreation and this is where certain ambiguities have arisen.[6] For example, some pregnancies may be established following the donation of eggs from one woman being used to establish a pregnancy in a second woman. In that situation both women can be said to have been involved in the procreative process, one in the genetic sense by passing on her genes to the next generation, the other in the gestational sense by virtue of her pregnancy and giving birth.

The ambiguities which ART brought about are well-illustrated by the fact that in drafting the Human Fertilisation and Embryology Act 1990 (HFE Act 1990) it was thought necessary to set out the meaning of 'mother' and 'father' in the legislation.[7] The legal parenthood position of the female was fairly straightforward in that the woman, who was carrying or had carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, was to be treated as the mother of the child.[8] It was the gestational

[5] Robertson recognises that a surrogate mother may not reproduce genetically but describes gestation as 'a central experience for women [which] should enjoy the special respect or protected status accorded reproductive activities'. Robertson, Children of Choice, 21.

[6] Robertson, Children of Choice, 22.

[7] HFE Act 1990 sec. 27 and sec. 28.

[8] HFE Act 1990 sec. 27(1).

process as opposed to any genetic relationship that determined who was the mother of the child, although this could be altered subsequently, by adoption transferring legal motherhood from a surrogate who gave the child at birth to another woman.[9] The legal definition of the child's mother has not been significantly altered since the passing of the HFE Act 1990.[10] However, as will come on to be discussed, the HFE Act 2008 introduced provisions which expanded the possibilities of who might become the child's legal mother.

In relation to the male the situation was understandably more complex. The simplest case was where a child was carried by a married woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination, using her husband's sperm. In such cases the husband was obviously treated as the father of the child. This was an uncontroversial situation and the law in that regard remains unchanged. The more complex situation involved the question of who was to be treated as the father of the child when a sperm donor had been used. If at the time of the placing in a woman of the embryo or the sperm and eggs or of her artificial insemination, the woman was a party to a marriage, but the creation of the embryo carried by her was not brought about with the sperm of her husband, the husband was to be treated as the father of the child unless it was shown that he did not consent to the placing in her of the embryo or the sperm and eggs or her artificial insemination.[11] No other person was to be treated as the father of the child[12] and the donor was still protected from legal fatherhood in the case of withdrawal of consent by the husband.[13] However, section 28(2) of the HFE Act 1990 could be voided if the husband could show that he did not, in fact, consent to the procedure, although the common law principle of *pater est quem nuptiae demonstrant*[14] was retained.[15] This meant that the husband who did not consent

[9] HFE Act 1990 sec. 27(2).

[10] It is repeated verbatim in HFE Act 2008 sec. 33.

[11] HFE Act 1990 sec. 28(1).

[12] HFE Act 1990 sec. 28(4).

[13] HFE Act 1990 sec. 28(6)(a).

[14] Translates as 'The nuptials show who is the father'.

to donor insemination still had to rebut the common law presumption by the use of a paternity test.[16] Again these provisions have not been altered since the legislation was enacted, although as will be discussed later, the HFE Act 2008 introduced provisions which expanded the possibilities of who might become the child's legal father.[17]

In regard to the situation when the couple were not married the position as set out in the originally enacted HFE Act 1990 was that when the embryo or the sperm and eggs were placed in the woman or she was artificially inseminated, in the course of treatment services provided for her and a man together and the creation of the embryo carried by her was not brought about with the sperm of that man, then that man was to be treated as the father of the child.[18]

There has been one case in the UK which illustrated the difficulties which can arise from these new forms of non-coital procreation when it comes to establishing who, if anyone, is to be treated at the legal father of the child. In the case of *In re R (A Child) (IVF: Paternity of Child)*[19] a mother appealed against an order declaring that her former partner was the legal father of her child born following IVF treatment using donor sperm. During the relationship they had sought treatment for assisted conception. By the time the woman was implanted with the embryos, the relationship had ended. The woman had not informed the treatment clinic of this fact. The man applied for a declaration of paternity, arguing that the successful implantation of the embryo had taken place in the context of the same course of treatment and he was therefore to be treated as the legal father. The case eventually made its way to the House of

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[15] HFE Act 1990 sec. 28(5).

[16] J.K. Mason and G.T. Laurie, Mason & McCall Smith's Law and Medical Ethics, Ninth Edition, Oxford University Press, Oxford, 2013, 83.

[17] HFE Act 1990 sec. 28(1) is reflected in HFE Act 2008 sec. 35.

[18] HFE Act 1990 sec. 28(3).

[19] [2003] EWCA Civ 182.

Lords[20] who held that for section 28(3) to apply the embryo had to be placed in the mother at a time when treatment services were being provided for the woman and the man together; that it was important that the legal relationship of parenthood should not be based on a fiction, especially if deception was involved, and section 28(3) should only apply to cases falling clearly within the statutory language; and that, although treatment services had originally been provided for the woman and the man together, they had not been so provided at the relevant time, namely when the implantation had taken place that had resulted in the birth of the child. Therefore declaration of the man's paternity was revoked. The House of Lords also commented *per curiam* that more reliable safeguards were needed in a matter directly affecting a child's parentage. If an unmarried man was to become the legal father of a child of which he is not the biological father that must be brought home to him as clearly as possible.[21] The difficulty for the clinic in this case was that the woman had not informed them that her relationship with the man had ended. If she had been open and honest with the clinic they would not have treated her without obtaining up to date consent from the man.

This case illustrates the difficulties which can occur with respect to legal parentage when embryos are created at one point in time but implanted at a different point in time when the couple who had sought treatment together are no longer together. All this is very different from 'natural' reproduction where the creation of the embryo and the resulting pregnancy occur as one process. The focus of the legislation has been on the intention of the 'father' to take legal responsibility for a child by providing his consent to the treatment being provided to his wife or partner through which the status of legal fatherhood arises. There has been a move away from the traditional view that the genetic father is the legal father in order to encourage sperm donors to come forward without them being subsequently faced with a claim that they have legal responsibilities towards a child who might come into existence as a result of their donation. However, as *In re R (A Child) (IVF: Paternity of Child)* illustrates

[20] In re R (A Child) (IVF: Paternity of Child) [2005] 2 AC 621.

[21] Ibid., para. 26.

this can lead to a situation where the child is subsequently left without a legal father. As will come on to be discussed this possibility taxed the minds of politicians considering whether the welfare of child born as a result of treatment should be a factor in accepting people for treatment.

The HFE Act 2008 introduced a whole raft of new provisions designed to tighten up the law with regards to consent to treatment and to bring parity between people in civil partnerships and married couples. The legislation introduced the concept of agreed fatherhood conditions.[22] What these provisions say is that if no man is treated as the father of the child by virtue of being the consenting husband, but the embryo or the sperm and eggs were placed in the woman or the woman was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies, at the time when the embryo or the sperm and eggs were placed in the woman or the woman was artificially inseminated, the agreed fatherhood conditions are satisfied in relation to a man, the man remained alive at that time, and the creation of the embryo carried by the woman was not brought about with the man's sperm, then that man is to be treated as the father of the child.[23]

The agreed fatherhood conditions are met in relation to treatment provided to a woman under a licence if, but only if, the man has given the person responsible a notice stating that he consents to being treated as the father of any child resulting from treatment provided to the woman under the licence; the woman has given the person responsible a notice stating that she consents to the man being so treated; neither the man nor the woman has given the person responsible notice of the withdrawal of the man's or woman's consent to the man being so treated; the woman has not, since the giving of the notice given the person responsible a further notice stating that she consents to another man being treated as the father of any resulting child, or a notice stating that she consents to a woman being treated as a parent of any resulting child, and the

[22] HFE Act 2008 sec. 37.

[23] HFE Act 2008 sec. 36.

woman and man are not within prohibited degrees of relationship in relation to each other.[24] All this must be in writing and is a clear effort to avoid the situation which occurred in *Re R (A Child) (IVF: Paternity of Child)*.[25]

The HFE Act 2008 also now allows for a woman in a civil partnership at the time of treatment to be treated as the parent of her partner's child unless it is shown that she did not consent to the placing in her partner of the embryo or the sperm and eggs or to her partner's artificial insemination.[26] The HFE Act 2008 also introduced agreed motherhood provisions along the same lines as the agreed fatherhood conditions to allow for a woman not in a civil partnership at the time of treatment.[27]

The HFE Act 2008 further introduced a provision where, on an application made by two people, the court may make an order providing for a child to be treated in law as the child of the applicants if the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination; the gametes of at least one of the applicants were used to bring about the creation of the embryo, and the applicants are husband and wife, civil partners of each other, or two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.[28] This provision allows for homosexual male couples 'living as partners in an enduring family relationship' to become the legal parents of a child carried by a surrogate.

What these provisions do is set out who can become the legal parent of a child with the full range of parental rights and responsibilities in relation to the child and in what circumstances. The intention of Parliament in extending legal

[24] HFE Act 2008 sec. 37.

[25] [2005] 2 AC 621.

[26] HFE Act 2008 sec. 42.

[27] HFE Act 2008 sec. 44.

[28] HFE Act 2008 sec. 54.

parentage to people in civil partnerships and unmarried same-sex couples was to ensure equality. What they have also done is strengthen the importance of social parenting – the intention and wish to parent a child – when traditionally it was the genetic link between parent and child that was viewed as the determinative factor. It is the fact of a person's intention to parent with the agreement of the woman being treated to that intention, rather than any genetic relationship with the child, which in these new family units is now considered determinative of parental status.

As will come on to be discussed in Chapter Four, being accorded the legal status of a parent gives rise to certain rights and responsibilities in regards to the child and the preceding discussion is of relevance to the question of child welfare concerns because it is fundamental in family law that it is the legal parents who are ultimately responsible for the child's welfare by warrant of their legal status. However, the relevance of the preceding discussion to this chapter is that it highlights the different individuals[29] who might be said to have a right to procreative liberty in the context of ART because they may be accorded parental status in relation to a child conceived through ART. Whether these individuals are one part of a heterosexual couple, one part of a homosexual couple, or single they all enjoy a right to procreative liberty and in seeking access to ART it will be argued should be afforded respect for their procreative choices.

One final comment to make is that whilst the question of whether gamete donors and surrogates might be said to have a right to reproductive liberty[30] in the context of ART is an interesting question, it is not one which is pertinent to this thesis because surrogates and donors are not people who will be raising the

[29] Robertson has pointed out that although a right to procreative liberty is often expressed or realised in the context of a couple (for obvious reasons), it is first and foremost an individual interest - Robertson, Children of Choice, 22. This thesis will seek to express a right to procreative liberty by reference to the individual and not the couple although it is not necessary to stick slavishly to this distinction.

[30] As discussed in Chapter One a right to reproductive liberty is the more appropriate term to be used when referring to donors and surrogates as they are involved in the reproductive process but are not intending to play a parental role.

children and creating the parenting environment for them. It is the persons who would be accorded legal parental status whose parenting ability is being assessed by the clinic as part of the child welfare assessment process. The persons who this thesis views as being relevant to the discussion of a right to procreative liberty thus identified, this chapter will now move on to look in more detail at the concept of procreative liberty itself.

2.3 The Right to Procreative Liberty

John Robertson in his book *'Children of Choice'* sets out a liberal defence of procreative liberty. He defines procreative liberty as an individual's freedom of choice to have children or not. He is of the view that a right to procreative liberty must be given presumptive priority when there is a conflict between respect for it and respect for other rights, although he does not take the view that a right to procreative liberty cannot be defeated in any circumstances. Robertson gives the example of where 'the danger to offspring or others from a particular activity may be patently obvious'[31] as a situation which might give rise to the defeat of a claim to a right to procreative liberty. He accepts that:

> Recognition of the primacy of procreation does not mean that all reproduction is morally blameless, much less that reproduction is always responsible and praiseworthy and can never be limited.[32]

However, Robertson proposes that:

> ...procreative liberty be given presumptive priority in all conflicts, with the burden on opponents of any particular technique to show that harmful effects from its use justify limiting procreative choice. With this presumption as a standard, there is a consistent way for

[31] Robertson, Children of Choice, 17.

[32] Robertson, Children of Choice, 30.

> resolving the conflicts and controversies that arise with new reproductive technologies.[33]

Robertson does not argue for an absolute right to make procreative choices but a presumptive negative right to be left free from State interference to do so. He also argues that the burden is upon the State of showing that it is justified in interfering with procreative decision-making if it seeks to do so. Robertson's book has been described as 'providing the infertility industry with its first coherent philosophy'.[34] It thus represents a good starting point for a definition of procreative liberty.

Robertson makes the point that a married couple's decision to have children by engaging in sexual intercourse is regarded as a fundamental right: the right to marry and found a family as set out in the United Nations Declaration of Human Rights (UNDHR).[35] Any interference with that right by the State could only be in extreme cases where significant harm to others would arise if the right was to be exercised.[36] He then poses the question, what of married couples who cannot procreate without the assistance of ART? Robertson considers that their desire to form a family is no less strong than the fertile couple's desire and the simple fact that the couple may require assistance does not mean that they would be inadequate parents. In Robertson's view the burden on the State of showing that interference in the interests of the infertile couple is justified can be no less than that required in the situation of the fertile, namely evidence of serious

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[33] Robertson, Children of Choice, 16.

[34] Robertson, Children of Choice, - Book Jacket quote accredited to George Annas.

[35] This would also apply to Article 12 of the ECHR. Robertson discussed the UNDHR as he is writing from an American and not a European perspective.

[36] J. Robertson, Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction, Law, Medicine and Health Care, 16, 18 - 26, 1988, 18.

harm to others.[37] Robertson's views are described by Steinbock as a strong procreative liberty view.[38]

Robertson's views are supported by Alghrani and Harris[39] who believe the key to the idea of procreative liberty to be 'respect for autonomy and for the values which underlie the importance attached to procreation and the acquisition of children broadly conceived'.[40] They draw a comparison between freedom of religion and freedom to make procreative choices as both involve freedom to chose one's own way of life and to live according to one's own beliefs.[41] They also support Robertson's view, that like other liberties, there should be a presumptive primacy in favour of respect for procreative liberty.

A quote from Feinberg illustrates the basis for the presumption in favour of liberty:

> Whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always needs some special justification. It is legitimate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm, or harm to important public institutions and practices. In short, state interference with a citizen's behaviour tends to be morally justified when it is reasonably necessary (that is, when there are reasonable grounds for taking it to be necessary as well as

[37] Ibid.

[38] B. Steinbock, A Philosopher Looks at Assisted Reproduction, Journal of Assisted Reproduction and Ethics, 1995, Vol. 12, No. 8, 543-552, 548.

[39] A. Alghrani and J. Harris, Reproductive liberty: should the foundation of families be regulated?, 18, 2006, Child and Family Law Quarterly, 191 – 210.

[40] Ibid., 193.

[41] Ibid., 193.

> effective) to prevent harm or the unreasonable risk of harm to parties other than the person interfered with.[42]

The question of to what extent people had a right to liberty was addressed by the nineteenth century philosopher John Stuart Mill in his work *On Liberty*.[43] Mill recognised that infringements of liberty came not only from tyrannical despots but also from what he called:

> The tyranny of the prevailing opinion and feeling...the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them.[44]

According to Mill respect had to be given to a right to liberty in order to avoid individual freedoms being trampled upon by the 'tyranny of the majority'.[45] Mill recognised that there had to be a limit placed upon the 'interference of collective opinion with individual independence'.[46] The question for Mill was where to place that limit. In his view:

> The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others...the only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.[47]

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[42] J. Feinberg, Harm to Others, Oxford University Press, Oxford, 1984, 9.

[43] J. S. Mill, On Liberty and Other Essays, Oxford University Press, Oxford, 1998, 8. (henceforth, Mill, On Liberty).

[44] Mill, On Liberty, 8.

[45] Mill, On Liberty, 14.

[46] Mill, On Liberty, 11.

[47] Mill, On Liberty, 14.

Mill believed that a person's 'own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode.'[48] In other words, people are free to make choices about their own lives even when others might view these choices as unwise or undesirable.

In a paper setting out a defence of a deaf lesbian couple's choice to have a genetically deaf child using PGD, Julian Savulescu expresses the opinion that Mill's philosophy justifies the extension of liberty to reproductive choice.[49] Mill asserts that in situations where our actions affect only ourselves we should be free to act provided that these actions do not cause harm to others. Savulescu is of the view that this philosophy can apply to reproductive choice.[50] As Savulescu points out, while Mill did not believe that freedom was solely valuable for its own sake, he believed that freedom was important for people to discover for themselves what kind of life is best for them. In Mill's view it was only through 'experiments in living'[51] that people discover what works for them. In applying Mill's philosophy to reproductive choice concerning selection of embryos for particular characteristics Savulescu states that:

> Reproduction should be about having children who have the best prospects. But to discover what are the best prospects, we must give individual couples the freedom to act on their own value judgment of what constitutes a life of prospect. 'Experiments in reproduction' are as important as 'experiments in living' as long as they don't harm the children who are produced. For this reason, reproductive freedom is important. It is easy to grant people the freedom to do what is agreeable to us; freedom is important only

[48] Mill, On Liberty, 15.

[49] J. Savulescu, Deaf lesbians, "designer babies," and the future of medicine, British Medical Journal, 2002, October 5; 325(7367): 771–773. The term 'reproductive choice' is more appropriate to the argument Savulescu makes because he is discussing more than a simply straight forward procreative choice to seek assistance to have a child to raise, he is discussing a broader choice to chose the genetic make-up of the child to be born.

[50] Ibid., 773.

[51] Mill, On Liberty, 14.

> when it is the freedom for people to do what is disagreeable to others.[52]

These comments can be applied more broadly to other decisions about reproduction, such as the use of ART, and at a much broader level still it has been said that Mill's philosophy underpins the concept of liberal democracy which has been prevalent in the West for over a century.[53] Liberal democracy is a political system marked by fair and free elections, the rule of law and the protection of basic liberties.[54] It is founded upon the argument that human beings have certain inalienable rights and that governments must accept limitations on their own powers in order to secure these inalienable rights.[55] For these reasons, Mill's philosophy is a sound basis on which to argue for respect to be given to a right to procreative liberty in Western liberal democracies. This thesis will argue that a right to procreative liberty should be recognised in Western liberal democracies given the presumption in favour of liberty on which these democracies depend. It is in broad agreement with the claim of Dworkin that:

> The right to procreative autonomy has an important place...in Western political culture...The most important feature of that culture is a belief in individual human dignity: that people have a moral right - and a moral responsibility – to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences and

[52] J. Savulescu, Deaf lesbians, "designer babies," and the future of medicine, British Medical Journal, 2002, October 5; 325(7367): 771–773, 773.

[53] F. Zakaria, The Rise of Illiberal Democracy, Foreign Affairs, 1997, 22(6), 22-43, 22.

[54] Ibid., 22.

[55] Ibid., 26.

> convictions...The principle of procreative autonomy, in a broad sense, is embedded in any genuine democratic culture. [56]

However, there is some difficulty in defining what is incorporated in a right to procreative liberty which is made clear in the following passage from Shanner:

> The area of procreative rights is itself in need of greater conceptual clarity, as it has been asserted to include a right to make procreative decisions without governmental restriction or force; a right to procreate without discrimination by doctors or others; an equal right of infertile people to procreate when fertile people can do so; a right to be assisted in procreating; a right to engage in reproductive contracts or multiple-party interventions; and a right to have procreative assistance funded.[57]

Shanner uses the term 'a right to procreate' in the title of her work and does provide a definition of what she believes is encompassed within this phrase:

> I will reserve the phrase 'procreative rights' to refer more specifically to initiating a pregnancy and bringing children into the world. Procreative rights are thus literally rights to have children at all, as distinguished from reproductive rights that concern the timing and manner in which one reproduces.[58]

This thesis does not follow Shanner's distinction completely as this thesis uses the term 'procreative liberty' because its' focus is upon patients seeking access to ART services for the purpose of initiating a pregnancy and bringing their own children into the world to raise and nurture as parents, it is less concerned

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[56] R. Dworkin, Life's Dominion An Argument About Abortion, Euthanasia, and Individual Freedom, Vintage, New York, 1994, 166-167.

[57] L. Shanner, The Right to Procreate: When Rights Claims Have Gone Wrong, McGill Law Journal, 1995, 40, 823 – 874, 826.

[58] Ibid.

about wider issues such as the availability of contraception, the right to chose to acts as a surrogate or donor, the right to access an abortion or the right to choose the genetic make-up of the child. So whilst Shanner sees procreative rights as rights to have children at all, this thesis takes the view that procreative rights are about the rights to have children and to subsequently parent these children. However, both this thesis and Shanner share the view that reproductive rights are a broader concept.

This thesis takes the position that a right to procreative liberty can consist of a right to make decisions about whether to seek to become parents without governmental restriction or force, a right to procreate without discrimination in their treatment by doctors or others and a right of infertile people to access available means to procreate. These rights should be respected unless there are sufficiently clear and strong justifications for restricting them. However, a distinction will be drawn between these rights and a right to be assisted in procreating. This chapter will come on to discuss that distinction in more detail in looking at the distinction between negative and positive rights.

Suzanne Uniacke is of the view that the literal meaning of a right to reproduce is simply the right to have children.[59] As Uniacke points out it is commonly assumed that people have a right to have children.[60] She makes the point that the assumption that people have a right to have children is one of the objections most likely to be made against any suggestion that requiring prospective parents to be licensed would be theoretically desirable.[61] With a few exceptions such as age of consent and consanguinity, we generally do not accept that the State has a right to interfere when a consenting couple decide to engage in sexual

[59] S. Uniacke, In Vitro Fertilization and the Right to Reproduce, Bioethics, Vol. 1, Issue 3, 1987, 241 – 254, 241. Uniacke uses the term 'a right to reproduce' and not 'a right to reproductive liberty' or a 'right to procreative liberty'. She defines a right to reproduce simply as a right to have children. {yes – and you need to do the same kind of thing with other authors eg algrhani and harris earlier]

[60] Ibid.

[61] Uniacke is referring to the suggestion of Hugh Lafollette in Licensing Parents, Philosophy and Public Affairs, 9 (1980), 182-97.

intercourse with the goal of having a child. However, whether or not the assumption that people have a right to have children is well-founded depends upon how such a right is explained and defined. A great deal of the legal and ethical discussion surrounding the regulation of access to ART does indeed centre upon a claim that people have a right to have children, or a right to reproduce or to procreate.[62] However, as Uniacke rightly says few people would argue that a right to reproduce, for example, entitles a person to the gametes of a non-consenting person.[63] Uniacke recognises that any right to reproduce is subject to limitation.[64]

This thesis will use the term procreative liberty rather than a right to reproduce because, it is suggested that the term 'right to reproduce' may be linked with the existence of a claim-right. There is a problem with thinking of reproduction as a claim-right which might entail significant duties of assistance on the part of the State and conflict with the reproductive rights of others. While an individual may be at liberty to seek to fulfil a particular reproductive choice, it is difficult to argue that this choice is necessarily the ground of other people's duties to assist her in her acting. This could create a situation where, for example, a single woman was entitled to demand that she be provided with means to fulfil her wish to have a child, for example through being provided with an embryo. It is difficult see that an obligation could lie upon the State to compel a couple who had created embryos for their own treatment to donate any spare embryos for this purpose, thereby overriding their right to consent to the use of their embryos. Furthermore, an obligation to provide every infertile person with unlimited access to ART would be likely to pose practical difficulties not just in terms of access to gametes, embryos but the facilities and the costs involved.

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[62] L. Shanner, The Right to Procreate: When Rights Claims Have Gone Wrong, McGill Law Journal, 1995, 40, 823 – 874, 825.

[63] S. Uniacke, In Vitro Fertilization and the Right to Reproduce, Bioethics, Vol. 1, Issue 3, 1987, 241 – 254, 240.

[64] Ibid., 247.

This thesis takes the view that seeking to have children should be regarded as simply a liberty which implies non-interference on the part of others, and so approaches the issue in terms of procreative liberty. The thesis will not argue that the current regulation governing access to ART services is inappropriate since it fails to create a duty on the State to provide assistance to people trying to have children. Instead it will argue that the current legislation infringes procreative liberty since it permits interference with a couple or individual's liberty to act with medical assistance, and the consensual involvement of a third party donor or surrogate if need be. The question whether there us a sufficient justification for this interference then arises.

Adopting this position, a single woman would be entitled to try to become pregnant through IVF using a donated embryo with the donor's consent and the State would have no basis on which to interfere unless the State can show that there is a sufficient justification: that significant avoidable harm would result from such an undertaking. Chapter Five will look at the arguments surrounding harm to a child born as a result of ART in respect of potential parenting environment and examine in detail whether any harms do exist which may justify State interference in access to ART services on the basis of child welfare concerns. However, having established that the approach to be used to examine the regulation of ART in this thesis is based on the concept of a right to procreative liberty, the next section will examine two leading theories of rights in an effort to provide some further understanding as to how a right to procreative liberty might be framed. While Robertson's justification for a right to procreative liberty has been set out, the next section will examine in more detail the ethical grounds for such a right, namely a respect for the autonomous decision-making of the individual.

2.4 Protection of Interests or Respect for Choices?

Again the terminology employed by commentators is not always consistent with each other when representing similar ideas, and for the following authors a

'right to reproduce' is used rather than my preference for procreative liberty. In an attempt to examine the possible justifications for a right to reproduce, Muiranne Quigley analyses the concept within the two main theories of rights: interest theory and choice theory.[65] Quigley makes the point that these two theories each represent a different conception of the function of rights and, as such, different justifications underpin the existence of rights depending on which theory of rights is proposed. The distinction according to Quigley is that 'Interest theory would justify a right to reproduce on the grounds of overriding interests, while choice theory, would justify it on the grounds of the necessity to protect personal autonomy.'[66] A closer examination of these two different theories of rights will assist in explaining why this thesis comes down in favour of a right to procreative liberty grounded in the importance of respect for personal autonomy when making choices fundamental to the life of the individual.

Joseph Raz, a major proponent of the interest theory, argues that an 'interest' should be seen as an aspect of a person's well-being.[67] Furthermore, to ground a right, this interest must be 'a sufficient reason for holding some other person(s) to be under a duty'.[68] According to the interest theory the strength of the interest, how fundamental it is to a person's well-being, determines the strength of the claim. Quigley points to two reproductive interests, which she claims, might ground sufficient reason for holding a person to a duty, namely, genetic reproduction (passing on genes to the next generation), and the subsequent child rearing.[69] Quigley rejects the idea that an interest in passing on ones genes to the next generation provides an adequate justification for a

[65] M. Quigley, A Right to Reproduce?, Bioethics, Volume 24, Number 8, 2010, 403–411, 404. Quigley is another commentator who uses the broader term of a right to reproduce. She does so in the context of looking at the foundation for the right in the context of two different rights theories, so again her discussion is broader than the foundation of the right based on liberty and autonomy. It is clear though that when she talks about a right to reproduce she is referring to a right to have children.

[66] Ibid., 404.

[67] J. Raz, 'On the Nature of Rights', Mind, 1984, Vol. 93, No. 370, 194-214, 195.

[68] Ibid.

[69] M. Quigley, A Right to Reproduce?, Bioethics, Volume 24, Number 8, 2010, 403–411, 406.

right to reproduce.[70] While she acknowledges the truth in Robertson's view that 'whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life'[71] she makes the point that taking this to the extreme would lead to morally questionable practices such as a man claiming he had a right to 'the unfettered distribution of his sperm' on the basis that the passing on of his genes was what afforded his life meaning.[72] The problem in Quigley's view is that it is somewhat overstating the case to attribute the passing on of your genetic material as being central to one's life, particularly if this male in question has no intention of child rearing but simply wishes to have as many of his progeny walking around as possible.[73]

Quigley then goes on to look at the interest in rearing a child. She accepts that an interest in child rearing, or the intention to rear, is strong enough to ground a right to reproduce.[74] The opportunity to experience raising one's own child is absolutely central to many people's lives. Bonnie Steinbock is of the view that a right to reproduce is best interpreted as a right to have one's own children to rear and where there is no intent or ability to rear, there is no fundamental right to reproduce.[75] Quigley asks the question – how do we assess the ability to rear? She then goes on to highlight the fact that 'In the United Kingdom, the Human Fertilisation and Embryology Authority (HFEA) appears to think that such an assessment is not only possible but also ethical'[76] by the application of section 13(5). What Quigley points out though is that:

> The practical implications of a right to reproduce deriving from an interest in having and raising a child and formulated as Steinbock

[70] Ibid.

[71] Robertson, Children of Choice, 24.

[72] M. Quigley, A Right to Reproduce?, Bioethics, Volume 24, Number 8, 2010, 403–411, 406.

[73] Ibid.

[74] Ibid.

[75] B. Steinbock, A Philosopher Looks at Assisted Reproduction, Journal of Assisted Reproduction and Ethics, 1995, Vol. 12, No. 8, 543-552, 543.

[76] M. Quigley, A Right to Reproduce?, Bioethics, Volume 24, Number 8, 2010, 403–411, 406.

> would want are apparent from the above look at the HFEA guidelines. Practically speaking fertile individuals might have a right to reproduce (or at least be able to exercise it), while infertile individuals might not. This is because the distinction between these two categories is not in the ability of the individuals to hold an interest in having and raising a child, but the practical ease of regulating the ensuing right.[77]

Quigley is making a very similar point to that of Robertson and alluded to above, that the desire of the infertile couple to form a family is no less strong than the fertile couple's desire and the simple fact that the couple may require assistance does not mean that they would be inadequate parents.

Quigley is of the view that the two principal interests people have in reproduction – passing on genes and child rearing - do not provide a basis for grounding a right to reproduce. In the case of the first of those interests it is not what gives reproduction meaning. The prolific sperm donor does not have a right to act in this way because his actions are not sufficiently meaningful. He is reproducing but only it would seem for somewhat selfish reasons. In the case of child rearing the difficulty is that this interest may vary with different people at different times. This would lead to the situation where Quigley explains that a number of questions arise:

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

[77] Ibid., 407.

> ground the right in question? Or does it mean that today Y does not have a right to reproduce because it does not represent a significant enough aspect of her well-being, but in five years when her interests have grown she will possess this right? This does not appear to be either a sensible or a plausible contention and, as such, cannot provide justifiable grounds for a right to reproduce.[78]

On these grounds Quigley rejects the interest theory as providing a sufficient basis to justify the existence of a right to reproduce. Likewise this thesis does not argue for a right to reproduce on the basis that people have interests in reproduction relating to their well-being that provide sufficient reason for holding some other person(s) to be under a duty to assist them. As Quigley points out this would not provide for a sensible approach. What is argued for instead is a right to procreative liberty which the choice theory of rights provides support for. The choice theory of rights understands a right as existing to promote and protect an individual's autonomy and liberty.[79] The choice theory of rights would justify a right to procreative liberty on the grounds of the necessity to protect personal autonomy.[80] A right to procreative liberty of this sort would be concerned with the promotion of the freedom or autonomy of the right-holder with regard to procreative matters.

Under the choice theory of rights H.L.A. Hart defined a right as follows:

> Any adult human being capable of choice (i) has the right to forbearance on the part of all others from the use of coercion or restraint against him save to hinder coercion or restraint and (ii) is at liberty to do (i.e., is under no obligation to abstain from) any

[78] Ibid., 407.

[79] Ibid., 404.

[80] Ibid.

> action which is not one coercing or restraining or designed to injure other persons.[81]

For the reasons set out in this section and the last this thesis prefers the characterisation of a right to procreative liberty in terms of the freedom to make procreative choices over the concept that it is grounded upon interests which hold other people to be under a duty.

The next section will come on to analyse in greater detail the extent and limitations upon a right to procreative liberty grounded upon what Quigley refers to as:

> ...the protection of an individual's liberty and autonomy with regard to reproductive matters...not derive[d] from an *unrestricted* general right to liberty...[but] within a narrow interpretation where the right is only a negative right of non-interference in reproductive choices rather than a positive right to the help and resources needed to reproduce.[82]

The next section will address the following question: if it is recognised that people have a right to procreative liberty then what correlative duties does such a right impose upon those who must respect such a right? It is important to note that in Quigley's view a right to reproduce is restricted in the extent to which it can entitle a person to make demands of others. This is also my position, although I prefer to see this in terms of procreative liberty. This is where the concept of positive and negative rights plays an important part in our understanding of what constitutes a right to procreative liberty.

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[81] H.L.A Hart, Are There Any Natural Rights, The Philosophical Review, 1955, Vol. 64, No. 2, 175-191, 175.

[82] M. Quigley, A Right to Reproduce?, Bioethics, Volume 24, Number 8, 2010, 403–411, 411.

2.5 Positive and Negative Rights

As explained by Beauchamp and Fadden:

> Rights claims, whether legal or moral, are commonly divided into two types: positive and negative. This distinction is based on the difference between the right to be free to do something (a right to non-interference) and the right to be provided by others with a particular action, good or service (a right to benefits).[83]

Shanner provides a description of what amounts to a negative right and a positive right in the following:

> A negative right is essentially a right of forbearance, entailing an obligation upon others to leave the claimant alone. Negative rights thus include the right to bodily integrity, the right not to be killed, the right not to be touched in any manner without permission, and the right to choose one's own beliefs. In addition, the notion is commonly, but more controversially, extended to include freedom to pursue freely chosen goals without interference by governments or others, as long as the exercise of one's liberty does not infringe upon the liberty of others.
>
> In contrast, a positive right is a claim to some form of assistance or positive support, which entails an obligation on someone else to provide the goods or services required for a person to exercise the right. For example, a right to life is a negative right when it prevents someone from killing another without strong justification, but access to lifesaving medical resources is a positive rights claim.[84]

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[83] T. L. Beauchamp and R. R. Faden, The Right to Health and the Right to Health Care, Journal of Medicine and Philosophy, 1979, Vol. 4, no. 2 118 – 131, 120.

[84] L. Shanner, The Right to Procreate: When Rights Claims Have Gone Wrong, McGill Law Journal, 1995, 40, 823 – 874, 839 – 840.

It is possible to find support for the validity of a negative right in Mill's theory of liberty referred to earlier: that the State may intervene to infringe the liberty of an individual only if the action of that person is causing harm to others. The State is permitted to limit freedom of action when that action causes harm to those who deserve protection from harm. This thesis will come on to discuss in more detail the difficulties created by the question of whether a yet-to-be-conceived 'child' can be said to be deserving of protection from harm. Clearly an existing child is a person deserving of protection but the child welfare principle as applied by section 13(5) of the HFE Act 1990 raises the questions of what stage, present or future, a child or future child can or should be protected and what it might actually mean to say that a future child can be harmed.

The distinction between a positive right and a negative right is of relevance to the definition of what constitutes a right to procreative liberty.

John Robertson claims that:

> ...'liberty' as used in procreative liberty is a negative right. It means that a person violates no moral duty in making a procreative choice, and that other persons have a duty not to interfere with that choice.[85]

Robertson proposes, therefore, that 'procreative liberty' is a right in so far as the individual has a right against the State to seek to fulfil a procreative choice, while the State has a correlative duty not to interfere with that choice. However, this right does not go so far as to impose upon the State a duty to provide assistance to the individual to enable him to fulfil his or her procreative choice. In essence, a negative right entails an obligation upon others to leave the claimant of the right alone.[86] Negative rights have been explained by Robertson to have included the freedom to pursue freely chosen goals without

[85] Robertson, Children of Choice, 23.

[86] L. Shanner, The Right to Procreate: When Rights Claims Have Gone Wrong, McGill Law Journal, 1995, 40, 823 – 874, 839.

interference by governments or others, as long as the exercise of one's liberty does not infringe upon the liberty of others.[87] A positive right on the other hand entails an obligation on someone else to provide the goods or services required for a person to exercise the right.[88]

However, it is questionable whether or not such a neat distinction can be drawn between negative rights and positive rights in the context of access to ART. In such a situation the negative right to be free from unjustified State interference when making the choice to access treatment can on one view be seen to also consist of a positive rights component in the sense that what the prospective patient is actually insisting on is a right to be provided with the services available. As Shanner puts it:

> Asserting the right of non-interference fails to describe the reality of ARTs, which by necessity require assistance and resources in the pursuit of the claimant's reproductive goals. As with other claims for medical care, there is little about the request for infertility treatment that involves mere liberties...assisted reproduction, by its very nature, is a positive rights claim because it necessarily requires assistance.[89]

Whilst this observation is sound this thesis proceeds on the basis that a right to procreative liberty is best characterised as a prima facie right for people to be left alone to make their own procreative choices. This thesis recognises that there are situations where access to treatment may be denied since people do not have a positive right to insist on access to treatment (for example, where resources in terms of gametes or funding of treatment are in short supply and do not permit universal access), but they do have a right to have their decision to seek access not interfered with on spurious grounds and for speculative reasons.

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[87] Robertson, Children of Choice, 23.

[88] Ibid.

[89] L. Shanner, The Right to Procreate: When Rights Claims Have Gone Wrong, McGill Law Journal, 1995, 40, 823 – 874, 843

Nevertheless, it would be wrong to regard someone as having an absolute right to procreative liberty. There are clearly cases where that right can be justifiably defeated.

The concept of personal autonomy, that a person has a right to self-determination, is central to any right to procreative liberty.[90] The freedom to choose how an individual lives his or her life underlies the importance that is attached to issues surrounding reproduction. The ruling in the American case of *Casey v Planned Parenthood*[91] outlined what the court saw as the significance of procreative choice with the statement:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, childrearing and education...matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.[92]

Given a right to procreative liberty's relationship to self-determination and self-identity it should be afforded the utmost respect.[93] Emily Jackson is of the view that:

> When we disregard an individual's reproductive preferences, we undermine their ability to control one of the most intimate spheres of their life. Our reproductive capacity or incapacity indubitably has a profound impact upon the course of our lives, and decisions about whether or not to reproduce are among the most momentous choices that we will ever make...I would argue that reproductive

[90] A. Alghrani and J. Harris, Reproductive liberty: should the foundation of families be regulated?, 18, 2006, Child and Family Law Quarterly, 191 – 210, 191.

[91] 112 S.Ct. 2791 (1992).

[92] 112 S.Ct. 2791 (1992).

[93] McLean, Choosing Children, 11.

> freedom is sufficiently integral to a satisfying life that it would be recognised as a critical 'conviction about what helps to make a life good'. Insofar as it is now possible for individuals to decide if, whether or when to reproduce, depriving them of this control significantly interferes with their capacity to live their life according to their own beliefs and practices.[94]

This statement goes to the heart of why procreative liberty is seen as a valuable concept and something which should be regarded as a right. To deprive people of their procreative choice interferes with their freedom to engage in 'experiments in living', as Mill put it, as they so desire.[95] For many people procreative choices involve a number of important human interests such as needs for love, purpose and belonging as well as feelings of esteem and self-respect. However, for others the choice not to have children involves interests of a different kind such as not wanting to be tied down or diverted from a life plan which does not involve children.[96] It is not so much the actual procreative choices to be made that are of importance in themselves, but the 'fostering of human needs'[97] that procreative choices engender which are critical. It is for this reason that procreative choice has value to human existence and deserves respect. However, it is also this very value which is attached to procreative choice which gives rise to criticisms of the liberal theory of a right to procreative liberty.

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[94] Jackson, Regulating Reproduction, 7.

[95] Mill, On Liberty, 260.

[96] N. Priaulx, Rethinking progenitive conflict: why reproductive autonomy matters, Medical Law Review, 2008, 16(2), 169 - 200, 175.

[97] Ibid., 176.

2.6 Criticism of a Right to Procreative Liberty

Robertson acknowledges that a rights-based approach to procreative liberty is open to criticism on the basis that it is 'individualistic and insensitive to the community'.[98] He acknowledges that a rights-based perspective views procreation as an isolated act when in actual fact it is never exclusively a private matter between two people. One of the difficulties with the rights based approach to procreative liberty has is that the effects of procreative choice on children, women, society or the family are treated as irrelevant, while procreation will inevitably have consequences for others than those making such choices.[99]

However, Robertson still seeks to defend his rights-based approach to procreative liberty. Firstly, he makes the point that the recognition of procreative liberty can encourage community interaction. He points to the fact that IVF, embryo donation and surrogacy encourage cooperation and the formation of families.[100] Secondly, Robertson claims that a rights-based approach does not ignore other interests so much as judge them against the importance of procreative liberty.[101] A right to procreative liberty allows possible harms to be judged against the right and if these harms are established, then justification exists to interfere with the right. Thirdly, Robertson contends that without rights the important values attached to reproduction are not protected.[102] An approach which is based not on rights but on proper consideration of social justice overlooks the fact that:

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[98] Robertson, Children of Choice, 223.

[99] Ibid.

[100] Ibid.

[101] Ibid.

[102] Ibid.

> Rights are essential precisely to guard against discriminatory agendas that deny dignity and integrity to women and men. They are responses to failures of social responsibility, not the causes of them.[103]

Robertson further acknowledges that:

> A major problem with a rights-based approach is that it ignores the social and economic context in which exercise of rights is embedded. Procreative rights are negative in protecting against private or state interference, but they give no positive assistance to someone who lacks the resources essential to exercise the right.[104]

Robertson acknowledges the views of Copelon who writes:

> The negative theory of privacy is...profoundly inadequate as a basis for reproductive and sexual freedom because it perpetuates the myth that the ability is effectuate one's choices rests exclusively on the individual, rather than acknowledging that choices are facilitated, hindered or entirely frustrated by social conditions. In doing so negative privacy theory exempts the state from responsibility for contributing to the material conditions and social relations that impede, and conversely, could encourage autonomous decision-making.[105]

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[103] Robertson, Children of Choice, 224.

[104] Robertson, Children of Choice, 225.

[105] R. Copelon, Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom, New York University Review of Law and Social Change, 1990 - 1991, Vol. XVIII, 15 – 50, 46.

Robertson is writing in a USA context where all infertility treatment must be paid for privately. In the UK, issues of access to IVF on the basis of income are to a certain extent addressed by the policy that all couples meeting certain clinical criteria should have up to three complete cycles of IVF free on the NHS.[106] That said the successful implementation of this policy has very much depended upon which part of the UK the couple reside in.[107] However, if a wealthy couple were to continue to seek private treatment following the failure of these three cycles, Robertson is of the view that it does not follow that such social inequality justifies denying access to IVF for those who can pay. While acknowledging that issues of social justice do arise Robertson states 'it does not follow that society's failure to assure access to reproductive technologies for all who would benefit justifies denying access to those who have the means to pay.'[108]

However, Roberts is of the opinion that John Robertson's view that procreative liberty is of such importance means that any view of procreative liberty must include the eradication of social inequality.[109] The principal concern for critics of a liberal negative rights-based approach is that it accepts social inequality as an inevitable consequence of upholding individual rights.[110] Roberts is critical of Robertson's negative right based-approach to procreative liberty on the basis that Robertson treats social justice as a separate issue when in actual fact,

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[106] R.E. Ashcroft, In Vitro Fertilisation for all?, British Medical Journal, 2003, Vol. 323, 511-512, 511.

[107] The Telegraph, 15 May 2014, 'NHS trusts told to end postcode lottery of IVF treatment' http://www.telegraph.co.uk/health/healthnews/10830769/NHS-trusts-told-to-end-postcode-lottery-of-IVF-treatment.html (accessed 20 June 2014)

[108] Robertson, Children of Choice, 226

[109] D.E. Roberts, Social Justice, Procreative Liberty and the Limits of Liberal Theory: Robertson's Children of Choice, Law and Social Inquiry, 1995, 20, 1005-1022, 1006.

[110] Ibid.

according to Roberts it is intertwined with the meaning of reproductive liberty.[111]

While this thesis acknowledges that it is desirable that social inequality in the provision of ART services is addressed as far as possible, it does not proceed on the view that the presence of social inequality is a sufficient basis for State interference in procreative choice to prevent such choices being made at all. While a negative rights-based approach may have its limits, the fact that there are inequalities in the distribution of ART services, does not justify limiting the rights of people who can afford to access these services.

The second part of this chapter will look at past examples of State interference in procreative choice and examine the justifications put forward for such interference. There is no question that the right to procreative liberty cannot be a completely unfettered right, with every procreative choice given absolute respect. In line with the purpose of this thesis there will be a particular focus on examples of situations where child welfare was used, either implicitly or explicitly, as justification for State interference in procreative choice. The purpose of looking back at this point is to illustrate the consequences of the State failing to respect people's right to procreative liberty and the way in which such a failure, as Robertson's argument contended, led to greater social injustice.

While there is a strong argument for a presumption in favour of a right to procreative liberty and non-interference when harm to others is not in contemplation or evident, the State has always been interested in the procreative behaviour of its citizens.[112] John Harris has said that:

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[111] Ibid., 1008.

[112] McLean, Choosing Children, 17.

> Reproductive choice is an idea that is respected more in the breach than in the observance. It is when people, particularly women, actually want to exercise choice that the trouble starts.[113]

The next section will therefore consider the way in which reproductive choice is respected more in the breach than in the observance and examine the problems which can arise when procreative liberty is denied.

2.7 Historical State Intervention

The State has always seen fit to place certain prohibitions upon marriage, thereby placing restrictions on procreative choice. For example, in AD 342 the Roman *Codex Theodosianus* contained a strict prohibition of marriage on the ground of consanguinity:

> If anyone should be so abominable as to believe that the daughter of his brother or sister should be made his wife, or should fly to her embrace not as her parental or maternal uncle, he shall be liable to a penalty of capital punishment.[114]

In the Middle Ages, the Church in England continued to refer to the laws of Ancient Rome when determining questions concerning the degrees of relationship within which marriage was prohibited on grounds of consanguinity. Pope Gregory I forbade marriages between persons closer than the third or fourth generation, step-mothers or sisters-in-law.[115] However, the Reformation saw the relaxation of Roman Canon law as the new Protestant Church passed

[113] J. Harris & S. Holm, 'The Future of Human Reproduction', Clarendon Press, Oxford, 2000, Chapter 1 – Rights and Reproductive Choice, 5.

[114] Codex Theodosianus 3.12.1

[115] C. McCarthy, Marriage in Medieval England, The Boydell Press, Woodbridge, 2004, 128.

laws permitting marriage between first cousins to take place.[116] The current law governing marriage and civil partnerships renders marriage between certain relatives void and makes sexual intercourse between these relatives a criminal offence.[117]

Throughout the ages incest has been a particularly serious social taboo and the State has legislated accordingly. However, overly stringent regulation of such matters in medieval times was not always met with widespread approval and acceptance. Kinship marriage often played an important part in ensuring that estates remained within a family, or within the aristocracy, as a means of consolidating political and economic power.[118] Interestingly in the context of this thesis, in commenting on the various taboos that society has placed around marriage and sexual intercourse Jacqueline Laing and David Oderberg are of the opinion that:

> The stigmatisation and/or legal prohibition of incest, adultery, fornication, and in certain ways even rape, arguably had - and continues to have, in many cultures - its roots in a generalised concern for the welfare of children generated by these means. Moreover, for children so conceived these practices go to their very identity. In concrete terms, the means of conception will determine a child's grandparents, aunts and uncles, siblings and cousins. Hence these practices bear on their race, ancestry, heritage, and medical inheritance.[119]

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[116] B. Hale, D. Pearl, E. Cooke and D. Monk, The Family, Law and Society, 6th Edition, Oxford University Press, Oxford, 2009, 77 (henceforth, Hale, The Family, Law and Society).

