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ARTIFICIAL REPRODUCTION, THE 'WELFARE PRINCIPLE', AND THE COMMON GOOD

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This article challenges the view most recently expounded by Emily Jackson that 'decisional privacy' ought to be respected in the realm of artificial reproduction (AR). On this view, it is considered an unjust infringement of individual liberty for the state to interfere with individual or group freedom artificially to produce a child. It is our contention that a proper evaluation of AR and of the relevance of welfare will be sensitive not only to the rights of 'commissioning parties' to AR but also to public policy considerations. We argue that AR has implications for the common good, by involving matters of human reproduction, kinship, race, parenthood and identity. In this paper we challenge presuppositions concerning decisional privacy. We examine the essential commodification of human life implicit in AR and the systematicity that makes this possible. We address the objection that it is an ethically neutral way of having children and consider the problem of 'existential debt'. After examining objections to the thesis that AR is illegitimate for reasons of public policy and the common good, we return to the issue of decisional privacy in the light of considerations concerning the legitimate role of the state in matters affecting human reproduction.

It is becoming increasingly common to discover theorists championing the view that 'decisional privacy' ought to be respected in questions of artificial reproduction (AR).[1] It is considered to be an unjust infringement

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[1] E. Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 MLR 176–203; J.A. Robertson, 'Human Cloning and the Challenge of Regulation' (1998) 339 *New England Journal of Medicine* 119–22 at 120, and 'Liberty, Identity, and Human Cloning' (1998) 76 *Texas Law Review* 1371–456 at 1389ff; J. Harris, 'Rights and Reproductive Choice' in J. Harris and S. Holm (eds), *The Future of*

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of individual liberty for the state, in the words of Emily Jackson, 'to ensure that prospective patients are fit people to bring a child into the world prior to acceptance onto an infertility clinic's treatment programme'.[2] Even the minimal child welfare regulations embodied in the Human Fertilisation and Embryology Act have come under fire from those who believe that the freedom artificially to produce a child is essentially a private contract between the infertile commissioning parties and their technical providers. Such contracts are implicitly regarded as insulated from broader public policy considerations, with perhaps the exception of those relating to health care rationing. Accordingly, 'child welfare filters' have been criticised as 'disingenuous and illegitimate'[3] at best, and 'incoherent and essentially meaningless'[4] at worst.

Even more problematically for the legislative framework governing artificial reproduction, both critics and supporters of AR see that framework as flawed and in need of major revision. For example, the House of Commons Science and Technology Committee, in its recent report *Inquiry into Human Reproductive Technologies and the Law*,[5] has asserted:

> The justification for the extent of the regulatory intervention which currently exists was appropriate to a time when the outcome of reproductive decisions in assisted reproduction was unknown and the state arguably had a legitimate interest in policing this area of medical practice. However, the evidence now suggests that the scale of the intrusion into the private choices of individuals seeking to have a family can no longer be justified.[6]

This attitude to the regulatory framework led the committee, in the teeth of a vigorous dissent from half of its members, to make some of the most extreme recommendations in the field of biotechnology ever made by a

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Human Reproduction: Ethics, Choice, and Regulation (Clarendon Press 1998) at 5–37; R. Dworkin, *Life's Dominion* (HarperCollins 1993); J. Savulescu, 'Deaf Lesbians, "Designer Disability" and the Future of Medicine' (2002) 32 BMJ 771–3. (Some of the writers frame the issue in terms of decisional 'liberty' rather than privacy, though the ethical thrust is the same.)

2 Jackson, *ibid.* at 177.

3 *Op.cit.*

4 *Ibid.* at 177, 178.

5 This can be viewed at http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/491/49102.htm (accessed 13.4.05). It is the Eighth Special Report of Session 2004–5. The much longer accompanying report, *Human Reproductive Technologies and the Law*, is the Fifth Report of Session 2004–5; it can be viewed at http://www.publications.parliament.uk/pa/cm200405/cmselect/cmsctech/7/702.htm.

6 Formal Minutes (23 March 2005) of the House of Commons Science and Technology Committee report, *Inquiry into Human Reproductive Technologies and the Law*, Annex A, p. 6.

public body in the UK, in favour of such practices as cloning, sex selection and the creation of animal-human hybrids.

We submit that it is not surprising that such extreme recommendations should ultimately emerge from the conceptual framework embodied by the regime of the Human Fertilisation and Embryology Act. Section 13(5) states: '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.' Our contention in this paper is that the welfare principle is devoid of any normative context specifying just what a child's welfare consists in.[7] As a result, Emily Jackson's proposal that section 13(5) be done away with leaves the door open to just the sorts of practice the committee recommended. Furthermore, we believe that the lack of any surrounding conception of the good of society—the common good—or of human dignity and the dignity of reproduction in particular, renders the entire regulatory framework open to virtual hijack by those who believe that such ill-defined rights as 'decisional privacy' and 'procreative autonomy' militate against the very idea of a welfare principle in the first place. Accordingly, such recommendations as those of the Commons committee, and of many bioethicists, are an inevitability.

It may be that Jackson would not advocate kinds of biotechnological practice such as cloning to produce a child, sex selection, or hybridisation. If so, we submit that she must show how eliminating the welfare principle leaves intact a legal framework that would stop them from becoming a reality. On the other hand, if she does implicitly see nothing wrong with these things, we claim that they are undoubtedly cases of practices that are, to use the language of the United Nations in connection with cloning, contrary to human dignity.[8] Moreover, such practices are inimical to the common good, including family life and the natural bonds of kinship and identity that are at the heart of a well-functioning society.

The liberal critique of child welfare provisions in the legislation is based on a number of principles and arguments which require separate evaluation. There are legitimate general principles against state interference in reproductive decision-making; these derive both from anti-eugenicist considerations and from 'the right of men and women

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[7] Apart from reference in s. 13(5) to 'the need [of that child] for a father', which is vague as between biological and social relationships.

[8] United Nations General Assembly, Declaration on Human Cloning, 8 March 2005. See also UNESCO, Universal Declaration on the Human Genome and Human Rights 1997, article 11: 'Practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted.' The General Assembly declaration is broader than UNESCO's, since on its face so-called 'therapeutic cloning' (cloning for research) is also declared wrongful.

of marriageable age . . . to marry and to found a family'.[9] There are also persuasive anti-utilitarian arguments against the idea that it is proper to undertake a cost-benefit analysis of the morality of the decision to produce a child. More doubtful, however, are what we might call arguments based on the principle of the 'existential indebtedness' of the child[10] and the notion that the method and system of reproduction do not themselves have any moral significance for the child or society.

It is our contention that a proper evaluation of artificial reproduction and of the relevance of welfare will be sensitive not only to the rights of 'commissioning parties' to AR but also to public policy considerations. One such consideration will be the way in which AR fundamentally alters the way our species reproduces; this in turn will have implications for the common good as well as for the welfare of AR offspring. In this paper we first set out the central ethical considerations that both bear on artificial reproduction as well as challenge presuppositions concerning decisional privacy. Secondly, we examine the essential commodification of human life implicit in AR and the systematicity that makes this possible. Thirdly, we address the charge that AR does not involve the infliction of harm upon the child and is therefore an ethically neutral way of having children. Fourthly, we then consider the problem of 'existential debt'. Fifthly, we examine a variety of objections to the thesis that AR is illegitimate for reasons of public policy and the common good. Finally, we return to the issue of decisional privacy in the light of considerations concerning the legitimate role of the state in matters affecting human reproduction.

II. BEYOND DECISIONAL PRIVACY

It is commonly assumed that concepts of autonomy and decisional privacy are paramount in discussions of actions that appear on their face to be non-harmful. This assumption is endemic in the liberal tradition stemming from John Stuart Mill,[11] with his famous distinction between self-regarding and other-regarding behaviour, and illustrated latterly in the Hart-Devlin debate on state interference in private morality.[12] More specifically, the modern concern with autonomy has matters of sexual morality at its core. Hence it has come to be widely supposed that all issues of family life and reproductive activity are similarly to be

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[9] European Convention on Human Rights, Article 12; see Schedule 1 of the Human Rights Act 1998 (UK).

[10] We owe the term 'existential indebtedness' to Rupert Rushbrooke. See further n. 38.

[11] In his classic essay *On Liberty*.

[12] P. Devlin, *The Enforcement of Morals* (Oxford University Press 1965); H.L.A. Hart, *Law, Liberty and Morality* (Oxford University Press 1963).

characterised as coming within the sphere of the self-regarding, and hence as prima facie immune from restrictions deriving from consideration of the common good.

The modern liberal elevation of autonomy might be thought to be beyond all dispute. Even brief reflection on broader historical and cultural conditions, however, should at the very least weaken autonomy's privileged status within liberal society. It would appear anomalous now to most societies outside the Western liberal tradition, let alone to most societies that have existed throughout history, to assume that the mere characterisation of an activity as one that touches upon reproduction or family life in general is sufficient to immunise it against public scrutiny informed by the common good. For instance, reproduction and the raising of a family might be thought narrowly to concern only the parties to the contract and their familiars. However, it has long been the case that societies have established a network of taboos around marriage and other activities likely to lead to the generation of children.[13] 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.

The point we are making here is not an empirical one. By reflecting on the many ways in which autonomy is restricted in other societies (not to mention our own), we should be prompted to reflect upon the underlying normative principles with which autonomy must be consistent in order for our most basic, reflective moral attitudes to be made plausible. To consider the way in which a given moral value such as autonomy has been historically and culturally conditioned is not to embrace relativism; it is merely a starting point for enquiry into the objective principles governing any kind of recognisably human society.

There is a general jurisprudential principle to which we wish to appeal here: namely, that certain means are inherently problematic from the moral point of view even if the end sought to be attained is socially desirable or morally indifferent, let alone intrinsically wrong. In the examples mentioned above, it is the means of reproduction that are hedged by social and legal taboos because of their likely effect on children generated by those means. And even in contemporary liberal

[13] See *e.g.* the Code of Hammurabi (Babylon, 18th century BC) and the Old and New Testaments (Hebrew and Christian Law) on adultery, homosexuality and other offences, Hindu legal condemnation of adultery, Roman laws against incest, and so on.

societies, practices such as 'reproductive' cloning are still considered an unacceptable means of generating children.[14] Few would agree, for example, that a man who wished to clone himself several hundred times would possess a right to decisional privacy that trumped any public policy considerations touching upon the legitimacy of certain means of reproduction. (Call this the case of the Multiple Cloner.) Again, few would agree that a man who wished to impregnate hundreds of fertile women (albeit with their consent) should be permitted to generate a legion of scattered blood descendants. (Call this the case of the Profligate Parent.) Even more would we recoil ethically from the prospect of a commissioning party enjoying decisional privacy to produce an animal-human hybrid for whatever purpose. (Call this the case of the Hybridiser.)

There are a number of concerns about such cases, including the deliberate yet avoidable nature of the enterprise, the harm to the offspring, the secrecy attendant upon such activities, and their potentially systematic or institutionalised nature. We return to these later. The central point we wish to raise is that such cases reveal that it is vital to go beyond decisional privacy in any adequate analysis of what is permissible. Accordingly, it is mistaken to claim that the kinds of legitimate ground for refusing a request for privately funded infertility treatment are limited to those relating to the ability of the commissioning parties to give consent to treatment. Emily Jackson, for example, writes:

> It is clearly possible to imagine circumstances when a doctor's ethical responsibility might prompt her to refuse a request for privately funded infertility treatment. Obvious examples would be if the would-be patient was herself a child or was otherwise incapable of giving a valid consent to medical treatment.[15]

Jackson nowhere appears to recognise that the doctor's ethical responsibility should encompass the sorts of consideration raised by the cases of the Multiple Cloner, the Profligate Parent, or the Hybridiser. Consent and decisional privacy are simply not the determining factors in judgments about the legitimacy of artificial reproduction. Moreover, once it is recognised that there are legitimate constraints (going beyond consent and decisional privacy) on decisions to supply the demands of

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[14] See, for instance, the recent vote by the European Parliament in favour of 'a universal and specific ban at the level of the United Nations on the cloning of human beings at all stages of formation and development.' (Report on the European Commission's Communication on *Life Sciences and Biotechnology: A Strategy for Europe*; consultation paper, voted 21 November 2002.)

[15] Jackson, *op.cit.* at 183.

commissioning parties, the way is open to a *general* critique of AR that takes into account a range of moral criteria.

III. COMMODITY AND SYSTEM

One of the factors underlying the anxiety that even contemporary liberal societies continue to show towards cases such as those of the Multiple Cloner, the Profligate Parent, and the Hybridiser, is a concern over the *calculated and systematic* disregard by the gamete suppliers for the potential harm to which their activities give rise. On the assumption that AR in general is a source of harm—a controversial question we will address later—the point about calculation and systematicity is that it is a harm which is freely chosen and hence avoidable. This is arguably not the case with adoption, where typically this practice is a damage-limitation exercise imposed upon the natural parents as a result of such situations as death, illness, or other circumstances beyond their control. There is a fundamental distinction in both legal and moral theory between what one does and what happens to one; between creating a problem and a problem's happening (with the resultant need to react to it by, for instance, minimising the damage to which it gives rise). Although this distinction is self-evident, it is commonly lost sight of in debates about AR. One of the reasons adoption is condoned at all is that it is typically an undesired, unavoidable response to a difficult situation.

Social attitudes would justifiably be quite different, however, were an entrepreneur to set about establishing an Offspring Warehouse where children were regularly created in order that they be given away (let alone sold) for adoption. What is important here is not whether, as a matter of empirical fact, a majority in society would approve of an Offspring Warehouse. What matters is that if we are to hold onto the view that such an enterprise would offend against morality, we had better base it on the devaluation of human life inherent in it. It is one thing to allow adoption in order to minimise harm; it is another altogether to create an institution that traffics in human life (whether money is exchanged or not), where such a practice is not only harmful but intrinsically undermining of human dignity. What it means for human dignity to be undermined in cases such as this will become clearer as our discussion progresses.

The distinction between what an agent chooses to do and what merely happens to a person is borne out in both criminal and civil law. To take a simple example, there is a world of juridical and moral difference between mere death and homicide. The doctrine of *novus actus interveniens*, recognised across all branches of law, is testimony to the centrality of agency in questions of culpability. Acts of God, unforeseeable acts of third parties, and deviant causal chains can all militate against the presence of agency and of relevant legal causation.

Systematicity and institutionalisation, however, are an aggravating factor in the willed causation of harm. To take an extreme example, the jurisprudence of the Nuremberg Trials and the subsequent development of the international law on genocide demonstrate that intentional killing merits special legal condemnation when it takes place within a systematic programme involving complicity across a wide range of people and institutions. It might be objected, however, that there is a feature of AR that prevents its being neatly placed within the category of wrongful and systematic infliction of harm, namely that the harm is merely foreseen rather than intended. Nevertheless, it is clear both from the Nuremberg Trials and from such cases of institutionalised harm as that of slavery, that it is not an essential note of the law's condemnation that the systematic harm done be always intended. In the cases of Nazi persecution and of slavery, although much of the harm done was intentional, much was also the foreseen side effect of other actions (such as disease caused by overcrowding, damage to the family relations of slaves caused by enforced separation, and so on).