[117] Marriage Acts 1949, section 1; Marriage (Scotland) Act 1977, section 2; Civil Partnership Act 2004; Sexual Offences Act 2003, section 6(4).

[118] Hale, The Family, Law and Society, 77.

[119] J.A. Laing and D.S Oderberg, Artificial Reproduction, the 'welfare principle' and the common good, Medical Law Review, 2005, 13, 328 – 345, 331.

The law against marriage and sexual intercourse on grounds of consanguinity is a good example of a long-standing and widely accepted State interference in the right to procreative liberty. The potential for children to be harmed, together with an almost instinctive revulsion towards such relationships, provides adequate justification in the vast majority of people's eyes for State interference and it is not intended to debate the merits or otherwise of this restriction in this thesis.

Incest and rape have always been, and continue to be, treated as criminal offences. It is possible to argue that the reason for these offences is based, at least in part, on welfare of the child concerns. If that is accepted, they do raise the issue of restricting behaviour which may result in pregnancy where there is no child in existence and indeed, in order to prevent the birth of children because of the fear of future harm to them. While these specific offences will not be considered further, using child welfare concerns to place restrictions on procreative liberty in the context of ART raises similar issues. The next example of State interference, more than any other, highlights what can go wrong when respect for procreative choice is disregarded by the State. The State-sponsored eugenics programmes of the first half of the twentieth century saw widespread and systematic abuse of an individual's right to procreative liberty that has consequences to this day.

2.8 Eugenics

In 1904 Francis Galton defined eugenics as 'the science which deals with all influences that improve the inborn qualities of a race; also those that develop them to the utmost advantage.'[120] Galton was of the view that eugenic practices could reflect an entirely and self-evidently preferable state of affairs in humankind where 'it was better to be healthy than sick, vigorous than weak,

[120] F. Galton, Eugenics: It's Definition, Scope and Aims, The American Journal of Sociology, 1904, 10(1), 1-25, 1.

well-fitted than ill-fitted for their part in life'.[121] Galton believed that 'the aim of eugenics is to represent each class or sect by its best specimens'.[122]

To say that Galton was a proponent of eugenics is perhaps an understatement best summed up by his view that eugenics had 'strong claims to become an orthodox religious tenet of the future, for eugenics co-operate with the workings of nature by securing that humanity will be represented by the fittest races.'[123] However, whilst evangelical in his support of eugenics, Galton was perhaps also prophetic in his warning that 'overzeal [in eugenic practices] leading to hasty action would do harm, by holding out expectations of a golden age, which will certainly be falsified and cause the science to be discredited.'[124]

The term eugenics is also commonly understood, not in a purely scientific sense, but to refer to the social movement and policy initiatives which strove to 'improve the biological character of a breed by deliberate methods to that end'.[125] In relation to policy, Galton was a proponent of 'positive eugenics' and called for a regulated marriage licensing process to facilitate and encourage biologically acceptable marriages.[126] However, his ideas soon developed into the more coercive system of 'negative eugenics', which sought to use marriage prohibition, compulsory sterilisation and segregation to achieve its aims.[127]

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[121] Ibid.

[122] Ibid., 2.

[123] Ibid., 5.

[124] Ibid., 6.

[125] S. Wilkinson, "Eugenics Talk" and the language of bioethics, Journal of Medical Ethics, 2008, 34, 467-471, 467.

[126] E. Black, War against the weak – Eugenics and America's Campaign to Create a Master Race, Four Walls Eight Windows, London, 2003, 18.

[127] Ibid., 19.

2.9 Justifying Eugenics

2.9.1 Protecting Society from the 'Unfit'

One of the principal aims of the eugenicists was to prevent persons they considered to be 'unfit' from reproducing. While this aim is a million miles away from the efforts of those seeking to alleviate infertility through ART,[128] the history of eugenics serves as a useful reminder of the need for caution when it comes to implementing regulations that impact upon procreative liberty. The idea that classes of people are 'unfit' to procreate because of their race, religion, intellect or criminal record may seem abhorrent today, but in the first half of the twentieth century this idea justified to many influential people in the United States of America and Europe the compulsory sterilisation of thousands of individuals. Therefore questions should be raised when patients can be denied access to ART (and therefore the opportunity to procreate) if there is evidence that they might not be 'supportive parents': in other words, because they are not 'fit' to parent.

Proponents of negative eugenics in both the USA and Europe were able to utilise the power of the law to implement their eugenic ideology.[129] Legislation from that time illustrates who was considered 'unfit' to procreate. The first 'eugenic law' in the USA was passed by the State of Indiana in 1907.[130] It legalised the involuntary sterilisation of inmates of State institutions[131] and was 'an act to prevent procreation of convicted criminals, idiots, imbeciles and convicted rapists'.[132] This legislation was followed by nearly one hundred other eugenics

[128] McLean, Choosing Children, 66.

[129] P. A. Lombardo, Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom, Journal of Contemporary Health Law & Policy, 1996-1997, 13(1), 1 – 25, 1.

[130] E. Black, War against the weak – Eugenics and America's Campaign to Create a Master Race, Four Walls Eight Windows, London, 2003, 67.

[131] K. L. Garver and B. Garver, Eugenics: Past, Present and the Future, American Journal of Human Genetics, 1991, 49, 1109-1118, 1111.

[132] Indiana Eugenics Legislation 1907 (http://www.in.gov/judiciary/citc/cle/eugenics/index.html accessed on 3/10/10).

statutes passed by over thirty different American states between 1910 and 1970.[133] The majority of these statutes focused on limiting the procreative capacity of certain individuals with the aim of eliminating supposed genetic defects such as criminality, poverty or mental illness.[134] It has been suggested that the eugenicists were successful in getting these laws passed by portraying these measures as a public health initiative.[135] An estimated 60,000 people were sterilised as part of the negative eugenics programmes in the USA over seven decades of the 20th Century.[136]

The eugenics movement was not restricted to the USA and through shared academic knowledge the ideas of the eugenicists quickly found particular favour amongst the leaders of the Germanic and Nordic people of Northern Europe. Hitler, writing in *Mein Kampf* in 1925, echoed much of what was said by the early pioneers of eugenics in the USA when he declared:

> The demand that defective people be prevented from propagating equally defective offspring is a demand of the clearest reason and, if systematically executed, represents the most humane act of mankind. It will spare millions of unfortunates undeserved sufferings, and consequently will lead to a rising improvement of health as a whole.[137]

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[133] P. A. Lombardo, Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom, Journal of Contemporary Health Law & Policy, 1996-1997, 13(1), 1 – 25, 1-2.

[134] Ibid.

[135] Ibid., 3.

[136] P. A. Lombardo, Taking Eugenics Seriously: Three Generations of ??? are enough?, Florida State University Law Review, 2002-2003, 30, 191 – 218, 202.

[137] Hitler, Mein Kampf - see E. Black, War against the weak – Eugenics and America's Campaign to Create a Master Race, Four Walls Eight Windows, London, 2003, 274.

The Nazi party passed its first involuntary sterilisation legislation in July 1933 known as the Law for the Prevention of Defective Progeny. This statute was based on Laughlin's Model Eugenical Sterilization Law.[138] This legislation allowed for compulsory sterilization in cases of 'congenital mental defects, schizophrenia, manic-depressive psychosis, hereditary epilepsy, severe alcoholism, hereditary blindness and Huntington's chorea'.[139] It was to provide the legal basis for the involuntary sterilisation of more than 350,000 people[140] and paved the way for the compulsory sterilisation of thousands more healthy individuals on the basis of 'racial inferiority'.

2.9.2 Fitness to Parent and the Welfare of the Child

While the Nazi ideology was based on notions of nationhood and race at the expense of the individual, some of the thinking behind eugenics was based on a concern for the welfare of the individual child. This concern centred either on the idea that a degenerate and unfit parent would be unable to provide the child with adequate care, or that the genetic condition of the child would be so poor that it would be unkind to bring it into the world.

It has been claimed that the eugenics programmes in the USA were as much about preventing child-rearing as they were child-bearing.[141] In 1940 the Minnesota Board of Control stated that the 'socio-economic justification of sterilization, that the feeble-minded parent cannot provide a stable and secure family life for his children, is paramount'.[142] Eugenicists were happy to evoke the image of the irresponsible and promiscuous 'bad' mother who was not fit to

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[138] K. L. Garver and B. Garver, Eugenics: Past, Present and the Future, American Journal of Human Genetics, 1991, 49, 1109-1118, 1113.

[139] Ibid.

[140] Eugenic Sterilization Laws (http://www.eugenicsarchive.org/html/eugenics/essay8text.html accessed on 6/10/10)

[141] M. Ladd-Taylor, Saving Babies and Sterilizing Mothers: Eugenics and Welfare Politics in the Inter War United States, Social Politics, Spring 1997, 137 – 153, 143.

[142] Ibid.

bear, never mind raise, the nation's children.[143] It has been argued that this apparent concern surrounding apparent lack of parenting ability was merely a smokescreen to limit spending on welfare benefits.[144] Whatever the real reason, concern for the welfare of children raised by unfit parents was commonly evoked to justify the implementation of many compulsory sterilisation programmes.

The other aspect of child welfare associated with promoting a justification for eugenics programmes was the thinking that child welfare was best served by ensuring that the children who were born had 'good' genes and children with potentially 'bad' genes should be prevented from being born. In the view of Dealey, a strong advocate for eugenics, writing in 1914:

> Eugenics rests upon the fact that it is genetically possible to secure for new-born babies an innate mental and physical nature superior to that of the present generation of children. Through this primary aim of genetically better children, resulting in increased child welfare and happiness Eugenics thus demonstrates that a single microscopic cell from which one great human being springs is of greater importance to the race than the painstaking efforts of a hundred thousand child-rearers and educators with a child-material below par.[145]

The idea was that developing the genetic potential of a child would ensure that the child inherited all of the positive traits and characteristics necessary to develop into a propitious member of society. For some, there are worrying

[143] Ibid., 139.

[144] Ibid., 137.

[145] W.L. Dealey, The Eugenic-Euthenic Relation in Child Welfare, American Journal of Sociology, Vol. 19, No. 6 (May, 1914), 835-841, 837.

echoes of this thinking in the so-called 'designer babies' cases.[146] The spectre of eugenics hangs over those scientists working in ART today.

2.10 Opposition to Eugenics

The eugenics statutes did face challenges in the U.S Supreme Court. The most famous of these cases is *Buck v Bell* (1927).[147] The case of *Buck* sought to challenge the Eugenical Sterilization Act[148] which had been passed by the State of Virginia in 1924. The challenge was unsuccessful. In the opinion of Justice Oliver Wendell Holmes 'experience has shown that heredity plays an important part in the transmission of insanity and imbecility'.[149] Holmes was convinced by the genetic determinism arguments put forward by the proponents of eugenics.

Ms Buck based her case on the 14th Amendment to the USA constitution which states that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law'.[150] The *Buck* judgment is of interest as it declared that compulsory sterilisation did not infringe the rights enjoyed by American citizens under the 14th amendment.[151] Justice Holmes in delivering his famous opinion gave far greater weight to the rights of society to promote reproduction of its fittest members

[146] Designer Babies Ethics Fear (http://news.bbc.co.uk/1/hi/health/955644.stm accessed on 12th January 2011).

[147] 274 US 200 (1927)

[148] Eugenical Sterilization Act, Act of March 20, 1924 ch. 394 1924 Va. Acts 569-70.

[149] 274 US 200 (1927) p. 205 -206.

[150] 14th Amendment of the Constitution of the United States of America (www.usconstitution.net accessed on 1st December 2010).

[151] J. Leslie-Miller, From Bell to Bell: Responsible Reproduction in the Twentieth Century, Maryland Journal of Contemporary Legal Issues, 1997, Vol. 8, Issue 2, 123 – 150, 127.

than any individual right to procreative liberty which may have been implied under the constitution.[152]

The second Supreme Court case which challenged state legislation involved the involuntary sterilisation of convicted criminals. *Skinner v Oklahoma* (1942)[153] saw the successful striking down of the Oklahoma Habitual Criminal Sterilization Act 1935. The decision of the Supreme Court in *Skinner* was the first time that reproduction was described as a right. Justice William O. Douglas stated:

> This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race - the right to have offspring...We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.[154]

The thinking of the judiciary in *Skinner* was that if a state sterilisation statute was to be considered constitutionally sound there must be a compelling and rational state interest in controlling procreative matters.[155] This was a far more stringent test than was applied in *Buck* which had merely required that the interests of the state and the individual be balanced before making a decision. In requiring that the state interest in sterilisation had to be compelling, the Supreme Court acknowledged that the procreative rights of prison inmates outweighed the state's interests in controlling their ability to procreate.[156]

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[152] Ibid., 129.

[153] 316 U.S. 535 (1942).

[154] 316 U.S. 535 (1942) at p. 536 and 541.

[155] J. Leslie-Miller, From Bell to Bell: Responsible Reproduction in the Twentieth Century, Maryland Journal of Contemporary Legal Issues, 1997, Vol. 8, Issue 2, 123 – 150, 129.

[156] Ibid.

While *Skinner* can be viewed as a victory for opponents of eugenics the fact is that involuntary sterilisation of people in institutions for the mentally ill and mentally retarded continued in the USA up until the 1970s, albeit to a much lesser extent.[157] Many states viewed *Skinner* as only applying to prisoners and believed that their interest in sterilising 'deficients' was compelling.[158]

At the end of the Second World War exposure of the Nazi compulsory sterilisation programmes led to widespread revulsion and extensive criticism of similar programmes in the USA.[159] Although most USA states continued to have compulsory sterilisation legislation on the statute book the laws were rarely applied and almost all were eventually repealed between 1968 and 1975.[160] In the USA, proponents of eugenic sterilisation laws modernised eugenic legislation to reflect the changing norms of the post-war era.[161] In the 1950s and 1960s the issue of unwed mothers, considered to be unfit to raise children simply on the basis of their marital status, was seen by many as a growing problem which had to be resolved.[162] Those wishing to tackle the issue of unwed mothers had to look to different methods from those previously used to seek to prevent pregnancies, such as fines, short prison sentences and making welfare benefits dependent upon 'voluntary' sterilisation.[163] The proponents of these coercive measures sought to distinguish them from compulsory sterilisation legislation by

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[157] Eugenic Sterilization Laws (http://www.eugenicsarchive.org/html/eugenics/essay8text.html accessed on 6/10/10).

[158] J. Leslie-Miller, From Bell to Bell: Responsible Reproduction in the Twentieth Century, Maryland Journal of Contemporary Legal Issues, 1997, Vol. 8, Issue 2, 123 – 150, 129.

[159] M. Ziegler Reinventing Eugenics: Reproductive Choice and Law Reform after World War II, Cardozo Journal of Law & Gender, 2008, 14, 319-351, 320.

[160] Ibid., 327.

[161] Ibid., 322.

[162] Ibid., 326.

[163] Ibid., 328-329.

arguing that they gave notice of condemned conduct and only punished those who made 'bad choices'.[164]

2.11 Modern Day Eugenics

The term 'eugenics' is often used today by critics of ART to evoke an emotional response.[165] There are numerous 'right to life' websites which draw comparisons between the Nazi eugenics programmes of the 1930s and 1940s and modern genetic screening programmes,[166] or the selection of healthy embryos for IVF treatment.[167] Indeed, the word 'eugenics' has become so unpalatable that it may be deliberately used by critics of reproductive and selection technologies in an effort to associate modern day science with the negative connotations it still carries.[168] The term eugenics now 'suggests Nazi before we even start to consider the issues.'[169]

The outrage which the eugenics programmes of the 20th century now usually engenders arises from the fact that people were coerced, discriminated against and subjected to invasive medical procedures without their consent. While this outrage about the past is justified, there is an important difference between the eugenics programmes of the past and the 'eugenics' work being carried out today. The eugenics programmes of the past were State sponsored programmes

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[164] Ibid., 330.

[165] S. Wilkinson, "Eugenics Talk" and the language of bioethics, Journal of Medical Ethics, 2008, 34, 467-471, 467.

[166] See for example, M. Sullivan, Eugenics alive and well in New Zealand, http://righttolife.org.nz/2010/eugenics-alive-and-well-in-new-zealand/ (accessed on 31 October 2010).

[167] See for example, E. Keane, Resurrecting Nazi Eugenics', (http://www.renewamerica.com/columns/keane/101111 (accessed on 7 December 2010)

[168] S. Wilkinson, "Eugenics Talk" and the language of bioethics, Journal of Medical Ethics, 2008, 34, 467-471, 468.

[169] Ibid.

aimed at the improvement of a group through changes to the gene pool. The very different focus today is upon individual choice to select one embryo over another with the aim of having a healthy child.

The view of the 20th century eugenicists was that improvement in a group through genetic change could be brought about by some sort of policy to be implemented on a wide scale. This is not the same as allowing a couple to make a free and informed choice about which embryo they select for implantation. The challenge then is to ensure that 'eugenics' as practiced today continues to focus on the procreative choices of parents and keep coercion and prejudice out of any laws which regulate ART. What the eugenics programmes of the past have shown is that even a country like the USA, with a written constitution that claims to afford equal rights to all citizens, can easily neglect these principles in the name of social improvement.

Laing and Oderberg, while of the opinion that access to ART should be regulated, accept that:

> It may be wrong to disallow reproduction on the part of certain classes of people simply because of who they are or what their pre-existing medical conditions might be. It is a further step, however, to argue that a restriction on means employed is of itself eugenicist in nature.[170]

The anti-eugenics argument is well-founded on the basis that discrimination of certain groups is clearly wrong. For example, denying a Jewish couple access to ART services on account of their religion would be considered abhorrent. It is important that regulations governing access to ART services in the UK do not stray from the principle that individual freedoms are protected. To ensure that this does not happen the UK must show particular respect for the individuals'

[170] J.A. Laing and D.S Oderberg, Artificial Reproduction, the 'welfare principle' and the common good, Medical Law Review, 2005, 13, 328 – 345, 338.

right to procreative liberty and be certain that any State interference in such a right is ethically justified.

2.12 Restrictions on a Right to Procreative Liberty

The unease created by these past attempts to curtail the procreative liberty of certain groups of people does highlight the importance of ensuring that the State does not once more in the field of ART unjustifiably infringe people's rights. That said it would be wrong to argue that there are no situations where a right to procreative liberty can be justifiably defeated. Whilst the right to proceative liberty cannot be 'taken away' from someone - they are invested with and possess that right - that does not mean it is an absolute right which must inevitably be permitted to be exercised in the manner which the individual chooses. Beauchamp and Faden provide the following explanation:

> It is sometimes assumed, for example, that we have a right to life irrespective of competing claims or social conditions. This thesis is implausible, as evidenced by common moral judgments about capital punishment, international agreements about killing in war, and beliefs about the justifiability of killing in self-defence. At most, morality posits a right not to have one's life taken without sufficient justification. Rights, then, are inalienable in that one always maintains them, and yet they are contingent. Rights claims are thus prima facie rather than absolute — that is, they are presumptively valid standing claims that may be overridden by more stringent competing claims. Virtually all agree that no right always has the right of way when rights themselves come into conflicting traffic. As we shall see, many discussions about a right to health or health care must involve a balancing of social interests and individual rights.[171]

[171] T. L. Beauchamp and R. R. Faden, The Right to Health and the Right to Health Care, Journal of Medicine and Philosophy, 1979, Vol. 4, no. 2 118 – 131, 122.

This thesis is examining whether a right to procreative liberty can be justifiably infringed on the basis of child welfare concerns. Interestingly there have been two cases where the courts have specifically referred to child welfare concerns when determining the controversial question of whether prisoners and their partners could be allowed access to facilities for artificial insemination.

In the first case of *Mellor v Secretary of State for the Home Department*[172] the Court of Appeal upheld the decision to dismiss the petition for judicial review of the decision not to allow a prisoner access to artificial insemination. Lord Phillips was of the view that:

> A policy which accorded to prisoners in general the right to beget children by artificial insemination would, I believe, raise difficult ethical questions and give rise to legitimate public concern.[173]

Lord Phillips then went on to address the argument put forward by the Secretary of State that to allow prisoners access to Artificial Insemination (AI) facilities would disadvantage the children as they would in the circumstances be born into single parent families. He stated:

> By imprisoning the husband the state creates the situation where, if the wife is to have a child, that child will, until the husband's release, be brought up in a single parent family. I consider it legitimate, and indeed desirable, that the state should consider the implications of children being brought up in those circumstances when deciding whether or not to have a general policy of facilitating the artificial insemination of the wives of prisoners or of wives who are themselves prisoners.[174]

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[172] [2002] Q.B. 13.

[173] Ibid., 33.

[174] Ibid., 33.

Whilst Lord Phillips does not comment on what he feels the implications of children being brought up in single parent families might be it is clear from the context of the judgement that these implications are negative. This is an example of the courts endorsing State interference in the procreative choices of individuals on the grounds of child welfare concerns. It is debateable, given the new laws introduced in the HFE Act 2008 as to who can be appointed the legal parent of a child, the aim of which was partly to give legal recognition to alternative family structures, whether Lord Phillips' view would be expressed by the Court of Appeal today. However, in 2001 the courts were not prepared to recognise an absolute right to procreative liberty for prisoners.

In another similar case of *Dickson v Premier Prison Service Ltd*[175] which eventually went all the way to the European Court of Human Rights (ECtHR) Grand Chamber[176] the Court of Appeal refused to find that the Secretary of State's decision to refuse the request for access to AI was unreasonable. The reasons for refusing as they related to child welfare concerns were:

> (2) the fact that, despite their full agreement in seeking facilities for artificial insemination and the commitment they had so far shown to each other, their relationship had yet to be tested in the normal environment of daily life, making it difficult to assess whether it would continue after Mr Dickson's release; (3) the seeming insufficiency of resources to provide independently for the material welfare of any child who might be conceived; (4) the seeming paucity of any supportive network for mother and child and the fact that the child would not have the presence of a father for an important part of his or her own childhood.[177]

Whilst it may be pointed out that it was the procreative liberty of prisoners that was being considered and that it was their incarceration which was the real

[175] [2004] EWCA Civ 1477.

[176] Dickson v United Kingdom (2007) 44 EHRR 21.

[177] [2004] EWCA Civ 1477, para. 7.

reason for the restriction, it has to be remembered that it was also the procreative liberty of the woman seeking to be inseminated that was being interfered with. The prisoner access to AI cases are of interest because they deal with the question of a right to procreative liberty from the angle of 'a right to realise or control the capacity, opportunity or ability to procreate'.[178] Those parents seeking access to ART treatment are also seeking to exercise such a right and are confronted with the requirement to engage in a child welfare assessment.

It has been argued by Professor John Williams that 'Procreative autonomy imposes a heavy standard of proof on those who wish to deny prisoners (or others) the right to access AI.'[179] However, he goes on to cite Robertson's view that there are limits on the State's ability to restrict an individual's right to procreative liberty to situations where 'the reproductive actions at issue would create such substantial harm that they could justifiably be limited',[180] although Robertson is not of the view that the fact that somebody is imprisoned is, in itself, a good reason for denying them a right to procreative liberty.[181] As will be discussed in greater detail in what follows the fact that a child born utilising ART may not be born into ideal circumstances is not a good reason for denying anyone a right to procreative liberty.

The next section will analyse the impact of human rights arguments on procreation as they have played an important role in the justification for the acceptability of using ART to assist women to have children. As this thesis argues for a right to procreative liberty based on the freedom to choose without being subjected to unjustified State interference in the exercise of that choice it

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[178] M. Eijkholt, The Right to Procreate is not Aborted - Dickson v United Kingdom, Medical Law Review, 2008, 16, 284, 284.

[179] J. Williams, The Queen on the Application of Mellor v Secretary of State for the Home Department Prisoners and artificial insemination - have the courts got it right?, Child and Family Law Quarterly, Vol 14, No 2, 2002, 217 – 228, 218.

[180] Robertson, Children of Choice, 24.

[181] Robertson, Children of Choice, 35.

will be illustrative to examine how well human rights law protects this type of freedom.

2.13 Reproduction and Human Rights

The United Nations Universal Declaration of Human Rights (UNUDHR) and the ECHR both include the right to marry and found a family as a fundamental human right.[182] Both treaties also contain articles which uphold a right to private and family life.[183] Article 12 of the ECHR reads: Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right while Article 8(1) of the ECHR reads: Everyone has the right to respect for his private and family life, his home and his correspondence. The UNUDHR is written in terms of a right not to be subjected to arbitrary interference with his family.

In the UK the ECHR has practical utility because the Human Rights Act 1998 formally incorporated it into UK law. It is unlawful for a public authority to act in a way which is incompatible with a Convention right.[184] An individual can challenge any decision of a public authority on the grounds that it is incompatible with one or more of his Convention rights. This section will examine case law where such a challenge has taken place.

The early proponents of ART cited the human rights declarations on the right to found a family as providing the ethical justification for their work. The Nobel Prize winner, Robert Edwards, who developed the science which led to the first IVF baby, said:

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[182] UDHR 1948 Article 16.1 and ECHR 1950 Article 12.

[183] UDHR 1948 Article 12 and ECHR 1950 Article 8.

[184] Human Rights Act 1998 sec. 6(1).

> I had no doubts about the morals and ethics of our work. I accepted the right of our patients to found their family, to have their own children...The Declaration of Human Rights made by the United Nations includes the right to establish a family.[185]

References to the right to marry and found a family and a right to respect for family life were influential in securing research funding and approval in the late 1970s and early 1980s, when IVF was being challenged on moral grounds by the Vatican, feminist critics, and people concerned about possible damage to offspring.[186] However, the inclusion of a right to marry and found a family and a right to respect for family life in these international declarations had been in reaction to Nazi polices of eugenics and racial hygiene.[187] These international declarations were designed to protect people from future attempts by the State to remove their capacity to exercise their procreative liberty through segregation laws or court-ordered sterilisation. What is significant about this is that it was acknowledged that certain States had grossly infringed procreative liberty and that there are limitations upon legitimate State interference in this fundamental human right. The inclusion of a right to found a family highlighted the importance such a decision has for the individual. As Eijkholt has said in regards to the ECHR:

> The origins and historical interpretation of Article 12 seem logically to imply that Article 12 could serve as a legal ground of a right to procreate. The codification of Article 12, the right to (marry and) found a family, in the ECHR was a reaction against the Nazis' racially prejudiced reproductive policies and more widespread eugenics practices in Europe. Furthermore, both the concept of a moral right to procreate and the legal right to found a family

[185] R. Edwards and P. Steptoe, A Matter of Life: The Story of a Medical Breakthrough, Hutchinson, London, 1980, 101-102.

[186] L. Shanner, The Right to Procreate: When Rights Claims Have Gone Wrong, McGill Law Journal, 1995, 40, 823 – 874, 834.

[187] R. J. Cook, International Protection of Women's Reproductive Rights, New York University Journal of International Law and Politics, 1991-1992, 24, 645-728, 658.

> seemed a response to the involuntary sterilisation cases and the movement that discouraged certain groups from reproducing in the USA and elsewhere. Accordingly, Article 12 shared, to a major extent, the same context as a right to procreate. Article 12 illustrated that the capacity and potential to reproduce were considered important for the individual and should be controlled by each individual her/himself. Both a right to procreate and a right to found a family seemed to indicate that self-determination in the family context would be the key factor in this matter.[188]

Eijkholt sought to examine the grounding of a right to procreate[189] in Article 12, and whether it is the case that Article 12 has been replaced by Article 8 as the more important legal principle upon which a right to procreate is now based.[190] Article 12 makes specific reference to 'founding a family' which would necessarily seem to include doing so by procreation. Article 8 on the other hand with its reference to a right to respect for private and family life does not specifically refer to founding a family or procreation so as Eijkholt points out it had not, in the past at least, been seen to 'function as a basis for any aspect of a right to procreate'.[191] This section will look at the impact which both Articles have had in defining the human rights law basis of a right to procreate. Early cases in the ECtHR interpreted Article 12 as encompassing a right to procreate.[192] In contrast the ECtHR held that Article 8 applied only to matters

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[188] M. Eijkholt, The Right to Found a Family as a Stillborn Right to Procreate?, Medical Law Review, 18, Spring 2010, 127–151, 133. The term 'a right to found a family' is a direct reference to Article 12 and Eijkholt argues that this serves as the legal ground of what she calls 'a right to procreate', which she is using in the sense that such a right is grounded in self-determination (or autonomous decision-making i.e. liberty). However, as Eijholt uses the term 'a right to procreate' the thesis will also use that term in reference to her work.

[189] Eijkholt uses the terms a right to procreate to mean simply a right to have children. Se? is not however looking at the right in terms of a right to liberty but asking whether it can be said that a right to have children is protected by the ECHR.

[190] Ibid., 129.

[191] Ibid.

[192] X and Y v United Kingdom (Application No. 7229/75, 15 December 1977).

where family life would already be in existence.[193] In Eijkholt's analysis, however, that situation has changed as she highlights:

> Yet by 2010, despite the fact that Article 12 linguistically and traditionally may have been seen as the key ground for the right to procreate, Article 12 has become barren soil for the development of a fully evolved concept of a right to procreate. The interpretation and application of the right to procreate seem to have changed, and no longer follow the same line of interpretation as the right to found a family.

The scope of Article 12 is limited by its terms. It limits the right to 'men and women of marriageable age' and 'according to the national laws governing the exercise of this right' so can be made the subject of domestic law restrictions. On the other hand Article 8 according to Eijkholt 'has evolved to become a full-fledged and independent ground for basing claims relating to reproduction'.[194] This is because of the wider interpretation it is capable of than Article 12. Private life is described as a 'broad term encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development, and to establish and develop relationships with other human beings and the outside world'.[195] Therefore, Article 8 could be said to protect certain interests which are intrinsic to a right to procreative liberty such as the right to personal autonomy.

In Shanner's view, 'Collectively, and perhaps individually, these declarations support efforts to protect fertility, to protect individuals from discriminatory government policies, and to affirm the value of families. The protections in these international human rights documents do not necessarily ground rights to procreate, to have reproductive assistance, or to have infertility treatment

[193] In Frette v France (Application No. 36515/97, February 26 2002), para. 31; Marckx v Belgium (Application 6833/74, 13 June 1979) para. 11.

[194] M. Eijkholt, The Right to Found a Family as a Stillborn Right to Procreate?, Medical Law Review, 18, Spring 2010, pp. 127–151, 138.

[195] Dickson v The United Kingdom (Application No. 44362/04, 4 December 2007).

funded.'[196] Although that might be the case, the international declarations of human rights, in particular the right to marry and found a family and the right to family life, have been influential in court decisions in the age of ART which have examined the scope of that right in the context of what might constitute a right to procreative liberty.[197] The question at this point for this thesis is to what extent Article 12 and 8 of the ECHR provide clarity as to the parameters of a right to procreative liberty.

In *Evans v United Kingdom*[198] the circumstances of the case were that Ms Evans and Mr Johnston had become engaged in 2000. In 2001 Ms Evans was diagnosed with ovarian cancer and underwent IVF treatment using Mr Johnston's sperm to create and store embryos before an operation took place to remove her ovaries. In 2002 the couple separated and Mr Johnston made a request to the clinic that the embryos be destroyed. Ms Evans commenced a legal challenge in an attempt to prevent the clinic destroying the stored embryos. The case went all the way to the ECtHR Grand Chamber. At first instance the case was heard alongside another case, *Hadley*, which involved some similar issues, so the E*vans* first instance judgment refers to the claimants plural. The *Hadley* case will not be discussed separately though since the main issues for this thesis are contained within the *Evans* case.

Ms Evans brought the domestic action under a number of different heads. She claimed that the frozen embryos had a right to life under Article 2 of the ECHR. She claimed that the HFE Act 1990 which required the consent of her previous partner to the use of their embryos for her treatment was a breach of her right to private and family life under Article 8 of the ECHR. She claimed that to destroy the embryos would be a breach of her right to marry and found a family under Article 12 of the ECHR. Finally she claimed that her right to be free from discrimination as an infertile woman was infringed under Article 14 of the ECHR

[196] L. Shanner, The Right to Procreate: When Rights Claims Have Gone Wrong, McGill Law Journal, 1995, 40, 823 – 874, 838.

[197] Dickson v The United Kingdom (2007) 44 EHRR 21; Evans v United Kingdom (2006) 43 EHHR 21; S.H. and others v Austria (Application No. 57813/00, November 15 2007).

[198] (2006) 43 EHHR 21

because the UK legislative requirements effectively provided for a male veto which could only be imposed on an infertile woman using ART, since once an embryo was in existence *in utero* a man could not veto the continuation of pregnancy.

The domestic court had little difficulty in finding that Article 12 was not breached in the absence of any breach of Article 8. This was because the parties accepted that any interference with private and family which was justified under article 8(2) could not at the same time constitute a violation of article 12.[199] As Ms Evans was arguing that her right to family life under Article 8 was breached by the denial of access to the embryos because of the provisions of the HFE Act 1990, it was accepted that if these provisions were in accordance with the law and necessary in a democratic society in the interests of the rights and freedoms of others, then there could be no separate argument under Article 12.

The relevant issue for the court in *Evans* was whether the requirements under Schedule 3 of the HFE Act 1990 pertaining to the requirements for consents to the keeping in storage[200] and use[201] of any embryo breached Ms Evans Article 8 rights. This section required that an embryo the creation of which was brought about *in vitro* must not be kept in storage unless there is an effective consent by each person whose gametes were used to bring about the creation of the embryo to the storage of the embryo, and the embryo is stored in accordance with those consents. In the High Court, Justice Wall commented that:

> ...an unfettered right on the claimants' part to have the embryos transferred into them would, by parity of reasoning, constitute an interference with respect of the men's Article 8 rights, in the same way that any attempt on their part to insist that the claimants have

[199] Lord Phillips of Worth Matravers MR in R (Mellor) v Secretary of State for the Home Department [2002] QB 13, 23 – 27 paras. 22 - 38 'The qualifications on the right to respect for family life that are recognised by article 8(2) apply equally to the article 12 rights'.

[200] HFE Act 1990 sch. 3 para. 8(2)

[201] HFE Act 1990 sch. 3 para. 6(3)

> the embryos transferred into them against their will would undoubtedly constitute an interference both with the claimants' right to autonomy over their own bodies, and with respect for their private lives.[202]

Only Ms Evans as a claimant appealed and the Court of Appeal held that:

> We ask ourselves whether the proposed interference with the right to respect for private life is proportionate to the need which makes it legitimate. The answer, in our judgment, is that it does. The need, as perceived by Parliament, is for bilateral consent to implantation, not simply to the taking and storage of genetic material, and that need cannot be met if one half of the consent is no longer effective. To dilute this requirement in the interests of proportionality, in order to meet Ms. Evans's otherwise intractable biological handicap, by making the withdrawal of the man's consent relevant but inconclusive, would create new and even more intractable difficulties of arbitrariness and inconsistency.[203]

The same approach was taken when the case moved beyond the UK domestic courts. In the Grand Chamber the view was taken that:

> ...the applicant's right to respect for the decision to become a parent in the genetic sense should [not] be accorded greater weight than J's right to respect for his decision not to have a genetically related child with her.[204]

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[202] Evans v Amicus Healthcare Ltd and Others (Secretary of State for Health and Another intervening) Hadley v Midland Fertility Services Ltd and Others (Secretary of State for Health and Another intervening) [2003] EWHC 2161 (Fam).

[203] Evans v Amicus Healthcare Ltd and Others (Secretary of State for Health intervening), Hadley v Midland Fertility Services Ltd and Others (Secretary of State for Health intervening) [2004] EWCA (Civ) 727, [2004] 2 FLR 766 (Evans CA) at para. 110, per Arden LJ.

[204] Evans v United Kingdom (2006) 43 EHHR 21 para. 90.

The Grand Chamber held that private life incorporated the right to respect for the decisions to become and not to become a parent; that the case involved the irreconcilable conflict between the Article 8 rights of two people, but that the consent provisions contained in the HFE Act 1990 served a number of wider, public interests. The Grand Chamber characterised Ms Evans' right as a right to respect for her decision to become a parent in the genetic sense, as that was clearly deemed to be an important aspect of an individual's private life and another aspect of what is encompassed by a right to procreative liberty. However, no matter the importance to the individual of becoming a parent, the right not to become a parent was considered to be equally important.

The Grand Chamber also recognised that the State enjoyed a certain margin of appreciation when seeking to strike a fair balance between the competing interests. The Grand Chamber recognised that:

> Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider… The issues raised by the present case are undoubtedly of a morally and ethically delicate nature...there is no uniform European approach in this field... In conclusion, therefore, since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one.[205]

[205] Evans v United Kingdom (2006) 43 EHHR 21 paras. 77 - 82.

In this case given the conflicting and equal rights of the parties the Grand Chamber was not prepared to say that the approach taken to the issue by the UK amounted to a breach of Ms Evans' human rights and therefore she lost her case.

There was however a dissenting judgement from 4 of the 17 Grand Chamber Judges. In the view of the dissenting Judges their view was that:

> ...the interests of the party who withdraws consent and wants to have the embryos destroyed should prevail (if domestic law so provides), unless the other party: (a) has no other means to have a genetically-related child; and (b) has no children at all; and (c) does not intend to have recourse to a surrogate mother in the process of implantation.[206]

In their view, in a situation where there was no other possibility for the woman to have a child, then the woman's desire to access assistance to have a child should outweigh the man's right to bodily autonomy and right to private life. The difference arose from the dissenting minority viewing the case as one of interference with the applicant's right to respect for the decision to become a genetically related parent, while the majority took the view that the case involved the State's positive obligations to adopt measures designed to secure respect for private life which they determined the UK had done.

All this leaves the observer with a rather confused picture of just what constitutes a right to procreative liberty under human rights law principles. Whilst a right to bodily autonomy and a right to respect for private life might be prayed in aid of a right to procreative liberty, is what is of overriding importance the right to have a child or the right to choose not to have a child? The majority in the Grand Chamber took the view that provided the State had met its positive obligations to secure respect for both these private decisions then one could not be preferred over the other. In situations where they conflict, the State could

[206] Ibid., para. 426.

pass legislation in favour of one party at the expense of the other without breaching human rights law.

Human rights arguments are of particular interest when applied to procreative choice given the importance of procreation as a significant human value.[207] ECHR Articles have been taken to mean that it is unlawful for States to remove from people the capacity to reproduce.[208] However, they have not been taken to establish a legal right to successful treatment.

In considering the meaning of the rights protected by Article 12, the right to marry and found a family the presiding Judge at first instance in the *Evans* case, Justice Wall, commented that:

> The two rights identified in article 12 are expressed conjunctively. However, even if I were able to read them disjunctively, as Mr Tolson and Miss Freeborn invited me to, and assume that the right to found a family can exist independently of the right to marry (which is plainly not engaged) it does not seem to me that they benefit either claimant in the instant case. The right to found a family through IVF can only, put at its highest, amount to the right to have access to IVF treatment. Self-evidently, it cannot be a right to be treated successfully. Furthermore, it is a right which is qualified by availability, suitability for treatment and cost. Once it is clear, as in my judgment it is, that the consensual scheme for IVF treatment contained in the Act (and to which both claimants have had access) is lawful and does not breach article 8 of the Convention, it must follow that there is no breach of article 12.[209]

[207] McLean, Choosing Children, 17.

[208] Ibid.

[209] Evans v Amicus Healthcare Ltd and Others (Secretary of State for Health and Another intervening) Hadley v Midland Fertility Services Ltd and Others (Secretary of State for Health and Another intervening) [2003] EWHC 2161 (Fam) at para. 264.

Justice Wall clearly had doubts that the right to found a family could be applied to anyone other than those within a marital relationship. This doubt was legally well founded as if the intention of the drafters of the ECHR had been that the right to marry and found a family were to exist independently of one another it can be assumed that they would have made express provision to that effect.[210] This thesis is concerned with a wider array of procreative choices than the right of a married couple to have a child. In that regard the right to marry and found a family is not an adequate source for a right to procreative liberty upon which this thesis relies. However, the protection a right to marry and found a family was said in *Evans* to provide, namely, the right of married couples to access ART services, is at least a restricted version of a right to procreative liberty which this thesis relies. Recent changes to allow same sex marriage in England and Wales and similar legislation introduced in Scotland will lessen some of the problems here at least in so far as the scope of Article 12 protection is concerned.[211]

Article 14 which secures the enjoyment of the other rights set out in the convention without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, was also held not to be engaged in the facts and circumstances surrounding *Evans*. One of the main difficulties for the Court was deciding upon a comparator against which the question of whether Ms Evans had been discriminated against could be tested. The three Court of Appeal Judges were divided on the issue. The majority decided that the correct comparator was between a women seeking treatment whose partner had withdrawn his consent and a woman whose partner had not. In her minority judgment, Arden LJ took the alternative view that the relevant comparator was between an infertile woman who had created frozen embryos using ART and a fertile woman who had created an embryo inside her

[210] In the case of Goodwin v UK (Application No. 28957/95, July 11 2002), the Court held that the ability to found a family was not required as a condition for a right to marry but did not determine the opposite.

[211] Marriage (Same Sex Couples) Act 2013 and Marriage and Civil Partnership (Scotland) Act 2014.

body through sexual intercourse. In any event the Grand Chamber unanimously held that the terms of the HFE Act 1990 did not violate Article 14. The court held that if differences in treatment between Ms Evans and the comparator (a woman who was able to conceive without assistance) were objectively and reasonably justified then there could be no discrimination. The reasons for finding that domestic law had not exceeded the State's margin of appreciation in balancing the parties' Article 8 rights also served to establish that there had been no violation of Article 14.

The *Evans* case which looked at procreative rights in the context of a right to marry and found a family, the right to private and family life and the right to be free from discrimination is interesting because it highlights the different facets of what a right to procreative liberty might entail. The right to procreative liberty is essentially an amalgam of rights[212] which include a right to make procreative choices without State interference, a right to make procreative choices without discrimination and a right to equal treatment when it comes to respect for procreative choice. However, while the language of human rights is important to any analysis of a right to procreative liberty, viewing such a right within a legalistic framework can disguise the moral basis of the right.

While a great many of the arguments for a right to procreative liberty can be framed in terms of human rights, in Emily Jackson's view:

> Rights, in the narrow sense envisaged by the Human Rights Act 1998, are unlikely to transform the regulation of reproduction in the UK. Nevertheless, I would argue that a more broadly conceived right to respect for reproductive autonomy is demanded by basic principles of justice, liberty and moral tolerance.[213]

What then would that 'broadly conceived right for reproductive autonomy' actually mean in practice? While the *Evans* case did not provide support for an

[212] McLean, Choosing Children, 212.

[213] Jackson, Regulating Reproduction, 9.

argument that one person's right to procreative liberty could take precedence over another's right to procreative liberty on human rights grounds it did in the view of Ruth Chadwick demonstrate:

> How unclear the notion of a right to reproduce, although so frequently appealed to, remains - who's right, and to what? What does reproductive autonomy amount to where one person's exercise of it appears to deny it to someone else? To deal with such conflicts requires more than common sense, and perhaps more than the language of rights.[214]

In a paper seeking to address the question of why procreative liberty is valuable Nicola Priaulx makes the point that when seeking to explore that question a legal framing of the matter might well prove counterproductive.[215] The *Evans* case involved the deployment of highly specific rules to determine who won the case. Priaulx is of the view that while this is necessary in a court room setting, when thinking about the value of procreative liberty such an approach is too narrow. The language of rights can mask the moral arguments which the rights are founded upon and is not the language used in the context of our daily lives when discussing procreation. Priaulx is of the view that when looking at the value of a right to procreative liberty the social dimension of procreation n must be the starting point.[216]

Priaulx grapples with the question of whether a right not to procreate can trump a right to procreate, a conclusion which the case of *Evans* might be said to support, or at least of equal value thus drawing a stalemate. In examining this question Priaulx makes the point that 'the notion that reproductive autonomy is less about the *kinds of reproductive decisions* (i.e. right to reproduce) and more about its instrumentality to the fostering of human needs is an important

[214] R. Chadwick, Reproductive Autonomy – A Special Issue, Bioethics, Vol. 21, Number 6, 2007, ii, ii.

[215] N. Priaulx, Rethinking progenitive conflict: why reproductive autonomy matters, Medical Law Review, 2008, 16(2), 169 - 200, 173.

[216] Ibid., 173.

distinction to draw'.[217] As respect for one's bodily autonomy is a particularly important aspect of a sense of self then when there is an apparent conflict between procreative decisions then the importance of bodily autonomy must determine whose right to procreative liberty is protected. The right to procreative liberty cannot then be founded upon human rights recognised under the international declarations but is founded more on the value which is placed upon the 'instrumentality for fostering one's human needs and interests given their centrality to our well-being and sense of self.'[218]

How might this relate to the question of whether or not section 13(5) represents an arbitrary interference in a person's right to procreative liberty? The question which Priaulx seeks to address is – Why is procreative autonomy so valuable? If section 13(5) was to be applied to a couple seeking access to ART it would be a denial of procreative liberty which 'prevents one from an experience that is central to individual identity and meaning in life'.[219] This idea will be returned to in more detail in Chapter Five.

2.14 Conclusion

In conclusion then procreative decisions should be protected from unjustified State interference to a significant extent by virtue of a right to procreative liberty. Whilst this right does not entitle an individual to make demands on others in order for their particular procreative choice to be realised, it should go so far as to afford people the right to non-interference based on respect for procreative liberty provided that this does not bring about significant harm to others. The vital importance of procreation to human values should warrant procreative liberty being granted 'presumptive primacy' where conflicts arise.[220]

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[217] Ibid.

[218] Ibid., 193.

[219] Robertson, Children of Choice, 24.

[220] Robertson, Children of Choice, 30.

State interference in procreative liberty has in the past resulted in quite horrific consequences. While justifications were put forward for this interference and widely accepted, as the justifications were not based on actual evidenced harm, but relied on pseudo-scientific claims and discriminatory attitudes, there was in actual fact no ethical basis for these proposed justifications. The past illustrates the importance of not being complacent when it comes to justifying State interference in procreative liberty. As the eugenics programmes in the USA illustrate, even when fundamental human rights are an integral part of a nation's law, serious infringement of a right to procreative liberty is still possible.

That is not to say that the right to procreative liberty is an absolute right. The right is founded upon rights to bodily autonomy and self determination. Procreation is an action which creates a child who, when born, undoubtedly will have rights and interests and which enables a person to establish a parenting relationship with the child. When the State intervenes in the parent/child relationship by removing the child when there is suspicion of neglect or abuse, such interference is completely justified on child welfare grounds when there is evidence of significant harm. However, it is more difficult to see how procreative liberty, choices to seek to have children and to create parenting relationships, can justifiably be interfered with on this basis. Chapter Five will return to this question when examining whether child welfare concerns are justification for denying patients access to ART treatment.

Prior to the discussion on child welfare however it is necessary to set out a more thorough analysis of the regulation of ART in the UK and the reasons behind the implementation of the current system in place. It will be illustrative to look at the function and purpose of regulation in an effort to understand the extent to which the state seeks to exercise control over it in certain areas in the UK, in particular access to treatment. In doing so this thesis will be able to develop its arguments that the regulation governing access to treatment has been overly influenced by the thinking behind the child welfare principle, which will be examined in Chapter Four, and that it should be amended because as it currently stands it represents an unjustified interference in a right to procreative liberty.

Regulation in the form of section 13(5) is of course a form of interference allowing the State to exercise control over who is permitted to access ART services.

What the next chapter seeks to build on from the arguments set out in this chapter is to examine whether the regulation prevents people from exercising their right to procreative liberty in the absence of any evidence that that decision will cause significant harm to another.

Martin Johnson has made the point that:

> It is incumbent upon those who wish to regulate to demonstrate: (i) that in doing so they have clear, worthy and justifiable objectives based on sound principles; (ii) that these objectives cannot be met within a deregulated framework; and, perhaps most important of all, (iii) that the regulatory framework proposed will allow the maximum responsible expression of creativity for doctors and scientists and of responsible choice and self-determination for patients.

The next chapter will set out in detail the development of regulation in this area - what section 13(5) actually says and does by way of regulating access to ART and examining the thinking behind the introduction and retention of section 13(5) in the Houses of Parliament to provide the means to evaluate the restriction on procreative liberty that this represents.

CHAPTER THREE – THE REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE CHILD WELFARE PRINCIPLE

3.1 Introduction

The previous chapter looked at the justifications for claims that people have a right to procreative liberty and how such a right had been neglected and breached in the past on spurious grounds. It also examined the human rights law principles that lend support to the importance society places upon a right to procreative liberty. However, it was acknowledged that there might be limitations on procreative liberty if there were deemed to be sufficiently compelling justifications. One possible justification would be harm to others, and in this context it is harm to children that might be born as a result of ART that requires consideration. This chapter seeks to examine the specific ways in which the welfare of the child principle is dealt with by the legislation governing ART in the UK in order to provide a clearer picture of the regulatory framework which the State has chosen to implement in an effort to ensure that the welfare of the child is protected to the degree which the State has deemed to be appropriate. The purpose of this chapter is not to question whether there should be any regulation of ART at all as it takes as its starting point that regulation is the established and current state of affairs. However it is intended to consider the appropriateness of regulation which can restrict access to ART on child welfare grounds. Given such regulation it is important to examine the criteria against which it should be measured. It is one thing to claim that regulation is justified in this area; it is quite another to put in place justifiable regulation.

This chapter examines whether the State, through legislation, and the Human Fertilisation and Embryology Authority, through its policy and practice has satisfied the burden of demonstrating that the current regulation is fulfilling the objectives which Johnson sees as important. This will have a particular focus on how the current regulation is or is not maximising self-determination for patients.

As outlined in Chapter One it is section 13(5) of the HFE Act 1990 which requires that licensed clinics take into account the welfare of the child to be born and any existing child prior to providing treatment services for women that are governed by this legislation. This thesis will argue that the UK Government should propose legislation to amend section 13(5) and the Code of Practice to remove the parental ability assessment requirements. The reasons they should do so will be argued in greater detail in Chapter Five but can be briefly summarised here as being because this part of section 13(5) is discriminatory, impracticable and inconsistent. The crux of the issue is that if regulation is unworkable in practice, not achieving what it sets out to do and is not being applied fairly then it is not regulation which is fit for purpose.

Before looking into these arguments in more detail it is necessary to set out some background to the regulatory framework which was put in place and why the UK introduced a system of statutory regulation. There are alternatives to statutory regulation which existed for a time in the UK but were ultimately replaced. Why this was so highlights some of the reasoning behind the current support for statutory regulation. The chapter will then set out in detail the 'nuts and bolts' of the regulatory regime in a general way, setting out the powers of the HFEA. It will then look at the Parliamentary debates which led to the introduction of the legislation in 1990 and its amendment in 2008 to give a flavour of what Parliamentary intention was in bringing forward section 13(5). It will then go on to look at the way in which concern about the welfare of the child to be born utilising ART has been incorporated into the regulation and the approach which the regulatory body takes to this important area. It will then look at some of the problems with regulating in relation to a very specific group of people, those seeking access to ART, whilst apparently ignoring potential child welfare concerns in other areas. It will then conclude with an analysis of whether or not the regulatory regime, particularly section 13(5) is actually working in practice.

3.2 The Human Fertilisation and Embryology Authority (HFEA)

The formal regulation of ART services has been in place in the United Kingdom now for well over 20 years.[1] The body entrusted with overseeing the practice of ART in line with this regulation is the HFEA. The HFEA was established in August 1991 and consists of twenty members made up of medical and nursing practitioners, academics and other professional people who are all appointed by the UK Secretary of State for Health.[2] The Chair, Vice-Chair and at least half of the membership must be lay persons in an effort to ensure objectivity, while at least one-third must be medical practitioners or scientists to ensure that there is a sound knowledge-base.[3] The HFEA is a body corporate[4] and an executive Non-departmental Public Body sponsored by the Department of Health.[5] It has its origins in the recommendation of the Warnock Committee that infertility services and embryo research should be regulated.[6] The principal role of the HFEA is to control and monitor the activities of licensed clinics and research facilities. As the HFEA has said, it is the UK's independent regulator overseeing the use of gametes and embryos in fertility treatment and research.[7]

In September 2010 the Government announced plans to scrap the HFEA along with 176 other 'quangos' in a move designed to cut costs.[8] The Public Bodies

[1] The HFE Act 1990 received Royal Assent on 1 November 1990.

[2] In accordance with the HFE Act 1990 schedule 1 paragraph 4(1).

[3] In accordance with the HFE Act 1990 sch. 1 paras. 4(3) and (4).

[4] Established by HFE Act 1990 section 5.

[5] See www.hfea.gov.uk/docs/HFEA_standing_orders.pdf (accessed 25 May 2011).

[6] The Warnock Report, para. 13.3.

[7] See www.hfea.gov.uk (accessed 25 May 2011).

[8] See www.bbc.co.uk/news/uk-politics-11407174 (accessed on 27 May 2011) - Television Interview with Linda Jardine of HFEA quango – 'We will hold the line', 24 September 2010.

Act 2011[9] provided Ministers with powers to abolish specified bodies or offices, of which the HFEA was one.[10] However, in January 2013 the Government backtracked on this proposal following a public consultation exercise. In their response to the public consultation[11] the Government decided that:

> We will not pursue a transfer of functions at the present time. However, retaining the HFEA and the HTA with further efficiencies must take account of the support for a review of the way in which the two bodies undertake their functions, with a view to reducing the regulatory burden. It must also include a programme of work on achieving efficiencies to deliver streamlining of their non-specialist functions.[12]

The Government went on to say:

> In line with our conclusion above, the Department will arrange an immediate independent review of the way in which the HFEA and the HTA undertake their regulatory functions.

The independent review[13] which followed included recommendations to retain the HFEA as a separate Non-Departmental Public Body in order to ensure

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[9] http://www.legislation.gov.uk/ukpga/2011/24/contents/enacted (accessed on 4 February 2014). The legislation received Royal Assent on 14 December 2011 and commenced on 14 February 2012.

[10] Public Bodies Act 2011 sec. 1 and sch. 1.

[11] Government response to the consultation on proposals to transfer functions from the Human Fertilisation and Embryology Authority and the Human Tissue Authority, Department of Health, Published 25 January 2013. http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/health/2013/01/response-hfea-hta/ (accessed on 4 February 2014) (hereinafter 'Government Response').

[12] Government Response, para. 69.

[13] Review of the Human Fertilisation & Embryology Authority and the Human Tissue Authority, April 2013. https://www.gov.uk/government/publications/review-of-human-fertilisation-embryology-authority-and-human-tissue-authority (accessed on 10 February 2014).

maintenance of public confidence in the activities it regulates,[14] to have the HFEA review and strengthen their arrangements for consulting with stakeholders on their approach to regulatory activities to improve transparency,[15] and for the HFEA to conduct their own review of the balance of its regulatory focus to ensure that it reflected the relative risks of the different activities that it oversaw.[16] All the recommendations of the independent review were accepted by the Government.[17] The author of the independent review concluded that the regulatory regime operated by the HFEA was achieving its primary purpose of 'providing effective public protection and commanding public confidence in sensitive, complex, and dynamic areas' and that there were thus 'no public protection or public confidence drivers for changes in the regulatory landscape'.[18]

So despite the Government proposals to significantly alter the regulatory framework, the role which the HFEA performs in relation to the regulation of ART continues largely unaltered for the time being.[19] The stakeholders sent a clear message to the Government that any changes to the framework would risk damaging public confidence in the regulatory regime. One of the proposed objectives of the Government's original proposals was 'strengthening the effectiveness of regulation in this area – recognising that effective regulation enforcement is paramount to ensure public confidence and protect health and safety.'[20] This statement provides some insight into the view that the

[14] Ibid., Recommendation 1.

[15] Ibid., Recommendation 4.

[16] Ibid., Recommendation 10.

[17] Department of Health, Response to the Review of the Human Fertilisation & Embryology Authority and the Human Tissue Authority, July 2013. https://www.gov.uk/government/publications/review-of-human-fertilisation-embryology-authority-and-human-tissue-authority (accessed on 10th February 2014).

[18] See fn 16, 28.

[19] UK Government has 'no intention to revisit' the HFE Act, www.bionews.org.uk/page_90916.asp (accessed on 16 September 2011).

[20] Government Response, para. 22.

Government took as to the purpose and goal of regulation in this area. Public confidence was also a fundamental consideration for the various stakeholders.[21]

Therefore, it was perhaps heartening for the HFEA to learn that 85% of the responses received through the public consultation were against it being subsumed into the Care Quality Commission. One commonly expressed reason for not transferring its functions was that it had 'developed considerable expertise in highly specialised fields and [was] trusted and respected by the regulated sectors.'[22] Interestingly however the British Fertility Society which represents a large number of fertility clinicians, nurses, scientists and others who work in the field, were supportive of the proposed transfer because 'There are no compelling reasons to continue to regulate IVF as a distinct category of treatment, and some serious downsides to doing so'.[23] So whilst the proposed changes to the HFEA will not be happening there are still some outstanding questions and disagreement as to the role regulation should play in this area of medical practice. The HFEA having been established almost 25 years ago continues as the body authorised by Government to oversee the regulation of ART. It describes its current role as 'setting standards for clinics, licensing them, and providing a range of information for the public, particularly people seeking treatment, donor-conceived people and donors.'[24] The HFEA stated in 2014 that they will over the next three years undertake to improve the quality and standard of care through their regulatory activities; improve the lifelong experience of donors, donor-conceived people, patients using donor conception and their wider families; use the data in the registrar of treatments to improve outcomes and research; ensure that patients have access to high quality meaningful information; ensure the HFEA remains demonstrably good value for the public, the sector and Government.[25]

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[21] Government Response, para. 37.

[22] Government Response, para. 36.

[23] Government Response, para. 39.

[24] HFEA, HFEA Strategy 2014 – 2017.

[25] Ibid.

The regulation of ART in the form of the HFE Acts 1990 and 2008 has a fairly lengthy history which went through various stages of development. In the beginning, the science and its application were unregulated. There then followed a period of self-regulation, before statutory regulation was formally introduced in 1990. The form that the statutory regulation took was influenced by the way in which non-regulation and self-regulation had previously operated. Therefore, it is worth spending some time analysing the past to explain how the situation in regard to statutory regulation restricting access to ART on the grounds of child welfare got us to where we are today.

3.3 The Unregulated System

The birth of the first 'test-tube' baby in 1978 acted as the catalyst for widespread public debate which eventually led to the establishment of the HFEA.[26] However, there was an extensive period of time, from 1968 to 1985, when specific regulation of ART research or treatment, above and beyond the rules of medical ethics pertinent to all medical practice and research, was non-existent.[27] In Johnson's view the unregulated period between 1968 and 1985 had a number of advantages, not least the freedom it allowed scientists to develop new ideas in the field. As Johnson says:

> Perhaps the most powerful argument [in favour of no regulation] is the maximized creativity and freedom of ideas, action, exploration and discovery that such a situation brings. Science and medicine at their most innovative and imaginative are the province of the

[26] R.L. Stenger, The Law and Assisted Reproduction in the United Kingdom and United States, Journal of Law and Health, 1994-1995, vol. 9, 135 - 161, 139.

[27] M.H. Johnson, Should the use of assisted reproduction techniques be deregulated? The UK experience: options for change, Human Reproduction, 1998, vol.13, no.7, 1769–1776, 1770.

> adventurous, the non-conventional, the opportunist, the risk-taker and the boundary crosser.[28]

Interestingly Johnson was writing at the time of another great medical advance in the field of embryology, the creation of the cloned 'Dolly the Sheep'.[29] It is also of note that following the creation of Dolly the Sheep there was swift action as a working group consisting of members of the HFEA and of the Human Genetics Advisory Commission was established to look at the issue of human cloning. Thereafter the Human Reproductive Cloning Act (2001) was passed which made reproductive human cloning illegal in the UK.[30] It certainly appears that whenever science advances in a way which is unsettling to the general public there are calls for the review of the regulatory framework governing the field. As Johnson noted 'The successful reproductive cloning of Dolly using a nucleus from an adult sheep cell has stimulated a resurgence of discussion about whether and how to control the development and therapeutic application of all the new assisted reproduction technologies'. [31]

Johnson goes on to make the important point that it was in an unregulated environment that the whole research project aimed at alleviating infertility through IVF began.[32] He asks the question whether or not the work of Edwards and Steptoe would have proceeded at all if regulation had been in place at that time.[33] Johnson suggests that deregulation is the political philosophy underpinning the free market economy and is often heralded in the field of

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[28] Ibid.

[29] Ibid.

[30] HFEA Website, Cloning issues in reproductive science, http://www.hfea.gov.uk/518.html (accessed on 25 June 2014).

[31] M.H. Johnson, Should the use of assisted reproduction techniques be deregulated? The UK experience: options for change, Human Reproduction, 1998, vol.13, no.7, 1769–1776, 1771.

[32] Ibid., 1770.

[33] Ibid.

economics[34] and asks 'why should not scientists and doctors also be set free to explore the boundaries of their imagination and expand the boundaries of reproductive manipulation?'[35] However, it is worth noting as an aside that one major concern commonly voiced with respect to ART is that it involves the commoditisation of embryos and pregnancy and this may be one reason why deregulation on a free market model is opposed.[36]

While the period of non-regulation left the way clear for innovative scientists to forge ahead, the science was not without its critics who expressed their concerns and put certain obstacles in the way of unfettered research and application of novel techniques in medical treatment. Edwards and Steptoe's application for funding to the Medical Research Council (MRC) for long-term support for a programme of scientific and clinical 'Studies on Human Reproduction' was declined on the basis of concerns over the safety and well-being of patients and potential offspring.[37] The MRC's stated reasons for refusal were on ethical grounds. They wanted to see experiments carried out on primates first and had serious reservations about the experimental nature of the work.[38] Furthermore the Chief Medical Officer at the Department of Health and Social Services did not believe that public money should be spent on experiments which might produce abnormal offspring.[39] The work of Edwards

[34] Although it should be noted that Johnson was writing prior to the banking crisis of 2008 which led many to question the wisdom of unbridled deregulation in this area.

[35] M.H. Johnson, Should the use of assisted reproduction techniques be deregulated? The UK experience: options for change, Human Reproduction, 1998, vol.13, no.7, 1769 – 1776, 1770.

[36] See for example, A. Banerjee, An insight into the ethical issues related to in vitro fertilization, The Internet Journal of Health, 2006, Volume 6, Number 1.

[37] M.H. Johnston, S.B. Franklin, M. Cottingham, N. Hopwood, Why the Medical Research Council refused Robert Edwards and Patrick Steptoe support for research on human conception in 1971, Human Reproduction, 2010, Volume 25, Issue 9, 2157 - 2174.

[38] Ibid., 2158.

[39] M.H. Johnson, Should the use of assisted reproduction techniques be deregulated? The UK experience: options for change, Human Reproduction, 1998, vol.13, no.7, 1769 – 1776, 1770.

and Steptoe continued with the use of private money until the birth of Louise Brown in 1978 turned the MRC into enthusiastic backers of ART.[40]

As this thesis is focused on the impact of child welfare concerns upon the current regulation of ART services, it is interesting to note that some of the first opposition to this work centred on concerns for the physical welfare of the potential child. The view that children who might be born through the use of ART required some sort of protection influenced the debate on regulation of this field from the outset.

Edwards himself was aware of the social and ethical issues surrounding his work and in 1971 asked the question; did anything need to be done to regulate the application of these new scientific advances.[41] Edwards was of the opinion that the difficulty with regulation was that it contained an implicit direction for the scientist to ask permission before carrying out his/her work.[42] Edwards noted the great strides science had taken when the need to ask the permission of the Church disappeared.[43] One of Edwards' fears was that the State would appropriate the science of human embryology and turn all research over to a government agency. In his view:

> If some form of regulation is required, perhaps what is needed is not heavy handed public statute, or rule making committees, or the conscience of individual doctors, but a simple organisation easily

[40] M.H. Johnston, S.B. Franklin, M. Cottingham, N. Hopwood, Why the Medical Research Council refused Robert Edwards and Patrick Steptoe support for research on human conception in 1971, Human Reproduction, 2010, Volume 25, Issue 9, 2157-2174, 2157.

[41] R.G. Edwards and D.J. Sharpe, Social values and research in human embryology, Nature, 231, 87-91, 89.

[42] Ibid.

[43] Ibid.

> approachable and consulted to advise and assist biologists and others to reach their own decisions. Such an organisation must represent widespread but uncommitted interests and be free of partisan politics. It would frame public debate, act as a watchdog, and yet interfere minimally with the independence of science.[44]

It is arguable whether or not this is what Edwards saw being introduced in the end. Whether the HFEA is a simple, easily approachable organisation offering advice and assistance, or a body created through heavy-handed statute is a matter of debate. However, by the time legislation was being considered, the focus had shifted somewhat from concerns about the physical welfare of the potential child to upholding the special status of the embryo. Given the concerns and arguments surrounding the status to be afforded the human embryo,[45] ART was not being seen as just any other medical procedure and extensive regulation of human embryology was considered necessary.

While an unregulated state of affairs was useful in the early stages of the development of ART, it was acknowledged at the time that scientific research should not go beyond what was tolerable to the wider society.[46] There had to be room for consultation between the scientific community and the general public to ensure that public confidence was maintained. For this reason there was a good deal of support amongst scientists for a system of self-regulation. As Edwards said himself:

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[44] Ibid., 90

[45] The Warnock Committee actually reached the conclusion that the embryo was 'special' and should be treated with 'respect'. The Warnock Report, para. 11.7.

[46] J. Gunning and V. English, Human In Vitro Fertilization, Dartmouth Publishing Company, Vermont, 1993, 41a (henceforth, Gunning and English, Human In Vitro Fertilization).

> Forms of regulations or consultation immediately between *laisser-faire* and state pre-emption might be useful. In many professions various forms of self-regulation exist already, and could be adapted to meet present needs.....Delegating regulations to individual physicians or medical organisations is an attractive possibility.[47]

In the UK a system of self regulation was introduced between 1985 and 1991 in the form of the Voluntary Licensing Authority (VLA) which became for a short period of time the Interim Licensing Authority (ILA), a forerunner to the HFEA. The next section will look at that system of self regulation and examine why it was replaced by a more formal system of statutory regulation. It is of note that this debate is still ongoing particularly in the USA where according to one commenter lack of formal regulation has led to a 'reproductive free-for-all'.[48]

3.4 The System of Self Regulation

In November 1984 the MRC Advisory Group met to co-ordinate their response to the recently published Warnock Committee Report.[49] The Group welcomed the recommendation that a statutory authority should be set up and proposed that some interim arrangements be put in place. At the same time the Warnock Committee was generating heated debate in Parliament, principally on the issue of human embryo research.[50] The House of Lords called for a moratorium on human embryo research until such time as legislation was enacted.[51] The VLA

[47] R.G. Edwards and D.J. Sharpe, Social values and research in human embryology, Nature, 231, 87-91, 90.

[48] K. Riggan, Regulation (or Lack Thereof) of Assisted Reproductive Technologies in the U.S. and Abroad, Dignitas, 17(1 & 2), Spring/Summer 2010, 8-11.

[49] Gunning and English, Human In Vitro Fertilization, 41.

[50] Gunning and English, Human In Vitro Fertilization, 41-42.

[51] Gunning and English, Human In Vitro Fertilization, 41-42.

was hastily established to counter the serious threat to continuing research contained in Enoch Powell's Unborn Children (Protection) Bill, which was receiving widespread support in Parliament.[52] The remit of the VLA was to approve a Code of Practice on research related to human fertilisation and embryology; to invite all centres, clinicians and scientists engaged in research on IVF to submit their work for approval and licensing; to visit each centre prior to granting a licence; and to make known publically details of approved and unapproved work.[53] The uptake of licences issued by the VLA was a resounding success with practitioners keen to show that their work had been afforded some sort of official approval.[54] Whilst the aim of setting up the VLA was to ward off the prohibitions to research proposed by Powell's Bill the organisation later became the Interim Licensing Authority (ILA), one of the motives being that practitioners wished to emphasis the desire for statutory guidance and protection from claims of unethical behaviour in the face of uncertainty as to what they were and were not allowed to do.[55]

There were certain advantages to a system of self-regulation such as the fact that the regulators were from the profession and therefore knowledgeable about the type of work being carried out. Whilst the VLA was not endowed with legal powers to enforce its code of practice, the potential for the withdrawal of its endorsement of a clinic was a powerful means through which it could ensure compliance. The VLA code of practice also played a significant role in the initial considerations surrounding the question of how ART might impact upon the welfare of the children born as a result. The code of practice 'Guidelines for both Clinical and Research Applications of Human in vitro Fertilisation' contained a clause which read:

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[52] Gunning and English, Human In Vitro Fertilization, 42; M. Mulkay, The embryo research debate – Science and the politics of reproduction, Cambridge University Press, Cambridge, 1997, 24-29.

[53] Gunning and English, Human In Vitro Fertilization, 45.

[54] Gunning and English, Human In Vitro Fertilization, 48.

[55] M.H. Johnson, Should the use of assisted reproduction techniques be deregulated? The UK experience: options for change, Human Reproduction, 1998, vol.13, no.7, 1769 – 1776, 1771.

> The following general considerations must be taken into account when establishing clinical facilities where in vitro fertilisation or GIFT is carried out: detailed records must be kept along the lines recommended in the Warnock Committee Report, and should include details of the children born as a result of in vitro fertilisation; the records should be readily available for examination by duty authorised staff for collation on a national basis for a follow-up study.[56]

Clinics were asked to provide these records to Dr Valerie Beral who was carrying out a follow-up study of children born as a result of IVF. The study found that multiple pregnancies which frequently resulted from assisted conception were the main determinant of complications during pregnancy and of the health of the children at the time of birth. The study also found that overall malformation rates were similar to those in the country as a whole. However, there were insufficient numbers of children studied at the time to draw firm conclusions about the risk of specific types of malformations. Continued monitoring of children resulting from assisted conception and the continued co-operation of individuals and centres practising assisted conception were recommended.[57] It is clear, then, that the physical welfare of the children resulting from assisted conception was a particular area of concern between 1985 and 1991, although, beyond the increased risks associated with multiple births, the research did not provide particularly strong confirmation of grounds for this concern.

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[56] Guidelines for both Clinical and Research Applications of Human in vitro Fertilization, Clause 13(b) at Gunning and English, Human In Vitro Fertilization, 187.

[57] V. Beral, P. Doyle, S.L. Tan, B.A. Mason, S. Campbell, Outcomes of pregnancies resulting from assisted conception, British Medical Bulletin, (1990) Vol. 46, No. 3, 753-768.

The idea of making value judgements on the 'type' of people who should be offered treatment and be 'allowed' to become parents was raised in 1984 in the Warnock Committee Report which - as has previously been noted - stated that 'we believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother'.[58] However the Warnock Committee considered the welfare of the future child and concluded that 'hard and fast rules are not applicable'[59], preferring to leave the final access to treatment decision in the hands of the consultant. Although the Committee recommended that anyone seeking infertility treatment should be provided with the opportunity of advice and investigation, it could also:

> ...foresee occasions where the consultant may, after discussion with professional health and social work colleagues, consider that there are valid reasons why infertility treatment would not be in the best interests of the patient, the child that may be born following that treatment, or the patient's immediate family.[60]

In McLean's opinion the Warnock Committee Report was relatively inconclusive on the question of whether access to treatment should depend upon parenting ability.[61] That said the Warnock Committee clearly envisaged situations where a clinic might consider a patient unsuitable for treatment for reasons unrelated to medical issues.[62] While the Warnock Committee had raised the question of the suitability of a patient in terms of allowing access to ART, the self-regulatory regime did not address this issue directly. It did not, for example, form part of

[58] The Warnock Report, para 2.11.

[59] The Warnock Report, para 2.13.

[60] The Warnock Report, para 2.12.

[61] S. McLean, Assisted Reproduction and the Welfare of the Child, (Cardiff Centre for Ethics, Law and Society, 2005), 1.

[62] Ibid., 2.

the VLA's Guidelines for both Clinical and Research Applications of Human *in vitro* Fertilisation.[63] It was not until legislation was introduced that the questions raised by the Warnock Committee in 1984 were addressed in terms of a regulatory framework. Regulation was principally concerned with controlling what clinics could and could not do. It was decided that the HFEA would exert this control through the issuing of licences under certain conditions. One of these licence conditions was that treatment providers would take into account the welfare of the child to be born.

3.5 Statutory Regulation

The regulation of ART performs two main functions. Firstly, it places constraints on the practice of fertility medicine above and beyond the standard ethical and legal constraints incumbent upon all medical practitioners, and, secondly, it places limits on what treatment patients seeking access to ART may receive.[64] As previously noted the licensing and control of clinics by the HFEA arose from a recommendation from the Warnock Committee Report[65] which saw the primary objective of regulation as being the protection of the public.[66] Other reasons for statutory regulation which have been identified included the need to allay public concerns about the creation, manipulation and appropriate uses of human embryos; to protect scientific freedom by reassuring the public that the work was subject to monitoring and proper control; and to protect those working in the field from criticisms and accusations of unethical behaviour.[67] The licensing role of the HFEA was established to ensure that these goals were achieved. The

[63] Gunning and English, Human In Vitro Fertilization, 49.

[64] M. Brazier, Regulating the Reproduction Business?, Medical Law Review, 7, Summer 1999, 166-193, 166.

[65] The Warnock Report, Chapter 13 – Regulating Infertility Services and Research.

[66] The Warnock Report, para. 13.3.

[67] V. English, Autonomy versus protection — who benefits from the regulation of IVF?, Human Reproduction, Vol.21, No.12, pp. 3044–3049, 2006, 3045.

Warnock Committee made clear it was not the intention of licensing regulation to interfere with the duty of the doctor to exercise clinical judgement in treating patients.[68] However, clinics were expected to operate within a moral and legal framework determined by society through Parliament.[69]

The HFE Act 1990 made it a criminal offence to bring about the creation of an embryo except in pursuance of a licence,[70] or to keep or use an embryo except in pursuance of a licence.[71] The HFE Act 1990 also made it a criminal offence to procure or distribute an embryo intended for human application except in pursuance of a licence or third party agreement,[72] place in a woman a live embryo other than a human embryo,[73] or place in a woman any live gametes other than human gametes.[74] The HFE Act 1990 created similar criminal sanctions in relation to the storage, use, procurement or distribution of gametes.[75]

The terminology in regard to the placing of a live embryo other than a human embryo was altered by the HFE Act 2008. Section 3(2) now reads that no person shall place in a woman an embryo other than a permitted embryo (as defined by section 3ZA) any gametes other than permitted eggs or permitted sperm (as so defined).[76] A permitted egg is one (a) which has been produced by or extracted from the ovaries of a woman, and (b) whose nuclear or mitochondrial DNA has

[68] The Warnock Report, para. 13.1.

[69] The Warnock Report, para. 13.2.

[70] HFE Act 1990 sec. 3(1) and sec. 41(2).

[71] HFE Act 1990 sec. 3(1A) and sec. 41(2).

[72] HFE Act 1990 sec. 3(1B) and sec. 41(2).

[73] HFE Act 1990 sec. 3(2)(a) and sec. 41(1)(a).

[74] HFE Act 1990 sec. 3(2)(b) and sec. 41(1)(a).

[75] HFE Act 1990 sec. 4 and sec. 41.

[76] HFE Act 1990 sec. 3(2)(a) and (b) as amended by of the HFE Act 2008 sec. 3(2).

not been altered.[77] Permitted sperm are sperm (a) which have been produced by or extracted from the testes of a man, and (b) whose nuclear or mitochondrial DNA has not been altered.[78] An embryo is a permitted embryo if (a) it has been created by the fertilisation of a permitted egg by permitted sperm, (b) no nuclear or mitochondrial DNA of any cell of the embryo has been altered, and (c) no cell has been added to it other than by division of the embryo's own cells.[79] Regulations may provide that (a) an egg can be a permitted egg, or (b) an embryo can be a permitted embryo, even though the egg or embryo has had applied to it in prescribed circumstances a prescribed process designed to prevent the transmission of serious mitochondrial disease.[80] The requirement that treatment be given to patients using only permitted embryos was introduced to prohibit the use of genetically modified embryos for reproductive purposes.

A licence cannot authorise keeping or using an embryo after the appearance of the primitive streak,[81] placing an embryo in any animal,[82] keeping or using an embryo in any circumstances in which regulations prohibit its keeping or use, or replacing a nucleus of a cell of an embryo with a nucleus taken from a cell of any person,[83] embryo or subsequent development of an embryo[84] and it is a criminal offence to do any of these things, which cannot be authorised by a licence.[85]

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[77] HFE Act 1990 sec. 3ZA(2) inserted by the HFE Act 2008 sec. 3(5).

[78] HFE Act 1990 sec. 3ZA(3) inserted by HFE Act 2008 sec. 3(5).

[79] HFE Act 1990 sec. 3ZA(4) inserted by HFE Act 2008 sec. 3(5).

[80] HFE Act 1990 sec. 3ZA(5) inserted by of the HFE Act 2008 sec. 3(5).

[81] HFE Act 1990 sec. 3(3)(a).

[82] HFE Act 1990 sec. 3(3)(b).

[83] HFE Act 1990 sec. 3(3)(c).

[84] HFE Act 1990 sec. 3(3)(d).

[85] HFE Act 1990 sec. 41(1)(b).

The licensing role of the HFEA illustrates one of its leading goals which is 'safety first'.[86] When regulation was first proposed by the Warnock Committee in 1984 a great deal of doubt and fear surrounded the whole practice of infertility treatment, as Mulkay has observed 'The reception given to the Warnock Report in 1984 showed that many people, in parliament and in society at large, were deeply disturbed to find that there was no law dealing with research on human embryos and no formal procedures whereby scientists? could be made accountable for their use of human embryos'.[87] As a consequence, the HFE Act 1990 created a regulatory body tasked with keeping a close eye on what was happening within clinics and research facilities. As discussed, the HFEA still has a significant role in setting standards and protecting the public and the licensing powers are the teeth it has to achieve this. Nevertheless, as a result of the stautory provisions, the HFEA has no power to grant licences in certain areas which are considered to be ethically unsound, either because they undermine the moral status of the human embryo or are in some other way considered to be problematic.

The HFEA is required to maintain a Code of Practice giving guidance about the proper conduct of activities carried on in pursuance of a licence under the Act.[88] This includes guidance for those providing treatment services about the account to be taken of the welfare of the children who may be born as a result of treatment services.[89] Unlike a breach of a licence condition, a failure to observe any part of the Code of Practice does not in itself render a person liable to any

[86] M. Brazier, Regulating the Reproductive Business, Medical Law Review, 7, Summer 1999, 166-193, 173.

[87] M. Mulkay, The Embryo Research Debate: Science and Politics of Reproduction, Cambridge University Press, Cambridge, 1997, 3.

[88] HFE Act 1990 sec. 25(1).

[89] HFE Act 1990 sec. 25(2).

legal proceedings,[90] but the licence committee may take the Code of Practice into account when deciding whether or not there has been a failure to comply with a licence condition[91] and take into account any failure to observe any provisions of the Code of Practice when considering whether to vary or revoke a licence.[92] The Code of Practice represents a different sort of rule-making which is designed to complement the statutory powers of the HFEA.

The UK statutory regime as set out in the HFE Act 1990 has been described as 'a milestone in biomedical regulation...the first attempt in English law to provide a comprehensive framework for making medical science democratically accountable'.[93] Montgomery is of the view that the HFE Act 1990 operates as a model for establishing a workable compromise between incompatible ethical positions as opposed to setting out definitive solutions to resolve conflicts where they might arise.[94] The statutory powers and duties set out above illustrate that the HFEA has considerable powers to determine what embryo research and infertility treatment will be carried out, with the creation of a system of checks and balances through Parliamentary oversight. Montgomery considers that the HFEA licensing model of regulation is attractive because it allows for the continuing review of professional practice and is flexible enough to allow for new issues to be dealt with without recourse to Parliament. However, he is more cautious in his views about how much it makes the clinicians accountable to the public. Whilst he welcomed the inclusion of lay members of the HFEA he contends that 'Lay participation is sought through the benevolence of the great and the good, not by empowering consumers. As a result, the practical effect of the powers given to the licensing authority may turn out to be more the

[90] HFE Act 1990 sec. 25(6).

[91] HFE Act 1990 sec. 25(6)(a).

[92] HFE Act 1990 sec. 25(6)(b).

[93] J. Montgomery, Rights, Restraints and Pragmatism: The Human Fertilisation and Embryology Act 1990, The Modern Law Review, Vol. 54, No. 4 (Jul., 1991), 524-534, 524.

[94] Ibid., 525.

centralisation of medical power than the opening of professional values to public debate.'[95] So whilst the licensing model of regulation by a non-government authority has some particular advantages over direct Government involvement, Montgomery for one is not fully convinced that the model goes far enough in making the practitioners accountable to the public.

The role of the HFEA is to balance the risk of harm against the benefits of proceeding. However, Dawson argues that the regulatory role which the HFEA plays is confused.[96] It is tasked with what he calls its 'narrow role' of licensing and inspecting clinics, but it also has a 'broader role' in policy formation. In Dawson's view this has meant that the HFEA has become embroiled in difficult ethical decisions which have a huge impact upon the lives of the people involved.[97] This has led to it being criticised both by those who wish to see greater respect for reproductive liberty and those who wish to see it act in a more conservative fashion.[98] The regulatory model which Dawson calls for is a separation of the two roles. The body tasked with the broader role of policy formation would be guided by:

> ...the fundamental principle that private individuals should be able to make free decisions about their reproductive choices (in line with article 8 of the European Convention on Human Rights Act). This would only be subject to constraints based upon evidenced risk of harm to the resultant child. No decision would be permissible based upon a mere assumed risk of harm but must be backed up with solid evidence. Such a policy would be able to take into account the benefits of producing children as well as removing the

[95] Ibid., 534.

[96] Ibid., 1.

[97] The HFEA's involvement in the Diane Blood case is a particular case in point.

[98] A. Dawson, The Human Fertilisation and Embryology Authority: Evidence Based Policy Formation in a Contested Context, Health Care Analysis, Vol. 12, No.1, March 2004, 1-6, 2.

> harm of not permitting people to have children that they would love.[99]

While, as discussed in Chapter Two, there may be doubts about the extent to which Article 8 (and indeed Article 12) can be useful in practice to uphold specific procreative choices, it is undoubtedly true that human rights principles are engaged in this area and are seen as an aspect of respect for autonomy. The focus of this thesis is whether public concern for the welfare of the child to be born justifies interference with procreative liberty. One of the principal issues is whether it is for those who wish to restrict procreative liberty to provide evidence of harm, or the responsibility of those seeking to exercise make procreative choices to demonstrate that their choice is safe. The next section will look at the way in which concern about the welfare of the child to be born utilising ART services has been incorporated into the regulation and the approach which the regulatory body takes to this important area.

3.6 Section 13(5) of the HFE Act 1990

Section 13(5) of the HFE Act 1990 as enacted stated that:

> A woman shall not be provided with treatment services unless account has been taken of the welfare of the child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.[100]

[99] Ibid., 6.

[100] A discussion of the need to take into account the welfare of any other child who may be affected by the birth is outwith the scope of this thesis and will not be examined in detail. However, it is worth noting that this requirement does mean that section 13(5) is not entirely about the welfare of the yet-to-be-conceived child.

In order to obtain a licence a clinic had to satisfy the HFEA that it would adhere to this requirement. Treatment services meant medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children.[101] Section 25 of the HFE Act 1990 required the HFEA to maintain a code of practice giving guidance about the proper conduct of activities carried on in pursuance of a licence under the Act.[102] All the HFEA codes of practice since 1990, eight to date, have included a section intended as guidance to clinics on how to apply section 13(5). The first Code of Practice gave guidance on how clinics were to carry out a child welfare assessment in circumstances where the child would be born with no legal father.

> Where the child will have no legal father centres are required to have regard to the child's need for a father and should pay particular attention to the prospective mother's ability to meet the child's needs throughout his or her childhood, and where appropriate whether there is anyone else within the prospective mother's family and social circle who is willing and able to share the responsibility for meeting those needs and for bringing? up, maintaining and caring for the child. [103]

The HFEA commenced a public consultation in 2005 in order to gauge public opinion on guidance to licensed clinics on taking into account the welfare of a child born of assisted conception treatment. The consultation paper was entitled 'Tomorrow's Children'.[104] In setting out the purpose of the consultation exercise the HFEA stated that:

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[101] HFE Act 1990 sec. 2(1).

[102] HFE Act 1990 sec. 25(1).

[103] HFEA Code of Practice 1st Edition. para. 3.16b available at http://www.hfea.gov.uk/1682.html (accessed on 1 August 2013).

[104] Tomorrow's Children – A consultation on guidance to licensed fertility clinics on taking into account the welfare of the child to be born of assisted conception treatment, HFEA Publication, January 2005. (henceforth, Tomorrow's Children Consultation Paper).

> Since 1991, when the first Code of Practice was published, staff in licensed fertility clinics have acquired more than ten years' experience of carrying out welfare of the child assessments. The purpose of this consultation is to capture that experience and to gather views both on the limitations of the current guidance and on how it could be improved in the future.
>
> It is not within the powers of the HFEA to amend the welfare section in the Human Fertilisation and Embryology Act. Therefore, whilst we welcome views on the welfare principle itself, the primary purpose of this consultation is not to solicit suggestions on how the Act might be amended. The Department of Health is carrying out its own review of the Act.[105]

The consultation paper set out what the HFEA believed to be the harms that children born using ART might face. The HFEA separated these possible harms into four categories; medical, physical, psychological and social. Medical harms were defined as the risk of being born with a genetic or infectious disease due to a potential parent transmitting that disease to the child. Physical harms were defined as the risk of a child being subjected to abuse or neglect after birth, or risks associated with drug or alcohol abuse during pregnancy or after birth. Psychological risks were classified in two ways; firstly, the risk of psychological harm associated with growing up in a particular family structure, such as being raised by a single parent, gay couple, older couple or non-genetically related parent(s) and secondly, the psychological risk to a child as a result of abuse and neglect. The latter is clearly closely associated with physical harm though this need not have been the cause. Social harms were defined as care being compromised due to a particular factor associated with the patient(s), such as age, absence of a father figure or an unstable relationship.

[105] Tomorrow's Children Consultation Paper, para. 1.1.

This thesis is principally concerned with the assessment of what might be called the parenting environment which really pertains to the risk of physical or psychological harm that might arise from social factors. These were identified by the HFEA in the report as:

> Any aspect of the patient's past or current circumstances which means that either the child to be born or any existing child of the family are likely to face serious physical or psychological harm or neglect. Such aspects might include:
>
> (a) previous convictions relating to harming children;
> (b) child protection measures taken regarding existing children; or
> (c) serious violence or discord within the family environment.
>
> Any aspect of the patient's past or current circumstances which is likely to lead to an inability to care for the child to be born or which is already seriously impairing the care of any existing child of the family. Such aspects might include:
> (a) mental or physical conditions; or
> (b) drug or alcohol abuse.[106]

The outcome of the Tomorrow's Children consultation was to shift the burden of proof from requiring the prospective parents to show that there was no reason why they should not be provided with treatment to a 'presumption to provide treatment, unless there is evidence that any child born to an individual or couple, or any existing child of their family, would face a risk of serious harm.'[107] This was a significant change in emphasis and was accompanied by a revision of the risk factors which had to be taken into account as the HFEA 'concluded that broader social factors such as the stability of the relationship,

[106] Tomorrow's Children – Report of the policy review of welfare of the child assessments in licensed assisted conception clinics, HFEA Publication, November 2005, Chair's forward. (henceforth Tomorrow's Children Report).

[107] Tomorrow's Children Report, 8.

the commitment to having children and the age of the prospective parents, are unlikely to pose a risk of serious harm to the child'.[108] The overall outcome from the report was that:

> There should be a presumption to provide treatment to all those who request it, unless there is evidence that the child to be born would face a risk of serious medical, physical or psychological harm. Clinics should collect medical and social information from the patient(s) about the risk factors described above. In cases where clinics think that the child may be at risk of serious harm, they should obtain the patient's consent to make enquiries of other individuals, agencies or authorities in order to gather further factual information.[109]

These changes to HFEA Code of Practice preceded the amendments to the legislation which came about following a Government consultation exercise undertaken by the Department of Health in the summer of 2005. The proposals following this consultation exercise were contained in a paper entitled '*Review of the Human Fertilisation and Embryology Act*: Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos)'.[110] In parallel to this consultation exercise the House of Commons Science and Technology Committee conducted its own enquiry into Human Reproductive Technologies and the Law and produced its report in March 2005.[111]

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[108] Ibid.

[109] Tomorrow's Children Report, 3.

[110] Review of the Human Fertilisation and Embryology Act: Proposals for revised legislation (including establishment of the Regulatory Authority for Tissue and Embryos), Department of Health, December 2006

[111] House of Commons Science and Technology Committee, Human Reproductive Technologies and the Law, Fifth Report of Session 2004–05, Volume 1, HC 7-1.

In response to the consultation and enquiry Parliament eventually passed the HFE Act 2008 which amended (but did not delete) section 13(5) so that it now reads:

> A woman shall not be provided with treatment services, other than basic partner treatment services, unless account has been taken of the welfare of the child who may be born as a result of the treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth.

Section 25 of the HFE Act 1990 was also amended and now stipulates that the guidance given by the HFEA Code of Practice shall include guidance for those providing treatment services about the account to be taken of the welfare of children who may be born as a result of treatment services (including a child's need for a supportive parenting), and of other children who may be affected by such births.[112]

The current Code of Practice provides a definition of the term 'supportive parenting', the words which replaced 'a father' in section 13(5) following its amendment by the HFE Act 2008. It states:

> Supportive parenting is a commitment to the health, well being and development of the child. It is presumed that all prospective parents will be supportive parents, in the absence of any reasonable cause for concern that any child who may be born, or any other child, may be at risk of significant harm or neglect. Where centres have concern as to whether this commitment exists, they may wish to take account of wider family and social networks within which the child will be raised.[113]

[112] HFE Act 1990 sec. 25 (2).

[113] HFEA Code of Practice, 8th Edition, para 8.11.

It goes on to state that a centre providing assisted reproductive services should assess each patient and their partner (if they have one) before providing any treatment, and should use that assessment to decide whether there is a risk of significant harm or neglect to any child.[114] While the changes to the guidance following the 'Tomorrow's Children' consultation exercise introduced a presumption in favour of treatment, for a couple or individual seeking access to infertility treatment the section 13(5) assessment still represents a fairly wide-ranging analysis of past, present and future abilities to care for a child. The language used in the current HFEA Code of Practice is almost identical to that used in parts of the Children Act 1989 and the Children (Scotland) Act 1995.

In terms of the Children (Scotland) Act 1995, a sheriff can make a child protection order removing the child to a place of safety if the sheriff is satisfied that there are reasonable grounds to believe that the child is being so treated (or neglected) that he is suffering significant harm.[115] In terms of the Children Act 1989 a court may only make a care or supervision order if satisfied that the child concerned is suffering, or is likely to suffer, significant harm; and that the harm, or likelihood of harm, is attributable to the care given to the child.[116] The Children Act 1989 defines 'harm' as ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another.[117] The parallels between the interpretation of section 13(5) in the HFEA Code of Practice and the child welfare principle as applied to children are clear.

[114] HFEA Code of Practice, 8th Edition, para 9.3.

[115] Children (Scotland) Act 1995 sec. 57.

[116] Children Act 1989 sec. 31.

[117] Children Act 1989 sec. 31(9) (b).

The supportive parenting requirement has been described by Jackson as 'rather puzzling'[118] as it requires the clinician to decide whether or not to allow access to treatment with the aim of bringing a child into existence based on the welfare of that child. This thesis will come on to address in greater detail the difficulties in attempting to weigh up the benefits of existence against non-existence in a later chapter, but at present it is worth noting that in Jackson's view:

> Section 13(5) cannot in fact be directed towards assessing whether being conceived would promote the child's welfare, because if the alternative is not being conceived, it obviously would. Instead section 13(5) requires clinics to take into account the prospective patent's aptitude for parenthood.[119]

What a licensed clinic is actually being asked to do when deciding on whether or not to provide a woman with treatment services when social factors are concerned is to make various judgements on how satisfactory a parent a patient seeking access treatment might become. It has been said that:

> ...the issue raised by s. 13(5) concerns the grounds on which persons may be rejected when seeking treatment services, and more particularly whether the regulation of assisted conception can become an excuse to promote values and limit persons to relationships seen worthy of support by the state.[120]

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[118] Jackson, Regulating Reproduction, 192.

[119] Ibid.

[120] R. G. Lee and D. Morgan, Human Fertilisation and Embryology: Regulating the Reproductive Revolution, Blackstone Press (London) 2001, 159.

In the case of *R. v Ethical Committee of St Mary's Hospital Ex p. Harriott*[121] an infertile woman's application to adopt a child had been refused because of her criminal record for offences related to prostitution and the running of a brothel and because of her allegedly poor understanding of the roles of a foster-parent and the local authority's social service department. She then sought access to IVF treatment and saw a consultant who decided that IVF treatment should not be given due to these and other reasons. The question that the facts of this case give rise to is whether the consultant was in any position to say that a person convicted of these offences would necessarily make a bad parent. The Court recognised that decisions on whether to treat patients 'will place a heavy burden of responsibility on the individual consultant who must make social judgements that go beyond the purely medical'.[122] If it is necessary for consultants to make social judgements then the question can be asked just what the basis of their expertise in actually making such decisions is?