Of critical importance to the concept of systematicity in AR, however, is the inherent commodification implied in its very artificiality. The issue of commodification has been occasionally explored in various places,[16] but has not, in our opinion, been emphasised nearly enough. Commodification may be broadly defined as the conversion of a thing, process, or activity into an object of commercial transaction. Some things are the proper objects of commercial transaction, others are not: for instance, trafficking in human beings (slavery, child prostitution, and so on) is not to be thought of as a legitimate commercial enterprise. Similarly, the creation of human beings for 'spare parts' would be regarded with abhorrence by most people. There is increasing concern about the patenting (and hence commodification) of life forms,[17] and the sale of bodily organs continues to cause moral disquiet.[18]

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[16] See *e.g.* L.R. Kass, 'The Wisdom of Repugnance', *The New Republic* (2 June 1997) 17–26; also L.R. Kass and J.Q. Wilson, *The Ethics of Human Cloning* (American Enterprise Institute Press 1998); F. Bowring, *Science, Seeds, and Cyborgs: Biotechnology and the Appropriation of Life* (Verso 2003); J. Rifkin, *The Biotech Century: Harnessing the Gene and Remaking the World* (Jeremy P. Tarcher/Putnam 1998).

[17] See *e.g.* M.-W. Ho, 'Why Biotech Patents Are Patently Absurd: Scientific Briefing on TRIPs and Related Issues', *Institute of Science in Society-Third World Network Report 2001*, at http://www.i-sis.org.uk/trips2.php; M. Khor, 'A Worldwide Fight against Biopiracy and Patents on Life', Third World Newtork article at http://www.twnside.org.sg/title/pat-ch.htm; G. Monbiot, 'Science with Scruples', Amnesty Lecture 1997, at http://www.monbiot.com/archives/1997/01/01/science-with-scruples/. (All articles accessed 5.5.05.)

[18] See *e.g.* the human traffic in the organs of executed prisoners in China (for a detailed report see D. Kram, 'Illegal Human Organ Trade from Executed Prisoners in China' (2001) 11(2) *Trade and Environment Database Case Studies* at http://www.american.edu/TED/

A standard liberal response to this objection is that what we are effectively criticising is not commodification per se, but the causing of harm or the violation of autonomy. Yet not all of the commodified practices to which the above considerations apply need do either. Child prostitution, for instance, may not violate autonomy if the child is a willing participant, perhaps bribed or otherwise provided for materially. It is of no use to reply that what would be violated in such a case is *informed* consent, because the child may well be too young to grasp all the relevant information. Nor might there be any harm in the practice, if we use the restrictive notion of harm current in liberal thinking. (We will have more to say about this in the next section.) Likewise, a slave may be both willing and content in her current state, but that does not make justification of slavery any easier in such a case. What all sides of the debate will agree on is that even the contented and willing slave suffers a debasement of her human dignity, even though there may be no occurrent pain or distress. There are, we would submit, far more categories of moral wrong (of a type that the law should recognise) than infliction of harm and violation of autonomy. Acts, practices and institutions may undermine equality of dignity,[19] self-respect and respect for others, solidarity between the strong and the weak, and the general flourishing of people in their individual and social pursuits. Yet it is possible for such undermining to occur without anyone's violating autonomy or causing measurable, quantifiable harm.

One of the concerns about the commodification of activities and things such as those just mentioned is that an essential feature of commodification is the creation of objects of ownership. A commodity is essentially

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prisonorgans.htm [accessed 6.4.05]); the sale of bodily organs by the poor in developing countries (see the resources at http://www.vachss.com/help_text/organ_trafficking.html [accessed 6.4.05]); unease caused by campaigns to legalise the trade in organs in Western countries (see the Policy and Ethics statement of the Transplantation Society, at http://www.transplantation-soc.org/policy.php [accessed 6.4.05]). At the time of writing, section 1 of the Human Organ Transplants Act 1989 (UK) prohibits the sale or solicitation of organs within the country; the same is true for Brazil (1997) and South Africa (1983), and organ sales are illegal in most of India. (In addition, the Human Tissue Act 2004 (UK) will continue that ban and closely regulate the storage, use, and disposal of human organs in the wake of scandals at children's and other hospitals involving the retention and use of such material without consent.)

[19] 'All human beings are born free and equal in dignity and rights' (Universal Declaration of Human Rights, Article 1); 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment' (European Convention on Human Rights, Article 3, incorporated into the Human Rights Act 1998 (UK)). Yet a form of treatment can be degrading without the victims' feeling or thinking it is degrading, or suffering any actual distress thereby.

property and as such has, *inter alia*, the following characteristics: it is capable of alienation, *e.g.* sale or transfer; of use purely as a means to an end; of modification at the will of the owner; and, ultimately, of destruction. It is true, of course, that anyone who works for another commodifies his labour. But commodification of labour and of human life are radically different practices. It might be replied that, at least when it comes to embryos, fetuses, and young children, we are no more dealing with persons—and the inherent dignity they possess—than when we deal with labour, services, or artefacts. This view of human life and development is, to say the least, highly questionable.[20]

The application of concepts of property to human beings is incompatible with the status of the *homo liber et legalis* of the common law; hence the common law's condemnation of slavery, as explained by Blackstone:

> [T]his spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a Negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* a freeman.[21]
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> I have formerly observed that pure and proper slavery does not, nay cannot, subsist in England; such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where.[22]

The essential point, namely that slavery involves an 'absolute and unlimited power . . . over the life and fortune of the slave' carries over to other cases of commodification of human life in whole or in part. By 'unlimited', we do not mean 'unregulated'. Even where slavery has been legal it has usually been regulated, for example, by laws against mistreatment of slaves. Similarly, commercial transactions involving body parts might be regulated, just as the buying and selling of houses or

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[20] There is no space to list here, let alone discuss, the literature on 'personhood' and 'personism' in modern bioethics and medical law. But for a sample, see: D.S. Oderberg, *Moral Theory* (Blackwell 2000), ch. 4, and *Applied Ethics* (Blackwell 2000), ch. 1; J. Teichman, *Social Ethics* (Blackwell 1996), Part 2; J.A. Laing, 'Innocence and Consequentialism: Inconsistency, Equivocation and Contradiction in the Philosophy of Peter Singer' in D.S. Oderberg and J.A. Laing (eds), *Human Lives: Critical Essays on Consequentialist Bioethics* (Macmillan 1997) at 196–224; D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press 2002).

[21] Blackstone, *Commentaries on the Laws of England*, Book 1, Ch. 1, 'Of the Absolute Rights of Individuals'.

[22] Ibid., Book 1, Ch. 14, 'Of Master and Servant'.

cars is regulated. The concept of unlimitedness concerns the fact that commodity owners are free to create or not to create this or that commodity; free to sell or transfer and free not to; free to employ the commodity for any purpose subject to law; and free to destroy the commodity. The sort of dominion bound up with the commodification of human life itself creates improper relations of power between owner and 'human product' since it introduces a whole range of variables of control that would otherwise be unavailable to one human being over another, including those that touch the most intimate parts of a person's life. In the case of assisted reproduction by means of IVF, for example, the control extends not just to the lives of human embryos but to fertility itself.[23] By ceding control of one's fertility to an expert who may or may not himself be part of a larger commercial enterprise, one cedes control over when, where, and in what quantity, one might become a parent.

In effect commodification takes out of the private sphere, and puts into the public sphere, a large part of the process of reproduction itself. By turning the most intimate aspects of human activity into essentially public, commercial processes supervised from beginning to end by third parties, one thereby cedes dominion of one's character as parent. In AR, the act of becoming a parent is founded upon the assumption that the freezing, mass storage, experimentation upon, quality control and destruction of particular parents' offspring is a legitimate technological extension of natural methods of reproduction. It is somewhat surprising, therefore, that advocates of 'decisional privacy' have not been more sensitive to the extent to which AR removes reproduction from the realm of the private and the intimate and sets it in a context of third party oversight and control. Cases that highlight the sort of control that is exercised include: those in which embryos or gametes are mixed up so that, for instance, a child of one race is born to commissioning parties of a different race (on the assumption this was not a desired outcome);[24] those in which one party separates from the other and a dispute ensues over 'ownership' of the embryos due to their

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[23] See R. Rowland, *Living Laboratories: Women and Reproductive Technologies* (Indiana University Press 1992).