This part has looked at the development of the current wording of section 13(5). The next will take a step back slightly and look at the Parliamentary debates which surrounded the HFE Act 1990 and in particular section 13(5). It is important when looking at the regulation of ART in the UK to examine the intention of Parliament in enacting this law as that may provide guidance on how it was and is supposed to be applied in practice. As will become clear there were many assumptions made (some might say prejudices expressed) as to what the important factors were in ensuring that a child born using ART was not put at an acceptable risk of harm. While the terms of section 13(5) would lead one to believe that Parliament was motivated by child welfare concerns, the debates present a different picture.

[121] [1998] 1 FLR 512.

[122] Ibid., 514.

3.7 The Political Debates

The Warnock Committee gave consideration to the welfare of the child in regard to surrogacy[123] and the deliberate creation of single-parent families.[124] However, what the Committee did not do was specifically recommend that a child welfare provision be incorporated into any legislation regulating ART. When the Government produced its consultation in 1986[125] and its White Paper in 1987[126] there was only one specific reference to the welfare of the child, which pertained solely to surrogacy arrangements. The incorporation of a general child welfare provision only came about after debates in the Houses of Parliament.

In 1990, during a House of Lords debate on the Human Fertilisation and Embryology Bill, Lord MacKay, the then Lord Chancellor, observed:

> I think everyone would agree that it is important that children are born into a stable and loving environment and that the family is a concept whose health is fundamental to the health of society in general. A fundamental principle to our law about children, including the legislation which this House considered in such detail last Session and which became the Children Act 1989, is that the welfare of children is of paramount consideration. I think it is, for these general reasons, entirely right that the Bill should be amended to add that concept. It could be argued that the concept of the welfare of the child is very broad and indeed all-embracing. That I think is inevitable given the very wide range of factors which need to be taken into account when considering the future lives of

[123] The Warnock Report, para. 8.11.

[124] The Warnock Report, para. 2.11.

[125] Department of Health and Social Security (1986) Legislation on Human Infertility Services and Embryo Research. Cm. 46. London: HMSO.

[126] Department of Health and Social Security (1987) Human Fertilisation and Embryology: A Framework for Legislation. Cm. 257. London: HMSO.

> children who may be born as a result of technologies to be licensed under the Bill.[127]

The suggested amendment to the Bill moved by the Lord Chancellor was to the effect that: 'A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment, and of any other child who may be affected by the birth'.[128] This amendment was moved along with an amendment which would require the licensing authority to include guidelines as to the assessment of the welfare of children within the Code of Practice.

It is of note that these proposed amendments had only been introduced following a debate on another amendment moved in Committee by Lady Saltoun which would have confined the treatments licensed by the HFE Bill to married couples only.[129] Lady Saltoun was quite clear that the purpose of her proposed amendment was to prohibit the provision of Artificial Insemination by Donor (AID) and *In Vitro* Fertilisation (IVF) to unmarried women, lesbian couples or unmarried couples. While Lady Saltoun acknowledged that: 'many single women have succeeded in giving their child a good home and upbringing, and that their children are wanted and very much loved', she felt that: 'no one would deny that their children must, in the nature of things, suffer some disadvantage from the lack of a father, if only that they have only one parent who loves them and belongs to them instead of two'.[130] Lady Saltoun had particular concerns about a lack of a male role model in the home and suggested that unmarried couples could not be in stable relationships otherwise they would have married. The whole argument of course was predicated on a belief that it was not in the best interests of the child to be born into a single-parent, same-sex couple or unmarried couple family.

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[127] MacKay, HL Deb. Vol. 516, col. 1097, 1990 (6 March).

[128] MacKay, HL Deb. Vol. 516, col. 1097, 1990 (6 March).

[129] Saltoun, HL Deb. Vol. 515, col. 788, 1990 (6 February).

[130] Saltoun, HL Deb. Vol. 515, col. 788, 1990 (6 February).

In response Lord Ennals, while believing himself to be a family man, sharing family values, did not think it was his responsibility to tell other people what they should do. He considered that having children was a private area of human affairs and it was not for the State to decide who should or should not be allowed to bear children.[131] He felt that such a law would be 'bossy, judgemental, and interfering'.[132] Baroness Ewart-Biggs, while stating that she would always favour a nuclear family as the right setting in which to bring up children, made the argument that as the statistics showed that children were commonly raised by unmarried couples or single-parents, it was in the best interest of the child to support the family in whatever structure it came in.[133]

In the end, Lady Saltoun's amendment was defeated on a free vote, but only by one solitary vote. The House of Lords felt that the course of the debate had raised the question of what account should be taken of the welfare of the child when considering allowing access to treatment. This is worth remarking upon because the origins of section 13(5) do not lie in concerns arising from a broad concept of child welfare *per se* but from concerns about children being born out of wedlock and/or without a father present during childhood. This attitude is reflected in the rest of the Lord Chancellor's speech where he goes on to say:

> Among the factors which clinicians should take into account [with regard to the welfare of the child] will be the material circumstances in which the child is likely to be brought up and also the stability and love which he or she is likely to enjoy. Such stability is clearly linked to the marital position of the woman and in particular whether a husband or long-term partner can play a full

[131] Ennals, HL Deb. Vol. 515, col. 789, 1990 (6 February).

[132] Ennals, HL Deb. Vol. 515, col. 789, 1990 (6 February).

[133] Ewart-Biggs, HL Deb. Vol. 515, col. 794, 1990 (6 February).

> part in providing the child with a permanent family setting in the fullest sense of that term, including financial provision.[134]

This led on to consideration not only of whether the Human Fertilisation and Embryology Bill ought to include a stipulation that the welfare of the child should be taken into account, but also whether treatment services should only be given to a woman together with a man. Baroness Warnock was not in favour of such an amendment saying:

> My Lords, the amendment in whatever words it was put forward would be difficult to enforce. I oppose it because Amendment No. 15 moved by the noble and learned Lord the Lord Chancellor [the welfare of the child amendment] has already taken care of the true issue, which is the good of the child, which must be considered and taken into account. There is to be discussion and counselling is to be given to anyone who attends for treatment.[135]

That proposed amendment was withdrawn but the issue was raised in a slightly different format during the House of Commons debate when the insertion of a clause stating that licensed clinics should take into account the child's 'need for a father' was debated. Ann Winterton MP's principal concern when proposing this amendment was 'absent fathers'. She proposed that single women who present themselves for artificial insemination by donor should not be allowed to be inseminated unless they were prepared to bring forward a man who would stand as the 'social father'.[136] This social father would enter into an agreement by saying that throughout the life of the child he would be responsible for it in financial and other ways in the same way as a natural father. This, in

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[134] MacKay, HL Deb. Vol. 516, col. 1097, 1990 (6 March).

[135] Warnock, HL Deb. Vol. 516, col. 1104, 1990 (6 March).

[136] Winterton, HC Deb. Vol. 174, col. 1022, 1990 (20 June).

Winterton's view, was extremely important to assure the child's sense of security and identity.[137]

In supporting the amendment David Wilshire MP said:

> For me, the word "family" means three things. It means the family as a social unit, a financial unit, and a biological unit... As to the family being a social unit... when speaking of the family in this context, we are seeking to speak up for the traditional values and standards of society that have stood us in good stead for a long time. It is clear to me that the traditional social family unit in this country is, for better or worse, a unit of a mother and a father in a stable, long-term relationship... As to the family being a financial unit... It is clear also that looking after a young child requires the combined efforts of two people. If one refers to the evidence provided by those who are often referred to as the new poor, figuring largely among them are the single mums with their young children who look desperately to the state to provide the financial security that they need to be able to cope. As to the family being a biological unit... fathers still have a role to play in the process somewhere. It is important that we should make it clear that the father's role does not begin and end at conception.[138]

The amendment was passed and licensed clinics were required as part of their licensing conditions to take into account the welfare of the child including the child's 'need for a father' when considering whether or not to allow access to treatment. What the original debates in the Houses of Parliament were really about were as one MP put it, 'the welfare of the family'[139] not the welfare of the child, although at the same time the accepted wisdom among many

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[137] Ibid.

[138] Wilshire, HC Deb. Vol. 174, col. 1025, 1990 (20 June).

[139] Peacock, HC Deb. Vol. 174, col. 1027, 1990 (20 June).

politicians then was that a child's welfare would suffer if the child was raised outwith a traditional family unit. This position lasted for a period of 15 years before pressure from the lesbian community in particular and changes in societal attitudes meant that a change was considered necessary.[140] As McCandless and Shedlon noted 'the 2008 Act would provide an opportunity to update the legislation in the light of changing social and familial norms, most notably with respect to the recognition of single and same-sex parents.'[141]

As has been said, the HFE Act 2008 removed the 'need for a father' consideration and replaced it with the 'need for supportive parenting'. The Government originally intended simply to remove the 'need for a father' provision from the legislation, in recognition of the range of different family models that exist.[142] There was never an intention to remove the requirement for the welfare of the child to be taken into account and there was little, if any, discussion around this point. Following strong objections to the removal of the 'need for a father' provision the Government tabled the 'supportive parenting' amendment. The Bill included amendments which provided clear recognition of same-sex couples as legal parents of children conceived through the use of donated sperm, eggs or embryos.

In contrast Baroness Deech, a former Chair of the HFEA, opposed the amendment saying:[143]

> The requirement is, after all, only to consider the need; it is not an absolute ban on treatment by any means, and it is well known that many single women and gay couples receive IVF treatment at clinics and have children... The current law does no more than require that a doctor checks whether there is a male in the social circle—

[140] J. McCandless and S. Sheldon, "No Father Required"? The Welfare Assessment in the Human Fertilisation and Embryology Act 2008 Feminist Legal Studies, 2008, 18(3): 201-225.

[141] Ibid., 202.

[142] Human Tissues and Embryos (Draft) Bill 2007, s 21(2)(b).

[143] Deech, HL Deb. Vol. 696, col. 674, 2007 (19 November).

> for example, a grandfather—and causes parents to reflect on how to cope with the situation...I would argue that the present law is not discriminatory. It applies to men and women: heterosexual couples, homosexual couples, married, cohabiting and others. *Even if it were discriminatory, it is justified on the ground that the welfare of the child is paramount*. [emphasis added].

Also in support of retaining the clause Baroness Williams of Corby said:

> My main concern is that research shows conclusively in fields such as education and educational achievement that a child who has a male model as well as a female model is likely to do considerably better than one who does not have that male model...I refer in this context to the very interesting research done by Professor Carol Gilligan in the United States and her book *In a Different Voice*. She goes at length into the ways in which little girls and little boys develop. In no sense is one more able than the other. Simply, one is rather different from the other, and a child will benefit from understanding from its babyhood what a man and a woman constitute and how they should complement each other.[144]

In support of the amendment, Baroness Hollis pointed out that: 'Either the need for a father contained in a phrase or clause in the Bill carries meaning or it does not. Currently it is in the Act and I understand that it has become meaningless, vacuous, empty rhetoric.'[145] Baroness O'Neill of Bengarvelt described it as: 'a highly ambiguous phrase which has not proved practical in the way in which IVF clinics operate.'[146] The point being made that because the 'need for a father' stipulation merely required clinics to check whether there was a male in the

[144] Williams, HL Deb. Vol. 696, col. 687, 2007 (21 November).

[145] Hollis, HL Deb. Vol. 696, col. 857, 2007 (21 November).

[146] O'Neill, HL Deb. Vol. 696, col. 857, 2007 (21 November).

social circle the argument for its inclusion was being undermined rather than strengthened. The criticism ran that there was a lack of effectiveness in the practical application of the clause. So despite fears that doing away with the requirement to consider a child's need for a father would 'undermine the role of fathers' the decision reached by Parliament was that children's welfare could be safeguarded with the requirement to consider a child's need for supportive parenting.

The debates in the Houses of Parliament on both the 1990 and 2008 Acts focused upon questions of traditional family values versus alternative family units, with the welfare of the child very much presumed to be a necessary consideration in any and every case. Blyth and Cameron observed that the debates in both Houses of Parliament assumed the value of consideration of the welfare of the child and set it against other considerations, such as the desirability of children being born to single mothers or unmarried couples.[147] In Jackson's view the proposition that the welfare of the child should be taken into account largely went unquestioned during the debates and that 'it was simply assumed to be self-evidently true that their future child's welfare ought to be taken into account before the couple is offered assistance with conception'.[148] What Parliament failed to address in their debates (their focus being drawn elsewhere) was the vitally important question of whether or not a child welfare assessment at the pre-conception stage was in any way justifiable and conceptually sound, quite apart from individual factors thought to affect child welfare. Chapter Five will come on to address this question in more detail later.

When the new Code of Practice guidelines were introduced in 2005, Suzi Leather, then Chair of the HFEA, said:

[147] E. Blyth and C. Cameron, The welfare of the child: An emerging issue in the regulation of assisted conception, Human Reproduction, vol.13, no.9, 1998, 2339–2355, 2340.

[148] E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 65, 2002, 176 – 203, 176.

> By focussing more clearly on the risk factors that could lead to serious harm, we will have a system that is fairer for patients and more proportionate for doctors whilst still protecting children's interests. Our revised guidance will support clinicians in using their professional judgement to assess patients. Where they have concerns, clinicians will still contact GPs, social services or other relevant bodies. These new guidelines will enable medical teams to get on with the job and will give patients reassurance that the process will not be unjustifiably burdensome or intrusive.[149]

It is clear, then, that a judgement is being made of a person's competence to parent, before, it should be noted, that person may ever have been given the opportunity to conceive, never mind parent (at least in cases where there is no existing child in the family). Alghrani and Harris are of the view that:

> The very fact the law insists that only those individuals who require assistance in founding a family are screened for their potential as prospective parents is not only inconsistent and unjustifiable, but is a clear violation of reproductive liberty...The HFE Act, which determines who may be granted access to assisted conception services based on a speculative judgement as to their potential to parent, is a clear and unjustifiable violation of reproductive liberty.[150]

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[149] HFEA Press Release - Improved welfare checks will be better, fairer and clearer for fertility patients, GPs and clinics, 2 November 2005 (accessed at http://www.hfea.gov.uk/667.html on 27 September 2011).

[150] A. Alghrani and J. Harris, Reproductive liberty: should the foundation of families be regulated?, 18, 2006, Child and Family Law Quarterly, 191 – 210, 195.

Alghrani and Harris expressed doubt as to whether or not the amended guidelines were fairer for patients as Suzi Leather had suggested. Section 13(5) still required clinics to operate some form of screening of prospective parents, and could still exclude some people from access to ART.[151] Alghrani and Harris also make the point that it is doctors who continue to be required to make a social judgement about whether a child would be at risk of serious physical or psychological harm or neglect or whether there was the risk that the patient may not be able to provide ongoing care for the child. Alghrani and Harris are critical of the fact that section 13(5) requires doctors to make decisions that go beyond their expertise.[152]

In discussing the question of whether doctors may permissibly deny assistance to prospective parents whom they deem unsuitable on non-clinical grounds, Mary Warnock said of the child welfare principle:

> What exactly this principle means, what force it has, and how the child's future good is to be estimated have not been seriously examined, nor did we on the Committee examine such issues. The principle sounded good, and we adopted it.[153]

Whether a piece of legislation can be justified when issues surrounding what it actually means, what force it has and how it is to be applied have not been seriously examined, but adopting a position merely because it 'sounded good', is surely questionable. The uncertainty surrounding section 13(5) of the HFE Act 1990 calls into question whether its continuing existence is justified or whether it should be scrapped altogether. As is apparent from the above discussion the

[151] Ibid., 197.

[152] Ibid.

[153] M. Warnock, Making Babies: Is There A Right To Have Children?', Oxford University Press, Oxford, 2002, 45.

option of repealing section 13(5) was available to Parliament when they introduced the HFA Act 2008. This was an opportunity which they did not take and which this I would suggest was a mistake which remains to be rectified. While this thesis is limited to arguing for amendment of section 13(5) in respect the need for a parenting assessment, it is clear that many of the arguments in favour of this amendment also support repeal in its entirety.

3.8 Other Fertility Treatments and Natural Reproduction

In terms of the HFE Act 1990 'treatment services' means medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children.[154] 'Basic partner treatment services' are treatment services provided for a woman and man together without using the gametes of another person or embryos created outside a woman's body.[155] It is only treatment services and basic partner treatment services which a patient can be denied access to unless account has been taken of the welfare of any child who may be born as a result of the treatment and judged favourably. Treatment services and basic treatment partner services as defined within the legislation do not cover other forms of medical assistance to conceive, such as the prescription of fertility drugs or an operation to unblock Fallopian tubes. While the resources in question are likely to be cheaper and more common when compared with IVF, they do still amount to seeking third party assistance to enable conception. The prospective parents are taking their decision to try to conceive a child out of the bedroom and into the consultation room. The fact that there is no social screening of patients seeking assistance in this manner places a question mark over why it is justifiable in the case of IVF.

[154] HFE Act 1990 sec. 2(1).

[155] HFE Act 1990 sec. 2(1) as inserted by Regulation 6 of the Human Fertilisation and Embryology (Quality and Safety) Regulations 2007.

A Select Committee Report noted in 2005 that the welfare provision was being unevenly applied:

> If one accepts that the welfare of the child provision is important and that the involvement of healthcare professionals justifies an erosion of liberty, logic would dictate that any professional intervention to overcome infertility or sub-fertility should be subject to the same standards. IVF is just one of a number of techniques that include ovulation induction, tubal and uterine surgery, surgical management of endometriosis, IUI and GIFT. Only with the last two is a welfare of the child assessment required, and only if donor sperm is being used. The exclusive requirement to consider the welfare of the child for fertility treatments where fertilisation takes place outside the woman or involves donated sperm is illogical. If the legislation aims to regulate the treatment of infertility or sub-fertility then it should cover all forms of interventions. If it wishes to do both then this needs to be clearly stated and justified.[156]

In the recent past if a woman used self-insemination there were no safeguards protecting the welfare of the future child nor any monitoring of the donor sperm for disease such as HIV or sexually transmitted diseases. Likewise Gamete Intra-Fallopian Transfer (GIFT) using a partner's sperm and Intrauterine Insemination (IUI) using a partner's sperm were not regulated. However, the Human Fertilisation and Embryology (Quality and Safety) Regulations 2007 brought the EU Tissues and Cells Directive into UK law and set a higher standard of quality and safety for previously unregulated treatments. Non-medical fertility services such as internet sperm providers were also brought under the HFE Act 1990 by

[156] House of Commons Science and Technology Committee, Human Reproductive Technologies and the Law, Fifth Report of Session 2004–05, Volume 1, HC 7-1.

the 2007 Regulations.[157] A greater range of treatments and services are now covered by the HFE Acts and therefore require a treatment provider to carry out a child welfare assessment. However, ovulation induction, tubal and uterine surgery and surgical management of endometriosis still do not require a child welfare assessment to be made even though they involve a person seeking medical assistance to conceive a child. The regulation of treatment services in certain areas of treatment designed to assist a woman to conceive and its absence in others calls into question the justification of regulation in these specific areas.

The argument that the welfare of the future child is a matter which must be considered in reproductive decision-making does not, of course, generally apply to people having children 'naturally'. The choice to engage in sexual intercourse with the aim of having a child is (with the exception of criminal offences such as incest and rape previously mentioned) unregulated in the UK, while at the same time access to ART services is comprehensively regulated.[158] Any proposals to regulate 'natural' reproduction are largely rejected, due in no small part to the spectre of the eugenics programmes of the past which were discussed in the previous chapter. It is argued that their implementation would violate some of our most cherished interests and rights: in particular the interest in becoming a parent and the right to reproduction and parenting.[159] However, such fears do not prevent the regulation of assisted reproduction. There is inequality in the way in which the State respects the procreative choices of those who can reproduce through engaging in sexual intercourse and those who require certain forms of medical assistance to create a child.

[157] Regulation 29 of the Human Fertilisation and Embryology (Quality and Safety) Regulations 2007 introduced a requirement of a licence for the procurement or distribution of sperm.

[158] D. E. Cutas and L. Bortolotti, Natural versus Assisted Reproduction: In Search of Fairness, Studies in Ethics, Law, and Technology, 2010, Vol. 4, Issue 1, Article 1, 1.

[159] Ibid.

Cutas and Bortolotti are of the view that there are serious inconsistencies in the treatment of people who become parents naturally and people who require assistance to become parents. They propose that regulation of reproduction and parenting be revised in such a way as to eliminate the inconsistencies.[160] They agree with the point made earlier that if the welfare of the child is a sufficiently important reason to justify intervention in assisted reproduction, it is hard to justify the exemption from scrutiny that people engaging in natural reproduction currently enjoy. This inconsistency has also been criticised on the basis that assistance in reproduction comes in different degrees[161] and the distinction between 'natural' reproduction and assisted reproduction is not always as clear cut as might be imagined.[162] As mentioned above, the provision of fertility drugs falls outwith the remit of the HFE Act 1990, but it is still assistance with reproduction in a very real sense. This particular justification for regulation of ART services is therefore weakened by its inconsistent application.

The HFEA has stated that it is determined to 'safeguard all relevant interests – patients, children, doctors and scientists, the wider public and future generations'.[163] This is clearly an ambitious undertaking, given that many of these interests have the potential to conflict with one another. It is important, therefore, to consider whether or not the powers granted to the HFEA by the HFE Act 1990 effectively deliver the safeguards that all of the relevant people with these varying interests might reasonably expect to receive.

[160] Ibid.

[161] Ibid., 4.

[162] Jackson, Regulating Reproduction, 171.

[163] Human Fertilisation & Embryology Authority, 8th Annual Report, 1999, 1.

3.9 Good or Bad Regulation?

This Chapter has set out in detail the development of regulation of ART, the current regulatory regime and the views of the politicians who voted to introduce and then amend section 13(5). The purpose of doing so has been to question of whether or not the regulation, to paraphrase Johnson, allows for responsible choice and self-determination for patients. This thesis argues that section 13(5) in its current form falls to demonstrate such a requirement.

A couple who have been informed by their doctor that the only chance they have of conceiving a child genetically related to them both is to access ART, have a hugely personal decision to make as to whether they wish to go down this road. The decision to seek to have children in itself is a very personal decision which goes to fundamental aspects of an individual's sense of identity and place in society. The decision to seek to have children utilising ART services carries yet more weighty decisions surrounding the nature of the treatment itself, the impact the treatment would have on physical health, potential cost, the time commitments and the chances of failure with all the emotional considerations that entails. There can be few decisions which are more personal and deserving of respect.

What the UK legislation in effect does is require couples to decide whether they wish to subject themselves to an enquiry into whether or not they will be supportive parents to the child they are seeking to create. This thesis argues that this requirement acts as a barrier to self-determination and is therefore an interference with procreative liberty. This is because the couple in my example are required to disclose information pertaining to the issues of supportive parenting to an employee of the licenced clinic who then has to exercise a judgement on whether or not the answer to these questions rebuts the supportive parenting presumption. This is not conducive to self-determination. This thesis argues that it should be left to prospective parents to make the decision for themselves as to whether they are able to give the care, support

and love which their child will require. The application of section 13(5) in its current form takes one of the most fundamental and personal decisions about procreation and hands it to an employee of a licensed clinic who will have no involvement in the rearing of that child whatsoever. As such this forms a ground for considering that this interference with procreative liberty requires serious reconsideration.

What though of responsible choice? Is the presence of section 13(5) not a good thing to have in place as it directs prospective parents towards responsible choice, or at least to give some consideration to whether they are acting responsibly or not? This thesis takes the view that rather than allow for responsible choice what section 13(5) does is to remove the responsibility from the patients and places it in the hands of a third party. The factors which can rebut the presumption of supportive parenting - previous convictions for harming children, child protection measures, serious violence and discord within the family, mental or physical conditions, drug or alcohol problems and other aspects of their lives which may pose a risk - are all factors which any responsible prospective parent should be considering in regards to their parental abilities. People will ask themselves the question 'will I make a good parent'. They do not require to be directed towards responsible choice by legislation.

3.10 Conclusion

Margaret Brazier praises the system of regulation in the UK for ensuring public accountability, promoting high standards of medical treatment and providing a certain amount of protection for patients against medical negligence.[164] However, she also draws attention to the fact that, while the regulatory system is built on reaching a consensus on difficult issues meaning that regulators and

[164] M. Brazier, Regulating the Reproduction Business?, Medical Law Review, 7, Summer 1999, 166-193, 167.

scientists have to work together, this is at the cost of issues central to individual rights being 'skated over'.[165] It is perhaps understandable that Parliament did not attempt to find comprehensive solutions to the controversial ethical issues raised by ART. A line could not have been taken which would have satisfied all parties. While Brazier argues that 'British law displays contradictions, no single, coherent philosophy underpins the law's response to reproductive medicine' she nonetheless suggests that, as a workable system has been put in place, perhaps the pragmatic approach has its advantages.[166] The approach of the UK government of avoiding making definitive pronouncements upon highly controversial ethical issues, but instead setting up a regulatory body with the stated aim of reaching consensus where possible, illustrates the difficulty legislators have in creating a system of regulation in this controversial area. That is not a reason though to continue to review and assess the fairness and practical utility of the rules and regulations in place.

The previous chapter has set out what this thesis contends are the important aspects of an individual's right to procreative liberty. This chapter has analysed the regulatory framework and the specific provisions which the UK Parliament has felt justified putting in place to limit that right, focusing on child welfare grounds arising from questions about parental ability. The justification put forward by the UK Government in support of section 13(5) is that it acts to protect children from harm and is therefore justified as an extension of the State mandate to ensure that the welfare of children is protected by the State.

This thesis argues that section 13(5) should be amended to remove a parental ability assessment. The development of regulation from non-regulation to self regulation to a licensing authority highlights the way in which various societal attitudes and concerns about the consequences of ART have influenced the

[165] Ibid.

[166] Ibid.

debate on what level of State interference is acceptable. As this chapter has shown the regulation has already gone through revision following valid criticism from the lesbian community and single women that the original wording of section 13(5) was discriminatory against them. This thesis argues that the legislation remains discriminatory against infertile people or people who cannot have children genetically related to themselves because of sexual preference as it requires them to undergo a parenting ability assessment not required of those who can procreate through heterosexual intercourse.

The purported justification for section 13(5) cannot be fully held up to criticism unless the extent of the State mandate to ensure that the welfare of children is protected is analysed. The next chapter will develop the overall argument of the thesis further by examining how the child welfare principle developed as an established legal principle, how it is applied and what problems exist for its application which might mirror the application of section 13(5). It is the right to parent which the child welfare principle can justifiably interfere with on child welfare grounds not, it will be argued, the right to procreative liberty. That raises the question of whether the State mandate to protect children from harm can be extended backwards to the pre-conception stage. The next chapter will therefore look at where that general mandate arises from and ask whether concerns surrounding child welfare in general are acting to blur the distinction between a right to procreative liberty and parental rights and responsibilities. The chapter will analyse the development of the child welfare principle in family law and how this is applied in the context of parental rights and responsibilities. While it is largely accepted that the child welfare principle applies to the exercise of parental rights and provides valid justification for the curtailment of these rights in cases of abuse or neglect, it is more difficult to support the notion that child welfare should be a factor in limiting access to ART services.

CHAPTER FOUR – THE CHILD WELFARE PRINCIPLE

4.1 Introduction

The previous two chapters have sought to examine the basis upon which people seeking access to ART treatment are entitled to have that procreative choice respected and the regulatory framework put in place by the UK as a means of controlling access to treatment. The Lord Chancellor chose to word the legislation so that control is exercised by clinics 'taking account of' the welfare of the child prior to allowing access to treatment. What follows in this chapter is an examination of the child welfare principle as applied in the familiar context of family law. An analysis of the child welfare principle in this context is necessary before moving on to look at how the child welfare principle has influenced the question of who should be allowed access to ART. It is necessary because it is the child welfare principle which the Government claims provided the mandate to pass section 13(5).

While the child welfare principle is set out in relatively recent legal instruments[1], the concept that a child's welfare is an important consideration in legal proceedings concerning children is not so recent and it is a worthwhile exercise to examine the child welfare principle in its historical context because this will highlight how the concept has become to be so all encompassing. Eekelar has suggested that since Victorian times there has been a movement away from what he calls 'instrumentalism', where children were perceived as instruments for the promotion of the interests of others, to one of 'welfarism', where parents were expected to use their position to further their children's interests.[2] It is certainly of note that the legal status of the child has developed over the centuries from the father having absolute authority over the child's life to the parent(s) owing a myriad of legal parental responsibilities towards the child. It is clear that the welfare of the child has progressively become an issue of greater and greater significance for society, perhaps to the point now where

[1] Children Act 1989 in England and Wales and Children (Scotland) Act 1995 in Scotland.

2 S. Katz, J. Eekelaar and M. Maclean (eds), Cross Currents: Family Law and Policy in the US and England, Oxford University Press, Oxford, 2000, chapter 29.

society has lost the ability to distinguish between an actual welfare of the child assessment and a speculative welfare of the future child assessment.

4.2 The Historical Development of the Child Welfare Principle

The roots of the child welfare principle can be found in the feudal system of guardianship.[3] In Medieval England, where a child had an interest in inherited property which also involved an inherited duty of fealty, the courts would protect these interests by the use of guardianship appointments.[4] Guardianship was viewed as a duty placed upon the relevant adult to protect the property of the child and, with it, the child himself. It was rooted in the concept of 'trust' or 'office'.[5] There also existed within the feudal system a principle that all subjects owe allegiance to the Crown and the Crown in return protected its subjects as *parens patraie*.[6] In the 16th Century case of *Eyre v Shaftsbury*[7] it was accepted that 'the Crown as *parens patriae*, was the supreme guardian and superintendent over all infants'.[8] The protection of the Crown was afforded to children by making them wards of the Crown. In mid-16th century England and Wales responsibility for wardship was transferred to the Chancery Courts.[9] Wardship enabled the court, on behalf of the Crown, to effectively act as if it were a parent, and the court assumed responsibility for the upbringing of the

3 K. O'Halloran, The Welfare of the Child: The Principle and the Law: a Study of the Meaning, Role and Functions of the Principle as it Has Evolved within the Family Law of England and Wales, Ashgate Publishing Group, Aldershot, 1999, 2 (henceforth, O'Halloran, The Welfare of the Child).

4 O'Halloran, The Welfare of the Child, 2.

5 O'Halloran, The Welfare of the Child, 14.

6 R. Opie, C. Willmott, Competent children, medical consent and their best interest, at http://www.familieslink.co.uk/pages/law_gillick_competence.htm (accessed 11 September 2012). The term parens patraie literally translates from the Latin as "Father of the Nation".

7 24 Eng. Rep. 659 (Ch. 1722).

8 Ibid., 659.

9 R. Opie, C. Willmott, Competent children, medical consent and their best interest, at http://www.familieslink.co.uk/pages/law_gillick_competence.htm

child.[10] The court's inherent jurisdiction, which this chapter will look at in more detail in the next section, is derived from the *parens patriae* doctrine.[11]

By the middle of the 19th Century the courts had generally moved away from the concepts of guardianship and wardship and had reverted to one of parental authority more akin to the Roman law doctrine of *patria potestas.*[12] A father was considered to have an over-riding authority over the custody and control of his child which would only be interfered with by the courts in extreme cases of abuse and neglect. The powerful legal position of the father to control the upbringing of the child is well-illustrated by the comments of Cotton LJ in the 1883 case of *Re Agar-Ellis:*[13]

> When by birth a child is subject to a father it is for the general interest of children and really for the interest of the particular infant that the Court should not, except in extreme cases interfere with the discretion of the father but leave to him the responsibility by exercising that power which nature has given by the birth of the child.[14]

The corresponding legal position of the mother was weak and she had no 'rights' over the child as such. However, during the 19th Century a progression of Government Acts, beginning with the Infants Custody Act 1839, did give the courts the discretion to grant the mother custody and access to any of her children.[15] However, while moves to equalise maternal and paternal rights

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[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] (1883) 24 ChD 317.

[14] Ibid., 334.

[15] N. V. Lowe, The Legal Position of Parents and Children in English Law, Singapore Journal of Legal Studies, [1994] 332 – 346, 335.

continued into the 20th Century,[16] this development was generally overshadowed by a growing focus on the welfare of the child.[17]

The modern concept of the State having a duty to protect the welfare of children has its roots in the work of the Victorian social reform movement of the late 19th century. In 1881, the Reverend George Staite called for the formation of a society for the protection of children. He wrote to the philanthropist Lord Shaftesbury who warned Staite against the difficulties of trying to protect children through legal means.[18] Lord Shaftesbury noted that '[t]he evils you state are enormous and indisputable, but they are of so private, internal and domestic a nature as to be beyond the reach of legislation'.[19] Nonetheless, the year 1889 saw the occurrence of two important and connected events, with the formation of the National Society for the Prevention of Cruelty to Children (NSPCC) and the passing of the Prevention of Cruelty to Children Act 1889 (the 1889 Act).[20] The 1889 Act made cruelty to children a crime. Intentional ill-treatment or neglect was punishable by up to six months imprisonment and policemen were empowered to remove suspected child victims from their homes.[21] This was very much the beginning of English society's efforts to use the law for the specific purpose of furthering the welfare of the child.

In Scotland the impact of the Reformation from the mid-16th century onwards saw a greater availability of affordable education, first provided for by the

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[16] The Guardianship of Infants Act 1925 provided that in any proceedings before any court neither the father nor the mother should be regarded as having a superior claim to the other in respect of the custody and upbringing of the child.

[17] N. V. Lowe, The Legal Position of Parents and Children in English Law, Singapore Journal of Legal Studies, [1994] 332 – 346, 336.

[18] At http://www.nspcc.org.uk/what-we-do/about-the-nspcc/history-of-NSPCC (accessed 14 November 2011).

[19] H. Hendrick, Child Welfare: historical dimensions, contemporary debates, The Policy Press, Bristol, 2003, 24 (henceforth, Hendrick, Child Welfare: historical dimensions).

[20] At http://www.nspcc.org.uk/what-we-do/about-the-nspcc/history-of-NSPCC (accessed 14 November 2011).

[21] Hendrick, Child Welfare: historical dimensions, 29.

Church of Scotland and later subsidised by the tax payer, than in England and Wales.[22] Poor laws in the 16th Century in Scotland placed a duty on parishes to provide for the poor, including children.[23] However, there was no formalised system of poor law relief in Scotland until 1845 which saw the setting up of a National Supervisory Board.[24] The vast upheavals in society brought about by the industrial revolution had a significant impact upon the health, education and work of children.[25] In the 19th Century the infant mortality rate was lower in Scotland than it was in England but this situation had been reversed by the 1930's.[26] Average levels of child poverty have remained higher in Scotland than in England and Wales throughout the 20th Century and into the 21st Century[27] and it is fair to say that the issue of child welfare has been viewed through the lens of child poverty in Scotland to an even greater extent than England and Wales.

The year 1884 had seen the setting up in Scotland of a similar organisation to that of the NSPCC known as the Society for the Prevention of Cruelty to Children which in 1922 became the Royal Scottish Society for the Prevention of Cruelty to Children.[28] The NSPCC's definition of cruelty in the early 20th Century included inflicting wrongful, needless or excessive physical pain; endangering life, limb or health; causing morals to be imperilled or depraved; all forms of neglect relating to food, clothing, shelter, protection and care; forcing the child to work overly long hours or in degrading, unlawful or illegal employment; and vagrancy or begging.[29] In 1900, of the 573,325 children that the NSPCC investigated, the

[22] Hendrick, Child Welfare: historical dimensions, 185.

[23] Hendrick, Child Welfare: historical dimensions, 186.

[24] Hendrick, Child Welfare: historical dimensions, 187.

[25] M. Hill, K. Murray, J. Rankin, The Early History of Scottish Child Welfare, Children and Society, (1991) 5.2, 182 – 195, 184.

[26] Ibid.

[27] Ibid.

[28] Ibid., 187. This organisation now goes by the name of Children 1st. Both Children 1st and the NSPCC continue to play an important charitable and lobbying role today.

[29] Hendrick, Child Welfare: historical dimensions, 29.

vast majority, 446,722, fell into the category of neglect.[30] This had a great deal to do with the fact that it was the children of the poor who society viewed almost exclusively as the problem. The cause of neglect was largely viewed as being the ignorance and incompetence of the mother who had led the family into poverty.[31] However, while the 1889 Act was as much about addressing the perceived shortcomings of the poor as it was about protecting child welfare, Hendricks is of the view that the legislation marked a turning point in legal and social attitudes towards children.[32] It developed the whole idea of parental responsibilities and introduced the interventionist approach by the state into family life previously thought impossible by Lord Shaftesbury.

The next big step forward regarding concern for the welfare of the child in England and Wales came with the introduction of the Guardianship of Infants Act 1925. This Act provided that, in deciding issues concerning the custody or upbringing of a child, all courts were to regard the child's welfare as 'the first and paramount consideration'.[33] This legislation effectively established the paramountcy of the child's welfare in court decisions which concerned them and this has been continued and refined in subsequent legislation up to the present day.[34]

The end of the Second World War saw the creation of the welfare state and with it a major shift in child welfare theory. The Children Act 1948 saw the

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[30] Hendrick, Child Welfare: historical dimensions, 30.

[31] Hendrick, Child Welfare: historical dimensions, 30.

[32] H. Hendricks, Child welfare: England 1872 – 1989, Routledge, London, 1994, 49.

[33] Section 1:- Where in any proceedings before any court . . . the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

[34] Most notably the Guardianship of Minors Act 1971 and Children Act 1989 as previously mentioned.

introduction of the position that remains in place today in England and Wales; namely, that local authorities have a duty of care towards children whose parents are unable to look after them and whose welfare requires the intervention of the local authority.[35] Section 12 of the Children Act 1948 required local authorities to exercise their powers with respect to the child so as to further his best interests and afford him opportunity for the proper development of his character and abilities. The 1948 Act is of particular significance because of the large increase in the level of state intervention into the sphere of private family life it brought about.

In Scotland a significant piece of legislation was enacted in the form of the Children and Young Persons (Scotland) Act 1932[36] which introduced a number of offences pertaining to such matters as cruelty to persons under the age of sixteen, causing or allowing persons under the age of sixteen to be used for begging, giving liquor to children under the age of five, restrictions on employment of children and other child protection measures. However, probably the most significant development in Scots law pertaining to child protection and juvenile offending was the creation of the Children's Hearing System[37] which was set up following a major review in 1961 'to consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control'. [38] The committee produced what was entitled The Kilbrandon Report which recommended the establishment of a Children's Hearings System to deal with those who Lord Kilbrandon described as 'children in trouble'.[39] These children fell into four categories: a) those with delinquent behaviour, b) those in

[35] H. Hendricks, Child welfare: England 1872 – 1989, Routledge, London, 1994, 199.

[36] Consolidated in the Children and Young Persons (Scotland) Act 1937.

[37] Commonly referred to as The Children's Panel.

[38] See http://www.chscotland.gov.uk/the-childrens-hearings-system/background/ (accessed on 8 July 2014). This was the remit of the committee set up in 1961 by the then Secretary of State for Scotland.

[39] J. Shaw, Lord Kilbrandon, Children in Trouble, British Journal of Criminology, Vol. 1, 1966, 112 – 122.

need of care or protection, c) those beyond parental control, and d) those who persistently truant.[40] The system which was put into practice and remains largely unaltered today was to remove children from the adult criminal law procedures and to bring all cases in need of compulsory measures of care before a lay panel of three members. The ideas behind the system were that it would allow for proper multi-disciplinary assessment, family and child participation, informal procedures and practical disposals.[41] It was a significant step in putting the welfare of the child at the centre of Scottish society's concerns.

The last fifty years or so have seen a gradual move towards the idea that children have specific rights which are deserving of protection. Today the UK is a signatory of the United Nations Convention on the Rights of the Child (UNCRC).[42] While the UNCRC has not been incorporated directly into English or Scots Law, both jurisdictions are bound by international law to reflect the aims of the UNCRC in all of their policies and legislation although it has no direct legal effect in UK courts. That said, in Scotland, the Children and Young People (Scotland) Act 2014 (the 2014 Act) will, when commenced on a yet to be appointed date, impose certain duties on public authorities in relation to the UNCRC. Section 1 of the 2014 Act requires Scottish Ministers to keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, taking into account relevant views of children.[43] The 2014 Act will require the Scottish Minsters and other relevant public authorities to publish a report every three years of what steps it has taken in that period to better secure or further

[40] Ibid.

[41] Ibid.

[42] UNICEF described the UNCRC as the most complete statement of children's rights ever produced. It is the most widely-ratified international human rights treaty in history. All UN member states except for the United States, Somalia and South Sudan have approved the Convention. http://www.unicef.org.uk/UNICEFs-Work/UN-Convention/ (accessed 10 September 2014)

[43] Sec. 1 of the Children and Young People (Scotland) Act 2014

effect the UNCRC requirements within its areas of responsibility.[44] Whilst the 2014 Act will not mean that the UNCRC is directly enforceable in the same way as the ECHR is via the Human Rights Act 1998, the reporting requirements will ensure that a significant degree of thought not currently required is given to UNCRC compliance.

The UNCRC represents a move towards the idea that children hold certain fundamental rights in addition to those of adults which are worthy of protection from unwarranted interference. These rights should protect children from abuse and neglect at the hands of those who have responsibilities towards them and from overly intrusive interference into their lives by the state. State concern for the rights of the child has come a considerable distance since the days of medieval guardianship. The next section will set out the current legal position which sets the boundaries to the State's involvement in the lives of children.

4.3 Child Welfare and Best Interests

In the UK, the term 'child welfare principle' is generally now understood as referring to the terms of the Children Act 1989 (the 1989 Act) in England and Wales, or the Children (Scotland) Act 1995 (the 1995 Act) in Scotland. Section 16 (1) of the 1995 Act states:

> Where under or by virtue of this Part of this Act, a children's hearing decides, or a court determines, any matter with respect to a child, the welfare of the child throughout his childhood shall be their or its paramount consideration.

Section 1(1) of the 1989 Act states:

> When a court determines any question with respect to the upbringing of the child or the administration of a child's property

[44] Sec. 2 of the Children and Young People (Scotland) Act 2014

> or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.

Some of the literature in this field also makes reference to the 'paramountcy principle'.[45] This term is often used interchangeably with 'child welfare principle' although it directly refers to the weight to be given to consideration of the child's welfare, while the term 'child welfare principle' refers to the question that the courts must address; namely, what is conducive to the welfare of the child?

Another term that is often used interchangeably with the child welfare principle is the 'best interests principle'.[46] So when applying the child welfare principle, the domestic courts may ask the question; what is in the child's best interests?[47] This can lead to confusion, as not only can the three terms be used interchangeably to refer to the definition of the principle as understood within the narrow confines of the 1989 Act and 1995 Act, but the term 'best interests principle' can also be used in reference to the more broadly applied Article 3 of the UNCRC which provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[48]

As this chapter will come on to look at in more detail, while the UNCRC has no direct effect in the UK it can be used as guidance as to what the courts should

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[45] See for example, H. Reece, The Paramountcy Principle – Consensus or Construct?, Current Legal Problems, 1996, 49, 267 – 304.

[46] See for example, A. MacDonald QC, The Best Interests Principle Breaks Out, Family Law, 2011, 851.

[47] See for example, City of Edinburgh Council v B [2014] CSOH 128 'giving her a family and a secure identity was plainly in her best interests'; Re: G (A child) [2014] EWCA Civ 1173 'I readily contemplate that either of the two outcomes could be in E's best interests'

[48] See http://www2.ohchr.org/english/law/crc.htm (accessed on 24 February 2012)

have regard to when making decisions affecting children which fall outwith the 1989 Act and 1995 Act.

The leading case as to the definition of the child welfare principle, *J v C*[49], dates back to 1970. It concerned section 1 of the Guardianship of Infants Act 1925, which declared that where the custody or upbringing of an infant was in dispute the welfare of the infant was the paramount consideration and that this applied not only between parent and parent but also between the parents and strangers. In his ruling Lord MacDermott defined the child welfare principle as:

> A process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighted, the course to be followed will be that which is most in the interests of the child's welfare. That is...the paramount consideration because it rules or determines the course to be followed.[50]

Eekelar has stated that family law practitioners hold the child welfare principle in particularly high regard:

> For family lawyers, particularly those specialising in the law relating to children, the 'best interests' principle may be considered a talisman, a mantra and, more prosaically but more appropriately, a fundamental principle of interpretation. It has been said that the best interests principle requires a decision made with respect to a child to be justified from the point of view of a judgement about a child's interests, it being inconsistent with the

[49] [1970] AC 668.

[50] Ibid., 710.

> best interests principle to make a decision that is overtly justified by reference to some other interest or interests.[51]

This approach puts the welfare of the child to the forefront of the decision-making process. Mnookin commented that 'deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself'.[52]

Prior to the introduction of the 1989 Act in England and Wales the State under the guise of local authorities, would regularly apply to the courts for wardship of children, often when the local authority were unable to prove the statutory criteria for a care order yet considered that it was in the child's best interests to be in care, or when they wished to challenge the discharge of a care order.[53] The 1989 Act sought to restrict the use by local authorities of the courts' inherent jurisdiction, particularly in regards to wardship.[54] The courts' inherent jurisdiction includes but is not limited to wardship.

Section 100(1) of the 1989 Act abolished the power in the Family Law Reform Act1969, section 7, whereby the High Court in exceptional circumstances could place a ward in the care, or under the supervision, of a local authority. The enactment of section 100(2) of the 1989 Act meant that the High Court's inherent jurisdiction, including wardship, was not to be used to place a child in the care, or put under the supervision of a local authority, or to accommodate a child by or on behalf of a local authority, or to make a child who was the subject of a care order a ward of court, or to confer power on a local authority to determine any question in connection with any aspect of parental responsibility. The effect of these restrictions in section 100 prevented the inherent

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[51] J. Eekelar, Beyond the Welfare Principle, [2002], Children and Family Law Quarterly, 237. Note that Eekelar uses the term 'best interests principle' when referring to what this thesis terms the child welfare principle. This is an example of the interchange in usage referred to.

[52] R. Mnookin, Child Custody and Adjudication: Judicial Functions in the Face of Indeterminacy, Law and Contemporary Problems, 1975, 39, 226 - 293, 260.

[53] M. L. Parry, The Children Act 1989: Local authorities, wardship and the revival of the inherent jurisdiction, Journal of Social Welfare and Family Law, 1992, 14:3, 212-222.

[54] Children Act 1989 sec. 100.

jurisdiction being used as an alternative to the statutory provisions contained within the 1989 Act. However, subject to obtaining leave of the court[55] the local authorities could still apply to the High Court to exercise its inherent jurisdiction in relation to a child. Local authorities have continued to apply to the inherent jurisdiction of the court with regard to matters concerning children which cannot satisfactorily be dealt with under the 1989 Act.[56]

In the lead up to the introduction of the 1989 Act, the Law Commission looked to replace the phrase relating to child welfare in the Guardianship of Minors Act 1971, that it should be the 'first and paramount consideration', with the phrase that it should be the 'only consideration' in the new legislation.[57] This recommendation was rejected as, in the opinion of Parliament, it went too far since it would have had the effect of completely excluding the interests of the parents in any matter relating to children.[58] The word 'first' was also dropped due to concerns that it had 'led some courts to balance other considerations against the child's welfare rather than to consider what light they shed upon it'.[59] That the welfare of the child should be the 'paramount consideration' was the term that eventually found its way onto the statute books.

While the child welfare principle required the courts to make the welfare of the child the paramount consideration, the UNCRC only stipulates that the best interests of the child should be a primary consideration. The domestic legislation and the international convention require different weight to be placed upon the question of what is in the best interests of the child. There is a

[55] Children Act 1989 sec. 100(3).

[56] For Example, In re M (minors) (wardship: publication of information) [1989] 3 W.L.R. 1136) - undesirable publicity; In re B (wardship: abortion) [1991] 2 F.L.R. 426) - significant medical treatment such as abortion; In re B a minor) (wardship: sterilisation) [1988] A.C. 199) - sterilisation.

[57] H. Reece, The Paramountcy Principle – Consensus or Construct? Current Legal Problems, 1996, 49, 267 – 304, 269.

[58] Ibid., 270.

[59] Law Commission Report, No. 172, Review of Child Law, Guardianship and Custody (London, 1988), para. 3.13.

clear difference between the domestic legislation and the international treaty in the use of the words 'paramount' and 'primary'. The dictionary definition of paramount is 'Of the greatest importance or significance'[60], while the dictionary definition of primary is 'First or highest in rank, quality, or importance; principal.'[61] The use of the word 'paramount' stresses that this one consideration outweighs all others, while the word 'primary' stresses that the child's interests must be ranked above other considerations, but is but one of several considerations, albeit one that must be considered first.

The adoption of the term 'a primary consideration' in the UNCRC arose from the consideration that, in addition to the child's best interests, there may be other interests competing with those of the child. The concern was that these interests would be excluded from evaluation if the best interests of the child were always the paramount consideration. The requirement that the child's best interests be 'a primary consideration' meant that the child's best interests would not always be the single, overriding factor to be considered.[62]

The case of *ZH (Tanzania) v Secretary of State for the Home Department*[63] in the field of Immigration law provides a good illustration of how Article 3 of the UNCRC can influence the UK Courts. The case is the most recent Supreme Court decision which discussed the weight to be placed on the best interests of the child in decisions falling outwith the 1989 Act or the 1995 Act. It is worth quoting the views of the court in this case at length as the judges sought to clarify the scope of the best interest principle and in what way it differed from the child welfare principle. In this case Lord Kerr said:

> It is a universal theme of the various international and domestic instruments….that, in reaching decisions that will affect a child, a

[60] http://www.thefreedictionary.com/paramount (accessed on 16 February 2012).

[61] http://www.thefreedictionary.com/primary (accessed on 16 February 2012).

[62] A. MacDonald QC, The Best Interests Principle Breaks Out, 2011, Family Law, 851.

[63] [2011] W.L.R. 4.

> primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.[64]

Baroness Hale of Richmond in her speech made reference to a decision of the European Court of Human Rights, *Neulinger v Switzerland*[65], in which the court observed that 'there is currently a broad consensus including in international law in support of the idea that in all decisions concerning children, their best interests must be paramount.'[66] Baroness Hale noted that:

> ...the court had earlier, in paras 49—56, collected references in support of this proposition from several international human rights instruments: from the second principle of the United Nations Declaration on the Rights of the Child 1959; from article 3.1 of the Convention on the Rights of the Child 1989 (UNCRC); from articles 5(b) and 16.1(d) of the Convention on the Elimination of All Forms of Discrimination against Women 1979; from General Comments 17 and 19 of the Human Rights Committee in relation to the

[64] [2011] UKSC 4 at para. 46.

[65] (Application no. 41615/07, 6 July 2010).

[66] (Application no. 41615/07, 6 July 2010), para. 135.

> International Covenant on Civil and Political Rights 1966; and from article 24 of the European Union's Charter of Fundamental Rights. All of these refer to the best interests of the child, variously describing these as paramount, or primordial, or a primary consideration. To a United Kingdom lawyer, however, these do not mean the same thing.[67]

Baroness Hale went on:

> For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3.1 of the UNCRC: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. [68]

It is clear that the child welfare principle (treating the welfare of the child as the paramount consideration) and the best interests principle (treating the best interests of the child as a primary consideration) are not the same. Again quoting from Baroness Hale in *ZH (Tanzania)*:

> ...the Strasbourg court will expect national authorities to apply article 3.1 of UNCRC and treat the best interests of a child as a primary consideration. Of course, despite the looseness with which these terms are sometimes used, a primary consideration is not the

[67] [2011] UKSC 4, para. 22

[68] [2011] UKSC 4, para. 23

same as the primary consideration, still less as the paramount consideration... questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly, at para 1.1: "The term 'best interests' broadly describes the well-being of a child... The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the child, but stipulates that:

- the best interests must be the determining factor for specific actions, notably adoption (Article 21) and separation of a child from parents against their will (Article 9);

- the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3)."

This seems to me accurately to distinguish between decisions which directly affect the child's upbringing, such as the parent or other person with whom she is to live, and decisions which may affect her more indirectly, such as decisions about where one or both of her parents are to live. Article 9 of UNCRC, for example, draws a distinction between the compulsory separation of a child from her parents, which must be necessary in her best interests, and the separation of a parent from his child, for example, by detention, imprisonment, exile, deportation or even death.[69]

[69] [2011] UKSC 4, para. 25.

To reiterate, what the Supreme Court recognised in *ZH (Tanzania)* is that the application of the child welfare principle applies to decisions which directly concern the upbringing of a child, while the best interests principle applies to decisions which may affect the child more indirectly. When the child welfare principle is applied, the process is to identify what is conducive to the welfare of the child and make a decision which ensures that this is protected. When the best interests principle is applied, provided the court does not treat any other consideration as inherently more significant than the best interests of the child and considers the child's best interests first, the court can conclude that other considerations outweigh what is in the best interests of the child. It has been said that in relation to the child welfare principle the question asked is not what the essential justice of the case requires but rather what the child's welfare requires.[70] The requirement that the best interests of the child be a primary consideration on the other hand would require the court to carry out a balancing exercise between the child's best interests and the interests of others.[71]

The importance of *ZH (Tanzania*) has been said to lie in the fact that it allowed the Supreme Court to 'imbue the best interests principle with a far wider reach than the traditional formulation of 'paramount consideration' that continues to apply within the context of proceedings under the Children Act 1989 and the Adoption and Children Act 2002.'[72] So whilst it has not altered the way in which the child welfare principle would be applied it has meant that 'the best interests principle emerges from the narrow confines comprised by those statutes to encompass a much broader spectrum of situations and circumstances which touch and concern the day to day lives of children.'[73] MacDonald ponders the question of whether or not we should worry that 'the domestic application of Article 3 will threaten the integrity of the paramountcy principle in that even decisions directly concerning the upbringing of children often engage the

[70] A. MacDonald QC, The Best Interests Principle Breaks Out, 2011, Family Law, 851 with reference to the case of S(BD) v S(DJ) (Infants: Care and Consent) [1977] Fam 109.

[71] Ibid.

[72] Ibid.

[73] Ibid.

interests of others, most commonly the parents.'[74] This thesis takes the view that there is little chance of the paramountcy (child welfare) principle being threatened by the application of Article 3 and that consideration of the best interest of the child as a primary concern in matters which indirectly impact upon the child will complement not threaten the domestic legislation.

4.4 The Legal Definition of a Child

Article 1 of the UNCRC is fairly straightforward in regard to its definition of a child as anyone under the age of 18. However, it goes on to state that this is the case unless majority is attained earlier under the domestic law applicable to the child. In Scotland the 1995 Act defines a child as a person under the age of 16 for the purpose of all the requisite parental responsibilities.[75] However, a person under the age of 18 is included in relation to the parental responsibility to provide, in a manner appropriate to the stage of development of the child, guidance to the child. In relation to the powers and duties of the local authority, young people between the age of 16 and 18 who are still subject to a supervision requirement by a Children's Hearing can be viewed as a child.[76] So, it is recognised in Scotland that young people over the age of 16 may still require intervention to protect them. In England, the 1989 Act defines a child as a person under the age of 18[77] with a narrow exception allowing for orders for financial relief to be made in relation to children who have reached the age of 18.[78]

In ratifying the UNCRC, the UK declared that it was to be interpreted as applying only following a live birth[79] and generally the UK has been consistent that for a

[74] Ibid.

[75] Children (Scotland) Act 1995 sec. 1(a), (b)(i) + (ii), (c) and (d)

[76] Children (Scotland) Act 1995 sec. 93(2)(a) and (b)

[77] Children Act 1989 sec. 105(1)

[78] Children Act 1989 sch. 1 para. 16.

[79] The UK Reservation and Declarations. CRC/C/2/Rev 4, at 32, 16 December 1991.

'child' to be the subject of legal rights and responsibilities it has to have been born alive. The concept of 'foetal rights' is an issue which has generated a huge amount of academic debate and is beyond the scope of this thesis. However, it is worth setting out the general position of the law in relation to the foetus in order to understand why some commentators find the law as expressed in section 13(5) of the HFE Act 1990 to be completely nonsensical.[80]

The law does not grant full legal personality to a foetus. In *Paton v British Pregnancy Advisory Service Trustees*[81] Sir George Baker P. stated:

> The foetus cannot, in English law.....have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law in this country.[82]

Nevertheless, the so called 'born alive' rule does grant a child a right to seek financial damages for injuries sustained prior to birth as a result of the conduct of any third party, in England and Wales under the Congenital Disabilities (Civil Liability) Act 1976 and in Scotland under Common Law. For example, in the Scottish case of *Hamilton v Fife Health Board*[83] Lord McCluskey held that:

> Once the foetus ceases on birth to be a foetus and becomes a person there is a concurrence of *injuria* and *damnum* and the newly born child has a right to sue the person whose breach of duty has resulted in the child's loss.[84]

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[80] See for example, E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 65, 2002, 176 – 203, 180.

[81] (1979) 1 QB 270. The case concerned a husband's application for an injunction to stop his wife having an abortion. The husband took his case to the European Commission for Human Rights which held that Article 2 of the ECHR did not extend to a foetus.

[82] (1979) 1 QB 270 at p. 279.

[83] [1993] S.L.T. 624.

[84] [1993] S.L.T. 624 at p. 629.

So, while the action which caused the injury happened at an earlier date, the injury and the resulting loss to the child is deemed to have occurred at birth. However, although the courts are prepared to recognise that a child's welfare can be adversely affected by an event that occurs prior to birth there is a complete unwillingness from the courts to accord the foetus legal personality.[85] In effect the courts are acknowledging the existence of the foetus during pregnancy but take the view that this alone does not warrant the recognition of legal personality.

In relation to a foetus, then, the child welfare principle as understood by the 1989 Act and 1995 Act is not applicable. Where a court determines any matter with respect to a child in connection with those Acts, a foetus will not be awarded the protection which is afforded a child under these legislative provisions. While no one has tried to argue this specific point, the question was dealt with in a case pre-dating the legislation in the context of wardship.

In the case of *In Re F (In Utero),*[86] the local authority was concerned that a pregnant woman, who was mentally disturbed and led a nomadic existence, would not take sufficient care for the well-being of her child at the time of birth and thereafter and would fail to seek medical attention for the child. The local authority applied to make the foetus a ward of court. The court refused the application holding, with reference to *Paton v British Pregnancy Advisory Service Trustees,* that it had no wardship jurisdiction over an unborn child. If somebody did seek to argue in court that a foetus should be awarded the protection which is accorded to a child under the 1989 Act or 1995 Act, it seems inevitable that the court would hold that the child welfare principle only applies to live born children; it is not applicable at the pre-birth stage. This is of course significant in the context of this thesis where section 13(5) seeks to take account of the welfare of child who is yet to be conceived. It raises the question of why such

[85] Kelly v Kelly 1997 S.C. 285 - nothing in the authorities to support the view that a foetus was a legal person.

[86] [1988] 2 All E.R. 193.

an approach is being taken when the law does not grant any legal status to a child until birth.

4.5 The Legal Definition of a Parent

The Law Commission Review of Child Law Guardianship and Custody prior to the enactment of the Children Act 1989 stated that:

> A fundamental principle which guided both the Review of Child Care Law and the Government's response to it was that the primary responsibility for the upbringing of children rests with their parents. The State should be ready to help them to discharge that responsibility and should intervene compulsorily only where the child is placed at unacceptable risk...The present law, however, does not adequately recognise that parenthood is a matter of responsibility rather than rights, while at the same time it may encourage the State (which includes the courts) to intervene unnecessarily in the discharge of those responsibilities.[87]

This matter was addressed in the consequent legislation which, as has been discussed, refers explicitly to parental responsibilities and accords rights in order to enable these responsibilities to be performed. If the parents are the ones who have the primary responsibility for their children's upbringing, then it is clearly of great importance to these children that their parents are identified and held legally responsible for their welfare. Traditionally, the term 'parent' applied to the two people genetically responsible for the conception and birth of the child. As has been previously discussed in Chapter Two this traditional definition has been challenged both by the development of ART which introduced the possibility of a separation in the concepts of 'natural parent', 'birth parent', 'genetic parent' and 'social parent' and from societal changes that have been brought about by an increase in 'social parents' in the form of

[87] Law Commission Report, No. 172, Review of Child Law, Guardianship and Custody (London, 1988), para. 2.1.

step-parents[88] and extended family members taking on the principal carer role for children.

The Warnock Committee considered the implications in relation to the legal status of the child's parents in each of these scenarios.[89] While the Committee had no difficulties in relation to artificial insemination using the sperm of the woman's husband, it was of the view that assisted insemination of a woman using the previously stored sperm of her deceased husband 'may give rise to profound psychological problems for the child and the mother'.[90] In regard to artificial insemination by donor, the Committee considered arguments against this practice. These arguments included fears that the practice would be a threat to the couple's relationship,[91] fears that keeping the child in the dark as to his genetic origins would be damaging to the child[92] and fears surrounding the danger of a donor passing on a genetically inherited condition to the child.[93] Nonetheless, the Committee recommended that donor artificial insemination should be made available[94] and the law changed to make a consenting husband the legal father of the child.[95] In relation to the question of the legal status of the parent following egg donation and embryo donation, the Warnock Committee was of the view that the same objections existed as in relation to donor artificial insemination.[96] The Committee's recommendations on the legal status of the parent in relation to a child born via ART were accepted by

[88] There are approximately 150,000 divorces each year in England and Wales (Social Trends 33 (2003). In 1993 it was estimated that 8% of children spent some time as part of a step-family. Data produced in 2003 showed that 17% of men were step fathers by the age of 30 (Changing Britain, Changing Lives (Institute of Education, 2003)).

[89] The Warnock Report, para. 4.3.

[90] The Warnock Report, para. 4.4.

[91] The Warnock Report, para. 4.10 and 4.11.

[92] The Warnock Report, para. 4.12.

[93] The Warnock Report, para. 4.13.

[94] The Warnock Report, para. 4.16.

[95] The Warnock Report, para. 4.25.

[96] The Warnock Report, para. 6.4 and 7.2.

Parliament and were followed in the HFE Act 1990. As has been discussed in Chapter Two these provisions subsequently underwent significant revision with the passing of the HFE Act 2008.

It is clear from the provisions within the HFE Act 2008 and those they replaced in the HFE Act 1990 that Parliament has grappled with the many different concepts of parenthood that the development of ART has created. The effort that has gone into drafting these provisions goes to show the importance that is attached to the idea that a child should be able to identify an adult who has parental rights and responsibilities towards him or her in order that the child's welfare can be safeguarded and promoted by that adult. It is even considered important that children are able to identify their fathers on their birth certificates if their fathers died before implantation of the embryos. The State is of the view that it is the parents of the child who should be expected to be the people primarily responsible for the child's upbringing. The application of the child welfare principle can be viewed in the context of parental rights and responsibilities which are necessary to enable the parent(s) to ensure that the welfare of the child is being met.

4.6 The Application of the Child Welfare Principle in Family Law

In England and Wales, the Children Act 1989 requires the courts to have regard to certain issues when deciding whether to make, vary or discharge section 8 orders[97] in contested proceedings.[98] The court is also required to have regard to these issues in all public proceedings under Part IV of the 1989 Act which relate

[97] Children Act 1989 sec. 8(1). A section 8 order can refer to a child arrangements order which means an order regulating arrangements relating to any of the following— (a) with whom a child is to live, spend time or otherwise have contact, and (b) when a child is to live, spend time or otherwise have contact with any person; a prohibited steps order which means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court; and a specific issue order which means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

[98] Children Act 1989 sec. 1(4)(a).

to applications by local authorities for care and supervision orders in relation to children.[99] These issues are; (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding); (b) his physical, emotional and educational needs; (c) the likely effect on him of any change in his circumstances; (d) his age, sex, background and any characteristics of his which the court considers relevant; (e) any harm which he has suffered or is at risk of suffering; (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (g) the range of powers available to the court under this Act in the proceedings in question.[100] If the court fails to have regard for any one of the statutory criteria, that failure may form the basis for an appeal.

Prior to the passing of the 1989 Act, it was difficult to say with any great certainty what factors had to be taken into account by the court when applying the child welfare principle. The courts did state:

> There is only one rule; that rule is that in a consideration of the future of the child the interests and welfare of the child are the first and paramount consideration. But within that rule, the circumstances of each individual case are so infinitely varied that it is unwise to rely upon any rule of thumb, or any formula, to try and resolve the difficult problem which arises on the facts of each individual case. [101]

In effect, the English legislation now mandates that the welfare of the child incorporates his physical, emotional and educational needs; the likely effect on him of any change in his circumstances; his age, sex, background and any

[99] Children Act 1989 sec. 1 (4)(a).

[100] Children Act 1989 sec. 1 (3).

[101] Pountney and Morris [1984] 4 FLR 381.

characteristics of his which the court considers relevant; and any harm which he has suffered or is at risk of suffering. How the court has addressed these issues is of interest in establishing how the child welfare principle is applied in practice.

In Scotland, under the 1995 Act when considering whether or not to make an order in relation to parental responsibilities, commonly referred to as a section 11 order, the court shall regard the welfare of the child concerned as its paramount consideration.[102] In effect, the legislation in Scotland simply restates the paramountcy principle. It does not attempt, as in England, to define the issues which pertain to the question of the child's welfare. However, that is not to say that the Scottish courts do not have regard to like issues when making decisions in relation to section 11 orders.

In Scotland, the case of *Pearson v Pearson*[103] held that the assessment of a child's welfare is a matter of judgement, not a judge's discretion, to be based on all the relevant facts and circumstances. In reaching that judgement, the courts in Scotland clearly pay particular attention to the same issues that are specified in the English legislation. The Court identified the essential questions of fact relating to the father's drinking, whether or not the evidence warranted a conclusion that it was under control and whether or not there was a significant risk that the father would be materially affected by drink during access periods (parenting capability). The relevant facts and circumstances pertaining to the welfare of the child from the perspective of the child are the meeting of the child's needs and the protection of the child from harm.

In relation to determining the needs of the child, the courts have moved a long way from the 19th Century focus on poverty equating to a form of neglect. In

[102] Children (Scotland) Act 1995 sec. 11 (7)(a).

[103] 1999 S.L.T. 1364.

the case of *Re P (Adoption: Parental Agreement)*,[104] the legal representative of the child's mother (who was facing the prospect of her child being adopted without her consent) submitted that whenever a mother who lived in poor circumstances objected to the adoption of her child by middle-class parents, the decision would go against the mother. In rejecting that submission the court stated that:

> ....of course one aspect of the approach of the hypothetical reasonable person will be to consider the material circumstances which the child is likely to enjoy with the adoptive parents when compared with the material circumstances which the child is likely to enjoy with the natural mother. But that is only an element and I would agree entirely with Mr Sears that it is not an element that should be allowed to weigh too heavily in the scale. Anyone with experience of life knows that affluence and happiness are not necessarily synonymous.[105]

Therefore, while the material needs of the child, presumably in the context of physical needs, may be a factor to be weighted into the balance, it does not carry determinative weight. When assessing the needs of the child, the Court is likely to place far greater weight on the quality of the relationship which the child has with each parent.[106] The strength and depth of the parent-child bond is a crucial aspect in determining the child's welfare, particularly when the decision to be made relates to which parent the child is to live with following a divorce or a decision on whether to remove a child from parental care altogether.

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[104] [1985] FLR 635

[105] Ibid at 637.

[106] A. Bainham, Children – The Modern Law, Third Edition, Family Law, Bristol, 2005, 176.

4.7 Residence and Contact

A Government Green paper published in July 2004[107] stated that 'in the event of parental separation, a child's welfare is best promoted by a continuing relationship with both parents as long as it is safe to do so'. The law seeks to encourage divorced and separated parents to maintain contact with their children, provided that this is something that can enhance the welfare of the child. There is probably no better illustration of the influence of the child welfare principle than the way it is used to regulate residence and contact between parent and child.

Child arrangement orders were introduced by the Children and Families Act 2014 and came into force on 22 April 2014. They replaced Residence orders and Contact orders but effectively do the same thing. They are probably the most important orders in relation to the welfare of the child. They determine with whom the child lives and has contact with on a day to day basis. Clearly, a great deal of the parental responsibility to safeguard and promote the welfare of the child is affected by the practical matter of where the child lives. These issues take up a significant amount of court time in the UK and have generated a large body of case law.

Section 8 of the 1989 Act defined a residence order as an order settling the arrangements to be made as to the person with whom a child is to live.[108] The recently enacted child arrangements order means an order regulating arrangements relating to any of the following— (a) with whom a child is to live, spend time or otherwise have contact, and (b) when a child is to live, spend time or otherwise have contact with any person.[109]

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[107] Parental Separation: Children's Needs and Parents' Responsibilities (2004) (Cm 6273)

[108] Children Act 1989 sec. 8 (1) as originally enacted.

[109] Children Act 1989 sec. 8 (1) as amended by the Children and Families Act 2014 c. 6 Pt 2 s.12(3)

In terms of section 11 of the 1995 Act, a residence order was 'an order regulating the arrangements as to with whom, or if with different persons alternately or periodically, with whom during that period, a child under the age of sixteen years is to live'.[110] A residence order was not made in favour of one parent or another, because both have the parental right to have the child living with them. What the order does it to 'settle' or 'regulate' the way in which this parental right is exercised.

The courts had adopted the attitude that it was not conducive to the welfare of the child to have him or her move backwards and forwards between two different homes. The court held in *Riley v Riley*,[111] that the paramount interests of the child were that she should have a settled home. However, in the case of *A v A (Minors) (Shared Residence Orders)*,[112] it was held that, while the views expressed in *Riley* (that a child should have one settled home and that competing homes could lead to confusion) still held some weight, joint residence orders were something that had been specifically contemplated by the 1989 Act. A joint residence order did not have to be confined to exceptional circumstances, although if one was made there would have to be some specific, positive benefit to the child for such an arrangement to be put in place. The idea that a child's welfare is always best served by having an undisrupted, constant home life no longer holds such sway in the courts, which are willing to look at other less conventional living arrangements for the child as long as it can be shown that the living arrangements enhance or protect the welfare of the child.

Courts are prepared to restrict the parental right to contact quite severely if an alternative arrangement, which has that inevitable outcome, can be shown to be

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[110] Children (Scotland) Act 1995 sec. 11 (2)(c)(i)and (ii).

[111] [1986] 2 FLR 429.

[112] [1994] 1 FLR 669.

conducive to the welfare of the child. In the case of *M v M,*[113] the court allowed the mother of three children to remove them from Scotland to the United States. This would have the effect of drastically reducing the father's contact with his children. The father opposed the making of the order. The court held that, on the balance of evidence, various factors outweighed the negative factors of reduced contact with their father including: that the children would be provided with a materially better life and education and a more stable environment; their inheritance would be better protected; and if the mother's plans were thwarted, the strong sense of regret that might follow might sour the family atmosphere. The court also expressed an opinion that the father's approach to care was over protective.

A contact order was defined by section 8 of the 1989 Act as 'an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other'.[114] The Children and Family Act 2014 has in effect subsumed the definitions of a residence order and a contact orders into the one definition set out in the child arrangement order definition. However, it remains useful to consider case law heard under the previous legislation.

In terms of section 11 of the 1995 Act 'a contact order is an order regulating the arrangements for maintaining personal relations and direct contact between a child under the age of sixteen years and a person with whom the child is not, or will not be, living'.[115] The order would be worded in such a way as to stress that the parent has a responsibility to the child to maintain contact, as opposed to

[113] 2000 Fam. L.R. 84.

[114] Children Act 1989 sec. 8 (1) as originally enacted.

[115] Children (Scotland) Act 1995 sec. 11 (2)(d).

the idea that a parent has a right to access. Contact orders have been far and away the most common orders sought in the courts.[116]

In the case of *Re M (Contact): Welfare Test)*,[117] the Court of Appeal held that the judge had been entitled to form the view that the risk of distress to the children outweighed the strong presumption in favour of contact. The test, having regard to the issues set out in section 1(3) of the 1989 Act, was 'whether the fundamental emotional need of every child to have an enduring relationship with both his parents (section 1(3)(b) his physical, emotional and educational needs) is outweighed by the depth of harm which in the light, inter alia, of his wishes and feelings (section 1(3)(a) the ascertainable wishes and feelings of the child concerned) the child would be at risk of suffering (section 1(3)(e) any harm which he has suffered or is at risk of suffering) by virtue of a contact order.'[118] This case illustrates the balancing exercise that a court will engage in when assessing what is most conducive to the welfare of the child.

What can be taken from the courts' application of the child welfare principle in residence and contact orders is that there is a strong emphasis upon the parental responsibility towards the child. The concept of parental rights is only relevant in so far as it is necessary to enable to parent to carry out parental responsibilities. The task of the court is to decide what arrangements will provide the best parenting environment for the child. In the next chapter, the thesis will examine whether people seeking to become parents using ART should have to satisfy the clinic that they are willing and able to exercise parental responsibility adequately/satisfactorily towards a child before treatment can be provided to them. One issue that is considered important for the clinic to assess

[116] A. Bainham, Children – The Modern Law, Third Edition, Family Law, Bristol, 2005, 156.

[117] [1995] 1 FLR 274.

[118] Wilson J, [1995] 1 FLR 274.

is whether there is any serious discord within the family environment.[119] Presumably this factor is considered to be important to avoid a situation where the child's welfare will be put at risk by future parental conflict and separation. This thesis is of the view that the influence of the day to day work in the family courts making decisions about residence and contact and assessing what parental environment would be in the child's best interests can be clearly seen within the HFEA guidance to clinics on how to apply section13(5).

4.8 State Protection of Children at Risk

The issues considered so far concern the intervention by courts in order to settle private disputes between parents when they disagree over matters concerning the lives of their children. However, another important area where the child welfare principle plays a significant role is the State's duty to protect children from harm. A local authority has a duty in terms of section 22 of the 1995 Act 'to safeguard and promote the welfare of children in their area who are in need, by providing a range and level of services appropriate to the children's needs, although so far as is consistent with that duty, the local authority must promote the upbringing of children in need by their families.'[120] A similar duty is set out in the 1989 Act at section 17 which reads: '(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)— (a) to safeguard and promote the welfare of children within their area who are in need; and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.'[121]

[119] HFEA Welfare of the child: patient history form at http://www.hfea.gov.uk/1414.html (accessed on 12 December 2013).

[120] Children (Scotland) Act 1995 sec. 22(1).

[121] Children Act 1989 sec. 17(1).

In Scotland, the court may make an order 'depriving a person of some or all of his parental responsibilities or parental rights in relation to a child'.[122] The court should have regard to 'the need to protect the child from any abuse, the effect of such abuse and the ability of a person who has carried out abuse to care for, or otherwise meet the needs of, the child.'[123] Prior to 24 June 2013, in terms of section 52 of the 1995 Act a child could be referred to a Children's Hearing to consider whether compulsory measures of supervision are necessary if 'the child is beyond the control of any relevant person; is falling into bad associations or is exposed to moral danger; is likely to suffer unnecessarily; or be impaired seriously in his health or development due to a lack of parental care; is a child in respect of whom an offence has been committed or is likely to become a member of the same household as a person who has committed offences against children; has failed to attend school without reasonable excuse; has committed an offence; has misused drugs or alcohol; is being provided with accommodation by a local authority; or is the subject of a parental responsibilities order in favour of the local authority.'[124] Section 52 of the 1995 Act has since been repealed and replaced with section 83 of the Children Hearings (Scotland) Act 2011 which gives the Children's Hearing or court the power to make a compulsory supervision order which means an order in relation to a child which can requires that the child resides at a specified place[125] and prohibits the disclosure of such a place.[126] A compulsory supervision order can also requires the local authority to perform duties in relation to the child's needs, such as arranging a medical or other examination or treatment of the child,[127] regulate contact between the child and a specified person or class of person,[128] or restrict the child's liberty to the extent considered appropriate.[129]

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[122] Children (Scotland) Act 1995 sec. 11(2)(a).

[123] Children (Scotland) Act 1995 sec. 11(7B)(a)-(c).

[124] Children (Scotland) Act 1995 sec. 52.

[125] Children's Hearings (Scotland) Act 2011 sec. 83(2)(a).

[126] Children's Hearings (Scotland) Act 2011 sec. 83(2)(c).

[127] Children's Hearings (Scotland) Act 2011 sec. 83(2)(f)(i) and (ii).

[128] Children's Hearings (Scotland) Act 2011 sec. 83(2)(g).

Clearly, the State plays a wide-ranging role in ensuring that the welfare of the child is protected. However, the State is not to be viewed as a substitute parent and the legislation is clear that, first and foremost, the responsibility for the welfare of the child lies with the parents. The ethos of the domestic legislation is that the family unit should be free from unjustified interference by the State.[130] It is the tradition of the UK that children should be brought up within natural families. Lord Templeman, in *Re KD (A Minor Ward) (Termination of Access)*,[131] said:

> The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature.[132]

The local authority powers are designed to work in partnership with parents, with the aim of returning the child to the care of his or her parents when and wherever possible.[133] It is of note that the legislation encourages local authorities to support parents to raise their children wherever possible, with court ordered removal to be treated as a last resort.

The circumstances in which children are taken into care invariably involve a finding that the parent(s) have failed to fulfil their parental responsibility to safeguard and promote the child's health, development and welfare. Sadly, these cases all too often involve the physical or sexual abuse of children or

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[129] Children's Hearings (Scotland) Act 2011 sec. 83(2)(b).

[130] A. MacDonald, The Rights of the Child: Law and Practice, Family law - Jordan Publishing Limited, Bristol, 2011, 542.

[131] [1988] 1 AC 806, [1988] 2 FLR 139

[132] [1988] 1 AC 806, [1988] 2 FLR 139, at 812 and 141

[133] Children Act 1989 sec. 17(1) (b) and Children (Scotland) Act 1995 sec. 22 actively encourage this.

situations of serious neglect. In England, the court can make what is known as a care order or supervision order if it is satisfied that the child concerned 'is suffering, or is likely to suffer, significant harm; and that the harm, or likelihood of harm, is attributable to the care given to the child being what it would be reasonable to expect a parent to give to him.'[134] In Scotland, the sheriff may grant a child protection order on the application of a Local Authority if satisfied that (a) the local authority has reasonable grounds to suspect that (i) the child has been or is being treated in such a way that the child is suffering or is likely to suffer significant harm, (ii) the child has been or is being neglected and as a result of the neglect the child is suffering or is likely to suffer significant harm, or (iii) the child will be treated or neglected in such a way that is likely to cause significant harm to the child.[135]

These orders have significant consequences for the parent/child relationship, as they invariably remove the child from the parental home and place him or her in the care of the local authority. They are often the first step in the parent/child relationship being severed entirely through the removal of parental rights and having the child placed for adoption. The threshold criterion is a fairly high one; that of *significant harm*.

The courts have held that there is no all-embracing definition of significant harm and that it is fact-specific. It has to retain the breadth of meaning that human shortcomings requires of it. For there to be 'significant harm', there has to be something more than commonplace human failure or inadequacy.[136] In *Re L (Care: Threshold Criteria)*[137] Hendley J observed:

> ...society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the

[134] Children Act 1989 sec. 31.

[135] Children's Hearings (Scotland) Act 2011 sec. 38.

[136] In re L (Care: Threshold Criteria) [2007] 1 FLR 2050.

[137] [2007] 1 FLR 2050.

> inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of out fallible humanity and it is not the provenance of the State to spare children all consequences of defective parenting. In any event, it simply could not be done.[138]

In the case of *A and B (Children), Re*[139] the issue of the significant harm test was fairly clear cut, the court holding that in all cases where one parent had been killed by another the threshold criteria would be met. However, there have been a series of more controversial cases; namely, the 'shaken baby syndrome' cases which have called into question the reliability of medical evidence when making a finding that the significant harm threshold has been met.

In *A and D (Non Accidental Injury: Subdural Haematomas), Re*[140] a baby was taken to hospital with left side convulsions. An examination showed that these were caused by two acute subdural haematomas and bilateral retinal haemorrhages. The consultant paediatrician was of the view that the injuries were non-accidental and had probably been caused by the baby being shaken by an adult. The parents denied this and suggested that the injuries were due to either rough play by the baby's older siblings or by a three year old sibling falling on top of the baby five days before the convulsions started. The local authority argued that it should be allowed to intervene as the 1989 Act section 31 threshold (significant harm) had been exceeded. The court held that this threshold had been exceeded so that the local authority was entitled to intervene and that expert evidence as to the nature and extent of the injuries was such that they could not have been caused by rough play or a toddler

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[138] [2007] 1 FLR 2050, 2063.

[139] [2010] EWCA 3824.

[140] [2002] 1 FLR 337.

accidentally falling onto the baby. The court held that the most probable cause was shaking by the parents and found that their evidence was not credible on this issue. However, the court commented that further research on the mechanics of subdural haematomas and the force required to cause them would be valuable. In a recent case, two parents were cleared of murdering their child by inflicting head injuries as experts were unable to agree on whether the injuries were a result of non-accidental injury or accidental injury exacerbated by rickets.[141] These cases are of note because the controversy surrounding shaken baby syndrome illustrates the difficulties that medical practitioners and social workers have in identifying whether or not a child has been deliberately harmed, even where the child has clearly suffered severe injury while in their parents' care.

In the case of *B (Children) (Sexual Abuse: Standard of Proof), Re*,[142] it was held that the standard of proof in establishing whether the significant harm threshold criterion was met was the balance of probabilities. In this case, the court held that neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. There was no logical or necessary connection between seriousness and probability. The inherent probabilities were simply something to be taken into account, where relevant, in deciding where the truth lay. To allow the courts to make decisions about the allocation of parental responsibility for children on the basis of unproven allegations and unsubstantiated suspicions would be to deny them their essential role in protecting both children and their families from the intervention of the State, however well intentioned that intervention might be. It would confuse the role of the local authority in assessing and managing risk, in planning for the child, and deciding what action to take, with the role of the court in seeking to decide where the truth lay and what the legal consequences should be.

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[141] Pair cleared over Jayden Wray death, http://www.bbc.co.uk/news/uk-england-16107085, 9 December 2011 (accessed 7 June 2012).

[142] [2008] UKHL 35.

All these cases highlight the difficulties that the courts and local authorities have in determining when and how a child's welfare may be at risk. It is clearly not an easy task to determine whether the child's welfare would be safeguarded and promoted by the removal of the child from the parental home, given the negative impact such an action may have, or safeguarded and promoted by allowing the child to remain in the parental home in the face of evidence of a possible risk of abuse and neglect. Given the difficulties faced in applying the child welfare principle to cases even where there is a child in existence, it may be that any useful, accurate or meaningful assessment of the risk of significant harm faces even greater challenges at the pre-conception stage and is simply not possible.

4.9 Criticism of the Child Welfare Principle

4.9.1 Indeterminacy

It has been noted that while the child welfare principle has almost reached the stage of being cited as a 'sacred mantra'[143] it does have its critics. One major criticism of the welfare principle is directed towards its inherent indeterminacy;[144] the difficulty being that it lacks the certainty required of a rule of law. In a case in the High Court of Australia[145] a judge commented:

> ...it must be remembered that, in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision-maker. Absent any rule or guideline that approach simply creates an unexaminable discretion in the repository of the power.[146]

[143] A. MacDonald, The Rights of the Child: Law and Practice, Family law - Jordan Publishing Limited, Bristol, 2011, 182

[144] R. Mnookin, Child Custody and Adjudication: Judicial Functions in the Face of Indeterminacy, Law and Contemporary Problems, 1975, 39, 226 – 293.

[145] Secretary, Dept of Health and Community Services v JWB and SMB FLC 92-3, 191 (1992)

[146] FLC 92-3, 191 (1992), 79

If a legal principle lacks certainty, so the argument goes, it can lead to arbitrary and inconsistent decisions.[147] This is exacerbated by the value judgement which is attached to the question; 'what is in the child's best interests'?[148] Where a question involves a value judgement to be made it is difficult to settle that question impartially just on the facts.[149] This leaves the answer to the question vulnerable to interpretation based on the decision-makers own values.[150]

It has been suggested that when a judge decides about custody under the best-interests principle, he is:

> Not applying law or legal rules at all, but is exercising administrative discretion which by its nature cannot be rule-bound. The statutory admonitions to decide the question of custody so as to advance the welfare of the child is as remote from being a rule of law as an instruction to the manager of a state owned factory that he should follow the principle of maximizing output at the least cost to the state.[151]

Mnookin has expanded upon this idea that the judge is exercising an administrative function in determining the child's best interests by characterising the process as making a choice between alternative outcomes and choosing the one which is in the best interests of the child.[152] When making this choice, the decision maker requires a great deal of information relating to the past behaviour of the parents and the impact that behaviour has had on the

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[147] A. MacDonald, The Rights of the Child: Law and Practice, Family law - Jordan Publishing Limited, Bristol, 2011, 184

[148] Ibid.

[149] Ibid.

[150] Ibid.

[151] L. Fuller, Interaction Between Law and Its Social Context, Law and Contemporary Problems, (1975), 39, 226.

[152] R. Mnookin, Child Custody and Adjudication: Judicial Functions in the Face of Indeterminacy, Law and Contemporary Problems, 1975, 39, 226 – 293.

child. The judge then has to make a prediction of which alternative possible outcome will be in the child's best interest. [153] The difficulty the courts face when making decisions of this sort is that it is widely recognised by child psychologists that there is no set theory capable of predicting the psychological and behavioural consequences of favouring one course of action above another. The psychologist Anna Freud had said: 'In spite of...advances there remain factors which make clinical foresight, i.e., prediction, difficult and hazardous...environmental happenings in a child's life will always remain unpredictable since they are not governed by any known laws.'[154]

The difficulty of making accurate predictions was clearly shown in a study undertaken by Joan Macfarlane.[155] During a thirty-year period Macfarlane studied a group of 166 infants born in 1929. The objective was to observe the emotional, mental, and physical growth of 'normal' people. Commenting on the findings, Skolnick concluded that:

> Over the years this study has generated several significant research findings, but the most surprising of all was the difficulty of predicting what thirty-year-old adults would be like even after the most sophisticated data had been gathered on them as children.[156]

Skolnick explained the difficulty in interpreting the data collected as follows:

> Foremost, the researchers had tended to overestimate the damaging effects of early troubles of various kinds. Most personality theory had been derived from observations of troubled people in therapy. The pathology of adult neurotics and psychotics

[153] Ibid., 252

[154] A. Freud, Child Observation and Prediction of Development A Memorial Lecture in Honor of Ernst Kris, The Psychoanalytic Study of the Child, 13, 1958, 92, 97-98.

[155] J. Macfarlane, Perspectives on Personality Consistency and Change from the Guidance Study, Vita Humana, 7, 115 (1964).

[156] A. Skolnick, The Intimate Environment, Exploring Marriage and the Family, Pearson, Boston, 1997, 378.

> was traced back to disturbances early in childhood-poor parent-child relations, chronic school difficulties, and so forth. Consequently, theories of personality based on clinical observation tended to define adult psychological problems as socialization failures. But the psychiatrist sees only disturbed people; he does not encounter 'normal' individuals who may experience childhood difficulties, but who do not grow into troubled adults. The Berkeley method, however, called for studying such people. Data on the experience of these subjects demonstrated the error of assuming that similar childhood conditions affect every child the same way. Indeed, many instances of what looked like severe pathology to the researchers were put to constructive use by the subjects.[157]

This psychological study calls into question the ability of a judge (or indeed, anyone) to make an accurate prediction as to the circumstances which will most likely ensure that the best interests of the child are met. If it is accepted that the child welfare principle does indeed require a judge to make a prediction then clearly it cannot be said that the principle can be applied with any degree of certainty.

The difficulty created by the indeterminacy of the child welfare principle was also expressed by Parker:

> At the same time as the best interests standard is deepening its hold in domestic and international instruments, we hear that it provides a convenient cloak for bias, paternalism and capricious decision-making. Even worse, the open-endedness of the standard can legitimate practices in some cultures which are regarded in other cultures as positively harmful to children.[158]

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[157] Ibid., 379.

[158] S. Parker, The Best Interests of the Child: Principles and Problems, International Journal of Law and the Family, 8, 1994, 26-41, 26.

Parker examined what it means to say that the child welfare principle was indeterminate by examining it in the context of rational choice theory. Like Mnookin, he criticises the child welfare principle on the basis that decision-makers cannot make a rational choice about how the principle should be applied, which leads to a wide variation in outcomes. If a decision-maker is to make a rational choice, s/he must know all of the options available, all of the possible outcomes of each option, the probabilities of each possible outcome occurring and the value to be attached to each outcome. If two decision-makers are in possession of different information at any of these four stages then identical problems can be decided differently.

If the common example is taken of a custody dispute then the options available are that the child lives with the mother and visits the father of visa versa, it is still difficult to say with any certainty what the outcome will be for the child. As Parker notes:

> Child custody cases involve the imprecise exercise of appraising peoples' characters and dispositions and then trying to work out how each possible decision might affect them and thus indirectly the child.[159]

Even then, there remains the difficulty of assigning probability to the outcome and attaching a value to all of the possible outcomes. Mnookin expressed the difficulty of attaching a value to a possible outcome in the following terms:

> Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic 'productivity' of the child when he grows up? Are the primary values of life in warm, interpersonal relationships, or in

[159] Ibid., 30.

> discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly. And yet, where is the judge to look for the set of values that should inform the choice of what is best for the child? Normally, the custody statutes do not themselves give content or relative weights to the pertinent values. And if the judge looks to society at large, he finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.[160]

Therefore, the child welfare principle can yield indeterminate results because of problems concerning having enough information to make the decision, problems with the uncertainty associated with making predictions about the future and problems in deciding what values should guide the decision. All this said, however, Mnookin acknowledges that in many cases the question of what is in the child's best interest is a fairly straightforward matter.[161] As he puts it, while there might be little consensus as to what it good for a child there is a general consensus as to what is bad for a child, be that physical abuse, neglect or sexual exploitation. If a judge is to decide a custody case between a capable mother and a violent, alcoholic father the decision is straightforward enough.

4.9.2 Conflict of Rights

The indeterminacy of the child welfare principle is not the only criticism directed at it. Eekelar sets out in his article 'Beyond the Welfare Principle' a number of other contemporary criticisms.[162] The first of these he calls the lack of transparency objection. This criticism states that the child welfare principle fails in its child protection purpose because what actually drives the decision is the interests of other parties or untested assumptions about what is best for

[160] R. Mnookin, Child Custody and Adjudication: Judicial Functions in the Face of Indeterminacy, Law and Contemporary Problems, 1975, 39, 226 – 293, 261.

[161] Ibid.

[162] J. Eekelar, Beyond the Welfare Principle, Children and Family Law Quarterly, 2002, 237.

children. Eekelar suggests that the non-disclosure of origins to children born through IVF was one such example where the decision was guided not by what was in the best interests of the child but rather in the interests of the donor and the wish not to see potential donors put off.[163]

Another criticism Eekelar calls the lack of fairness objection and is something of the opposite to the lack of transparency objection. This criticism runs that, by making the welfare of the child the paramount consideration, the interests of others are unjustly ignored. In effect, the child welfare principle ignores that the child is but one party in the process where the interests of others also count. This criticism has become particularly pertinent given the introduction of the Human Rights Act 1998 which incorporated the European Convention on Human Rights (ECHR) into UK law. This has given rise to the potential difficulty of a conflict between the welfare of the child and the human rights of the adult.

In the case of *Re KD (A Minor) (Ward: Termination of Access),*[164] the House of Lords held that any apparent conflict between the child welfare principle and the right of the parent to have contact with the child was a question of semantics and not an actual conflict in practice. However, Eekelar disagreed and expressed his disagreement in these terms:

> Suppose (a) that I can exercise my 'right' to paint my front door only if I submit my colour scheme to a committee of neighbours which 'pays regard' to it alongside other submissions, but will choose the scheme most pleasing to the committee. It is hard to say that I have a 'right' to paint my door that colour. But if (b) I can apply my own colours unless, on objection, it is proved that the result will devalue property prices, the 'right' appears altogether stronger. It is difficult to escape the conclusion that the view of

[163] The legal position on this has now changed of course with children being entitled to find out the identity of their genetic parent when they reach the age of 16. This change was introduced in 6 April 2009 by amendment to the HFE Act 1990 with the insertion of section 31ZA.

[164] [1988] 2 WLR 398.

> the welfare principle...as explained by Lord Oliver, is closer to model (a) than (b). Its potentially devastating effect on parental rights is obscured only by the facts that parents do not live under daily threat of its application to their conduct and that there is acceptance of a wide scope of different, but acceptable, means of enhancing children's interests.[165]

The criticism argues that the way in which the child welfare principle is applied cannot be reconciled with the need to uphold the rights of others. This was expressed by Reece in her statement that:

> ...the paramountcy principle must be abandoned, and replaced with a framework which recognises that the child is merely one participant in a process in which the interests of all the participants count.[166]

The case of *Re E (Residence: Imposition of Conditions)*[167] provided a good illustration of the type of conflict which can arise between the application of the child welfare principle and the rights of a parent under the Human Rights Act 1998. In this case, the parents of a child had separated. The child was living with the mother under a residence order. Both parents lived in London and the father had regular and beneficial contact with the child. The mother, however, wished to move to Liverpool. The father applied to the court for a condition to be attached to the mother's residence order requiring her to stay in London. There was clearly a potential clash here between the right of the mother to her private life under Article 8 and the parental rights of the father, also under Article 8, while both impacted upon the child's best interests.

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[165] J. Eekelar, Access Rights and Children's Welfare, Modern Law Review, 51, 1988, 629.

[166] H. Reece, The Paramountcy Principle – Consensus or Construct?, Current Legal Problems, 1996, 49, 267 – 304.

[167] [1997] 2 FLR 638.

Herring has suggested that the courts would reach two different decisions if applying the child welfare principle or applying the Human Rights Act 1998.[168] If applying the child welfare principle, the court would likely hold that the condition was in the child's best interests as it would have the effect of keeping in place beneficial contact between father and child, while on the other hand a move to another city would have no direct benefit for the child, although this may not always be the case as the earlier example illustrated. However, if the matter was considered with reference to the mother's right to a private life, an order requiring her to stay in London would infringe that right. The court ultimately held that that, as a residence order had been made in the mother's favour, attaching a condition was an unjustified interference with the mother's right to choose where to live within the UK and with whom. Clearly, the court took the view that the question of the child's welfare had been settled by the decision to make a residence order in the mother's favour; it was then appropriate to go on and consider the mother's human rights.