[24] Embryologist Dr Sammy Lee has recently written that mix-ups are a regular feature of clinical practice, that commissioning parties are sometimes kept in ignorance of this fact and further, that mix-ups are occasionally deliberate, for instance so that a 'deserving' couple be provided with a child: *BBC News Online*, 24 July 2002; *Sunday Telegraph*, 10 November 2002. For a case involving the birth of black children to white parents, see: *Leeds Teaching Hospitals N.H.S. Trust* v. *Mr A, Mrs A* [2003] 1 F.L.R. 1091, [2003] E.W.H.C. (Q.B.) 259.

being in cold storage;[25] and after the case of Diane Blood,[26] it is possible for a man to become a father to live-born children decades after his death, a situation that could not arise without the technical power exercised by the fertility industry.

Given the use in AR of commercial and technological methods such as mass storage, quality control, and export,[27] which are appropriate to the treatment of products rather than of human beings, a natural consequence is alienation on the part of a number of groups associated with the production process. First, gamete donors are *ipso facto* alienated—physically, emotionally, and financially—from their blood offspring, precisely because the gamete donor's role in the process is *only* one of supplier of essential ingredients. It is not surprising, therefore (a matter to which we will return in the next section), that people conceived of donor gametes are commonly asking for information about their biological parents, in some cases even resorting to the courts to secure the release of that information.[28] Secondly, surrogate mothers

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[25] See *Evans* v. *Amicus Healthcare Ltd (Secretary of State and another intervening)* [2004] E.W.C.A. Civ. 727, [2004] 3 All E.R. 1025, where the Court of Appeal upheld the High Court decision requiring continuing consent under the HFEA Act for Natalie Evans to be implanted with stored embryos conceived with gametes from her former partner.

[26] *R* v. *Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 All E.R. 687, [1997] 2 W.L.R. 806, C.A.

[27] For example, Ole Schou is chief of Danish sperm bank, Cryos International Sperm Bank Ltd: 'Cryos dominates the Scandinavian market from its headquarters in Aarhus, Denmark. In the early 1990s, the country began looking abroad for ways to expand its business and now exports to 25 countries, including Australia, Eastern Europe [sic], and the US. It markets three grades of sperm, including 'Extra' grade, which contains twice as many sperm as the standard grade and exhibits the highest levels of motility, a measure of sperm's ability to reach its target.' (P. Zachary, *Wall Street Journal*, 6 January 2000.)

[28] An action in the High Court was recently undertaken in which a woman and a six-year-old child born from donor insemination argued for the right to know more about their biological fathers. Scott Baker J. ruled that Article 8 of the European Convention on Human Rights, providing a legal right to respect for private and family life, also applied to those conceived by artificial insemination by donor. He said that Article 8 incorporated the concept of personal identity, which included a person's origins and the opportunity to understand them. It was, he added, entirely understandable that children conceived by artificial insemination by donor should wish to know about their origins: *R (on the application of Rose)* v. *Secretary of State for Health*; also known as *Rose* v. *Secretary of State for Health* [2002] 2 F.L.R. 962, [2002] E.W.H.C. (Admin.) 1593.

Baroness Warnock, one of the architects of the Human Fertilisation and Embryology Act 1990 (UK), has herself recently recommended that the law be changed to allow AR children to trace their biological fathers, saying: 'It's absolutely deplorable for a child not to know what other children know' (reported by the BBC, 14 May 2002). In response to pressure exerted by the Joanna Rose case the government agreed to the setting up of an identity register. The regulations now provide that donor-conceived

are, by the specific nature of their role in the production process, alienated from their birth offspring. Thirdly, IVF technologists are alienated from the human life they help to create, by a process that involves: quality control of their products by means of 'genetic screening' and other techniques designed to identify 'defects'; destruction of 'defective products'; cryopreservation and mass storage of 'excess stock'; experimentation on excess stock, *i.e.* on individuals who are the siblings of those fortunate enough to be born. Fourthly, commissioning parties are alienated by the process of AR: they remain infertile—hence there is no *treatment* of the infertility. Instead, a child is manufactured to order, circumventing the real biological problem at the heart of the whole enterprise. Compare this to treatment for unblocking fallopian tubes. This is a case of therapy; it does not involve the ceding of dominion over the process of reproduction itself. It is precisely this cession that affects matters such as maternity and paternity, medical inheritance, identity, origin, and the like. An objection such as the one from commodification does not touch a therapeutic treatment designed to repair fertility rather than replace it.

Further, however, is the fact that increasing numbers of commissioning parties are providing design specifications for their future offspring: not only may sex selection be requested, but prospective AR parents seek to choose the genetic characteristics of their commissioned offspring. (In some cases, tissue-typing has even been requested.[29]) Use of terms such as 'manufacture' and 'design specifications' might seem purely rhetorical, but in fact they are appropriate descriptions of the AR process. Without the sorts of control just mentioned, the AR service agreement itself cannot be fulfilled. To refer to processes of manufacture is not to indulge in emotive language but to use the concepts that give an accurate description of what (we believe) makes AR the kind of enterprise it is.[30]

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children will be able to access the identity of their donor and 'information about their genetic origins' when they reach the age of 18. However, since the regulations only apply to people who donate after 1 April 2005, Ms Rose and others like her are not entitled to receive this information. She discovered, in the course of the hearing, that records relating to her conception had been destroyed.

[29] Recently the House of Lords has upheld a Court of Appeal ruling that reversed the High Court judgment rejecting tissue-typing to produce a so-called 'saviour sibling' for a child with beta thalassaemia, an inherited disease; *R (on the application of Quintavalle* v. *Human Fertilization and Embryology Authority* [2005] U.K.H.L. 28.

[30] Note that bioethicists who adopt a very different position from ours are content to refer to the human embryo and/or the foetus as a 'lump of cells', or as 'not really a person', sometimes even 'not really a human being': such ways of talking are a commonplace in the literature. (See, *e.g.* the writings of P. Singer, J. Harris and M. Tooley.) Are such phrases merely emotive or rhetorical? To an opponent, of course, they may seem so, indeed they are seen as dehumanising expressions concealing the reality of the situation.

The same goes for the concept of alienation. The sense in which the various parties to AR are alienated from the human beings to which they give life is not merely that of commercial distance or donation. When an artist or craftsman sells his creative work (or when a scholar 'sells' her brain processes, as some might contend), they become alienated from it in a narrow commercial sense. But they have no duty towards their work. When it comes to human offspring, though, there are natural relations of paternity, kinship and identity, and care and love, that do not attach to the products of one's labour. Might the case of blood donation be more pertinent?[31] Could it not be argued that giving away one's gametes is no more significant than giving blood? Not if one recognises the absence, when it comes to blood donation, of the sorts of relation we have just mentioned in respect of giving away gametes. The nature of the latter involves issues of paternity, kinship, care and concern, that simply do not arise in the case of the former.[32]

It is considerations such as these that are altogether absent from current analyses of artificial reproduction including defences, such as Emily Jackson's, against welfare-based critiques of the process. By focusing on decisional privacy versus the need for a welfare principle, defenders of AR inevitably lose sight of the broader institutional and social context in which advances in biotechnology must take place. Nevertheless, since welfare and harm in respect of AR offspring themselves are central to any critique, it is to these that we now turn.

IV. HARM AND SECRECY

As we have claimed, the nature of artificial reproduction is such that it inevitably involves various kinds of harm to particular young human lives as well as overall damage to the social value of respect for human life in general. There is the creation, cryopreservation, mass storage, experimentation upon, quality control, and ultimately destruction of immature human beings. Further, there is an institutionalised manufacturing process that undermines the dignity of human life as such and commodifies it, leading to the alienation of all those classes of people involved in the 'production' process. (It is these features

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But the users of such terms see them as factually correct descriptions of what the embryo is and is not. It is the same when terms such as 'manufacture' and 'design specification' are used by us with reference to AR. What may seem mere rhetoric to one party will typically have a higher significance to the other; to try to eliminate such controversy only inhibits debate.