While the child welfare principle and the human rights of adults may appear to be set up for a collision Herring points out four ways in which the domestic courts have avoided such clashes.[169] The first is that the child welfare principle is quite loosely applied, at least with respect to private law matters. The welfare of the child is only ever considered if the matter is actually brought to court. While child minders, nurseries and schools may be subject to State regulation and inspection, the family home is free from such scrutiny. This, Herring believes, ensures that the parents' right to privacy is upheld. The second way that the domestic courts have ensured that the child welfare principle does not clash with the parents' human rights is referred to in the first section of this chapter; namely, that the scope of the child welfare principle is confined to matters arising from the 1989 Act and 1995 Act. The various issues to which the child welfare principle does not apply, even though the interests of the child may still be an important consideration, include the granting of a

[168] J. Herring, The Human Rights Act and the welfare principle in family law – conflicting or complementary?, Children and Family Law Quarterly, 1999, 1, 237 – 250.

[169] Ibid., 238.

divorce; domestic violence remedies; financial redistribution of property on divorce; and biological paternity tests. The third way that the domestic courts have got round the issue according to Herring is by associating the interests of the child with the interests of the parent. Fourthly, the courts have protected parents' interests by explicitly limiting their jurisdiction to make certain orders.[170]

Herring is of the view that although the ECHR makes no specific reference to children it does actually protect the welfare of children.[171] The Human Rights Act 1998 provides that the ECHR is enforceable against all public authorities; public authorities must act in a way that is compatible with the ECHR and all domestic legislation must be interpreted in line with the ECHR, and decisions of the ECtHR should be taken into account by domestic courts. What this means for the child welfare principle is that orders under the Children Acts in England and Scotland should not infringe the rights of individuals protected by the ECHR, unless this is required by the domestic legislation. Fortin has argued that:

> It is of fundamental importance that the judiciary shows a willingness to interpret the European Convention in a child-centered way, as far as its narrow scope allows. It would be unfortunate in the extreme, if such a change heralded in an increased willingness to allow parents to pursue their own rights under the Convention at the expense of those of their children.[172]

Children are obviously 'human beings' and enjoy the same rights as adults under the ECHR. The approach of the ECtHR has been to hold that the human rights of parents can be interfered with if necessary in the interests of children. National courts should always consider the interests of children, but only if those interests are of significant weight will they justify invasion of the rights of

[170] Ibid., 238.

[171] Ibid., 240.

[172] J. Fortin, The HRA's impact on litigation involving children and their families, Children and Family Law Quarterly, 1999, 237 - 256.

adults. The precise balance between parents' and children's rights is left to the national courts. This position was well summarised in the case of *Olsson v Sweden (No 2)*[173] where it was held that:

> ...the interests as well as the rights and freedoms of all concerned must be taken into account, notably the children's interests and their rights under Article 8 of the Convention. Where contacts with the natural parents would harm those interests or interfere with these rights, it is for the national authorities to strike a fair balance.[174]

Bainham has addressed the problem of a conflict of parental and child interests by suggesting that parents' and children's interests should be categorised further into either primary or secondary interests.[175] A child's secondary interests would have to give way to a parent's primary interests and vice versa. However, Herring criticises this approach on the grounds that it conceives parental interests and children's interests as being in direct competition with each other and that it provides no answer to the problem should primary interests clash.[176] Herring instead suggests 'a broader vision of the welfare principle which could allow consideration of the parent's interests, which I will call relationship-based welfare.'[177] The relationship-based welfare principle would require some recognition that children when growing up do have to make some limited sacrifices in the interests of family cohesiveness. It recognises that child welfare is not enhanced by placing unreasonable demands upon parents. As Herring puts it:

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[173] (1994) 17 EHRR 134.

[174] (1994) 17 EHRR 134, 182.

[175] A. Bainham, 'Non-Intervention and Judicial Paternalism', in P. Birks (ed), The Frontiers of Liability, Oxford University Press, Oxford, 1994.

[176] J. Herring, The Human Rights Act and the welfare principle in family law – conflicting or complementary?, Children and Family Law Quarterly, 1999, 1, 237 - 250, 244.

[177] Ibid.

> It is in the child's welfare to be brought up in a family whose members respect each other, and so, on occasion, sacrifices may be required of the child. As the preamble to the UN Convention on the Rights of the Child states, 'the child, for the full and harmonizing development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'. A relationship based on placing unjust demands on a parent is not furthering a child's welfare. So the effect of a relationship-based welfare approach is to move away from conceiving the problem as a clash between children and parents and in terms of weighing two conflicting interests, and towards seeing it rather as deciding what is a proper parent-child relationship. The child's welfare is promoted when he or she lives in a fair and just relationship with each parent, preserving the rights of each, but with the child's welfare at the forefront of the family's concern. So understood, the welfare principle can protect children while properly taking into account parents' rights.[178]

What this quote from Herring highlights well is that the welfare of a child cannot be viewed solely from the perspective of the child. What is good for the parent(s) more often than not may seen as good for the child, or at very least the family. As the next chapter will come on to discuss the requirement that clinics take into account the welfare of the child to be born can be criticised by placing too much emphasis upon the welfare of the child at the expense of the creation of a family unit within which the child can be nurtured and raised.

4.10 Conclusion

The historical development which saw a move away from the idea of paternal rights to children's rights has resulted in substantial beneficial consequences for children in the UK. The law now compels the State to afford children far greater

[178] Ibid.

protection from abuse, neglect and exploitation. It also expects parents to exercise their right to direct the upbringing of their child in such a way as to promote the child's welfare. While children in the UK and more globally still suffer at the hands of sadistic, exploitative or neglectful adults, children may now have the expectation that the law will intervene to protect them from such behaviour. On the whole, the introduction and development in law of the child welfare principle and the UNCRC have had a positive influence upon society. That said, when a legal principle has beneficial consequences there is always a danger in believing that it will have these beneficial consequences wherever it is applied. What this chapter has also set out to do is to outline the historical development and the modern application of the child welfare principle in family law cases. In doing so it aims to highlight the growing influence and persuasive nature of the child welfare principle which to a large extent explains why it was introduced and remains largely unchallenged as part of the HFE Acts.

What this chapter also aims to illustrate is that even when it is applied in the way it was envisaged it would be - to questions of residence, contact and State protection of children at risk - it still has its critics on the basis that it is a speculative and uncertain question to ask how this decision will impact upon the welfare of this child going forward. As was alluded to in the introduction and will be examined in greater detail in the next chapter, one of Emily Jackson's arguments for the repeal of section 13(5) is that it is ineffective because of the difficulties associated with assessing risk of harm to children and god or bad parenting. This thesis takes the view that these criticisms are amplified when a child welfare assessment is attempted at a pre-conception stage.

The next chapter will evaluate how the child welfare principle has influenced the provision of ART, examine whether the child welfare principle can appropriately be applied in this area and ask whether or not legislators have fallen into the trap of applying a beneficial principle to an area where its application is actually inappropriate and unfair. As has been said above a number of the criticisms of the child welfare principle which this chapter has addressed may be increased when the principle is applied to the question of

allowing access to ART, so it is worth bearing in mind that the child welfare principle requires the decision maker to make a prediction about the future, based on limited information about the present and past, while carrying out a subjective value judgement of the life circumstances of the parent(s), in the face of no clear consensus about what actually amounts to the best interests of the child in terms of appropriate parenting.

CHAPTER FIVE – CHILD WELFARE AND ACCESS TO TREATMENT

5.1 Introduction

As the last chapter made clear, the importance of the child welfare principle in family law is widely acknowledged. Furthermore, if a child is suffering or likely to suffer from abuse, harm or neglect at the hands of an adult, then a duty is incumbent upon the State to intervene to protect that child. However, there are a number of difficulties in treating the assessment of the welfare of a 'child' yet-to-be-conceived and the assessment of the welfare of a child as comparable exercises, as this chapter will seek to examine. The child welfare principle as applied in the context of legal decisions which directly impact upon a child's life, as discussed, is founded upon a solid mandate which allows the State to interfere with parental rights when to do so is in the best interests of the child. The question is whether or not it can reasonably be said that the State has a mandate to interfere with patients' access to ART when to do so may be in the 'best interests of the yet-to-be-conceived child'. Does the phrase 'best interests of the yet-to-be-conceived child' have any logical and applicable meaning?

In attempting to answer that question, this chapter will examine the thinking behind the inclusion of the child welfare provision within the HFE Act 1990. It will then examine whether the provision as currently drafted is actually doing what it purports to do, namely, protecting children, or is simply acting to vet people and exclude certain 'undesirables' from conceiving children. The proposition is essentially that the difficulty with section 13(5) as currently drafted lies in a fundamental misunderstanding of the breadth and scope of the child welfare principle and that the child welfare principle is being misapplied in the context of access to ART. While the child welfare principle can be usefully applied in the field of family law although, as has been shown, it is not without difficulties even there, it does not necessarily follow that it can be applied in any meaningful sense to the question of whether patients should be granted access to treatment services. Given these significant difficulties it will be argued that section 13(5) should be amended to exclude reference to 'the need for supportive parenting'. In addition, a narrower definition of 'welfare of the child' in the guidance given by the HFEA, including its Code of Practice, should

be stipulated to exclude child welfare considerations arising from questions surrounding the suitability or ability of the patient(s) to parent being taken into account. Emily Jackson has called for the removal of section 13(5) in its entirety describing its inclusion in the legislation as 'unjust, meaningless and inconsistent with existing legal principle'.[1] This thesis supports that view point, but only in so as far as it argues for amendment to remove references to supportive parenting. This chapter will set out to explain why.

This chapter will begin with an evaluation of how section 13(5) is to be interpreted and applied. When is account to be taken of the welfare of the child to be born? What level of risk of harm has the future child to be potentially exposed to before treatment is denied? Can useful and accurate predictions about the wellbeing of a future child be made anyway? It is important to address these questions in order to get an idea of what it is that section 13(5) has purportedly been put in place to achieve.

Chapter Three has already set out the provisions of section 13(5), both as originally enacted and as amended by the HFE Act 2008. That chapter explained the evolution of the legislation and how the justification for it has altered so it is now the child's 'need for supportive parenting' that is assessed and not the child's 'need for a father'. As noted in Chapter Three, when the HFE Act 1990 was being debated in Parliament both MPs and Lords accepted the wisdom of incorporating a child welfare principle into the legislation without a great deal of question.[2] Jackson has attributed this to the fact that:

> The welfare principle, which is derived from family law, has been in the ascendancy in recent years - few people, now, are prepared to question its universal relevance. It seems to have become the received wisdom that children's welfare must *always* be a central consideration when we make any decision that may affect their lives...The incorporation of the welfare principle in the rules

[1] E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 2002, 65, 176-203, 176.

[2] E. Jackson, Fertility Treatment: abolish the welfare principle, www.prochoiceforum.ord.uk/irl_rep_tech_1.php (accessed on 21 December 2011).

> governing the provision of infertility treatment has gone largely unnoticed. In the parliamentary debates leading up to the passage of the Human Fertilisation and Embryology Act in 1990, the inclusion of a welfare principle was neither challenged nor defended.[3]

Looking at the Parliamentary debates Jackson's view is supported by a number of quotes. Lord Mackay, the then Lord Chancellor, said: 'A fundamental principle to our law about children…is that the welfare of children is of paramount consideration. I think that it is…entirely right that the Bill should be amended to add that concept'.[4] Lord McGregor described it as 'a happy extension of a principle which has now been part of English law for more than half a century'.[5] Tory MP Ann Winterton asserted that 'the interests of the child in matters of artificial insemination should be paramount'.[6] The generally held view as expressed in these statements was that because the child welfare principle as applied in a family law context was so well established, it made complete sense that a like clause should be included in the legislation regulating ART. However, as Jackson has pointed out, just because the child welfare principle was an established part of the law when addressing issues which impacted upon the lives of existing children, that did not necessarily justify its inclusion in legislation which will determine whether a child is conceived or not.[7] It is certainly true that the inclusion of section 13(5) in the HFE Act 1990 has generated considerable controversy over the 24 years of its existence.[8]

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[3] Ibid.

[4] HL Deb vol 516 col 1097 6 March 1990.

[5] Lord McGregor, HL Deb vol 516 col 1100 6 March 1990.

[6] HC Deb vol 174 col 1021 20 June 1990.

[7] E. Jackson, Fertility Treatment: abolish the welfare principle, www.prochoiceforum.ord.uk/irl_rep_tech_1.php (accessed on 21 December 2011).

[8] See for example E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 2002, 65, 176-203 and J. McCandless and S. Sheldon, "No Father Required"? The Welfare Assessment in the Human Fertilisation and Embryology Act 2008, Feminist Legal Studies, 2008, 18(3): 201-225. Controversy surrounded both the 'need for a father' requirement which was eventually replaced, as well as the question of the need for the continuation of such a clause at all.

What this chapter will do is examine the difficulties which confront the practical application and utility of section 13(5) as it seeks to take into account the welfare of the yet-to-be-conceived child on parental ability grounds. In looking at this question the chapter will examine a philosophical theory which calls into question one of the justifications for the purported aim of section 13(5) - to protect the welfare of the child to be born - when the practical outcome of it being applied is to prevent the conception of the child which therefore will never come to be born. The so-called Non-Identity Problem, which was first highlighted by the philosopher Derek Parfit in his book *Reasons and Persons*,[9] poses interesting questions for those who support the retention of section 13(5) in its current form. In addition to the philosophical argument, from a legal perspective the coherence of section 13(5) has been called into question with reference to the so-called 'wrongful life' actions which this chapter will also examine and consider how rulings in this area reflect upon section 13(5) as currently drafted.

The chapter will then move on to look at one of the main arguments put forward as a justification for section 13(5) - that it is comparable to the child welfare assessment carried out when people are assessed as being suitable for adoption or not. Adoption is one area where it is generally accepted that a parenting assessment of prospective adoptive parents is justified on grounds of child welfare. This chapter will therefore examine whether there is an analogy to be drawn between this type of parenting assessment and the child to be born welfare assessment under section 13(5), or whether any such comparison is essentially meaningless.

A further major criticism of section 13(5) is that it discriminates against the infertile by placing upon them a requirement that is not present when the fertile procreate. However, what if natural procreation was the subject of State interference through the imposition of a parental licensing requirement for all who were planning to conceive? This chapter will examine the work of Hugh La Follette who proposed that very thing.[10] The purpose of looking at the work of

[9] D. Parfit, Reasons and Persons, Oxford University Press, Oxford, 1984, 359.
[10] H. La Follette, Licensing Parents, Philosophy & Public Affairs, Princeton University Press, 1980, 9, no. 2.

La Follette is to explain why such State interference in the right to procreative liberty of either the fertile or infertile is unjustified.

Finally the chapter will examine another of the main arguments put forward in support of section 13(5) – that the involvement of third parties in the procreative process places a responsibility upon them towards the child to be born and it will be explained why this thesis rejects that position. As Chapter Two explained, this thesis does not seek to argue that people have a positive right to demand access to ART, but what it does seek to argue is that people's procreative choices deserve respect and should not be interfered with using a speculative and esoteric assessment of the ability of a patent to safeguard the welfare of a yet-to-be-conceived child which section 13(5) represents.

5.2 Evaluating a Child's Welfare

As previously alluded to in Chapter Three the consultation paper 'Tomorrow's Children' the Human Fertilisation and Embryology Authority (HFEA) set out the harms they thought that children born as a result of ART might face.[11] The HFEA separated the possible harms into four categories; medical, physical, psychological and social. In the report[12] which followed the consultation paper the HFEA decided that:

> ...in order to take into account the welfare of the child, centres should consider factors which may pose a risk of serious medical, physical or psychological harm, either to the child to be born or to any existing child of the family. Although social circumstances have been removed from the guidance as factors to consider, we expect that where adverse social circumstances are severe enough either to be likely to pose a risk of serious psychological harm to

[11] Tomorrow's Children, A Consultation on Guidance to licensed fertility clinics on taking into account the welfare of the child to be born of assisted conception treatment, Human Fertilisation and Embryology Authority, January 2005, para. 2.3 (henceforth 'Tomorrow's Children Consultation Paper').

[12] Tomorrow's Children, Report of the Policy Review of welfare of the child assessments in licensed assisted conception clinics, Human Fertilisation and Embryology Authority, November 2005 (henceforth 'Tomorrow's Children Report').

> the child or to make the parents unable to care for a child, they will be caught by this new policy.[13]

This thesis is really concerned with the risks associated with the risk of a child being subjected to abuse or neglect after birth as this thesis takes the view that this is where the strongest link with the child welfare principle as applied in family law is to be found.

The consultation paper also discussed three different ways of evaluating whether or not the level of risk of harm a child may be exposed to would justify a refusal of ART.[14] These were the maximum welfare principle, the minimum threshold principle and the reasonable welfare principle. This section will come on to explain what each of these principles mean in practice. In doing so the issue which this section will examine is how clinics should evaluate the result of any assessment they actually carry out.[15] What is the threshold for saying when a child might actually be harmed by being born through ART?

In Penning's view 'The maximum welfare principle implies that one should not knowingly and intentionally bring a child into the world in less than ideal circumstances'.[16] The HFEA for their part stated that:

> The maximum welfare principle places a significant responsibility on those who assist in the creation of children to ensure that any child born has a good chance of living a happy and fulfilled life and is not disadvantaged in any foreseeable way. This approach considers a child's welfare to be of paramount importance and, borrowing from the approach taken in adoption, places the burden of proof upon the prospective parents to demonstrate their competence.[17]

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[13] Tomorrow's Children Report, 8.
[14] Tomorrow's Children Consultation Paper, para. 2.4.
[15] G. Pennings, The Welfare of the Child – Measuring the welfare of the child: in search of the appropriate evaluation principle, Human Reproduction, vol. 14, no. 5, 1999, 1146-1150, 1146.
[16] Ibid.
[17] Tomorrow's Children Consultation Paper, para. 2.4.

These two definitions are not identical but the references to bringing a child into the world in less than ideal circumstances and ensuring that any child born is not disadvantaged in any foreseeable way highlight the threshold which is to be reached if the maximum welfare principle is to be applied. In essence if applying the maximum welfare principle ART services should be refused if any of the issues identified by the HFEA as harms, whether medical, physical or psychological are present. The idea is that once the child is brought into existence it is harmed if it is brought into the world in less than ideal circumstances or is disadvantaged in any way.

The maximum welfare principle is of course a very high standard to meet. It would be extremely difficult for prospective parents to prove that their yet-to-be-conceived child would not be disadvantaged in any foreseeable way by being brought into the world. There are so many factors which come in to play which might be held against prospective parents when evaluating their suitability to parent that the maximum welfare principle becomes discriminatory, particularly if the 'ideal' is still envisaged as a heterosexual, married couple with genetically related children, as was evidently the view of some MPS during the debates that led to the HFEA 1990, referred to in Chapter Three and below. Pennings has criticised the maximum welfare principle and rejected it as the appropriate standard on the basis that:

> When we take the time to scrutinize the consistent application of this rule, we will soon find out that this standard would exclude the overwhelming majority of the population from procreation. People who are poor, unemployed, handicapped, obese, workaholics and/or old should all be rejected as potential parents since the child they will have would have had a better life had it been born to other parents.[18]

The difficult with this is that this particular child could not have been born to other parents, and this issue will be returned to later. For the moment, though it supports the view that the maximum welfare principle is in effect far too high

[18] G. Pennings, The Welfare of the Child – Measuring the welfare of the child: in search of the appropriate evaluation principle, Human Reproduction, vol. 14, no. 5, 1999, 1146-1150, 1147.

a standard to set for assessing whether or not people should be allowed or refused access to ART on the basis of the potential risk they might pose to the welfare of the child to be born through inadequate parenting.

During the debate in the House of Commons on whether it was necessary to insert the words 'including a child's need for a father' into what became section 13(5) Peter Thurnham MP said: 'We all want the 'ideal' family, and are considering the welfare of the child with that in mind'.[19] As Golombok observed in 1998:

> In spite of the changes that have taken place to the structure of the family in the latter part of this century, it remains the case that a family headed by two heterosexual married parents who are genetically related to their children represents the ideal, and that deviations from this pattern are commonly assumed to result in negative outcomes for the child.[20]

Golombok set out to investigate whether or not this common assumption could be supported by factual evidence. In one particular study Golombok set out to examine the parent-child relationship and the emotional and gender development of a group of 7-year old children with lesbian parents.[21] The study compared lesbian-mother families, two-parent heterosexual families and single heterosexual mother families using interviews and questionnaires to access the parent-child relationship within these different family structures. Some of the lesbian mothers had conceived via artificial insemination by donor (AID) and others whilst in a heterosexual relationship that they had since left. The results of this study were that no statistical differences were found on factors such as the mother's warmth towards her child, frequency or severity of disputes with the child, overall parenting quality, enjoyment of motherhood, maternal anxiety or stress, supervision of outside play, gender development of the children,

[19] Thurnham, HC Deb. Vol. 174, col. 1027, 1990 (20 June).
[20] S. Golombok, New families, old values: considerations regarding the welfare of the child Human Reproduction, 1998, vol. 13, no. 9, 2339 – 2355.
[21] S. Golombok, B. Perry, A. Burston, C. Murray, J. Mooney-Somers, and M. Stevens, Children with Lesbian Parents: A Community Study, Developmental Psychology, 2003, vol. 39, No. 1, 20 – 33.

abnormal behaviour of the children, psychiatric disorder in the children and the children's peer relations when the mother's sexual orientation was the factor being analysed. There was a significant difference between lesbian mothers and heterosexual mothers with regard to the frequency of smacking and imaginative play, with lesbian mothers smacking less and engaging in more imaginative play.

The research, then, did not support the denial of access to ART to lesbians on the basis that the clinic would be knowingly and intentionally bringing a child into the world in less than ideal circumstances in terms of being without a male parent contributing to the care of the child. It may therefore be argued that to apply the maximum welfare principle would indeed be discriminatory without the corresponding justification that it protected children from negative outcomes. From the example given, and others could be suggested, if seeking to impose a maximum welfare threshold there is a clear risk that prejudices and preferences about what constitutes ideal parenting, rather than evidence, might be used to determine the criteria for access to ART and exclude many people who would be perfectly adequate parents.

For their part, the HFEA in the Tomorrow's Children report decided to reject an interpretation of the child welfare principle within the HFE Act 1990 which took the approach that 'clinics should not provide treatment unless they are satisfied that the welfare of the child to be born will not be affected negatively.'[22] This was because it 'placed too much emphasis upon the interests of the prospective child at the expense of patient choice'.[23] The HFEA went on to acknowledge, possibly with a nod to Golombok's research, that 'Although this may have been the most appropriate interpretation to take of the welfare principle in the early 1990s, the experience of the past 14 years suggests that, as a group, children born of assisted conception are no more likely to be disadvantaged than their naturally conceived counterparts'.[24] The HFEA therefore dismissed a version of the maximum welfare principle as the correct interpretation of the child welfare principle in the HFE Act 1990.

[22] Tomorrow's Children Report, 6.
[23] Ibid.
[24] Ibid.

The minimum threshold principle emphasises the importance of protecting children from serious harm. The HFEA describe it in these terms:

> In the minimum threshold approach to considering a future child's welfare, the emphasis is upon protecting the child from serious harm. Doctors should withhold treatment, thereby preventing a child from coming into existence, only where the quality of the child's life would fall below a minimum threshold of acceptability. This approach places great importance upon the autonomy of the prospective parents and seeks to override their wishes only when their child would be at high risk of serious harm.[25]

Langdridge is of the view that the minimum threshold approach is the appropriate one to take to consideration of the welfare of the child at the pre-conception stage because 'it relies on a very basic level of welfare with which there is a strong degree of consensus'.[26] As Pennings points out:

> One of the most frequently used minimum thresholds can be called the 'wrongful life' or the 'worse than death' standard: 'A child should not be brought into the world if and only if it would have been better never to have been born at all.'[27]

This chapter will come on to look in more detail at so-called 'wrongful life' cases which illustrate what the minimum threshold standard means in practice. Interestingly, Pennings accepts that this might be appropriate as 'an acceptable reference point for legal rules'[28] but insists it 'should be rejected for the moral evaluation of procreation'.[29] That position will be examined in more detail also. Langdridge on the other hand sees no other acceptable alternative to the minimum threshold principle because it is the only standard which avoids the

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[25] Tomorrow's Children Consultation Paper, para. 2.4.
[26] D. Langdridge, The Welfare of the Child: problems of indeterminacy and deontology, Human Reproduction, vol. 15, no. 3, 2000, 502 - 504, 502.
[27] G. Pennings, The Welfare of the Child – Measuring the welfare of the child: in search of the appropriate evaluation principle, Human Reproduction, vol. 14, no. 5, 1999, 1146-1150, 1149.
[28] Ibid., 1149.
[29] Ibid., 1148.

influence of 'subjective moral opinions and culturally specific normative beliefs'[30] coming into play.

Pennings is supportive of a reasonable welfare principle, which was described by the HFEA in these terms:

> The reasonable welfare approach says that the provision of assisted conception treatment is acceptable when the child born as a result of the treatment will have a reasonably happy life. This approach requires those providing assisted conception services to satisfy themselves that any child born of treatment that they provide will have at least an adequate future, cared for by a 'good enough' family. The reasonable welfare principle takes a relatively thorough approach to the welfare of the child, whilst also attaching some importance to the autonomy of the prospective parents. Although it is difficult to determine exactly what this approach might mean in practice, it would require clinicians to consider a patient's or couple's social circumstances, but would only prevent treatment from going ahead if those circumstances meant that the couple were unable to provide a satisfactory level of parenting.[31]

Pennings is of the view that this approach is the preferred option because:

> On the one hand, we do not have to reject or criticise people for bringing a normal child into the world because they could have had a happier one. On the other hand, we are not forced to accept decisions which result in the birth of seriously handicapped children because the net result is a life still worth living. Our standard is not the perfectly happy child but the reasonably happy child.[32]

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[30] D. Langdridge, The Welfare of the Child: problems of indeterminacy and deontology, Human Reproduction, vol. 15, no. 3, 2000, 502 - 504, 504.
[31] Tomorrow's Children Consultation Paper, para. 2.4.
[32] G. Pennings, The Welfare of the Child – Measuring the welfare of the child: in search of the appropriate evaluation principle, Human Reproduction, vol. 14, no. 5, 1999, 1146-1150, 1148.

In support of this position Penning points out that we do not criticise parents when they make decisions which might have a negative influence on their children if there are good reasons for doing so.[33] He is of the view that common sense can be applied to ascertain what is an acceptable threshold for allowing access to ART and is of the view that 'an individual has a decent welfare level when he has the abilities and opportunities to realize those dimensions and goals that in general make human lives valuable'.[34]

Langdridge is critical of Pennings' approach because of the difficulty in determining possible outcomes for a child, determining the probability of one outcome over another and attaching values to these possible outcomes.[35] In Langridge's words 'it is a ridiculous exercise to attempt to predict the future welfare of a child (and then adult) when there are so many variables at play'.[36] In Langridge's view it is nonsensical to try to assess what level of welfare a yet-to-be-conceived child will have regardless of whether that might be the 'ideal upbringing' or the 'good-enough upbringing'.

As noted, Pennings rejected the minimal threshold principle because in his view 'The concept of parental responsibility would be a hollow notion if bringing, knowingly and willingly, children into existence who suffer devastating illnesses cannot be denounced'.[37] This, in his view, is a potential consequence of accepting a principle which espouses that a child is only harmed if it is brought into existence with a life not worth living. On the other hand Langdridge makes the point that it is impossible to compare the welfare of a child born in one circumstance with the same child born in another, since that is not a possible option in reality, and as such calls into question Pennings' acceptance of the reasonable welfare approach.

Following the consultation period the HFEA published their report within which they appeared to come down in favour of the minimum welfare principle. They

[33] Ibid., 1148.
[34] Ibid., 1148.
[35] D. Langdridge, The Welfare of the Child: problems of indeterminacy and deontology, Human Reproduction, vol. 15, no. 3, 2000, 502 - 504, 503.
[36] Ibid., 503.
[37] G. Pennings, The Welfare of the Child – Measuring the welfare of the child: in search of the appropriate evaluation principle, Human Reproduction, vol. 14, no. 5, 1999, 1146-1150, 1148.

stated that the preferred interpretation of the welfare of the child principle in the HFE Act 1990 was as follows:

> ...that clinics should only refuse to provide treatment where there is evidence that the child is likely to suffer serious physical or psychological harm.[38]

This, they said, was due to the importance of patient autonomy. The reference within the report to 'serious physical or psychological harm' corresponds closely to the reference in the consultation paper when linking the minimum welfare principle to 'serious harm'. It is worth noting here that the Pennings/Langdridge debate together with the changes brought about following the Tomorrow's Children Report highlight the point that answers to the questions: 'What level of risk of harm has the future child to be potentially exposed to before treatment is denied?' and – 'Can useful and accurate predictions about the wellbeing of a future child be made anyway?', are not universally agreed upon and that the justification or otherwise for section 13(5) is dependent upon the answer given.

This thesis takes the view that access to ART should not be denied on the grounds of concern for the welfare of the child to be born arising from the potential for inadequate parenting. It is only in extreme and rare circumstances where to bring a child into existence would inevitably cause it extreme suffering that the refusal of treatment would be justified. In other words when it can be predicted with some degree of certainty that the harms of existence would outweigh the benefits of existence a child should not be brought into existence. This thesis takes the view that parental ability concerns do not meet that threshold. It argues that making useful and accurate predictions about the wellbeing of a future child based on the ability of the patient to parent is so difficult that any attempt to do so becomes a meaningless task. Even if such predictions were possible, there are no situations where concern that the child will be harmed by inadequate parents should be used to conclude that non-existence is preferable and hence that ART should be refused on child welfare grounds.

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[38] Tomorrow's Children Report, 6.

The law already has sufficient protections in place to ensure that a child can be removed from the care of abusive and neglectful parents. This is not to say that very serious cases of abuse and neglect of children are to be taken lightly. The significant political and public support for the child welfare principle is usually at its highest when a desperately sad case of a child's death at the hands of a parent or carer is highlighted in the news.[39] However, denying the opportunity of children being born because they *might* suffer abuse or neglect even when they can be taken into care at birth, so that the means of 'protection' is to prevent them coming into existence in the first place, is not in the view of this thesis a sensible or justified way of protecting children from harm. It amounts to an unjustified interference with procreative liberty. What follows will expand on why this thesis takes these positions, initially with reference to the Non-Identity Problem.

5.3 The Non-Identity Problem and Section 13(5)

The philosopher Derek Parfit illustrated the non-identity problem in his book *Reasons and Persons*[40] where he considered the choice of a 14-year-old girl to have a child rather than wait a few years and have a different child who would have better opportunities in life. What Parfit seeks to explore with this example is whether or not it can be said that the 14-year-old girl has made the wrong decision in respect of the interests of the child by having a child at such a young age. He suggests that intuitively most people would say that she had. A child born to a 14-year-old girl may have a bad start in life as her mother might struggle to meet the child's needs. If the 14-year-old girl had waited a few years until she was in a better position to provide for a child's emotional and economic needs, the child born at that time would not have had to face such difficulties. It would seem then that in not waiting the 14-year-old girl has made the wrong decision in so far as the welfare of the child is concerned. However, what Parfit points out is that if the 14-year-old girl had waited, the later child would not have been the same person as the earlier child. The

[39] The Victoria Climbie and Peter Connolly (Baby P) cases which both involved the London Borough of Haringey were two particularly high profile and widely reported cases. The Guardian Newspaper, (12 November 2008) Squabble over Baby P was not the Commons at its best http://www.theguardian.com/politics/2008/nov/12/pmqs-baby-p (accessed 29 June 2013).

[40] D. Parfit, Reasons and Persons, Oxford University Press, Oxford, 1984, 359.

earlier child would never have been born. The 14-year-old girl has had a child who, but for her decision to have a child at that particular point in time, would not have existed. If the child, despite the difficulties of being raised by a 14-year-old girl, has overall a life worth living then is the 14-year-old girl's decision wrong in terms of the interests of the child? The answer would appear to be no because the child who has been born to the 14-year old girl has not been harmed.[41]

The non-identity problem arises in the context of section 13(5). In his book *Defending the Genetic Supermarket* Colin Gavaghan describes the child the girl could have had later in life as a 'never-existing potential future person'.[42] If section 13(5) was to be applied to prevent access to ART then the child whose welfare the clinic is required as part of its licence to take into account is in effect a never-existing potential future person. There can be no harm inflicted on a non-existent entity. As Gavaghan points out 'It never possessed, nor will it ever possess, any interests to be taken into account, and to speak in terms of its having an interest in being allowed to have interests seems circular and ultimately nonsensical'.[43]

Conversely, if the child is conceived and born after access to ART is provided, can the child be said to have been harmed by his or her existence, since the alternative was not to have been brought into existence? The child certainly has interests once born and those who support section 13(5) would say that what it does is legislate for our moral obligation to take into account the impact our procreative choices might have on the future child's interests, even though these interests may not crystallise until birth. However, this does not avoid the point made by Parfit that but for a particular reproductive choice at a particular point in time that particular child born would not have existed. The interests

[41] There is a caveat of course that the 14-year-old-girl may be said to have harmed herself by her decision to have a child. Indeed if a 14-year-old-girl was engaging in sexual intercourse she may very well be assessed as being at risk of harm in terms of the child welfare statutes discussed in Chapter Four.

[42] C. Gavaghan, Defending the Genetic Supermarket: Laws and Ethics of Selecting the Next Generation, Routledge-Cavendish, London, 2007, 71.

[43] Ibid., 72.

that the child has at birth can only arise because of the prior decision to bring the child into existence.

There is a clear difficulty which arises in seeking to compare existence with non-existence. As Gavaghan points out there are no interests to be taken into account in regards to a non-existent entity, so there are no benefits or harms done to a never-existing potential future person. Therefore it is not really possible to compare the benefits and harms of existence with the benefits and harms of non-existence and decide which state it is best to be in. All that can be done is to weigh up the benefits from existence against the harms of existence and only if the harms outweigh the benefits can it be said that a person is harmed by being brought into existence. That is why as already stated this thesis takes the view that ART should only be denied in extreme and rare circumstances where to bring a child into existence would cause it such suffering as to make existence unbearably cruel. In other words, so that harms of existence are weighed against benefits of existence.

As previously discussed in Chapter One, treatment clinics are now expected to assume that parents will be supportive of their children unless evidence to rebut that presumption is obtained. If a couple with a history of drug and alcohol abuse whose relationship has elements of serious discord within it seek assess to ART, then these factors are likely to be treated as evidence rebutting the supportive parenting presumption and that couple may very well be refused treatment and no child would come into existence. If that couple were to be given access to ART treatment, like the child in Parfit's 14-year-old-girl example, it could reasonably be anticipated that the child would have a bad start in life. The child may be neglected or abused if the parents lapse into drug and alcohol misuse. Social services may decide to take the child into care. However, as awful as that abuse and neglect might be, the child may form good friends, have loving grandparents, enjoy play and learning, or benefit from a host of other positive experiences. Overall, in spite of the abuse and neglect, the child may be considered to have a life worth living. The refusal of ART treatment based on section 13(5) would therefore have prevented the existence

of a child who would have a life worth living, which is a very extreme measure if the aim of the legislation is to protect the welfare of the child.

Answering the question of whether or not the child would have a life worth living also depends of course upon being able to make an accurate predictive assessment of future harms and benefits. It is extremely difficult to determine and weigh the benefits from a predicted existence against the harms of a predicted existence. This is a difficulty which renders section 13(5) a somewhat meaningless exercise. Nevertheless, this thesis argues that only rarely would such an assessment allow the conclusion that the child would be so harmed by existence that this should be prevented and never on parental ability grounds when the law allows the child to be removed from the care of inadequate parents at birth.

There is thus an important distinction which can be drawn between section 13(5) and the child welfare legislation discussed in Chapter Four. No one, it is proposed, would deny that the child's parents in the above example have caused the child harm if they neglected and physically abused the child. Reasonable people would believe that it is entirely right that the State exercise its mandate and intervene to protect that child. However, at the pre-conception stage the position is rather different as the State is intervening to prevent a child coming into existence. They are preventing the bringing into the world of a child that would have a life that overall is worth living. This is arguably not an approach that properly takes into account the welfare of the child and indeed the consequences of a decision to refuse access to ART means there will be no child whose welfare can be taken into account. The parental choice to have a child in less than ideal circumstances would not be in this sense a harmful choice to that child, although behaviour which does harm a child after birth is morally blameworthy.

The case of *A (A Minor) v A Health and Social Services Trust*[44] was a case which interestingly saw the non-identity problem arise in a real life court situation. The basic facts of this case were that two Caucasian parents had gone through IVF treatment. As a consequence of human error the sperm used to fertilise the egg was Caucasian (Cape Coloured) which resulted in the children being half Caucasian and half Caucasian (Cape Coloured). The children claimed damages, the primary focus of the alleged injury being that they had a noticeably darker skin colour than their parents. The children claimed that the clinic owed them a duty of care as the people who resulted from the IVF process. The difficulty for the children's claim was however that they were not the people who were in the contemplation of the clinic during the IVF process. The mix-up of the sperm meant that the children who did come into existence were not the same children who were envisaged. The children who were created owed their very existence to the mix up of the sperm. Any negligence on the part of the clinic related to the 'children' who were never brought into existence – Gavaghan's never-existing potential future people.

In dismissing the appeal the Court held that the children's claim had to fail because they could not point to any damage or injury resulting from the health authority's error. Since the children in this case suffered from no damage in law, it was unnecessary to consider the question of whether a theoretical duty of care arose on the part of the health authority. It would have been interesting if the Court had considered the question of whether a theoretical duty of care arose on the part of the health authority. The Court did state that 'inadequate and careless screening may result in the use of male sperm from a donor with genetic defects which may result in the child suffering from serious long term conditions that may reduce the quality of life of the child. Such a situation appears to be now governed by the provisions the Congenital Disabilities (Civil Liability) Act 1976.'[45] However, this thesis surmises that the Congenital Disabilities (Civil Liability) Act 1976 would not apply if sperm was used which resulted in a child being born with a disability because using such sperm would not amount to an occurrence before its birth which *affected either parent of the*

[44] [2011] NICA 28.

[45] Ibid.,

child in his or her ability to have a normal, healthy child.[46] This thesis would argue that a duty of care does not arise in circumstances where the child is brought into existence, even in a harmed state, when but for the mistake, that particular child would not have been brought into existence at all. The Congenital Disabilities (Civil Liability) Act 1976 only covers situations where the child brought into existence was disabled by an occurrence before birth which affected either parent of the child in his or her ability to have a normal, healthy child, not an occurrence before birth which resulted in a disabled child being born, when that child would not have been born at all but for the occurrence.

Unsurprisingly perhaps there are those who question the rationale behind the non-identity theory. Woodward is of the view that it can be coherently claimed that the 14-year-old girl's choice to have a child violates duties owed to the child and that this is an important part of explaining why the girl's choice is wrong.[47] As Gavaghan explains Woodward questions whether the fact that the benefit of existence can out-weigh harms of existence is sufficient justification for the harms.[48] What Woodward argues is that:

> ...people have relatively specific interests...that are not simply reducible to some general interest in maintaining a high overall level of well-being...That an action will cause an increase in someone's overall level of well-being is not always an adequate response to the claim that such a specific interest has been violated.[49]

If we look at Woodward's argument in terms of the reproductive choice of the volatile couple with a history of alcohol and drug abuse seeking access to ART, they could be said to have acted wrongly (and the State criticised for not intervening) as they know in advance that if they were to have a child they

[46] Section 2(a) Congenital Disabilities (Civil Liability) Act 1976
[47] J. Woodward, The Non-Identity Problem, Ethics, 1986; 96: 804-831, 806.
[48] C. Gavaghan, Defending the Genetic Supermarket: Laws and Ethics of Selecting the Next Generation, Routledge-Cavendish, London, 2007, 77.
[49] J. Woodward, 'The Non-Identity Problem', Ethics, 1986; 96: 804-831, 809.

would owe that child duties of care which they would not be in a position to meet adequately. Woodward would argue that the failure to be able to meet these duties constitutes an important reason not to have the child.[50] However, while the couple might be criticised for acting wrongly this is not the same as saying that they are harming the child by bringing it into existence, because in the grand scheme of things the child is likely to have a life worth living. In the context of allowing access to ART Woodward may argue that it is justifiable to refuse treatment on the basis that the prospective parents were behaving wrongly in seeking to have a child when they are not in a position to fulfil their duties of care to that child. This, some might argue, provides a different basis for refusing patients access to ART which does not rest upon harm the child. However, this thesis takes the view that if the prospective parents wrong is that they would be breaching a duty of care owed to the child to be born, then a decision to refuse them access to ART would still be based on child welfare grounds, as the wrong would be that they presented a risk to the future child's welfare.

In response to Woodward Gavaghan asks - what exactly is the standard that a parent is expected to reach in meeting their obligations to a future child?[51] An absolute standard would set definitive levels for emotional stability and economic security which if parents could not meet them, then they should not have children. Nevertheless, as Gavaghan points out, this is like saying that those in the third world are acting wrongly when they procreate because their children will be raised in poverty. A relative standard on the other hand would hold the parents to a duty to meet their parental obligations to the extent that it is possible for them to do so. If the parents have done their best to meet the child's needs then they cannot be criticised. This harks back to the discussion in the previous section which looked at the maximum, minimum and reasonable welfare principle thresholds. In doing their best to meet the child's needs the parents have probably reached the minimum welfare threshold and arguably

[50] This is really paraphrasing what Woodward had to say about Parfit's 14-year-old girl but applies to those prospective parents who may cause licensed clinics to reach the view that they would not be supportive parents.

[51] C. Gavaghan, Defending the Genetic Supermarket: Laws and Ethics of Selecting the Next Generation, Routledge-Cavendish, London, 2007, 79.

have also reached the reasonable welfare threshold. Even if a minimum standard threshold is not met and the parents are not doing their best, the proper course of action would be to remove the child after birth, not act so as to prevent that child coming into existence.

Velleman is also a critic of the non-identity theory. In regard to Parfit's 14-year-old girl having a child scenario he says as follows:

> In creating human lives, then, we must take care that they afford the best opportunity for personhood to flourish. We are obligated to give our children the best start that we can give to children, whichever children we have; and so we are obligated to have those children to whom we can give the best start. A child to whom we give a lesser initial provision will have been wronged by our lack of due concern for human life in creating him — our lack of concern for human life itself, albeit in his case.[52]

Velleman argues for a general right which each person has to be created with 'due consideration for his or her humanity' where a 'child has a right to be born into good enough circumstances, and being born to [e.g.] a fourteen-year-old mother isn't good enough'.[53] That the child was 'glad to be born' does not mean that that child has waived 'his birthright'.[54] According to Velleman the child would be justified in feeling that he was not given due consideration at his conception and what has been ignored is not his interests but his importance as a human being. Once more this relates back to the discussion on welfare thresholds. Velleman is looking for the child to be born into 'good enough' circumstances which is arguably what the reasonable welfare threshold requires.

[52] D. J. Velleman, Persons in Prospect, Philosophy & Public Affairs, 2008, 36, 221–288, 276.
[53] Ibid., 277.
[54] Ibid., 278.

Parfit counters Woodward's and Velleman's objection to the Non-Identity Problem by arguing that interests and rights can be waived. In the case of our child born into a family of serious discord he might[55] one day come to regard that difficult start in life as a price worth paying for the life worth living he now enjoys. He would have waived his right to an emotionally stable upbringing because overall he does not regret the fact that he was born. Gavaghan puts it in these terms:

> If it is reasonably foreseeable that you will regard the violation of your right as a price worth paying for some benefit you accrue (as Parfit puts it, that you will retrospectively waive your right) then it would be unusual to regard that violation as wrongful.[56]

There is a difficulty however with talking in terms of a child waiving his rights at some time in the future because the decision to bring the child into existence is made in advance without knowing whether or not the child will eventually come to be grateful for being brought into existence. If the child does not reach this state of mind but instead suffers from suicidal ideation because of adverse treatment inflicted upon him in childhood then it might be argued that he has not retrospectively waived his right and has been wronged by being brought into existence. This could arguably be seen as one of the extreme examples where the harms of existence outweigh the benefits from existence. The non-identity problem does acknowledge that such extreme examples could arise, but making predictions prior to conception about how a child might respond in adulthood to adverse treatment inflicted upon him in childhood is undoubtedly a seriously problematic exercise and carries to much uncertainty to justify a child not being brought into existence.

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[55] Gavaghan felt that Parfit was being unduly tentative and though that an adult not reaching this conclusion was 'a turn of events so unlikely as to lie outwith the realm of reasonable forseeability'.

[56] C. Gavaghan, Defending the Genetic Supermarket: Laws and Ethics of Selecting the Next Generation, Routledge-Cavendish, London, 2007, 79.

Even when the non-identity problem is accepted – that a potential future child is only harmed by being brought into existence if that existence is so awful as to constitute a life not worth living – many commentators still seek to explain what is wrong about harmful reproductive choices. In order to do so they move away from person-affecting explanations to non-person affecting explanations.[57] In Buchanan's view:

> This principle for the prevention of suffering applies not to distinct individuals, so that the prevention of suffering must make a distinct individual better off than he or she would have been... but to the class of individuals who will exist if the suffering is or is not prevented.[58]

In rejecting the argument that children who are brought into existence in less than ideal circumstances through the use of ART are not harmed because the alternative would be non-existence, Peters uses the real-life example of a sperm bank in Italy who failed to screen a donor who was infected with hepatitis C and genital herpes.[59] Peters claims that to say 'no harm was done by the failure to screen unless the affected children would have been better off never existing at all...defies common sense'[60] as 'Better screening would have avoided needless suffering'.[61] In Peter's view the analysis which says children are not harmed because the alternative would be non-existence focuses too much on the individual future child at the expense of looking at the harm that can be inflicted on future children as a class.