[31] As suggested by an anonymous referee.

[32] Let us leave aside the donation of blood or tissue for potential cloning.

which lead to the sorts of laboratory 'mix-ups' and 'switches' that are beginning to emerge in the fertility industry.)[33] There is, however, another kind of harm, one that ought to be apparent to those of a utilitarian cast, but whose very coherence as a category of harm, let alone its existence, is commonly denied both by utilitarians and by other defenders of AR. This concerns the possibility that a person could be harmed by the manner of their conception itself, in particular as it relates to the question of origins.

Thus one of the principal objections levelled by defenders of AR against its critics is that there is no real harm to the created offspring: 'fragmented origins' does not constitute a genuine category of harm of which the law should take notice. It is sometimes asserted that offspring conceived asexually do not differ in any significant way in their functioning from children conceived naturally or from adopted children, and indeed that AR sometimes confers a positive benefit upon the child.[34] The question of harm is, however, more complex and subtle than supporters of AR generally acknowledge.

The first point to note is primarily methodological. To the extent that empirical research has been carried out at all, it is often carried out on children rather than adults. The disadvantages of this are that: the long-term effects are not measured; many of the children do not know that they are donor-conceived; where they do, they are not aware of the potential significance of it; often third parties such as teachers are engaged by the researchers to report on the children's behaviour, but since the former are kept in as much ignorance as the latter, one

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[33] See n. 24.

[34] This is the thrust of research by Susan Golombok: see *e.g.* S. Golombok, A. Brewaeys, M.T. Giavazzi, D. Guerra, F. MacCallum and J. Rust, 'The European Study of Assisted Reproduction Families: The Transition to Adolescence' (2002) 17 *Human Reproduction* 830–40. But for strong empirical evidence of harm, see the work of Alexina McWhinnie: A. McWhinnie, 'Families from Assisted Conception: Ethical and Psychological Issues' (2000) 3 *Human Fertility* 13–19; A. McWhinnie, 'Euphoria or Despair? Coping with Multiple Births from ART: What Patients Don't Tell the Clinics' (2000) 3 *Human Fertility* 20–5; A. McWhinnie, 'Children from Assisted Reproductive Technology: The Psychological Issues and Ethical Dilemmas' (2001) 163 *Early Child Development and Care* 13–23; A. McWhinnie, 'Gamete Donation and Anonymity' (2001) 16 *Human Reproduction* 807–17. See also the literature cited in n. 36. Evidence of physical harm to IVF children is also beginning to emerge: see *e.g.* M. Hansen, J.J. Kurinczuk *et al.*, 'The Risk of Major Birth Defects after Intracytoplasmic Sperm Injection and In Vitro Fertilization' (2002) 346 *New England Journal of Medicine* 725–30. This study found that IVF (and ICSI) offspring have twice as high a risk of a major (*e.g.* chromosomal or musculoskeletal) birth defect as naturally conceived infants. A later study by the same researchers has shown a 30–40% increased risk of birth defects: M. Hansen, C. Bower *et al.*, 'Assisted Reproductive Technologies and the Risk of Birth Defects: A Systematic Review' (2005) 20 *Human Reproduction* 328–38.

should not expect them to know what signs of distress or psychological dislocation to look for. This last observation is important because it might be objected that the subjects of the research and related assistants in that research need to be kept in ignorance in order for the studies to be blind and controlled. However, in cases such as these where psychological and other evidence can be subtle and even repressed or otherwise far from manifest, it is vital that those gathering the evidence are aware of what it is that they are supposed to be looking for. In addition, the children's ignorance of their origins[35]—an ignorance that may not be maintained as they grow up—is an obstacle to drawing firm conclusions about the real impact of those abnormal origins on the children's psychic and emotional development. Further, it is worth mentioning that by researching children whose origins are kept from them, significant ethical considerations are raised about the legitimacy of experimenting on human subjects without their informed consent.

Secondly, whilst it might at first glance be thought that a person's origins do not matter, reflection ought to alert legal and moral theorists to the many ways in which a person can indeed be harmed in this respect by the manner of their conception. This is not to say that every person conceived by AR will inevitably perceive the harm in the same way or to the same degree. Some might not believe or feel they have been harmed even after being informed of their origins. Nevertheless, account needs to be taken of the fact that children of AR have a great deal invested in the maintenance of emotional and psychological normalcy: those whom they might feel inclined to accuse of having caused them harm—commissioning parties and the fertility experts who control the relevant information concerning origins—are precisely those to whom they will be bound for various reasons. They will be bound to their legal parents for their sustenance and protection, and to the fertility experts who produced them for crucial information about their identity. Hence there may well be a natural tendency to resile from confrontation and to repress feelings of distress or outrage. It is worth remembering, in addition, that it is possible for a person to be harmed even though she might maintain that she has not been harmed, and even though she may approve of or applaud the very acts or events that have caused the harm; one need only think of slavery or other forms of exploitation (economic, work-related, and the like) in

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[35] See *e.g.* J. Rose, 'The Response of an Adult Donor Insemination Offspring to the Article "The Psychology of Assisted Reproduction: or Psychology Assisting its Reproduction?"', (1999) 34 *Australian Psychologist* 220; C. Whipp, 'The Legacy of Deceit: A Donor Offspring's Perspective on Secrecy in Donor Assisted Conception' in E. Blyth, M. Crawshaw and J. Speirs (eds), *Truth and the Child 10 Years On: Information Exchange in Donor Assisted Conception* (British Association of Social Workers 1998).

which such a phenomenon is not uncommon. Hence research into harm caused by AR, where it is ethically legitimate, must take into account the possibility of repression.

Thirdly, there is an inconsistency in an AR supporter's holding both (a) that it is *conceptually impossible* for donor offspring to be harmed by the manner of their conception since the very fact of their being alive estops them, as it were, from complaining about the way that fact was brought about, and (b) that empirical research demonstrates, as a matter of *contingent* fact, that such children are not harmed by the manner of their conception. If empirical research following up on the fate of AR offspring is to matter, as it appears to for the supporters of the technology, then it must be logically possible to be harmed (or benefited) by that technology.

Furthermore, although discussion of the effects of AR is usually framed in terms of harm, it is important to note that the concept of harm must not be construed in such a way as to suggest that what happens to the AR child is a mere product of chance or accident. Often, what is crucial to the child (and hence to any plausible theory of the morality and legality of AR) is that what has happened to them has been brought about by design. It is not simply a question of whether the child has suffered harm, but of whether she has been *wronged*. The truth of AR is that a class of individuals is in the process of being created in a manner that is itself problematic. Not only is this class set aside from the rest of society as having been conceived asexually (made rather than begotten), but a proportion of them will have been conceived by donor gametes. Currently, this class of offspring (many of them now adults) is subject to a lack of fundamental information (parentage, ancestry, race, medical inheritance, etc.), which could lead to their unwittingly marrying their own siblings or possessing siblings of whom they will never have knowledge in virtue of the deliberate actions of their biological parents. The fragmentation of origins and identity—with the attendant secrecy characteristic of the AR enterprise[36]—can reasonably be thought to have a destabilising

[36] On some of the general issues raised by secrecy, including the obstacle it poses to the very possibility of obtaining reliable empirical evidence of the effects of AR, see R. Rushbrooke, 'Donor Insemination: The Secret Experiment' (2004) 196 *Bulletin of Medical Ethics* 13–22, and also: A.J. Turner and A. Coyle, 'What Does it Mean to be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy' (2000) 15 *Human Reproduction* 2041–51; A.W. Cordray, 'A Survey of People Conceived through Donor Insemination' (1999/2000) 14 *D.I. Network News* 4–5; E. Blyth, 'Donor Assisted Conception and Donor Offspring Rights to Genetic Origins Information' (1998) 6 *International Journal of Children's Rights* 237–53; E. Blyth, 'Sharing Genetic Origins Information in Third Party Assisted Conception: A Case for Victorian Family

effect on the offspring themselves and on society at large. What is at issue is not merely the harm that the AR offspring might suffer, but the fact that the harm is the effect (albeit unwanted *qua* harm) of an industry and system deliberately established for the production of human beings. This in itself is calculated to cause distress to the human beings produced by that system.