In Peters' opinion while the question of harm to an identifiable future child is necessary if legal actions for damages are what is at stake, such a viewpoint

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[57] Ibid.
[58] A. Buchanan, D. Brock, N. Daniels, D. Wiklert, From Chance to Choice, Cambridge University Press, Cambridge, 2000, 249.
[59] P. G. Peters, Harming Future Person: Obligations to the Children of Reproductive Technology, Southern California Interdisciplinary Law Journal, 1998 – 1999, 8, 375.
[60] Ibid., 376.
[61] Ibid.

should not guide public health regulation.[62] In Peters' view harm can be caused by the use of a dangerous or risky procedure when a safe one is available. For Peters, the non-existence threshold for harm is too high and there is an obligation on people who bring children into existence to ensure that the children have a minimally-decent existence. Peters' uses a phrase which stands out. He talks of the 'collective welfare of future children'. That this might be something which States strive to ensure is a nice thought and if Peters' approach is accepted it could perhaps be used as a basis to justify section 13(5) and avoid the non-identity problem. Such an approach may still be criticised on the grounds that it amounts to a restriction on procreative liberty, but it would not be based on the specific test of child welfare as set out in section 13(5). The real difficulty in the context of section 13(5) is, as Harris has pointed out, that the notion of collective welfare of future children is not what it is directed to: It is focused very clearly on the individual child who would result from treatment.[63]

The problem with section 13(5) is that it is worded in such a way as to definitively say that it is the welfare of the child who may be born as a result of the treatment which has to be taken into account as it refers to the welfare of a specific child. It is the conflation between general questions of what may or may not be good for children and the personal question of what is good for the welfare of a particular child that causes difficulties for section 13(5). If Parliament did not intend that section 13(5) be applied to safeguard the collective welfare of future children but be applied to, as it says, safeguard the welfare of the child to be born, then Peters' views cannot be put forward as providing justification for its continuation.

Harris and Feinberg also take a non-person affecting approach in seeking to explain just what harm a disabled child with a life worth living might actually have suffered.[64] Harris describes Feinberg's 'central idea as expressing the judgement that it is a wrong to the child to be born with such serious handicaps

[62] Ibid.
[63] J. Harris, The Welfare of Children, Health Care Analysis 8: 27–34, 2000.
[64] J. Harris, Wonderwoman and Superman: The Ethics of Human Biotechnology, Oxford, Oxford University Press, 1992. J. Feinberg, Harm to Others, Oxford, Oxford University Press, 1984.

that many very basic interests are doomed in advance'.[65] Harris also quotes Steinbock, who Harris says follows Feinberg in suggesting:

> Talk of a 'right not to be born' is a compendious way of referring to the plausible moral requirement that no child be brought into the world unless certain minimal conditions of well-being are assured. When a child is brought into existence even though those requirements have not been observed, he has been wronged thereby.[66]

Harris on the other hand is of the view that the only plausible answer to the question of whether a child is harmed by being brought into existence is as follows:

> ...unless the child's condition and circumstances can be predicted to be so bad that it would not have a worthwhile life, a life worth living, then it will always be *in that child's interests*, to be brought to being. If future children may be said to have interests at all, then it is palpably in the interests of any child whose life will likely be worth living overall, that the threshold is crossed bringing it into being. It is, after all, that child's ("*the child who may be born as a result of the treatment*") only chance of existing at all.[67]

Gavaghan looks at the views of Harris and Feinberg but rejects them.[68] As Gavaghan points out Harris and Feinberg both recognise that the disabled child with a life worth living will have no cause for complaint. However, both are still of the view that a mother will have acted wrongly by bringing a disabled child into the world. For Harris the wrong lies in 'the wrong of bringing avoidable suffering into the world, of choosing deliberately to increase unnecessarily the amount of harm or suffering in the world or of choosing a world with more

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[65] J. Harris, The Wrong of Wrongful Life, Journal of Law and Society, 1990, 17, 90-105, 93.
[66] Ibid.
[67] Ibid., 30.
[68] C. Gavaghan, Defending the Genetic Supermarket: Laws and Ethics of Selecting the Next Generation, Routledge-Cavendish, London, 2007, 88.

suffering rather than one with less.'[69] For Feinberg the difficulty lies in 'wantonly introducing a certain evil into the world, not for inflicting harm on a person.'[70] Gavaghan rejects the idea that people have what he calls 'a duty to the world'.[71] If the duty is to minimise the amount of suffering in the world regardless of any offset against happiness then that leads to the problem that anyone would do wrong when they bring any child into existence because every life has some suffering in it.[72] If the duty does offset the suffering we introduce into the world against the happiness brought, that still raises the problem that such a duty would lead us to conclude that refraining from having a child is the morally wrong thing to do as to have a child would increase the aggregate happiness in the world.[73] This chapter will return to the work of Harris and Feinberg to examine how their views on the wrongness of bringing a child into the world impact not only on the question of the wrongness of a decision to bring a child into the world but on the consequences which should flow from that in terms of imposing duties on others.

Jackson contrasts two different interpretations of section 13(5).[74] The first is what she calls the 'thin' interpretation, meaning that the welfare principle should only be applied to deny treatment in situations where not being born would be preferable to life. The parallels with the Non-Identity Problem here are clear. She describes the thin interpretation of section 13(5) in these terms:

> So to decide that it would be better not to be born than to have parents such as these is to decide that a particular couple or individual present an immediate threat to their offspring so grave that not being conceived could plausibly be considered preferable.[75]

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[69] J. Harris, Wonderwoman and Superman: The Ethics of Human Biotechnology, Oxford, Oxford University Press, 1992, 90.
[70] J. Feinberg, Harm to Others, Oxford, Oxford University Press, 1984, 103.
[71] C. Gavaghan, Defending the Genetic Supermarket: Laws and Ethics of Selecting the Next Generation, Routledge-Cavendish, London, 2007, 88.
[72] Ibid., 89.
[73] Ibid., 90.
[74] E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 2002, 65, 176-203.
[75] Ibid., 181.

This would require clinics to assess parents based on a minimum level of parenting ability and only refuse treatment on the basis that it would be better for the child's welfare not to be brought into existence. Jackson is of the view that if a literal interpretation of the wording of section 13(5) is taken, then this should be how it is applied. However, she contends that this is not how it has been interpreted and instead what has been applied is a 'thick' interpretation. The thick interpretation according to Jackson:

> Enjoins clinics to take into account factors such as the would-be parents' commitment to having and bringing up a child; their ability to provide a stable and supportive environment; their future ability to look after or provide for the child's needs and the possibility of any risk of harm to their child.[76]

The HFEA may argue that the situation changed following the Tomorrow's Children recommendations and that they have now guide clinics only to refuse to provide treatment where there is evidence that the child is likely to suffer serious physical or psychological harm. Clinics are now not expected to take into account social factors unless they might be severe enough either to be likely to pose a risk of serious psychological harm to the child or to make the parents unable to care for a child. However, whilst the approach to the child welfare principle contained within the HFE Act 1990 has been watered down following the Tomorrow's Children review, it is still some way off from only being applied to deny treatment in situations where not being born would be preferable to life. The language used in the current Code of Practice is still very much language which would be recognised by any family lawyer applying the child welfare principle: 'The centre should refuse treatment if it concludes that any child who may be born or any existing child of the family is likely to be at risk of significant harm or neglect'.[77] If the thin interpretation is applied then section 13(5) would only really be justly applied in situations where it could be predicted that the child would inevitably suffer horribly in life, with any countervailing predicted advantages being insufficient to offset the suffering to such an extent that access to treatment would be acceptable. It is clear from

[76] Ibid., 181.
[77] HFEA Code of Practice, 8th Edition, paras. 8.15.

the Parliamentary debates discussed in Chapter Three that the approach to section 13(5) was not to require clinics to assess whether there was the risk of harm so grave as to justify non-existence but, as Jackson points out, to carry out a child welfare assessment very much in line with what the Courts are required to do when deciding on family law issues such as residence and contact.[78]

Before going on to set out definitively why this thesis takes the position that section 13(5) should be amended it will be illustrative to look at the approach the Courts have taken to the Non-Identity Problem in the so-called 'wrongful life' cases. The wrongful life cases considered the difficulties with the philosophical problem of non-identity already discussed. As will be explained the Courts were reticent to make judgements about whether or not it is better for a child to be born than to never come into existence. This lends weight to the suggestion that Parliament did not intend that section 13(5) require clinics to assess whether there was the risk of harm so grave as to justify non-existence. Even if the intention of Parliament was that the child welfare assessment set out in the HFE Act 1990 was to be given a thick interpretation, there is still a problem with its practical application when the consequence of that is to prevent a child being brought into existence.

5.4 Wrongful Life and Section 13(5)

Jackson criticises section 13(5) on the grounds that it is incoherent from a legal perspective as well as from a philosophical one. What is highlighted by this criticism is the conceptually difficult idea of the non-identity problem discussed above. In developing her incoherency argument Jackson makes reference to the so-called 'wrongful life' cases. She specifically cites the case of *McKay v Essex Area Health Authority*[79] in which the child raised an actions for damages on the basis that, but for the defendant's negligence in failing to diagnose and treat her mother for a rubella infection during pregnancy, her mother would have been offered the option of a termination. She would not have been born and therefore her injuries would have been avoided. One judge commented that it

[78] Ibid., 181.
[79] 1982 QB 1166

was impossible to compare existence with injury against the alternative of non-existence:

> The disabilities were caused by the rubella and not by the doctor...What then are her injuries, which the doctor's negligence has caused? The answer must be that there are none in any accepted sense...What the doctor is blamed for is causing or permitting her to be born at all. Thus, the compensation must be based on a comparison between the value of non-existence (the doctor's alleged negligence having deprived her of this) and the value of her existence in a disabled state. But how can a court begin to evaluate non-existence, 'the undiscovered country from whose bourn no traveller returns?' No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action.[80]

Another took the view that when faced between a choice of a disabled existence and non-existence the former would almost always be preferable:

> If a court had to decide whether it were better to enter into life maimed or halt than not to enter it at all, it would, I think, be bound to say it was better in all cases of mental and physical disability, except possibly...extreme cases However that may be, it is not for the courts to take such a decision by weighing life against death or to take cognisance of a claim like this child's.[81]

In Jackson's view these two judgments do not sit right with section 13(5).[82] If the first Judge's view is taken as valid, that carrying out a comparison between the value of non-existence and the value of her existence is impossible, then what section 13(5) requires of treatment clinics is to engage in an impossible task.[83] If we take the second Judge's view as valid, that in almost all cases existence would be preferable to non-existence, then treatment clinics will

[80] Acker LJ 1982 QB 1166, 1189.
[81] Stephenson LJ 1982 QB 1166, 1182.
[82] E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 2002, 65, 176-203, 197.
[83] Ibid.

nearly always have to come to the conclusion that allowing access to treatment and thereby bringing a child into existence is the right decision. Jackson concludes that legislation which means that a decision can be taken not to bring a child into existence because it would be contrary to that child's welfare is incoherent. What section 13(5) effectively requires treatment clinics to do is weigh up whether or not the welfare of the child would be best served by being brought into existence. According to the approach taken to wrongful life litigation, this is either an impossible task or one which the answer will nearly always be yes. Only where the life of the future child could be said to be truly awful – the thin interpretation discussed above - would denying access to treatment be justified.

In Jackson's view even if it is the thick interpretation which is applied to section 13(5) decisions, the thrust of the wrongful life judgments make it fare no better. As she puts it:

> …section 13(5) rests upon the assumption that assessing the welfare of any child that might be born to particular parents is not merely a filter to exclude individuals whose baby is inevitably going to suffer from horrifying disabilities. Rather, it is directed towards judging a couple or individual's likely parenting ability before deciding whether to offer them treatment. However this 'thick' version of the welfare principle is plainly inconsistent with the judgements of both Stephenson and Ackner LJJ. If it is accepted that it will invariably be in a child's best interests to be conceived and born, applying the welfare principle prior to conception is essentially meaningless.[84]

Feinberg has looked at the wrongful life cases from the angle of Mill's harm principle.[85] Feinberg first defines what he takes Mill to have meant by harm for the purposes of the harm principle. In Feinberg's view:

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[84] Ibid.

[85] J. Feinberg, Wrongful Life and the Counterfactual Element in Harming, Social Philosophy & Policy, 1986 4(1).

> ...'harming' must mean adversely affecting another party's interest in a way that wrongs him or, alternatively, wronging him in a way that adversely affects his interest. It is a necessary element in all harming, then, that it have an effect on someone's interests.[86]

Feinberg suggests that wrongful life claims should not succeed on the basis that no harm has been done to the 'victim' in such cases and that no wrong has been done unless the consequences for the child are so severe as to render his life not worth living.[87] In Feinberg's view a child can be wrongfully conceived but not harmed even if the child's life is not worth living because whilst the child has been born into a condition harmful to it, the harm suffered is not as a result of a prior act of harming.[88] However, Feinberg is of the view that a child wrongfully conceived is wronged if the child's life is not worth living because the child 'comes into existence with his most basic 'birth rights' already violated and he has a genuine moral grievance against his parents. So while Feinberg takes the view that the child has had a moral wrong done to it, this does not give rise to a legal action. In doing so Harris states he leaves the child with no legal complaint.[89] Harris summarises Feinberg's views in the following:

> Feinberg insists that the child has only been *wronged* where non-existence is preferable and has not been *harmed* at all, for the simple reason, and for Feinberg sufficient, reason that it has not been made 'worse off'.[90]

However, Harris takes the view that:

> Where someone has caused another to be in a harmed condition and is moreover morally responsible for having caused such harm, it is natural and logical to say that they have harmed the other person.

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[86] Ibid., 148.
[87] J. Harris, The Wrong of Wrongful Life, Journal of Law and Society, 1990, 17, 90-105, 94.
[88] J. Feinberg, Harm to Others, Oxford, Oxford University Press, 1984, 103.
[89] Ibid.
[90] J. Harris, The Wrong of Wrongful Life, Journal of Law and Society, 1990, 17, 90-105, 95.

Harris is taking issue with Feinberg's view that wrongful life legal claims should not succeed on the basis that no harm, only a wrong, has been done to the victim of wrongful life. For Harris the wrong in wrongful life is as already alluded to in the section on the non-identity problem the 'wrong of bringing avoidable suffering into the world'.[91] Harris has attempted to identify the precise nature of the alleged harm and wrong in wrongful life cases.[92] In doing so he casts some further light on what is conceptually wrong with section 13(5) in requiring treatment clinics to weigh up whether or not the welfare of the child would be best served by coming into existence. Harris is of the view that wrongful life cases should not succeed.[93] In his view even if a child is harmed by the negligent actions of a mother and/or doctor, if that child has a life worth living then the child cannot claim to have been wronged by the fact of his birth because the child has received a net benefit from being born, albeit with disabilities, and their rights have not been violated.[94] Harris is also of the view that in cases where the child has been harmed to such an extent that life is not worth living, where it can be said that the child has been both harmed and wronged, the child should still not have a legal remedy. Harris is of the view that in such cases resources should be provided by society to assist the child in having a life worth living but that child should not be granted a legal remedy which other disabled children do not have. The only legal remedy which Harris supports if it is really the case that the child does not have a life worth living is legalisation of euthanasia.

Feinberg also addresses the problem that the idea of prenatal harm seems to involve legal duties to not yet existent persons. He talks of cases which involve what he calls a harming act which occurs before conception which results in the child being born in a harmed condition. One example he gives is of a hospital which gives an infected blood transfusion to a woman so that she contracts syphilis and one year later she conceives and the child is born syphilitic. Feinberg is of the view that the 'legal duties to not yet existent persons' difficulty can be got around by affirming that:

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[91] Ibid., 99.
[92] J. Harris, The Wrong of Wrongful Life, Journal of Law and Society, 1990, 17, 90-105.
[93] Ibid., 103.
[94] Ibid., 103.

> ...a person has a duty of care toward *anyone* who is likely to be harmed as a consequence of his conduct (a 'foreseeable victim'), and in the case of some actions, that includes persons not yet born nor even conceived...One of its implied consequences, incidentally, is that when you are dealing, medically or commercially, with a woman of a certain age, you've got to think of her as potentially pregnant, and her merely potential future child as a 'foreseeable victim' of your transaction with her now.[95]

It might be said by proponents of section 13(5) that Feinberg's view lends it some justification because by requiring that the clinic take into account the welfare of the child the State is fulfilling its duty of care to prevent harm to future people – the 'foreseeable victims'.

There are two problems with this argument in so far as section 13(5) is directed at ensuring a child is not put at a significant risk of harm as a consequence of a poor parental environment. The first is that while the State could be criticised for an omission if it did not ensure through enacting such a provision that the clinic take into account the welfare of the child to be born, that omission would not be the cause of the harm which befalls the child. The harmful act comes after birth at the hands of the abusive or neglectful parent(s). The State has enabled the child to be born into circumstances where there is a risk of harm but their omission is not the cause of the harm. This is a different set of circumstances to Feinberg's example where there is a direct causal link between the negligence of the hospital and the child's suffering. The second problem is that even if the State has a duty of care towards a foreseeable victim, the only way that harm could be prevented is by preventing the person being born.

Is the State therefore entitled to treat the yet-to-be conceived 'child' as a person that falls under their mandate to protect given that it is possible that the child may be harmed as a result of the potential parent's decision to seek access to ART? In addressing the issue of whether or not existence might ever be said to be less preferable to non-existence Feinberg is of the view that:

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[95] Ibid., 155.

> What we must ask, then, in wrongful life cases is 'whether nonexistence or nonlife is preferable to life attended by certain hardships'. If nonexistence in a given case would have been objectively preferable to existence, as judged for example by the law's convenient 'reasonable person', then any wrongful act or omission that caused (permitted) the child to be born can be judged to have harmed the child.[96]

How this might reflect on section 13(5) is that what the treatment clinic is being asked to do is not to weigh up whether or not the welfare of the child would be best served by coming into existence but whether to prevent the child's existence would avoid the child coming to harm in the future.

5.5 Further Criticism of Section 13(5)

Jackson also argues that section 13(5) is unfair because it invades the 'decisional privacy' of an infertile couple seeking access to ART when ordinarily such an invasion of 'decisional privacy' of a fertile couple deciding to try for a child would not be contemplated.[97] In Jackson's view the decision to try for a child is a 'self-regarding decision' which takes place within the privacy of a relationship. As the name suggests self-regarding decisions are decisions which are taken with the focus being upon how the outcome of that decision will impact upon one's own life. In a paper looking at respect for autonomy in medical decisions Gauthier is of the view that:

> ...medical treatment decisions are most often self-regarding... As long as these decisions do not lead to a breach of specific duties to others or otherwise cause harm to others, they are self-regarding and are clearly in the sphere of absolute liberty. Exceptions may arise in cases involving third parties, for

[96] Ibid., 155.

[97] E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 2002, 65, 176-203, 182.

> example, when a parent's death from the refusal of a blood transfusion would leave small children without needed care.[98]

However, Jackson is of the view that when an infertile couple seek access to ART their decision to try for a child is treated by section 13(5) as an 'other regarding decision' which must be judged with regard to the potential impact that decision may have on the yet-to-be-conceived child.[99] It might be argued that this is because the decision to seek to access ART treatment is an exception along the lines of that noted by Gauthier. If the decision to access medical treatment is with the intention of that it will result in the birth of a child, then the welfare of that child is something which has to be had regard to. However, that argument does avoid the difficulty of why the decision to access medical treatment with the intention of giving birth to a child should be treated any differently to the decision to engage in sexual intercourse with the intention of giving birth to a child – the consequences of the two decisions are the same.

In his work *On Liberty* John Stuart Mill also considered the distinction between self-regarding and other-regarding behaviour by noting that when a 'person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class and the sanctions of the law or public opinion may be used to force the behaviour that would meet those obligations'.[100] Mill recognised that the freedom to act on self-regarding decisions is limited and can only be exercised 'when a person's conduct affects the interests of no persons besides himself, or need not affect them unless they like'.[101] Mill's argument is that human beings will only be able to develop and exercise their individuality and life plan if they are permitted the freedom to make self-regarding decisions. The point which Jackson is making is that in treating the decision of an infertile couple to try for a child using ART as an other-regarding decision, whilst treating the decision of the fertile couple as a self-regarding decision, the State is imposing an unfair restriction on the

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[98] C. C. Gauthier, Philosophical Foundations of Respect for Autonomy, Kennedy Institute of Ethics Journal, Volume 3, Number 1, March 1993, 21-37, 28.
[99] E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 65, 2002, 182.
[100] J.S. Mill, On Liberty, 276.
[101] J.S. Mill, On Liberty, 281.

autonomous decision-making capacity of the infertile. In terms of this thesis, this would be regarded as an unfair restriction on procreative liberty. As Jackson points out there is no necessary correlation between biological fertility and a child's welfare so the future child's welfare should not be a consideration in determining whether access to ART is granted.[102]

Jackson also criticises section 13(5) on the grounds that it is disingenuous because clinics being asked to make the decision whether to offer treatment or not are not given sufficient information and do not have the necessary skill set to make a complex child welfare assessment. This does however raise the question - if the clinics were given better information and employed suitable experts to make these assessments, would that provide greater justification for section 13(5)? This question will be examined in greater detail in the next part of this chapter when a comparison of adoptive parenting assessments and section 13(5) assessments is carried out.

In the context of a parental environment which could subject a child to neglect or abuse, since removal of that child this situation would be an option post-birth, it is difficult to see when section 13(5) could be applied at all. There is a counter to that position - that child abuse may only be discovered too late to prevent irreparable damage or even death of the child and accordingly, where there is clear evidence of the potential for a significant risk of harm to be caused to the child in the future, then account must be taken of that to prevent it happening. Such a situation would at best justify the application of Jackson's thinly interpreted section 13(5). If there was clear evidence that it truly would be better for the child not to be born to such parents then the parents should be denied treatment. As Gavaghan puts it:

> A narrow construction of the welfare test would require fertility clinics to refuse treatment only in cases where it is foreseeable

[102] E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 65, 2002, 182.

> that the life of the resulting child would be subjectively worse than nothing.[103]

Gavaghan is writing in the context of genetic conditions and makes the point that 'it is often impossible in individual cases to make an accurate pronouncement on the quality of life until the child is born...the range of conditions to which section 13(5) would actually apply would be narrow indeed'.[104] In the context of parental environment which this thesis is concerned with it is submitted that the ability to accurately predict whether a potential parent might come to abuse, neglect or even murder their child is so difficult and based on so much subjectivity that the number of situations where section 13(5) would actually apply would be negligible to the point of making the entire exercise pointless.

5.6 The Adoption Comparison

In terms of the Adoption Agencies Regulations 2005 which apply to England only, prospective adopters have to go through a very rigorous vetting process before a child can be placed with them for adoption. An adoption agency is required to collect a significant amount of information on a prospective adopter, including a photograph and physical description; information as to racial origin, cultural and linguistic background and religious persuasion; a description of the prospective adopter's personality and interests; details of any previous family court proceedings in which the prospective adopter has been involved; the names and addresses of three referees who will give personal references on the prospective adopter; the details of any current and previous marriage, civil partnership or relationship; a family tree; a chronology; the observations of the prospective adopter about his own experience of being parented and how this has influenced him; details of any experience the prospective adopter has had of caring for children; and an assessment of his ability in this respect.[105] An extensive

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[103] C. Gavaghan, Defending the Genetic Supermarket: Laws and Ethics of Selecting the Next Generation, Routledge-Cavendish, London, 2007, 99.

[104] Ibid., 99.

[105] Schedule 4 of the Adoption Agencies Regulations 2005. Similar regulations also apply to the Fostering process in the form of Regulation 26 and Schedules 3 and 4 of the Fostering Service Regulations 2011.

criminal records check is also made in relation to the prospective adopter.[106] Clearly, it is a very wide-ranging and intrusive process. However, that process has been put in place as a means of meeting the State mandate to protect children.

There are clearly some parallels to be drawn between the parenting assessment carried out on potential adopters and the requirement upon an infertility clinic to into account the need of the child for supportive parenting deciding whether or not to allow access to treatment. In both cases the focus is upon the ability of the parent to raise a child. In both cases the opportunity to raise a child can be denied if the parent does not 'pass' the capability assessment. However, there is also a huge difference between assessing the ability of a potential adoptive parent to take on the role of raising another person's existing child, and assessing the ability of a potential parent to raise a child at the pre-conception stage.

There is also a clear difference as to the thoroughness of the parental assessment which is carried out. The Adoption and Children Act 2002 which applies in England and Wales[107]describes the child's welfare as the 'paramount consideration of the court or adoption agency'.[108] The Court or adoption agency must have regard to, among other things, any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering. Harm in the context of the Children Act 1989 means 'ill-treatment or the impairment of physical or mental health or development' and development means 'physical, intellectual, emotional, social or behavioural development.'[109] Government guidance in regard to these regulations[110] does not shy away from stating that these assessments are absolutely necessary. It states that the guidance is

[106] Regulation 23 of the Adoption Agencies Regulations 2005 requires the adoption agency to carry out an enhanced criminal records check.

[107] There are a small number of sections in the Adoption and Children Act 2002 which extend to Scotland and Northern Ireland although the law on adoption in these two jurisdictions is principally governed by the Adoption and Children (Scotland) Act 2007 and the Adoption (Northern Ireland) Order 1987 respectively.

[108] Adoption and Children Act 2002 sec 1(2).

[109] Sec. 31(9) (b) of the Children Act 1989

[110] Department of Education and Skills, Preparing and Assessing Prospective Adopters, at http://webarchive.nationalarchives.gov.uk/20130401151715/http://www.education.gov.uk/publications/eOrderingDownload/00193-2006BKL-EN.pdf (accessed on 15 November 2013).

intended to help practitioners 'assess potential adoptive parents so that their adopted children can benefit from confident, positive and resilient parenting throughout their childhood and beyond.'[111]

In Scotland the provisions of the Adoption and Children (Scotland) Act 2007 are broadly similar. Section 14(3) states that 'the court or adoption agency is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration', with the court or adoption agency, so far as is reasonably practicable, having regard in particular to the value of a stable family unit in the child's development, the child's ascertainable views regarding the decision (taking account of the child's age and maturity), the child's religious persuasion, racial origin and cultural and linguistic background, and the likely effect on the child, throughout the child's life, of the making of an adoption order.[112] Interestingly in Scotland the child has to live with the prospective adopters before an adoption order[113] is made and home visits[114] and court reports[115] provided on the suitability of the prospective adopters. I would suggest that this may be regarded as what a practical and sensible parental ability assessment requires. The approach taken to these assessments would be difficult and in many cases impossible to carry out prior to the conception of the 'child'.

If the statutory requirements in relation to the adoption process in the different parts of the UK are compared with the statutory requirements set out in section 13(5) of the HFE Act 1990 (as amended) it is apparent that section 13(5) makes no reference to the welfare of the child being the paramount or primary consideration. Instead section 13(5) states that: 'a woman shall not be provided with treatment services unless *account has been taken* of the welfare of the child or any existing child'. However, when the amendment to the HFE Bill 1990 (which sought to incorporate the child welfare assessment a condition of a licence) was tabled in the House of Commons by Ann Winterton MP in 1990, she specifically said:

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[111] Ibid.
[112] Adoption and Children (Scotland) Act 2007 sec 14(4).
[113] Adoption and Children (Scotland) Act 2007 sec 15.
[114] Adoption and Children (Scotland) Act 2007 sec 16.
[115] Adoption and Children (Scotland) Act 2007 sec 17.

> I have tabled the amendment because the interests of the child in matters of artificial insemination should be paramount. That term has been used most successfully in the Children Act 1989.[116]

It has been suggested that one explanation for Parliament's preference for the 'taking account of' approach over the 'paramount consideration' approach was the differences between the legal status of the potential child in assisted conception on the one hand and the status of actual children in family law practice on the other.[117] For example, when a decision is being made on whether or not it is in the child's best interest to remove that child from its family and take it into care, several factors have to be taken into account, including the wishes of the parents and the child, evidence of the child's developmental milestones, evidence of any abuse or neglect, school or nursery reports if relevant and evidence of any substance abuse problems. In contrast, what the licensed clinic has to assess is the risk of harm that a yet-to-be-conceived child might face if it is born to those particular parents. The only approach that the licensed clinic can undertake is an assessment of the potential parent(s) ability to care for a hypothetical child if that hypothetical child was to be born.[118]

It is also important to note that the State requires that some form of parenting ability assessment is carried out for those seeking to adopt and those seeking access to ART treatment, but not those fertile couples who engage in sexual intercourse with the intention of having children. This thesis takes the position that the adoption assessment process can be distinguished from these other situations because the parental assessment process is being carried out at the post-birth stage where the welfare of an existing child is at issue. The State mandate to protect *that* existing child is engaged. The adoption assessment process is not unlike the child welfare assessment carried out under the Children Acts if the State has reason to believe that a child may be at risk of significant harm. It is justifiable for the State to ensure in advance that an existing child

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[116] Winterton, HC Deb. Vol. 174, col. 1021, 1990 (20 June).
[117] Tomorrow's Children Consultation Paper, para. 2.2.
[118] Ibid., para. 22.

would not be put at risk of significant harm if placed with adoptive parents. This is very much in line with the rights of the child discussed in Chapter Four which are enjoyed by all children post-birth.

The fact that the potential adoptive parents are assessed at the post-birth stage but fertile individuals are not assessed at the pre-conception stage does not make a difference to the argument of this thesis that section 13(5) is an unjustified interference in the right to procreative liberty. This is because this thesis takes the view that any parental assessment of fertile individuals at the pre-conception stage would also be an unjustified interference in their right to procreative liberty. By contrast, the parental assessment carried out at the adoption stage is a justified interference with a right to chose to be a parent because it protects an existing child from the potential risk of harm.

Nevertheless, Ryburn and Fleming writing in 1993[119] referred to a study which in their view highlighted a fact that:

> The actual track record of professionals in assessing both for parenthood and the future best interests of children is quite unproven. The limited research on assessment for parenthood in adoption for example indicates that those approved as suitable by one agency may be declined by another and even within single agencies discrepant views were discovered amongst different members of staff.[120]

In other words even with adoption assessments the task of assessing parental ability without subjectivity coming into play is a very difficult task which calls into question the reliability of the assessment of future parenting ability process and its practical usefulness in either the adoption or ART treatment contexts.

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[119] M. Ryburn and A. Fleming, The Human Fertilisation and Embryology Act 1990 and Assessment for parenthood: in whose best interests, Early Child Development and Care, Vol. 91, 65-75.

[120] Ibid., 72 Referring to Bradley, T. (1966) "An Exploration of the caseworker's perceptions of adoptive applicants", Child Welfare, 45.Brown, E, Brieland D, (1975) "Adoptive Screening: New Data, New Dilemmas", Social Work, 20.

As discussed in the previous section Jackson criticised section 13(5) on the basis that it is disingenuous to even attempt in practice to distinguish between adequate and inadequate parents.[121] As Jackson points out the treatment clinic is not required to carry out anything like the level of assessment which a couple seeking to adopt a child are required to go through.[122] The adoption process is also of course entirely different as it is a matching process between prospective parents and an existing child. It is a genuine child welfare assessment not a future child welfare assessment. This makes a difference because adoption agencies are asking the question: are these parents suitable for this particular child?

Jackson also makes the point that the rigour of the section 13(5) assessment process varied between clinics[123], although she was writing prior to the introduction of the standardised 'Welfare of the child: patient history form' referred to in the introduction of this thesis, so that problem has diminished. Jackson notes that those who work in clinics are not qualified to carry out such assessment or have the information available to them[124], as social workers are and do. Jackson adds that the factors which may impact upon the welfare of the child are not necessarily the ones which have been identified by research, for example, being raised in a one-parent family may not be as detrimental to child welfare as first imagined if that single parent is nurturing and supportive.[125] As she points out, without the rigorous assessment process carried out in adoptions it is very difficult to predict the adequacy of proposed parents with any degree of accuracy and even within the rigorous adoption process it is the case that placements fail.

The disingenuousness of section 13(5) which Jackson alluded to in 2002 can still be found. The very fact that section 13(5) does not require that the welfare of the child be the paramount consideration raises a question mark over its effectiveness in being able to fulfil a similar function to the child welfare

[121] E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 65, 2002, 194.
[122] Ibid., 194.
[123] Ibid.
[124] Ibid.
[125] Ibid.

principle in family law in general and in comparison with adoption in particular. The Tomorrow's Children consultation appeared to suggest that because a more rigorous assessment was not possible at the pre-conception stage then child welfare could not be given the same status as a post-birth child welfare assessment:

> One explanation for the preference for the 'taking into account' approach in the HFE Bill might be the differences between the status of the potential child in assisted conception on the one hand and its status in areas of practice relating to actual children on the other. When a local authority considers whether or not to remove a child from its family and take it into care, the authority must take into account several factors including the wishes of the parents and the child and decide where the best interests of a living child lie. In order to inform this decision, the authority must assess the level of harm that the child is likely to face if it stays in the family home, based upon current family circumstances. In assisted conception, by contrast, the treating clinician must balance the wishes of the prospective parents against the interests of a child who does not yet exist. The clinician must assess the harm that the child is likely to face if it is born to those patients, based upon what the family circumstances might be once the family is created.[126]

There is something unpersuasive about this explanation. The welfare of the child is surely the paramount consideration in family law because of the perceived overriding importance of the welfare of the individual child being considered. What this thesis concludes is that it is only given the 'taken into account' status under section 13(5) because the legislators were really aware that it cannot be meaningfully assessed in the absence of an actual child. It is as if there was an acknowledgement that section 13(5) is generally ineffective but wish to retain it anyway possibly because it is, as Jackson describes it, 'a cosmetic provision'[127] and because as she says 'it would have been politically

[126] Tomorrow's Children Consultation Paper, para. 2.2.
[127] Ibid., 194.

unthinkable *not* to support the inclusion of a welfare principle, despite its incoherence and practical inefficiency'.[128] This goes back to the point that the child welfare principle has become something which is now widely approved and virtually beyond reproach.

It is reasonable to expect, from the point of view of the child and of society, that a child who is being placed for adoption will not be knowingly placed into a harmful situation by the State. The adoptive parenting assessment is therefore a justifiable means of ensuring that the welfare of a child is protected. On the other hand the aim of section 13(5) can only be to ensure that a child is not born into a harmful situation. This is an entirely different question which raises the issue of when it can be said that it is better not to be brought into existence at all as opposed to being brought into an existence which may involve harm being caused to the child. As was discussed in the previous section the harm principle in respect of a particular child cannot be said to extend to the need to prevent people from bringing him or her into existence unless, at best, it can truly be shown that it would be better for a child not to exist in the circumstances which are envisaged. These circumstances are likely to be extremely rare when it comes to questions of parenting ability, provided adequate post-birth protection systems are in place.

The fact that society does not carry out parental ability assessments on fertile couples who seek to have a child by engaging in sexual intercourse has been alluded to in this section. The next section will look in more detail at a paper which proposed that in actual fact such a system would be desirable. This paper is interesting in this context because it highlights the discriminatory nature of carrying out a parenting ability assessment of the infertile and also some of the other arguments in favour of a pre-conception parenting assessment.

5.7 Discrimination and Parental Licensing

As has been discussed the fact that potential parents seeking access to assisted reproduction treatment are treated differently from those conceiving naturally has led to criticism that section 13(5) is inherently unfair and discriminatory as it

[128] Ibid., 194.

imposes conditions upon potential parents for no other reason than it is more possible to do so, while at the same time leaving fertile individuals to reproduce freely, regardless of how unsuitable parents they might appear to make.[129] However, in 1980 Hugh La Follette argued that the State should require all parents to be licensed, saying that this was not only theoretically desirable but was actually possible.[130] La Follette's arguments for licensing all parents are pertinent to many of the arguments put forward for denying people access to assisted reproduction treatment on the grounds of child welfare.

In developing his argument, La Follette first pointed out that society regulates a great many activities already, such as driving or the practice of medicine. Society prohibits these activities until a license is obtained in order to limit the potential for harm caused by incompetent, incapable or dishonest people undertaking these activities. La Follette then made the claim that, given the fact that society licences these activities it is theoretically desirable to licence any activity that is potentially harmful to others and requires a certain competence to perform safely, provided there is a moderately reliable (but not necessarily perfect) procedure for determining that someone is competent.[131] La Follette also pointed out that society insists on licensing in these areas even when a failure to secure a licence would seriously inconvenience or upset the individual in question.

La Follette made the argument that these regulatory criteria could be applied to parents. There was ample evidence that parenting can be harmful to children, a significant number of whom suffer neglect and abuse at the hands of their parents. Therefore, a parent must show a minimal level of competence in order to obtain a licence to carry out the role of parenting without harming the child. La Follette argued that many people do not have the requisite level of competence to raise a child without inflicting harm and for that reason parents should be licensed. He argued that any intrusion into people's lives would be justified and minimal provided the people in question make good faith efforts to

[129] E. Jackson, Conception and the Irrelevance of the Welfare Principle, Modern Law Review, 65, 2002.
[130] H. La Follette, Licensing Parents, Philosophy & Public Affairs, Princeton University Press, 1980, 9, no. 2.
[131] Ibid., 183.

rear children without causing them harm. The only people who would suffer a major intrusion into their lives would be those who wished to have children in bad faith.[132]

La Follette then went on to argue against various practical objections put forward which suggest that a parental licensing scheme could not be effectively and justly implemented. These objections were that there are no adequate criteria for assessing a good parent; that there is no reliable way to predict who will maltreat their children; that even if a reliable test for ascertaining who would be an acceptable parent were available, administrators would unintentionally or intentionally misuse the test; and any system would be impossible to enforce. La Follette countered the first objection by saying that a licensing system would only act to 'weed out' the truly bad parents. It would not seek to make complex value judgements about the benefits of different methods of parenting. What it would do is prevent people at a high likelihood of being bad parents from becoming parents based on recognisable criteria such as previous convictions for child abuse. The license would not demand a gold standard of parenting.

There is some force in what La Follette said in this regard when analysing what is required of licensed clinics by the Code of Practice. Licensed clinics are advised to look for previous convictions related to harming children, child protection measures taken regarding existing children, violence or serious discord in the family environment, mental illness and drug or alcohol abuse. The presence of any of these factors would seem to put a child at a higher risk of abuse or neglect. Therefore if society can identify what makes a bad parent, then why should people who are likely to harm their children not be prevented from becoming parents? The difficulties of parenting and welfare of the child assessments being undertaken prior to conception have been discussed previously. However, putting these difficulties aside, preventing people from becoming parents because of definitive indicators that they would present a serious risk to children is not quite the same thing as requiring all potential patients to submit to the assessment on the grounds that the welfare of the child has to be taken into account. It should also be remembered that the

[132] Ibid., 187.

current welfare assessment requires the licensed clinic to address the question of whether there is any concern that the prospective parents may not be supportive parents by, for example, showing a lack of commitment to the health, well being and development of the prospective child. This goes beyond the serious identifiable and objective risk factors like previous convictions and drug addiction into a far wider and more subjective assessment of the parents.

With regard to the other objections, La Follette's responses were even less convincing. He argued that the predictive tests do not have to be 100% accurate and in any case accurate tests could be developed through the use of longitudinal studies to ascertain what factors were predictive of child abuse and neglect. However, La Follette did not tackle the valid criticism that a licensing system had the real potential to prevent perfectly capable people from becoming parents. With regard to the three other objections, he tended to downplay the practical difficulties, merely stating that he did not see how these objections should undermine his licensing proposal because of the importance of protecting children from harm.

La Follette's arguments, while interesting, seek to minimise the great importance people attach to having children and the fact that a great many pregnancies are unplanned and unforeseen. In his essay, he uses the examples of a driving licence and obtaining a licence to practice medicine or law to illustrate that licensing in other areas is acceptable. He proposes that to argue against licensing parents means arguing against these other types of licences. However, there is no strong biological drive to learn to drive or become a doctor and while possessing a life skill like driving or practising a profession may be an important aspect of a person's sense of identity and worth they are not the life affirming activities that many see parenthood as being. Further, not all pregnancies are necessarily planned in the same way that sitting a driving test or studying medicine is planned. It may be the case that some women become pregnant who would not be eligible for a licence. It is also of note that in China, where a one-child policy has been in place for a number of decades with serious social and economic consequences for those who do not comply, many people have continued to have more than one child. Government attempts to control the very personal decision of how many children one will have has led to serious

human rights abuses not least toward infants born outside the one child policy.[133]

La Follette himself asked: How would one deal with violators of the licensing system and what could we do with babies so conceived? His answer is that we might not punish parents at all, but we might just remove the children and put them up for adoption. It is rather fanciful to suggest that taking a child from the care of its biological parents and placing it up for adoption is not punishing the parents at all. Further, if this is all that a licensing program would achieve then it is not greatly different from the system currently in place which would remove children thought to be at risk of harm, although it may be the case that these measures would be implemented more often and at an earlier stage in the child's life.

If La Follette's proposals are to mean anything it would be to prevent women from becoming pregnant. While La Follette poses an interesting question there is virtually no possibility of his proposals being put into practice in any liberal democracy, for reasons considered in Chapter Two. However, whilst preventing people from conceiving in the natural way is a rather different proposition to stopping people receiving licensed treatment, the infringement upon the right to procreative liberty of the infertile should not be treated any less lightly than the right to procreative liberty of the fertile. That is why the existence of section 13(5) as presently enacted which in effect places licensing requirements on infertile couples seeking assistance to conceive is deeply flawed on the basis that it is discriminatory and rather than serving to protect children from harm only serves to stop children being born at all.

5.8 Section 13(5) and Third Party Involvement

The HFEA Tomorrow's Children consultation paper asked how assisted conception children compared with their naturally-conceived counterparts and answered as follows:

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[133] The Guardian Newspaper, China's Barbaric One Child Policy, http://www.theguardian.com/books/2013/may/06/chinas-barbaric-one-child-policy (accessed on 18 March 2014).

> When children are conceived naturally, the parents of the child usually make a private decision between themselves to proceed (unless the pregnancy is unplanned)...Parents seeking to adopt a child also make a private decision to proceed, but the decision about whether their desire to become adoptive parents will be realised is made by an adoption agency. In this situation, the agencies involved must make a judgement about the suitability of the prospective adopters to parent an adopted child. How should assisted conception children be regarded in the light of these examples? For couples needing assisted conception treatment, the initial decision to have a child is also a private one. But, as with adoptive parents, the realisation of the desire to have a child is achieved with the involvement of third parties: in this case, the medical and laboratory staff in an assisted conception clinic...Most would agree that they have a responsibility to protect a child from any significant medical risks associated with a particular procedure. But do they also have a responsibility to protect the child from any physical, psychological or social harm which might befall them after they are born?[134]

In 1993 the medical journal the *Lancet* when discussing whether or not postmenopausal women should be allowed access to ART to enable them to conceive a child said as follows:

> The long term well-being of the child should be of overriding importance. Research shows that children need a stable home with mature caring adults who themselves have a sound relationship. This need extends into the late teens, and even people in their 20s benefit from the love and support of their parents. Of course, many fertile couples have unplanned conceptions and some of their babies are born into circumstances that are far from ideal; we have little control over such 'natural' events. However, ethical considerations inevitably enter into the decision to use high

[134] Tomorrow's Children Consultation Paper, para. 2.2.

> technology to give a woman a pregnancy. Thus the Human Fertilisation and Embryology Act (1990) insists that those providing in-vitro fertilization must take into account the welfare of the child, including the need of that child for a father. Since we can control (at least to a certain extent) the circumstances in which a child is made when the candidates are infertile, we ought to restrict our cooperation to those cases which maximize the welfare of the child. At the same time this fact explains why the standard for medically-assisted procreation must and can be higher than for natural reproduction.[135]

This assumption that because ART is controlled by medical professionals that offers the opportunity to only offer treatment in circumstances where the child's welfare is maximised, has been criticised on the basis that it does not explain why those seeking ART treatment have to meet such a high standard of parenting, it merely explains that medical professionals are in a position to demand this high standard.[136] What the *Lancet* article appears to be saying is that whilst babies are born into circumstances that are far from ideal in 'natural' reproduction circumstances doctors have little control over that, but as they do have control over assisted reproduction they should exert it. It is unclear what the 'ethical considerations' which 'inevitably enter into the decision to use high technology to give a woman a pregnancy' might be that separate ART from natural reproduction beyond making sure that children born using ART are born as a result of appropriate standards of professional knowledge and skill.

Widdows and MacCallum have looked at the issue of third party involvement in the ART process and whether that can distinguish *natural* reproduction from *assisted* reproduction and adoption. In regards to this question they have said:

> Furthermore, in both adoption and embryo donation we have shown that social criteria are thought important in order to safeguard the

[135] Editorial, (1993), Too old to have a baby?, Lancet, 341, 344-345.
[136] D. Langridge, 'The Welfare of the Child: Problems of indeterminacy and deontology', Human Reproduction, vol. 15, no. 3, 502-504, 2000.

> welfare of the child. This responsibility stems from the necessity of third party involvement in these methods of family creation. The involvement of third parties marks a fundamental difference between natural conception on the one hand and NRTs and adoption on the other. It could be argued that third parties are involved in the care of parents who conceive naturally—for example, advice from GPs and so criteria should be applied in these cases also if consistency is to be maintained. This argument is unconvincing as there is a difference between caring for women who conceive naturally and those who become parents by virtue of, and as a direct result of, the practitioners' actions. Without the practitioners' (clinicians or social workers) intervention, the parents would not be caring for a child. This instrumental role in family creation makes third parties (and society, insofar as these practitioners are society's representatives) responsible for the child's welfare in way that they are not responsible in natural conception. [137]

Cutas and Bortolotti have looked at the claim that third party involvement gives rise to some kind of shared responsibility for the outcome of treatment in more detail. They state that:

> According to the *positive responsibility* thesis, agents are only responsible for the morally significant actions they perform or the morally significant events they bring about. In virtue of the involvement of a third party (e.g. doctors, lawyers, other members of society) in assisted reproduction or parenting, it is justifiable to expect prospective parents to satisfy some criteria in order for them to gain access to the relevant form of assistance. The same requirement does not seem to apply to people engaging in natural reproduction and parenting, because no third party has *positive* responsibility in bringing it about that a child is conceived or enters a permanent relationship with her natural parents. Interference

[137] H. Widdows and F. MacCallum, 'Disparities in parenting criteria: an exploration of the issues, focusing on adoption and embryo donation', Journal of Medical Ethics, 2002 28: 139-142, p. 142.

> with natural reproduction and parenting is considered unnecessary and unjustified, unless neglect or abuse becomes known.[138]

However, Cutas and Bortolotti go on:

> However, if we endorse a *negative responsibility* view, according to which agents are responsible not only for the morally significant events they bring about, but also for those they allow to happen, when they can sensibly prevent them, the difference between natural and assisted forms of reproduction and parenting with respect to the issue of third party responsibility becomes at most a practical one. It is *easier* to intervene in assisted reproduction and parenting than in natural reproduction and parenting. But this difference in itself does not seem to carry any ethical weight. If the welfare of children (of all children, regardless of the way in which they were conceived or entered a child-parent relationship) is important enough to allow intervention in assisted reproduction and parenting, and in natural reproduction when there are reasons to believe that neglect or abuse or both have taken place, it is hard to justify the exemption from scrutiny that people engaging in natural reproduction and parenting currently enjoy.[139]

Cutas and Bortolotti criticise Widdows and MacCallum's view on the basis that assistance in reproduction comes in different degrees.[140] So even if the positive responsibility view is preferred over the negative responsibility view, the claim that no third party has *positive* responsibility in bringing it about a child that is conceived *naturally* is not as simplistic as claimed. Emily Jackson has also made the point that the distinction between *natural* reproduction and *assisted* reproduction is not always as clear cut as might be imagined.[141]

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[138] Cutas and Bortolotti, Natural versus Assisted Reproduction, Studies in Ethics, Law, and Technology, Vol. 4, Issue 1, 2010, Article 1, 3.
[139] Ibid., 4.
[140] Ibid.
[141] Jackson, Regulating Reproduction, 171.