Philosophical thought experiments confirm that it is possible for a person to be wronged even though he has not suffered manifest physical or psychological harm at all. For instance, a person might have inherited money and then had it stolen from them without ever knowing either that they had an inheritance or that a theft had taken place—yet to claim that they would not have been the victim of a wrong is, to say the least, counterintuitive.

More interesting and germane cases involve perpetual deception: a person might go through his entire life believing that another person is his friend, and yet it turn out that he had been the victim of a gross misrepresentation on the part of the so-called friend, who never liked him at all.[37] In relation to AR (especially donor insemination), the point is emphatically not that the child is unloved or unwanted, but that they are *systematically deceived* about their origins. To deny that the deception is *in itself* a wrong is to disregard such children's dignity as human beings and effectively to permit any form of manipulation of one person by another as long as the manipulation is hidden and in the ostensible best interests of the one manipulated. Related to this, moreover, is the notion that a person may suffer actual harm without either knowing it or even feeling the harm. A drug addict, for instance, might deny (and *ipso facto* not know) that he is harming himself, and for a long period of his addiction might not even feel any harm to himself. In the case of artificial reproduction, we contend not only that the AR offspring does suffer wrong through systematic deception of which she may never become aware, but that in addition she suffers actual psychological harm (not to mention risks of physical harm) in virtue of the fragmenting and undermining of her origins.

In the case of the stolen inheritance mentioned earlier, the wrong can be explained by the victim having been deprived of a better financial position than he otherwise would have enjoyed. Similarly, we claim,

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Values?' (2000) 14 *Children and Society* 11–22. See also the papers by A. McWhinnie cited in n. 34. Note that most of this literature pertains to IVF in general and donor insemination in particular; but it is highly likely that in the case of other forms of AR such as cloning, should it ever become a reality, the sorts of harm discussed would only be greatly magnified (not to mention added to by other kinds of harm).

[37] By 'turn out' we do not mean that the innocent victim finds out about the deception; rather, that this is how the facts stand objectively after the victim's death.

AR offspring are deprived of goods relating to their origins that are fundamental to human well being. These deprivations can be of a greater or lesser kind depending on what form of AR is under consideration: not all cases of AR bring the same potential harms. They all involve forms of asexual reproduction, and therefore are open to the possibility of institutionalised abuse through secrecy, manipulation, and deception (*e.g.* as to the number and identity of one's siblings). But they also vary in the ways they undermine basic human goods such as family and identity.

Harms can range from an extreme case such as the fragmentation of species identity attendant on hypothetical animal-human hybrids, to deprivation of generational identity as in the case of human clones, to loss of love and support from one's biological parents as in the case of donor insemination. In the ostensibly least controversial case of AR, IVF using the couple's own gametes, what is in question is the asexual nature of the reproduction which, given the industrial and commercial context that replaces the natural processes, makes deception, secrecy, abuse and manipulation almost inevitable. Even the most apparently straightforward cases involve such problems as what to do with 'spare' embryos kept in frozen storage, and what to do with 'spare' gametes given the paternity/maternity to which they may give rise—all of which itself speaks of the commodification of human life inherent in all forms of AR.

That such notions are anathema to common law and to morality is evident in matters of such importance as those that bear on the very identity of the person. Deception, for instance, requires the full collaboration and complicity of virtually every institution with which an AR adult in particular will have to deal throughout her lifetime. It involves the falsification of birth certificates, the denial of access to medical records, the conditioning of counsellors and social workers into denying the possibility of injustice as opposed to mere harm, and the potential suppression of evidence should the AR adult turn out to know of her origins.

V. THE QUESTION OF EXISTENTIAL DEBT

It is sometimes asserted that children conceived by artificial reproduction—or, indeed, by any method at all—have no right to complain about the means by which they are brought into existence. The primary justification for the claim is that since it is better to be alive than not to be alive, any means employed to produce life are *ipso facto* permissible. It should be noted that utilitarians admit that a child conceived artificially might suffer harm from the means of conception to such an extent that it would have been better had they not come into existence.

But this is not to be confused with the anti-utilitarian claim that the means employed may themselves be wrongful irrespective of harm done and hence of a kind that should never have been used. Nevertheless, the vast majority of utilitarians do not recognise that there does flow from AR harm of a kind as to outweigh the benefit of being alive. Hence they are prepared to accept, along with other defenders of AR, that the child has a debt to those who bring her into existence. In the words of John Robertson (in the context of a discussion of cloning and 'wrongful life'):

> From the now existing child's perspective—the perspective of *this* particular child—it is not harmed by existence, because it has no alternative to existing with the defect or condition of concern, and it finds its current existence, being the only one available to it, very fine indeed.[38] ... [T]he problem is that their [opponents of cloning] position leads them to prevent the birth—*to deny existence*—to the very people they claim to respect.[39]

Whilst we would agree with the intuition that human life is a good, or to use different terminology a thing of value, as well as with the thought that a child does have a kind of debt to the authors of his existence, we dispute the assumption that this entails either the permissibility of any means of bringing him into existence or the proposition that the child produced by inherently problematic means has no right to complain about the use of those means. As explained earlier, means to an end, no matter how desirable the end, can be ethically impermissible, and we cited the examples of the Multiple Cloner, the Profligate Parent, and the Hybridiser. Once it is agreed, at least in principle, that some means are inherently unacceptable, it can then be seen that the goodness of life cannot be appealed to in itself as the reason why AR offspring are, as it were, estopped from complaining about the harm caused to them by the means used. (Note that by 'estoppel' we are not implying that the argument from existential debt recognises any legal bar, only a moral bar on complaint.)

The law has for a long time recognised that certain reproductive relationships are not mere private transactions: hence the prohibitions on incest, carnal knowledge of minors, and even rape, where in each case a child conceived as a result of the relationship is assumed by the

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[38] J.A. Robertson, 'Liberty, Identity, and Human Cloning' (1998) 76 *Texas Law Review* 1371–456, at 1407. The idea of 'existential debt' on the part of a person brought into existence, even if harmed thereby, to those who bring that person into existence, is found in D. Parfit, *Reasons and Persons* (OUP 1984) at 373–7.

[39] Robertson, *op.cit.* at 1408 (emphasis added).

law to have been brought into existence in deleterious circumstances.[40] In such cases the offspring is not estopped from asserting the wrongfulness of the means used to conceive him: the fact that he is *causally* indebted to incest, for example, for his existence, does not imply that he is *morally* indebted. And this lack of existential *moral* indebtedness is factored into the legal prohibition on incest. In short, there are wrongful ways of bringing people into the world, and the fact that such people exist cannot be used to justify the means adopted to bring them about. To assert existential debt is effectively to justify *any* means used to bring a child into existence solely on the ground that the child does exist.

It should be observed that on a utilitarian view of existential debt, the child's existence does not *always* trump any harm caused by the means of reproduction. (A particular child might be so harmed that its life was, in the objectionable utilitarian phrase, 'not worth living'.) Yet there will still be an acceptance of means that are in themselves, in our view, problematic inasmuch as they have an intrinsic tendency to fragment the child's biological origins. Even on the least troublesome IVF scenario—where the child is born to and raised by her own biological parents, with no physical harm—that child will not know with certainty that she does not have hundreds of siblings scattered throughout the world or in cold storage. What must be emphasised is that the law already prohibits certain *classes* of reproductive relationship, irrespective of whether in a particular case a child may suffer. What the law presumes is an intrinsic tendency to produce harm in these classes of relationship. Artificial reproduction, we contend, is no different.