A medical practitioner can provide hormone treatment to increase fertility, or surgery to unblock Fallopian tubes, treatments without which there is no pregnancy and yet these medical procedures are not regulated by Parliament and yet are a direct provision of treatment by a third party. This thesis takes the view that the involvement of a third party – be it the GP giving advice, the surgeon unblocking Fallopian tubes or the embryologist fertilising the donor egg – does not provide justification for any sort of interference on procreative liberty, be it of the fertile or the infertile. Widdows and MacCallum fail to explain why an 'instrumental role in family creation makes third parties responsible for the child's welfare' nor do they explain to what extent the third party is responsible for the child's welfare. It is not enough to point to an increasing level of medical assistance to justify an increasing level of responsibility for the child's welfare. There is no immediately obvious relationship between the two. The clinic is not after all going to be involved in parenting the child after birth; providing a good parenting environment for the child is the responsibility of the parents. This thesis agrees with Cutas and Bortolotti that the child welfare requirement in medically assisted reproduction exists because it is easier to intervene but that this fact does not carry any ethical weight. It is not a reason to continue with section 13(5) as currently in force.

The HFEA Tomorrow's Children report set out their position on this following consultation by considering two interpretations of the welfare of the child principle: (1) that the involvement of a medical team in assisted conception means that certain third parties have responsibility towards the child to be born. However, the importance of patient autonomy means that clinics should only refuse to provide treatment where there is evidence that the child is likely to suffer serious physical or psychological harm; and (2) the involvement of a medical team in assisted conception means that certain third parties have significant responsibility towards the child to be born.[142] Consequently, clinics should not provide treatment unless they are satisfied that the welfare of the child to be born will not be affected negatively.

[142] Tomorrow's Children, Report of the Policy Review of welfare of the child assessments in licensed assisted conception clinics, 6.

The HFEA report concluded that (2) placed too much emphasis upon the interests of the prospective child at the expense of patient choice.[143] Therefore the HFEA concluded that (1) was the preferred interpretation of the welfare of the child principle in the Act, stating that:

> Whilst the involvement of a medical team in conception brings some responsibility towards the child who may be born as a result of their assistance, this responsibility should not outweigh the important responsibility that clinicians have towards respecting patient choice. It is the Authority's view that *there should be a presumption towards providing treatment to those who request it*, but that treatment should be refused in cases where clinics conclude that the child to be born, or any existing child of the family, is likely to suffer serious harm.[144]

The HFEA taking the position still does not really explain why the involvement of a medical team brings responsibility towards the child who may be born as a result of their assistance or what the extent of that responsibility might be. This thesis takes the view that the medical team have responsibility to provide treatment in the ART context in accordance to ethical principles, such as respect for autonomy, beneficence and non-maleficence, which bind medical practitioners when providing any sort of treatment and in accordance with legal principles, such as providing treatment to the required standard of care to patients. Whilst the presumption towards providing treatment was a welcome change in direction, it is still the case that the presumption can be rebutted on grounds pertaining to the parental environment into which the child might be born. This thesis takes the view that just because medical intervention is required that does not provide adequate justification for the continuing state of affairs.

The arguments put forward by supporters of section 13(5) that because a third party is involved in ART this places a responsibility on the State to ensure that the welfare of the child is taken into account does not stand up to closer

[143] Ibid.
[144] Ibid.

scrutiny. The lack of regulation of other medical procedures which assist women to become pregnant highlights the fact that third party involvement cannot serve as a justification for the continuation of section 13(5) as currently enacted. The Parliamentary process in introducing the legislation has never set out what distinguished third party involvement in some areas from others and has therefore failed to show that section 13(5) as applied to 'treatment services' is justified in that it specifically prevents significant harm being caused to children born as a result of these procedures and not the other unregulated procedures.

5.9 Alternatives to section 13(5)

Eric Blyth is one commentator who has argued that 'there are defensible welfare arguments for curtailing unrestricted access to New Reproductive Technologies'.[145] However, while he mentions the effect of provision of assisted conception services to particular individuals or groups, such as single people, people in same-sex partnerships, or post-menopausal women as a factors concerning parenting environment which may have a questionable impact upon children his discussion as to the impact of ART on children is principally focused on the issues of intracytoplasmic sperm injection (ICSI); multiple births; pre-implantation genetic diagnosis (PGD) and selecting the characteristics of children, and donor conception. Blyth cites lack of space in his article to look at the parenting environment factor; however it is clear from what he writes that he includes parenting environment as a child welfare concern.

What Blyth proposes however is not the continuation of legislation based on the welfare principle which he characterises as the acceptance that while being brought into existence inevitably poses some risks, these risks are acceptable so long as the child will have a reasonably happy life, which he is of the view section 13(5) is based upon. Instead he champions a greater 'stakeholder voice' so that the 'promotion of children's rights to be heard and to participate in decision-making concerning their own lives is not only legitimate, but is integral

[145] E. Blyth, To Be or not to Be? A Critical Appraisal of the Welfare of Children Conceived through New Reproductive Technologies, International Journal of Children's Rights, 16 (2008) 505–522.

to contemporary orthodoxy in many jurisdictions.'[146] Blyth of course recognises that children cannot have a say in their own conception, but what he calls for is greater information gathering from those who have been born using ART, a retrospective approach, so that their views as to the impact upon them as to the means of their birth can be taken into account by future decision makers.

Solberg is of the view that 'the principle of the welfare of the child confuses the ethical framing of ART'.[147] He is of the opinion that the ethical argument should not be framed in terms of potential conflict between the right to procreative liberty of the potential parents and the welfare of the child, but instead argues that 'futile care' should be the guiding ethical principle when determining whether or not to allow access to ART. Solberg begins his argument by setting out the problem which the principle of the welfare of the child in the context of ART runs into when confronted by the non-identity problem. In his view:

> There is no child that may be better off depending on our decision. By not creating a child we have not benefitted the child, and by creating the child we have not harmed the child—simply because 'the child' must be actual before it can be harmed or benefitted. It is not meaningful to compare existence with non-existence. Towards a potential child we cannot have a moral obligation to create it or not create it. Potential children seem to be outside morality.[148]

In proposing an alternative ethical framework Solberg borrows from the idea of futile treatment in end of life cases. Solberg argues that it is generally accepted by the medical profession that futile treatment should be avoided if it were to expose the patient to harm without any benefit. He then goes on to define the goal of ART as not merely the delivery of a child but to make the patient a parent so that she can experience family life with her child. He then goes on:

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[146] E. Blyth, To Be or not to Be? A Critical Appraisal of the Welfare of Children Conceived through New Reproductive Technologies, International Journal of Children's Rights, 16 (2008) 505–522, 516.

[147] B. Solberg, Getting beyond the welfare of the child in assisted reproduction, Journal of Medical Ethics, 2009, 35, 373 - 376, 373.

[148] Ibid., 373.

> Delivering a baby to a drug addict would not be a fulfilment of the goal of ART treatment. She will not be able to function as a parent and allow the child to be part of a functioning family. We can state this even more strongly: the goal of the treatment is not just to produce parents in the biological sense of the word—the drug addict could become a biological parent. Rather, the goal is to produce parents in the social meaning of the word — by way of biological intervention—and in that sense, building functional families is the primary goal of the treatment.[149]

Solberg's opinions are helpful because they highlight that treatment could be refused in certain exceptional cases where the goal of ART – to produce social parents and functioning families – would not be met. However, it is perhaps questionable whether this is a real alternative to section 13(5) as presently enacted because medical practitioners in assessing whether or not treatment would be futile because a drug addict could not be able to function as a parent are still carrying out a parental assessment. This thesis takes the view that the only just way of proceeding is to amend section 13(5) to remove restrictions upon access to ART on parental ability grounds. This would leave clinics open to refuse treatment for reasons of risk to the health and welfare of the woman undergoing treatment, futility of treatment on medical grounds, a lack of resources, such as the availability of donor eggs and sperm, significant harm to the child or any existing child which might arise as a consequence of the ART process itself Harm as result of genetic make up?

5.10 Conclusion

When placed under proper scrutiny the justification for the continued inclusion of section 13(5) as currently enacted is found wanting. This is a statutory provision which has its origins in a proposal to exclude all but married couples for access to ART, developed on the basis that it would serve to put obstacles in the way of lesbian and single women being allowed access to ART and then retained in its current form without at any stage serious consideration given to

[149] Ibid., 374.

the real ethical basis for its inclusion beyond that it was good to include the principle of the welfare of the child wherever possible.

Its two principal flaws are to be found in the misguided belief in the universal applicability of the child welfare principle and a misunderstanding that concerns about the welfare of children provide adequate justification for preventing a child being brought into existence. The child welfare principle as applied in family law is a justifiable and useful tool which allows Courts to settle disputes involving children's lives in a way which safeguards their interests. The child welfare principle as presently applied in the context of access to ART treatment interferes with the autonomy of the prospective parents to make their own procreative choices and has the potential to result in the conclusion that preventing a child from coming into existence at all is better than a flawed existence when child protection measures are already available to protect the child's welfare once born.

To the extent that a comparison between existence and non-existence is possible at all, it would appear to be in extremely rare circumstances that existence could be envisaged to carry more burdens than benefits such as to enable an argument to be made that ART should be denied on the grounds of concerns for child welfare arising from inadequate parenting. Even where the interpretation of section 13(5) rests on it being intended to enable an assessment of the kind that takes place in family law cases, the applicability of such a test in this context appears discriminatory and ineffectual. The next chapter will seek to draw the strands of all that has been discussed in the previous four chapters together and set out the thesis conclusion.

CHAPTER SIX – CONCLUSION

6.1 Why Amend Section 13(5)?

In 2001 a case was brought concerning a couple in Scotland who had approached their local National Health Service Trust to obtain fertility treatment. In terms of their duty under section 13(5) of the HFEA 1990 the Trust made inquiries of Edinburgh City Council's social work department, in whose area the man had formerly lived, about his background. In September 2004 the Council responded to the Trust to the effect that in the social work file kept by the Council there was noted an allegation that the man had been in prison for murder. The consequences of this were that the Trust told the man that treatment would not be offered to him and his partner. This was despite the fact that the Trust had previously indicated that treatment would be provided. Subsequently, the Council indicated to the Trust that despite an extensive investigation, it had not been possible to confirm what had been said about the man and concluded that the allegations should be regarded as unfounded. The offer of fertility treatment was not renewed. The couple went abroad for private treatment, for which they paid, and which proved to be successful. The man tried to raise an action against the Council for solatium and the cost of the private treatment, but as a consequence of legal aid rules was prevented from doing so.[1]

This case is an interesting example of where the application of section 13(5) has gone seriously wrong. The case raises serious questions as to the ability of licensed clinics, and other third parties, to carry out a proper child welfare assessment. While a great deal should not hang on one very unfortunate example of administrative error, the case still serves as a warning to those who are of the view that the licensing condition imposed upon clinics by section 13(5) is workable, justified and fair.

It is very easy to have sympathy for the couple in *W v The Scottish Ministers* because the allegations of a previous conviction for murder were unfounded. However, the question might arise – what if the information had been correct? Would the clinic's decision have been justified? It would certainly appear to

[1] W v The Scottish Ministers 2010 S.L.T. 65.

have been in line with its licensing requirements and the purported aims of section 13(5). However, what this thesis concludes is that whilst cases of convicted murderers, child abusers or parents with children already in care seeking access to ART may arise on rare occasions, these difficult cases do not provide adequate justification for the blanket requirement to carry out a parenting assessment at the pre-conception stage for all patients seeking treatment. There are child protection measures in place to ensure that a child is protected from harm after birth which can be implemented to protect the child born to a convicted child abuser, instead of this infringement upon an individual's right to procreative liberty. If a parent is not able to safeguard the welfare of their child once that child is born then the State can justifiably interfere with that person's parental rights and indeed is under a duty to do so. The legislative basis for this duty was examined in greater detail in section 1.2 of Chapter One.

The conclusion of this thesis is that interference with the right to procreative liberty on the basis of parental environment is not justified. The thesis has not looked at factors, such as the impact on the child to be born of pre-determining the genetic make-up of that child, or the welfare of existing children of the family, that might be prayed in aid of interfering with procreative liberty on child welfare grounds. However it has argued that the State cannot justifiably interfere with a person's right to procreative liberty when there is no child yet born because to do so would simply mean that the child would not come into existence. Whilst this of course would prevent the child from suffering serious harm it would also prevent the child from being born and enjoying the benefits of existence. If it is accepted that only in very extreme circumstances would non-existence be preferable to existence then there is no justification for legislation, the consequence of which if applied, would be the non-existence of the very child whose welfare the legislation purports to be protecting. The argument can be made from what is examined in this thesis that to prevent access to ART on the grounds that the patient might be an unsuitable parent is not justified. In respect of the circumstances of the potential parents, this thesis accepts that clinics should make assessments based on medical evidence at the pre-conception stage to address the questions of whether attempting treatment would be futile, or dangerous

to the patient, and can justifiably refuse access to treatment on these grounds. However, such assessment has nothing to do with the welfare of the child to be born. It is raised here to highlight the fact that there are some circumstances where a right to procreative liberty can be justifiably interfered with, but that does not weaken the argument that an interference in a right to procreative liberty on the basis of parental environment is not justified. Refusing access to treatment on these limited medical grounds does not require that a parenting assessment purportedly taking into account the welfare of the child to be born is carried out.

This thesis also argues that it is not the extent of or the skill applied to carrying out the pre-conception child welfare assessment that is at issue either. Even if qualified social workers were employed by clinics to carry out the child welfare assessment and it is done carefully and professionally, to the same extent say as an adoption placement, that does not get rid of the overarching difficulty that to apply section 13(5) following an assessment results in no child being born. Section 13(5) might be described as 'a hammer to crack a nut' approach to child protection which is not apparent when the child welfare principle is applied in cases of abuse and neglect.

6.2 ART and Incest

There is one scenario which illustrates quite well the different issues which arise when considering the different factors - parental environment and pre-determined genetic make-up - upon which a right to procreative liberty might justifiably be interfered with. The current HFEA Code of Practice sets out rules on donor recruitment, assessment and screening which would prevent centres from performing treatment that involves mixing gametes of close relatives who are genetically related. A brother and sister seeking treatment together using their own gametes would be prevented from doing so. One justification for this would be grounded in the desire not to create children from a shallow gene pool who might be at greater risk of medical problems associated with in-

breeding. The other is that it would be contrary to the spirit, if not the actual letter, of the laws prohibiting incest.[2]

As was discussed in Chapter Two the State has for many years preceding the development of ART passed laws prohibiting incest. The question arises as to whether reproduction using ART between close family members can be objected to on the grounds that it amounts to incest. This thesis agrees with de Wert and others that:

> …first - or second-degree consanguineous Intrafamilial Medically Assisted Reproduction (IMAR) would be at odds with the spirit of laws and regulations forbidding consanguinity and incest and should therefore be rejected.[3]

Whilst this thesis has deliberately not made any arguments about whether genetic make-up should be taken into account in a welfare assessment, restricting its analysis to parental environment concerns, it does take the view that the Code of Practice prohibition on the mixing of gametes of close relatives may be argued to be a justified interference in the right to procreative liberty, given the increased risk to the child to be born of being born with an inherited disorder and the fact that it would be at odds with at least the spirit of laws prohibiting incest. As mentioned above there are some circumstances where a right to procreative liberty can be justifiably interfered with that do not weaken the central argument of the thesis.

However, the Code of Practice only prevents centres from performing treatment that involves *mixing* gametes of close relatives. If a brother and sister seek treatment whereby they used only the gametes of the brother and a donor egg to create an embryo to be implanted in the sister, should clinics refuse to treat them and if so on what grounds, as this would raise no issues of concern about the genetic make-up of the child and an increased risk of inherited disorders.

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[2] The criminal offence of incest is a prohibition of sexual intercourse between close relatives. This is of course not what is happening when IVF is used.

[3] Ibid., 509.

However, does the use of the brother's gametes and the sister's uterus to create a child go against the spirit of the laws prohibiting incest and harm the resulting child? This is a question which was asked in a case in France in 2001 where a 47-year-old woman became pregnant after treatment in the UK by using an egg from an anonymous donor and her brother's sperm. She had come to the UK for the procedure because French law did not allow treatment on post-menopausal women.[4] Chapter Two spent some time at the outset setting out the different definitions of a parent which the science of ART has created, such as a genetic, gestational and social mother, all of whom could be different people. So called intrafamilial ART can create a scenario whereby a sister agrees to act as a surrogate in a situation where her sister-in-law cannot conceive. In that scenario a child may be born with a genetic and social father and a gestational mother who are siblings, as well as a genetic and social mother who is married to the brother. It raises the question - should your aunt also be your mother? The other possible scenario is where a sister's egg and donor sperm are used to create an embryo which is then implanted into her sister-in-law, thereby giving rise to a situation where the genetic mother and social father of the child are siblings, and the child also has a gestational and social mother who is married to the brother. Such situations, it was been argued potentially put the welfare of the child to be born at risk. As de Wert and Others[5] have said:

> …risks…for the (future) child first and foremost regard psychosocial risks of growing up in the unconventional familial environment thus created. Relationships may be confusing for the child…The risk of identity problems of the child may increase in case of role confusion on the part of a collaborator wanting to take up part of the parental responsibilities.[6]

[4] The Guardian Newspaper Website, IVF to give woman a baby by brother, 27 August 2001, www.theguardian.com/uk/2001/aug/27/medicalscience.health (accessed 28 May 2015).
[5] ESHRE Task Force on Ethics and Law including G. de Wert, W. Dondorp, G. Pennings, F. Shenfield, P. Devroey, B. Tarlatzis, P. Barri, and K. Diedrich, Intrafamilial medically assisted reproduction, Human Reproduction, Vol.26, No.3 504–509, 2011.
[6] Ibid., 506.

However, where there is no mixing of genetic material between close family members, intrafamilial assisted reproduction is not sufficiently 'incest –like'[7] to justify prohibition. This thesis takes the view that fears about the potential psychological harm to the child are speculative and in any event would not lead to such significant harm that the harm of existence was outweighed by the benefit of existence. The 'need for a father' requirement was introduced largely because of fears about the impact on the child to be born in being raised within an unconventional familial environment. Just as that requirement has been removed because it created an unjustified interference in the right to procreative liberty, so to would preventing close family members from engaging in collaborative ART which does not involve the mixing of gametes. Speculative fears about the welfare of the child raised in an unconventional family unit are unjustified as a ground for restricting access to ART. This would also apply to families created by intrafamilial medically assisted reproduction which does not involve the gametes of people in prohibited consanguineous relationships.

As Wert and others have said:

> IMAR involving the mere semblance of first- or second-degree consanguinity may still raise concerns about incest. However, without further arguments establishing that these concerns refer to serious moral objections, providing assistance to such arrangements may well be justified.

The concerns which ART raises about children born in 'incest-like' circumstances highlight well the different factors which can and cannot justify interference in the right to procreative liberty. Parental environment, including being raised in an unconventional family unit, does not provide such justification because potential harm to the child is to a large extent speculative.

[7] Ibid.

6.3 A Right to Parent and a Right to Procreative Liberty

Alghrani and Harris are of the view that removing section 13(5) from the statute books does not preclude:

> ...the introduction of certain clear disqualifications from parenting whether through sexual reproduction, adoption, fostering or artificial reproductive technologies. Convicted paedophiles, serial child abusers, those with a history of recklessly abandoning children could be precluded from parenting (as opposed to producing offspring) as indeed they usually are. Alternatively, they could be subject to stringent review. This does not mean that we need the welfare provision, adoption agencies or parental licensing schemes to achieve this. In short, there is only one reliable criterion for inadequate parenting; it is the palpable demonstration of that inadequacy, in terms of cruelty, neglect or abuse of children.[8]

Alghrani and Harris are saying that no one should be precluded from reproduction on child welfare grounds but some should be precluded from parenting on child welfare grounds: that any assessment of the welfare of the child must wait until such time as the child is born. As was mentioned in Chapter One Alghrani and Harris have argued for a full repeal of section 13(5) on the basis that it amounts to a violation of a right to procreative liberty. They argue that post-birth checks are enough. This is the point being made in section 6.1, however, it is worth repeating as it is such a fundamental criticism of section 13(5) - that the legislation is simply unnecessary as part of a coherent child protection system. Further, Alghrani and Harris expand on the point made in section 6.1 by distinguishing a right to parent from a right to procreative liberty.

Alghrani and Harris also point out that there are good reasons for our reluctance to introduce a parental licensing system for all as suggested by La Follette and that:

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[8] A. Alghrani and J. Harris, Reproductive liberty: should the foundation of families be regulated?, 2006, Child and Family Law Quarterly, 191, 202.

> Some of these good reasons have to do with the inadequacy of speculative or prospective criteria about good parenting. More importantly they have to do with the importance and value that most people attach to the freedom to have children, coupled with our reluctance to place the comprehensive powers that licensing would involve in the hands of anyone at all, whether that person be some central authority or an individual doctor or social worker.

This thesis has not sought to argue that the child welfare principle applied to existing children is fundamentally flawed and ought to be abandoned. However Chapter Four did highlight some difficulties with its application, difficulties which this thesis argues are amplified when a child welfare assessment is being carried out at the pre-conception stage. It is the case that there are some question marks as to the adequacy of utilising prospective criteria about good parenting even where they are being used by the courts to determine issues regarding children in the family courts. However, despite these difficulties, the child welfare principle as applied to existing children can and does act as a means of protecting those at risk of significant harm. That does not mean however that this principle can therefore simply be transplanted by taking into account child welfare concerns at the pre-conception stage. This thesis has argued that section 13(5) as applied to children to be born amounts to an unjustified interference in a right to procreative liberty when the reason for refusing treatment is that a child may be born into a harmful parenting environment and that this unjustified interference has arisen as a result of a misapplication of the child welfare principle at too early a stage. The pervasive influence of the child welfare principle in family law, which this thesis summarised in Chapter Four, has enabled the introduction of section 13(5) to go largely unchallenged and unquestioned. The desire to send out a message that the State takes its duties to protect children from harm seriously has led politicians down a path where they have sought to apply the child welfare principle at an inappropriate time with the effect that it acts to unjustifiably infringe the procreative liberty of its citizens.

Chapter Four outlined the historical background to highlight the way in which the child welfare principle became and remained an established part of UK

law. Whilst not without its problems when being applied in the context of decisions affecting existing children, there can be little doubt that the child welfare principle is a very widely applied and highly regarded legal principle. However, as explained, what this thesis argues is that just because the child welfare principle can be applied in one area it does not mean it seamlessly transfers to another. The impact of the child welfare principle on access to ART is apparent from the continued requirements of section 13(5). This thesis argues that there has been a conflation of a right to procreative liberty with a right to parent which has led to the situation where we have a meaningless and ineffectual child welfare provision in the HFE Act 1990 which bears little conceptual relationship to the child welfare principle as articulated in the Children Act 1989 and Children (Scotland) Act 1995. What is meant by that is that circumstances which justify interference in a right to parent do not automatically provide like justification for interference in a right to procreative liberty.

In Chapter Five this thesis looked at the question of whether the parenting assessment carried out in adoption cases could be argued to be analogous to the exercise being carried out by infertility clinics when applying section 13(5). However, this thesis concludes that the adoption parenting assessment is not a valid comparator. There is a fundamental difference between the two, namely, that in adoption it is parent-child matching exercise which is being carried out. There is a child in existence whose needs are known and can be assessed in a very concrete way. The parents are not being assessed as suitable parents in a general sense but suitable parents for that particular child. What is being carried out when section 13(5) is applied is a generalised, speculative assessment of the ability of the patient(s) seeking assistance to ensure that the welfare of a future child, who is not at that point in existence, is safeguarded. The continued existence of section 13(5) in its current form says a great deal about the all-encompassing nature of the child welfare principle in law. Whilst this principle developed for very sound and laudable reasons in the family court context it has been expanded for reasons of political expediency into areas where its application is illogical.

Some may argue that allowing harm to happen rather than preventing it is ethically objectionable. This thesis takes the view that the child welfare principle as applied to living children does not require that harm be allowed to happen before action can be taken so is therefore robust enough to protect children as soon as they are born. As outlined in Chapter Four, a Local Authority in Scotland, for example, can apply for a child protection order removing the child from the care of the parent and only have to satisfy the Sheriff that the child *will be* treated or neglected in such a way that is *likely to* cause significant harm to the child. Actual harm does not have to befall an existing child before the State can intervene. The child welfare principle applied post-birth is in itself a preventative measure and does not have to be applied at an earlier pre-conception stage to prevent harm.

The most fundamental criticism I have made of section 13(5) in its present form is that what it requires clinics to engage in is essentially a meaningless exercise in gathering evidence to rebut a perfectly reasonable presumption that potential parents will be supportive parents. The requirement to gather this evidence is intrusive and whether what is then done with it is useful is highly questionable. This thesis concludes that all that can be done is for the clinic to engage in speculation as to what may or may not turn out to happen in the future. Further even if the parents were found seriously wanting once a child is born, then suitable child protection measures are in force to ensure that the child is not placed at risk of harm and these can be applied from the moment of birth. If Parliament feels it necessary to take into account the welfare of the child brought into existence by the application of ART services then there is no reason why this cannot be carried out at the post-birth stage. As it currently stands section 13(5) undermines the procreative liberty of patients seeking access to ART services and this thesis argues that it does little or nothing to ensure that the child to be born whose welfare it purports to take into account is protected from harm. Those who might argue that section 13(5) acts to prevent avoidable harm miss two crucial points, firstly, that the child welfare principle applied to an existing child is sufficient to prevent avoidable harm and secondly, that preventing a child from coming into existence may prevent avoidable harm but only by preventing the birth of a child. This creates conceptual and practical difficulties in assessing whether the parental

environment could be considered to be so harmful to a child that it is better that no child is able to be conceived by prospective parents. This has raised further issues.

6.4 The Interference with a Right to Procreative Liberty

A right to procreative liberty is founded upon the importance of procreative choice to an individual's own life plan, to their own sense of identity and meaning to life. In short the desire to have children is for some a very strong desire indeed and it was concluded in Chapter Two that it should not be undermined unless there is a very clear reason for doing so. Two aspects of procreation are of particular importance, firstly the basic biological imperative to pass on our genes to the next generation and secondly the desire to nurture and rear children. Evolutionists would argue that parents nurture and rear their children in order that the child can grow and pass their genes to the next generation and so on it goes. However, the nurturing and rearing of one's own children is likely to be seen by those making the procreative choice to conceive and raise children in far broader and deeper terms than that.

As discussed in Chapter Two there is a presumption in Western Liberal Democracies that people are free to act without interference from the State, unless the State has justifiable reasons for interfering. Justification for interference can be found if there is significant harm likely to be caused to others, where the definition of 'significant' relates to both the extent of the damage which might be caused and the immediacy of the threat. A right to procreative liberty as articulated in Chapter Two is of such fundamental importance that it should only be interfered with by the State in circumstances where not to do so would undeniably lead to significant harm being caused to others. The burden of showing that section 13(5) prevents significant harm being caused to children is on the legislators. Based on these propositions I would assert that patients seeking access to ART services should not have to enter into a parental ability assessment process to establish that they do not present a risk to a yet-to-be-born child. They should be free to make the choice to attempt to have children without having to satisfy an adequate

parent test. This is because procreative liberty should be the starting point, the presumption on which decisions about regulation of access to procreative treatments are based.

What is outlined in the preceding chapters of this thesis highlights that section 13(5) is an unjustified interference in the presumption of a right to procreative liberty because its application simply cannot identify a sufficiently serious level of real and immediate harm being caused to children on the basis of assessment of parental environment. At best section 13(5) might be able to identify in some extreme cases the potential for some future and speculative serious harm but this can be addressed sufficiently by the application of current child welfare measures that would be implemented once any child was born.

The right to respect for a person's right to procreative liberty is not an absolute right. There are and always have been certain situations, such as the prohibition against incest as discussed above, which have been seen as serving proper justification for the State to interfere with a right to procreative liberty. However, there is inadequate justification for a blanket requirement that every person seeking infertility treatment has to satisfy the clinic that the welfare of the future child will not be harmed by them. This is a degrading, insulting and overly-intrusive exercise which the State demands and cannot be justified on the basis of protecting a yet-to-be-born child. Further, even if there was strong evidence which pointed towards a potential risk of harm to a future child the question arises as to whether preventing that future child from coming into existence at all is the most appropriate way of ensuring that child is protected from harm.

The parental assessment which section 13(5) requires clinics to carry out is worrying because it has echoes of the practice of eugenics where certain people were judged to be unfit to parent. Whilst this thesis does not suggest that the aim of the legislation is to prevent specific groups of people from

having children, what is does do is allow others to make value judgements as to the fitness to parent of infertile individuals. It is clear that when this legislation was introduced certain politicians were happy to make value judgements based on no definitive evidence as to the fitness to parent of single women and homosexuals. A legislative provision which sought to require a parenting assessment at a pre-conception stage to apparently protect the welfare of a future child was misconceived from the beginning and should not have been introduced in 1990 in that form. It has been argued that the reasons behind its inclusion were in fact less to do with evidence based child welfare concerns and more to do with the Conservative government of the day looking to uphold 'traditional family values' and an antipathy towards single mothers and single-sex families, along with concerns about an apparent diminishing role of fathers in the upbringing of children. As the years have passed these prejudices and worries have diminished to a large extent, but that is not to say that given the continued existence of the legislation they have been eradicated entirely. The continuation of section 13(5) in its current form means that there is an ongoing risk that those tasked with carrying out these value judgements when taking into account the welfare of the child will be swayed by their own beliefs and prejudices about who and what makes a good parent.

The conclusion to this thesis is that the supportive parenting provision in relation to the child to be born, as set out at section 13(5) of the HFE Act 1990, represents unjustified State interference in the right to procreative liberty of UK citizens when used as part of a welfare of the child assessment The fundamental discrimination inherent in the treatment of people with fertility problems, together with the illogicality of assessing potential harm to a 'child' at the pre-conception stage, is essentially what renders section 13(5) in its current form unsuitable as a licensing condition for clinics to adhere to. This thesis proposes that section 13(5) should be amended and the next section will discuss what that amendment should be.

6.5 Amendment to Section 13(5)

In Chapter Three of the thesis the current position in relation to the regulation of ART was set out along with the history behind the regulatory process and introduction of the legislation. What was highlighted in Chapter Three is that the regulation of ART has been a process which has developed as views about the practice, scientific advances and societal attitudes have changed. This is not a process which has ended and this thesis takes the view that further amendment should be considered given the soundness of the argument that concerns about the welfare of a children to be born is not a justifiable reason for the parenting ability assessment.

It is clear that section 13(5) was introduced in the first instance as a consequence of an ideology which opposed the raising of children outwith two-parent, heterosexual families. The 'need for a father' consideration betrayed the true purpose of the clause. It was not introduced principally to protect the welfare of the child but to restrict access to ART services for those considered to be less than ideal parents. Whilst assertions were made that being born into a family without a father would be harmful to a child's welfare, these concerns were largely subjective and unsupported by the evidence. The default position for Parliament should have been that people are free to exercise their right to procreative liberty in whatever way they choose. However, because of an unease about the creation of alternative family units Parliament voted to pass legislation which set up a barrier to the exercise of free choice.

This thesis has not examined in detail the arguments that single parent or same sex parent families might be harmful to children because it has been argued that such claims have largely not been borne out by research. The negative attitudes towards single parent and same sex parents has faded into the background as the acceptance and recognition of alternative family units has grown and explicit provisions in the HFE Acts for different types of family unit with legal parenthood have been introduced. Further, the amendments introduced by the HFE Act 2008 to section 13(5) and the changes to the Code of

Practice, have altered the approach to be taken by licensed clinics in respect of assessment of potential parents. As was noted in Chapter One the presumption now is that people will be 'supportive parents' in the absence of 'reasonable cause for concern'. What this thesis takes from the earlier structure of section 13(5) and why it was set out in detail in Chapter Three is that its existence for 18 years highlights how the State can be driven to interfere with a right to procreative liberty for spurious reasons and also how legislation can be amended when attitudes change. There is no reason to assume that the remnants of section 13(5) which still require licenced clinics to take into account how supportive a parent a patient might be cannot be amended and the infertile allowed to make the decision to attempt to have genetically related children without undue interference in that decision based on the assessment of their fitness to parent.

What this thesis argues for is an amendment to section 13(5) which would see the current reference to supportive parenting in relation to the child to be born being removed. This thesis argues that the revised form that section 13(5) could take given the arguments put forward in this thesis is that:

> A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment, and the welfare of any other child who may be affected by the birth. Taking account of the welfare of any child who may be born as a result of the treatment shall not include any assessment of the parenting ability of the woman who is provided with treatment or anyone who is or may be deemed to be the legal parents of a child who may be born as a result of treatment.

The Code of Practice would also need to be amended so that factors to be taken into account during the assessment process do not include factors relating to the parental environment within which the child who might be born

as a result of ART is to be raised. Whilst this thesis does not necessarily support the retention of section 13(5) in any form, it has not been argued that the State does not have a mandate to take into account at the pre-conception stage the child to be born physical or mental health. If it was thought appropriate to retain section 13(5) at all, the criteria for assessing the potential impact upon the physical or mental health of the child to be born could also be further defined in statute or within the Code of Practice. This could encompass such factors as the risk to any child who may be born suffering from a serious medical condition, or the potential psychological harms on the child to be born of a pre-determined genetic make up. Arguments that the welfare implication for a child to be born utilising PGD are not sufficient to justify taking into account the welfare of the child to be born have been made elsewhere. This thesis has focused on the parental environment aspect of the child welfare assessment given its similarity to factors which are taken into account in abuse and neglect cases when the child welfare principle is applied.

This thesis has also not argued that the State does not have a mandate to take into account whether a existing child might be harmed by the birth of another child as a result of ART. This could also be considered further in the Statute or in the Code of Practice. There are unlikely to be many incidences where that could be shown to be to such an extent as to deny treatment, but one possible example might be parents who seek access to treatment when existing children are already in a state of neglect and the introduction of another child might reasonably be seen as increase the risk of yet more serious neglect. This is not the same as taking into account the welfare of the child to be born because the assessment of harm is far less speculative. There is actual evidence of a child suffering from significant harm and it is reasonable to assess that risk as being increased by the introduction of another child into the family. It would still prevent the birth of another child, but the ground for doing so would not be to preventing harm befalling a future child, but preventing significant harm to an existing child who has far greater rights and interests than a non-existent being. It should be pointed out however that this thesis does not argue *for* the retention of the existing child provision, merely that an argument cannot be made for its removal on the basis that it seeks to take into account the welfare

of a non-existent being. That said, fertile people with existing children do not have to have the welfare of that child taken into account prior to engaging in sexual intercourse with the aim of having a second child. The existing child provision can therefore be attacked on the grounds that it is discriminatory.

The UK Government Department of Health published a paper in March 2014 entitled Memorandum to the Health Committee: Post-Legislative Assessment of the Human Fertilisation and Embryology Act 2008.[9] In the section dealing with the Welfare of the Child Assessment the Memorandum states:

> The requirement for clinics to consider the welfare of any child that might be born as a result of treatment, or any existing child that might be affected by the birth, before making the offer of treatment has been a cornerstone of the 1990 Act and is retained by the 2008 Act amendments. This requirement was never intended to be a test of the patients' potential to be "good parents", as many have assumed. Rather, as treatment may result in a child that would otherwise not be brought into that environment, it was to examine whether there were any factors that might indicate that treatment would not be appropriate in that particular case. This is why the assessment has been retained.

This thesis takes the view that this statement is disingenuous. It has not just been assumed that section 13(5) is a test of the patients' potential to be good parents. It has been coherently argued by various commentators, and this thesis has reached the same conclusion in the chapters where it has been discussed, that it was intended and has been interpreted as doing just that. With the exception of medical welfare issues, how can an examination of 'factors that might indicate that treatment would not be appropriate in that

[9] At www.gov.uk/government/publications/human-fertilisation-and-embryology-act-2008-post-legislative-assessment (accessed 14 May 2014).

particular case' be carried out without testing the patients' potential to be good parents? It is abundantly clear that the distinction which the Department of Health seeks to draw is mere semantics which is no distinction at all in practice.

It is unfortunate that almost a decade later it is necessary to still be making the point that section 13(5) should be amended on the grounds set out in this thesis. The UK Government had the opportunity to amend or repeal the requirement in 2008 but instead found itself directed into a much narrower debate on the child's need for a father against a child's need for supportive parenting. In the 2014 memorandum they have stuck to their position that it is necessary without providing a coherent reason as to why. The possibility that the power to regulate ART might be devolved to the Scottish Parliament has been mooted recently.[10] It may be that the legislation in this area has to be looked at afresh in Scotland which would provide another opportunity to question whether patients seeking access to ART should have to undergo this parenting assessment. The matters raised in this thesis are still very much live issues which legislators should not shy away from tackling. As has been shown in the past the regulation of ART services has been a process not an event and it is hoped that this process will continue.

The suggested amendment of course does not deal with the difficulty which the term 'treatment services' poses for the legislation. As was discussed towards the end of Chapter Five the main difference between natural conception and assisted conception is that the assistance of a third party is required in the later. Section 13(5) does not even treat all third party assistance as justifying interference in reproductive choices. Fertility drugs are prescribed and operations performed without any regard having to be given to the welfare of the child who might be born. So why should IVF patients be subjected to such an assessment? Why should the welfare of any existing child of the family who

[10] See S. Hardbottle, Better Together: Why devolution of fertility legislation is not a good thing, Bionews, (24 October 2014) http://www.bionews.org.uk/page_462801.asp (accessed 5 July 2015).

may be affected by the birth be taken into account when IVF is provided but not when and operation to unblock fallopian tubes is provided? If the legislators wish to have legislation which is fair and consistent across the board then it is incumbent upon them to explain what is different about the treatment services which fall under the HFE Act 1990 and other treatments which do not. This thesis argues that there is no distinction to be drawn as far as child welfare issues are concerned. All these treatments aim to bring about a successful pregnancy and the birth of a child. The decision to seek to undergo the treatment required is a decision with goes to the heart of a right to procreative liberty. There is no justification for interfering with this right merely on the basis of the type of treatment given. This thesis argues that section 13(5) applies only to certain treatment services because what is involved is scientific work with genetic material and embryos which some argue have a special status. Whilst the treatment services which fall under section 13(5) may be distinguished in this way from other treatments, the distinction is not one which in anyway relates to the welfare of the child to be born.

This thesis has argued that the reason why section 13(5) was able to be introduced in the first place and why it remains in place today, despite the obvious logical difficulties which arise in protecting a child from harm by preventing that child from being brought into existence, is that it purports to act as a strong child welfare measure. This thesis argues that the UK Government are either blinded by or hiding behind the issue of child welfare in continuing to require licensed clinics to adhere to section 13(5). It would be a brave politician indeed who would stand up in the House of Commons or Scottish Parliament debating chamber and argue that child welfare concerns do not have to be taken into account.

6.6 Possible Impact on the Fertile

One of the reasons this thesis was embarked upon was due to a subjective awareness in my professional life as a solicitor with a Scottish local authority, who was tasked with applying to court to have children at risk removed from their parent(s), that social workers were frequently approaching the legal

department for advice about putting child protection measures in place during a woman's pregnancy. The legal advice was always the same - nothing could be done by way of application to the courts until such time as the child was born. However, given the availability of emergency child protection orders a child could be removed from the mother's care within hours of its birth. Very robust child protection measures exist. However, for some this is still not enough. One of the aims of this thesis was to highlight how the development of ART has provided the State with an opportunity to impinge upon the procreative liberty of individuals and couples seeking access to ART and to submit that there is always the potential there for the procreative choices of fertile people to be impinged upon in certain circumstances if the opportunity arose.

One reaction to the distressing incidences of child abuse and neglect of recent years has been to question whether or not a 'proven unfit mother' should have restrictions placed upon her procreative choice to have further children. An organisation originating in North Carolina and calling itself 'Project Prevention' has sought to address the problems associated with children born to drug addicted mothers,[11] by offering payment to the mother on the condition that she undergo a sterilisation operation or is fitted with a long-term contraceptive implant.[12] Project Prevention has recently established itself in the United Kingdom[13] and has been heavily criticised by drug addiction charities.[14] One of the principal criticisms is that this organisation offers money to vulnerable woman in exchange for them giving up their fundamental procreative rights.[15] Wolf describes the work of Project Prevention as 'a program that targets desperate women whose fundamental right to procreate is stripped away in exchange for a paltry, yet coercive, sum of money' which 'imposes a serious

[11] The medical term for these problems is known as Neonatal Abstinence Syndrome. The syndrome includes drug withdrawal symptoms at birth and possible developmental delay. There are of course also well-documented issues surrounding neglect of children born to drug-addicted mothers.

[12] See http://www.projectprevention.org (accessed 3 March 2012).

[13] The Daily Record, Mum's fury after being approached in the street and offered £200 to get sterilised, http://www.dailyrecord.co.uk/news/scottish-news/mums-fury-after-being-approached-1059660 (accessed 12 March 2012).

[14] See fn. 9 - Andrew Horne, the Director of Addaction described the practices of Project Prevention as 'morally reprehensible and repugnant'.

[15] A. B. Wolf, What Money Cannot Buy: A Legislative Response to C.R.A.C.K., University of Michigan Journal of Law Reform, 1999-2000, 33, 173.

limitation on individuals' and society's ability to assert fundamental claims to personhood'.[16] Project Prevention is by no means the only organisation to suggest that the procreative choice of fertile women who have failed in the past to safeguard the welfare of their children should be restricted. One Dutch MP recently proposed legislation which would allow courts to order a proven 'unfit mother' to receive a long-term contraceptive implant without her consent, thus preventing her from having more children whom she may place at risk of significant harm.[17] It would appear that the growing concern surrounding the welfare of children, particularly those children born to women with substance abuse problems, has led to the procreative liberty of these women to be curtailed in certain circumstances.

This thesis simply raises the question of the possible impact upon fertile individuals arising from the lack of respect for the right to procreative liberty of the infertile in passing because the way that the infertile are currently being treated by the State should act as a warning light for those who do not see the potential for the erosion of respect for a right to procreative liberty more generally. It is right to question the appropriateness of the child welfare principle in areas which are not concerned with making decisions about what is best for an existing child, but strays into areas relating to pregnancy, contraception and ART. Whilst to date the State has only felt able to place restrictions on access to ART, having done so it may make it easier to argue for restrictions to be placed on certain fertile individuals in an active sexual relationship - possibly because they will not satisfy the future child's need for supportive parenting. When the language of restriction on a fundamental right has already been adopted in one are and applied, it is often an easier step to apply it in other areas.

[16] Ibid., 175
[17] See http://www.marjovandijken.pvda.nl/ (accessed 3 March 2012).

6.7 Concluding Remarks

The aim of the thesis was to focus upon the parenting capability and environment aspects of section 13(5). The reason for doing so was because it is parental capability and environment questions that are invariably addressed by the courts when applying the child welfare principle in family law cases. Therefore, the impact of the child welfare principle upon questions surrounding access to ART is brought sharply into focus. There are numerous other child welfare concerns which this thesis has not touched upon to a significant extent such as the controversy surrounding 'designer babies', a term, Professor Stephen Wilkinson noted 'evokes thoughts of parents unhealthily obsessed with their child's appearance or who want to enhance their children to create...a kind of demigod race that will be taller, healthier [and] better-looking', or child welfare concerns in regards to sex selection of embryos prior to implantation and the impact this may have on the future child. As interesting as these areas of concern are, they are somewhat removed from the questions that confront family courts when deciding what course of action would be in the child's best interests. This thesis has added to the body of academic knowledge in this area by carrying out a thorough examination of how the development, growth and implementation of the child welfare principle as applied in family law has influenced, and continues to influence, the assessment of patients seeking access to ART, an assessment which in effect is seeking to explore whether or not the patient(s) would be in a position to fulfil their parental responsibilities towards the child to be born.

The bulk of the work analysing the difficulties which the implementation of section 13(5) creates was done prior to the amendments brought about by the HFE Act 2008. The focus prior to the amendments tended to be on the discriminatory nature of the requirement to take into account the child's 'need for a father'. This thesis has revisited the analysis of the appropriateness of section 13(5) since the removal of the 'need for a father' criteria which was roundly criticised as being discriminatory to single woman and lesbians. This thesis concludes that the discriminatory nature of section 13(5), whilst removed from single woman and lesbians specifically, still persists more

generally in the fact that section 13(5) imposes requirements on the infertile which are not asked of the fertile.

One thing that seems certain in the field of ART is that new techniques and methods to assist women to get pregnant or to ensure that a child is born free from genetic disease will continue to be developed. It also seems likely that as each new technique is developed a new ethical controversy will arise. The very latest technique to make the news is womb transplantation where donated wombs of living women have been used to assist woman to get pregnant.[18] Academics have published a paper on the implications of womb transplantation for post-operative male to female transsexuals becoming parents and the potential child welfare implications.[19] The rare studies which have looked the welfare of children show that such children do not fare any less well than children reared in other family units.[20] Even so one can postulate whether or not transsexuals might be denied access to ART on child welfare grounds such as 'any other aspects of your life or medical history which may pose a risk of serious harm to any child you might have'.

It seems unlikely then that the questions and controversies raised in this thesis will disappear anytime soon. It is all the more important that the UK reassesses the way in which patients' procreative choices are respected when they seek access to treatment. Currently the reference to 'the need for supportive parenting' and the factors which the treating clinic are advised by the HFEA in the Code of Practice to take into account present significant issues for proper respect for a right to procreative liberty. There are serious question marks hanging over section 13(5) surrounding its fairness in terms of

[18] The Guardian, Four women given pioneering womb transplants impregnated via IVF, 3 March 2014 http://www.theguardian.com/society/2014/mar/03/women-pioneering-womb-transplants-impregnated-ivf (accessed on 19 March 2014).

[19] S. McGuinness and A. Alghrani, Gender and Parenthood: The Case for Realignment, Medical Law Review, 16, Summer 2008, pp. 261–283.

[20] R. Green, 'Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents' (1978) 135 American Journal of Psychiatry 692–697; R. Green, 'Transsexuals' Children' (1998) 2 The International Journal of Transgenderism. http://www.symposium.com//ijt/ijtc0601.htm (accessed on 13 August 2015).

discrimination, proportionality as a child welfare measure and its meaningfulness.

Whilst the State's mandate to protect children from harm is a vitally important aspect of our society and can justifiably be exercised in regard to a child who is at risk of harm from parental abuse or neglect, it can not be justifiably exercised in regard to a future yet-to-be-conceived 'child' whose welfare it is suspected might be at risk from parental abuse or neglect and where the 'child protection measure' to prevent that child's existence entirely. That is why this thesis calls for the amendment of section 13(5) to remove any reference to 'the need for supportive parents' and significant changes to the Code of Practice removing parental environment factors as valid considerations in determining whether or not patients should be provided with access to ART. Such a move would see the right to procreative liberty of the infertile being accorded the same level of respect that is enjoyed by the fertile.

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