One thing to note about the denial of estoppel (in the sense explained above)—this in turn based on the non-acceptance of any 'existential debt' on the part of the offspring—is that it does not entail the endorsement of so-called claims for 'wrongful life'. For it does not follow that harm caused to a person created by certain impermissible means should have been avoided, say, by abortion or infanticide. But what about claims that imply a prior obligation on the parents not to have married, supposing they knew that the combination of their gametes would lead to genetic defect? Whatever ethical analysis one might give of the question whether such an obligation could exist, nevertheless it is arguable that there are public policy grounds for preventing such claims in any case (*e.g.* disruption to family life, social instability).

The same could be said about the question of whether there should be a suit for damages for 'reproductive harm caused by wrongful means'. Should an AR child be allowed to sue her parents for psychological

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[40] We leave aside the harmful effects on the parties to the relationship, which is also of course a potential basis of prohibition.

damage caused by fragmented origins, or for actual deception as to her origins? Such a question raises various public policy considerations which cannot be addressed here. Suffice it to say that if our position on the wrongfulness of certain means of reproduction is correct, the creation of such a cause of action cannot be ruled out in principle. By admitting this we are not endorsing the idea that such a claimant thereby argues that she should not have been born; only that by being born through wrongful means, she claims the right to compensation for harm done through the fragmentation of her origins.

VI. SOME OBJECTIONS

As will be evident from what has been said so far, our case against AR is not based on utilitarian theory. It does not involve an endorsement of the specious attempt—rightly described by Jackson as incoherent[41]—to calculate whether a child is better off not having been conceived. Nor does it involve adherence to a eugenicist agenda: we can agree with Jackson's assertion that 'it is simply illegitimate for the state to make judgments about who should and who should not be permitted to reproduce'.[42] Our qualification, however, is that concern about the *means* employed in reproduction does not in itself violate the basic anti-eugenicist sentiment. 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. On the contrary, we contend that a prohibition on AR is no more eugenicist than the prohibition on rape or incest as means of reproduction. By saying, as we did earlier, that the Multiple Cloner or the Hybridiser ought not to be allowed to create children using their favoured means, we are not thereby advancing a claim on behalf of the genetic enhancement of humanity.

It might be objected that we are harsh to criticise Jackson for failing to realise that doctors' responsibilities should encompass the issues raised by the Multiple Cloner, the Profligate Parent, or the Hybridiser. After all, her paper is a critique of the welfare principle as embodied by section 13(5) of the Human Fertilisation and Embryology Act 1990. The issues raised by these other cases, so the objection continues, would be dealt with under other provisions or legislation.[43] Human reproductive cloning is prohibited by the Human Reproductive Cloning Act 2001. The creation of animal-human hybrids is banned

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[41] Jackson, *op.cit.* at 196–9.
[42] *Ibid.* at 188.
[43] We are indebted to an anonymous referee for raising this point.

under section 4 of the Human Fertilisation and Embryology Act 1990. And so on.

The reply to this objection is that one should not read section 13(5) in isolation from the rest of the 1990 Act. If Jackson wishes to hold onto prohibitions on, say, hybridisation and multiple cloning, she will have to resort to some sort of welfare principle and/or broad conception of the dignity of the human being and of the importance of the common good.[44] To object that it is unfair to criticise her for not recognising the seriousness of the problem cases we have raised is, we submit, to fail to see the implications of dropping the welfare principle. We assume that Jackson would not want to drop or omit these other prohibitions in the name of 'decisional privacy'; in which case she is bound to give a rationale as to why, absent a welfare principle or some other broader conception of human dignity and the common good, these prohibitions should remain or be adopted in the first place. If the point of Jackson's paper is to do away with welfare considerations in favour of decisional privacy, it will not do simply to ignore hard cases that threaten her account.

Again, it might be objected that at least some of the harms we claim to be entailed by AR occur in natural reproduction anyway, even if they may be less likely. The fact that natural reproduction sometimes involves harms such as profligate parenting with multiple partners, or prejudicial secrecy in the case of some births, does not mean that such harms are or should be approved, or that the state does not have a legitimate interest in suppressing such behaviour. Rather, we claim that AR further threatens human dignity and the common good by its institutionalised and public nature. In short, the fact that the harms to which we point sometimes occur in natural reproduction in no way lessens their harmfulness; nor does it justify their occurrence when produced artificially.

This leads us to the more general question whether a system of regulation involving various prohibitions could obviate the sorts of problem we claim that AR entails. As implied earlier, it is difficult to see what principled basis there could be for the prohibitions introduced. Without one, we risk arbitrary and *ad hoc* arrangements. Recent government rules relaxing the secrecy of donor insemination records fail to address the fundamental problem. *Some* offspring, *if* they come to know they have been conceived through DI, will be able, where gametes were donated after 1 April 2005, to find out the names of their gamete donors and 'information about their genetic origins'. Even these children will not be in a position to make enquiries until

[44] We have not said anything about the dignity of human reproduction either, as this would take us too far afield. But it too can be appealed to in defence of our central claim.

they are eighteen. This still leaves thousands of people who will never know who their natural parents are.

If we appeal to a conception of harm limited to a notion of relatively direct, occurrent, subjectively perceived, physical or psychological damage, then we submit that such a notion is far too narrow.[45] It fails to capture what we have said about human dignity, the common good, the good of the family, the importance of kinship, as well as biological and even racial identity. Fundamental goods such as these cannot be protected by a system of regulation which nevertheless allows those goods themselves to be undermined. It is easy to imagine institutionalised wrongs that are not righted by a body of regulation. Moreover, as we have already suggested with our slavery analogy, regulation might even exacerbate the basic wrong by giving the impression that that wrong is not merely tolerated by society, but encouraged and accommodated.

An objection that might be raised against the claim that AR should be subject to legal restriction is that this means denying to potential parents their right to treatment for infertility. In reply, it should be noted that AR is *not* a treatment for infertility; rather, it is a means for *circumventing* infertility by the manufacture of a child using asexual processes. A related thought might be that any critique of AR is ipso facto a stigmatisation of the infertile. Jackson hypothesises that:

> it is perhaps infertile couples' *unnatural* failure to conceive that strips them of the privacy to which they would otherwise be entitled when deciding to start a family.[46] Further, members of the 'normal' majority (for my purposes, fertile heterosexual couples) tend to take for granted their own right to be free from state intrusion, while simultaneously assuming that scrutiny of the 'abnormal' minority (here, those who cannot conceive without assistance) is self-evidently legitimate.[47]

Such a charge misses the mark. If the critique of AR stigmatises anything, it is the processes of manufacture themselves, not the people who, for reasons that might be understandable, resort to such processes.

Another objection might be that a radical critique of AR fails to respect the right of potential parents to make subjective judgments about what is in their best interests. The charge here is not so much about the right of the state to interfere in such judgments (see next

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[45] On this point see further J.A. Laing, 'Law, Liberalism, and the Common Good' in D.S. Oderberg and T. Chappell (eds), *Human Values: New Essays in Ethics and Natural Law* (Palgrave 2004) at 185–216.

[46] *Ibid.* at 186.

[47] *Ibid.* at 187.

section) but about the alleged failure to account for the subjective nature of morality. In reply, it is not the right of a couple to make a judgment about what is best for them that is at issue, but the question of whether such a judgment should be measured against objective criteria. The continued antipathy to laws to sanctioning incest or mass cloning as means of reproduction, even if such means were to be judged by a couple to be desirable for them, arguably testifies to the ethical objectivism that remains at the heart of even liberal law-making.

VII. THE ROLE OF THE STATE

It might seem repugnant to notions of autonomy and privacy to assert that it is any business of the state to interfere in matters of human reproduction. Jackson refers to 'bodily integrity and sexual privacy'[48] and to the importance of having 'a space—physical or metaphoric—into which the state cannot intrude without compelling reasons'.[49] Our argument, on the contrary, is that the state has no alternative *but* to be concerned with the manner in which its members are created. The state is obliged to be interested is the welfare of future generations. If promoting the interests (in reproduction, for instance) of one generation means undermining the interests of a later generation (by harmful effects such as those mentioned earlier) the state is obliged to intervene in favour of the generation at risk. Anti-pollution laws are but one example of the state's acting legitimately to limit present autonomy in order to promote the welfare of future generations. Yet effects of pollution on future generations are contingent and often capable of being escaped. On the other hand, in the case of the Multiple Cloner, for instance, effects such as fragmentation of origins are built into the very definition of the activity and *ipso facto* incapable of being avoided, whatever attempts at harm minimisation might be undertaken by the clones or by the community.

Another reason justifying state interest in AR is that its effects of themselves bring in the need to resort to public institutions and public resources. So for instance, as mentioned earlier,[50] AR offspring in the UK may request limited information to which everyone else has the legal right, and which is kept by public bodies such as registries of births, deaths, and marriages. Even where specific information about origins is privately held by the AR service provider, these providers are currently publicly regulated, giving the state an immediate right to concern itself with the operations of such organisations. That AR offspring do not have routine access to fundamental information about themselves suggests a form of systematic

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[48] *Ibid.* at 177.
[49] *Ibid.* at 186.
[50] See n. 28.

deception and discrimination against them as a class. The state has a right to concern itself with just such discrimination.

Returning to the general question of illicit or abusive means of bringing children into existence, we note that were the state to be involved in legalising, funding, and/or regulating incest as a means of reproduction, the offspring produced by such means would have a legitimate complaint against the state itself for complicity in acts of inherent injustice. Further, given that the duty of the state is precisely to promote and protect the common good, mere inactivity or silence in respect of a practice that is unjust toward an entire class of people is a form of complicity. The fact that, given current circumstances, AR is going to continue and proliferate no matter what the level of social unease is not a reason for the state to refrain from interference. For the same could be said about a multitude of unjust practices such as human trafficking and child pornography.

Further, the term 'decisional privacy', as used by Jackson, conceals an ambiguity. Sometimes she speaks as though what should be protected is the right to artificial reproduction services per se, but at other times she refers solely to the right of a couple to make the *decision* to start a family.[51] Our claim that the state has a legitimate interest in preventing an unjust practice such as AR should not, however, be interpreted as advocacy for interference in decision-making as opposed to execution of decisions. Deciding is one thing, acting is another. It is not for the state to penalise thoughts and decisions; but where a person seeks to make good upon a thought or decision in the public sphere, the state has a legitimate concern, the law being interested only in the public nature of acts and attempts. As we have argued, the so-called right to artificial reproduction services is no right at all, since it compromises the common good that it is the strict obligation of the state to uphold.

VIII. CONCLUSION

In her original article, Jackson claims that the very idea of a welfare principle embedded in AR legislation is 'unjust, disingenuous and incoherent',[52] suffers from 'conceptual incoherence and practical inefficacy',[53] and if this is not enough it is also 'irrational',[54] 'essentially meaningless',[55] and 'profoundly dishonest'.[56] Polemics aside, we

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[51] For example, Jackson, *ibid.* at 182, 184, 186.
[52] *Ibid.* at 181.
[53] *Ibid.* at 195.
[54] *Ibid.* at 178.
[55] *Ibid.* at 97.
[56] *Ibid.* at 203.

submit that there is a serious case to answer for the proposition that future generations have an interest in the kinds of system that are established to bring them into existence, and that the state has an interest in protecting those generations from systems that are inherently unjust and harmful.

Jackson argues that it is the idea of a welfare principle for AR that is unfair, because 'we do not expect fertile people to prove their parental adequacy prior to conception'.[57] Her point is correct insofar it is misleadingly limited to parental adequacy per se. It is our contention, however, that this focus is misdirected. A welfare principle, such as section 13(5) of the Human Fertilisation and Embryology Act, *already* concedes too much to AR by accepting the institutionalisation of this means of reproduction as essentially unproblematic. A much broader welfare principle, on the other hand, one that implicitly recognised the law's persistent refusal to accept the legitimacy of certain means of reproduction (*e.g.* by means of rape or incest) could be applied *fairly* to prospective parents contemplating the use of artificial reproductive means. Prospective parents such as these would be treated no differently from any other prospective parents, all of whom have to abide by legal principles, based of child welfare and public policy, governing the legitimacy of means of reproduction.

Jackson adds that a child welfare principle is disingenuous since clinicians who are expected to make such welfare decisions are not given enough information on which to base their judgment. The point is correct but misdirected. It already concedes too much to AR clinicians to permit them to have a system of reproduction in which such decisions have to be made. By giving clinicians and technicians the authority to create children in what is, we contend, a dehumanised fashion that commodifies human life, often spelling grief and harm to such individuals in their adult lives, the legislature has already abandoned its foundational duty to ensure its decisions with respect to human reproduction are informed by public policy and the common good. We suggest that in the century to come, when people conceived of donor gametes grow to maturity, many of them will learn of the deception that has been routinely practised on them, of the fragmentation of their identity and of the loss of their blood ties. It is then that the full extent of the systematic wrong committed against them will be made manifest. The argument from decisional privacy will be of little weight for people born of cloning, let alone animal-human hybrids and other such disturbing products of technological devising. To assert that people and creatures

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[57] *Ibid.* at 202.

so conceived will have no ground to complain because they owe their very existence to this asexual technique of creation is as untenable as the idea that children born of rape or incest could not complain were either of these activities routinely permitted by the state.

Finally, Jackson concludes her analysis by saying that the welfare principle is incoherent for being inconsistent with the general legal recognition that 'existence must almost always be judged preferable to non-existence'.[58] The insertion of 'almost always' is crucial. The law does not and never has given a blanket recognition to the idea that existence is to be promoted over non-existence always and in all circumstances, as we have shown. The recognition of a narrow welfare principle such as section 13(5), or of a broader one such as we advocate, does not conflict with the law's settled view that public policy and the common good should always govern the means with which any human good is pursued, and its insistence that the means must be licit. We take the existence of human life to be a fundamental human good. We do not accept that that good, or any other, may be promoted at all costs and using any means. The idea that goods should be promoted, but need not always be respected—in simpler terms, that the ends justify the means—lies at the heart of the utilitarian reasoning that informs so much contemporary moral, judicial, and legislative decision-making, and that Jackson herself cogently criticises. We submit that it is essential to law and public policy that goods be respected as well as promoted. This is the settled view of jurisprudence as well. The recognition of artificial reproduction, and the concession of section 13(5) in the first place, undermine that settled view and threaten the foundations on which the law should be based.

How, in the light of our analysis, should the current legal situation concerning artificial reproduction be understood? We have argued that Emily Jackson is wrong to advocate the abolition of the welfare principle and maintenance of the rest of the regulatory regime. Nevertheless, we also contend that retention of section 13(5) in the context of that regime concedes far too much to a set of biotechnological practices that are both jurisprudentially problematic and ethically flawed. On the other hand, abolition of the Human Fertilisation and Embryology Act altogether, for which there is much pressure in quarters both commercial and political—would open the door to wholesale abuse of biotechnology in ways harmful to the individual and to the good of society. Would root and branch revision of the legal framework be desirable? Only, we submit, if whatever replaced the current regime

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[58] *Loc.cit.*

respected those values, fundamental moral goods, and jurisprudential norms that we have already discussed at length. Such a framework is possible, and would be consistent with basic biological research of the kind that can benefit humanity.[59]

[59] Adult stem cell research is an obvious example, as are certain kinds of reproductive therapy and genetic techniques that respect life and treat human illness.