

# ECTOGENESIS, ABORTION AND A RIGHT TO THE DEATH OF THE FETUS

by Mr. Joonas Räsänen

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## ABSTRACT:

*Many people believe that the abortion debate will end when at some point in the future it will be possible for fetuses to develop completely outside the womb. Ectogenesis, as this technology is called, would make possible to reconcile pro-life and pro-choice positions. That is because it is commonly believed that there is no right to kill the fetus if it can be detached alive and gestated in an artificial womb. Recently Eric Mathison and Jeremy Davis defended this position, by arguing against three common arguments for a right to the death of the fetus. I claim that their arguments are mistaken. I argue that there is a right to the death of the fetus because gestating a fetus in an artificial womb when genetic parents refuse it violates their rights not to become a biological parent, their rights to genetic privacy and their property rights. The right to the death of the fetus, however, is not a woman's right but genetic parents' collective right which can be used only together.*

## INTRODUCTION

The most prominent advocates of abortion rights believe that there is a right to terminate the pregnancy but not a right to the death of the fetus. Peter Singer and Deane Wills phrase this in the following way: 'Freedom to choose what is to happen to one's body is one thing; freedom to insist

on the death of a being that is capable of living outside one's body is another.'<sup>1</sup> Judith Jarvis Thomson<sup>2</sup> believes this, and so do David Boonin<sup>3</sup>, Frances M. Kamm<sup>4</sup> and Mary Ann Warren<sup>5</sup>. More recently Bertha Alvarez Manninen<sup>6</sup> and Lindsey Porter<sup>7</sup> have reached similar conclusions.

Whether there is a right to kill the fetus, in addition to the detachment, is not a question not explored in detail before. Michael Hawking argued – using an interesting thought experiment, viable violinist – that the Thomsonian defence of abortion gives the woman only a right to detachment, not a right to end the life of the fetus once it has reached the point of viability<sup>8</sup>.

Recently Eric Mathison and Jeremy Davis considered in this journal whether there is a right to the death of the fetus when ectogenesis is available.<sup>9</sup> They concluded that there is no such right.

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<sup>1</sup> P. Singer and D. Wells. 1984. *The Reproduction Revolution: New Ways of Making Babies*. Oxford: Oxford University Press: 135.

<sup>2</sup> J.J. Thomson. A Defense of Abortion. *Philos Public Aff* 1971; 1: 47–66: 66.

<sup>3</sup> D. Boonin 2003. *A Defense of Abortion*. Cambridge UK: Cambridge University Press: 257.

<sup>4</sup> F.C. Kamm. 1992. *Creation and Abortion: A Study in Moral and Legal Philosophy*. Oxford, UK: Oxford University Press: 81.

<sup>5</sup> M.A. Warren. 1982. Postscript on Infanticide, February 26, 1982. In J. Feinberg, eds. *The Problem of Abortion*. Wadsworth, Belmont CA: 116–119; M.A. Warren. The Moral Difference Between Infanticide and Abortion: A Response to Robert Card. *Bioethics* 2010; 14: 352–359.

<sup>6</sup> B.A. Manninen. Yes, the Baby Should Live: A Pro-Choice Response to Giubilini and Minerva. *J Med Ethics* 2013; 39: 330–335.

<sup>7</sup> L. Porter. Abortion, Infanticide and Moral Context. *J Med Ethics* 2013; 39: 350–352.

<sup>8</sup> M. Hawking. Viable Violinist. *Bioethics* 2015; 30: 312–316.

<sup>9</sup> E. Mathison and J. Davis. Is There a Right to the Death of the Foetus? *Bioethics* forthcoming doi:10.1111/bioe.12331.

Therefore, the possibility of ectogenesis should end the abortion debate to all these people.<sup>10</sup> That is because it would then be possible to reconcile (alleged) fetal rights with woman's rights.

I disagree. I argue that there is a right to the death of the fetus, but that right is not a woman's right. A right to the death of the fetus is a right of the genetic parents and only together can they use this right.

Mathison and Davis considered three arguments why a woman might have a right to the death of the fetus: 1) right not to become biological parent 2) right to one's genetic privacy and 3) right to property. They argue that none of the arguments succeed. I believe Mathison and Davis' argumentation does not show that there is no right to the death of the fetus. I consider their argumentation sequentially and argue why there is a right to the death of the fetus. I claim – contrary to Mathison and Davis – that because people have a right not to become biological parents, a right to genetic privacy and a right to their property and because ectogenesis without the consent of the genetic parents of the fetus violates these rights, genetic parents have a right to the death of the fetus.

I do not consider here whether the fetus itself has a moral standing or whether it has a right to life, although I admit – and agree with Mathison and Davis here – that to settle the issue fully, that is

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<sup>10</sup> I use the term ectogenesis as it is commonly used in bioethical literature. Ectogenesis refers the use of artificial or mechanical wombs. Ectogenesis could be understood as an alternative to the whole gestation process where the embryo is never inside the woman's uterus. Here the focus is on the form of ectogenesis, which I sometimes refer as to ectogenesis abortion, where the fetus removed alive from the woman's uterus will be gestated in an artificial womb. Although the technology is not yet possible, the ethical issues of ectogenesis deserve careful philosophical attention.

something which should be done.<sup>11</sup> At the end of the article, I make some remarks about the practical implications of my position and raise some new questions.

## **THE RIGHT NOT TO BECOME A BIOLOGICAL PARENT**

An argument given in support of the right to the death of the fetus is the right not to become a biological parent. Mathison and Davis (hereafter referred to as M&D) call this the ‘biological parents’ rights’ argument. Here, I frame the argument in detail and defend it against their criticism. M&D state that spelling this argument out in more detail – and perhaps the most common way, they say – is to argue that a right to the death of the fetus is necessary for preventing certain harms from befalling the biological parents. So, on this view, an abortion consists of both terminating a pregnancy and preventing parenthood.

The harms in question are parental obligations which are linked to the concept of attributional parenthood. That is the social attitude in which others treat a genetic parent as though she still has the same moral obligations to the child as a custodial parent, even when the legal system has absolved her of such obligations.<sup>12</sup>

This insight of attributional parenthood leads to the *Right Not to Become a Biological Parent Argument*:<sup>13</sup>

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<sup>11</sup> Mathison and Davis also do not consider whether a fetus has a right to life.

<sup>12</sup> I. G. Cohen. The Right Not to Be a Genetic Parent. *S Cal L Rev* 2008; 81: 1115–1196.

<sup>13</sup> The formulation of the argument is my own, although M&D argue against a similar argument.

1. Becoming a biological parent causes harms to the couple because of parental obligations towards the child.
2. The couple has the interest to avoid the harms of parental obligations.
3. Therefore, the couple has a right to the death of the fetus to avoid the harms of parental obligations.

M&D understand parental obligations in a way that the parents would still feel morally responsible for the child, which then could cause them significant psychological harms. They claim that such harms might be self- or socially imposed. For example, others might discriminate the parents by displaying negative attitudes or behaviour towards them. To support this claim, M&D cite a study where several women reported that ectogenesis would leave them with the lingering sense of obligation toward the child, even if no legal obligation were maintained.<sup>14</sup>

M&D reject the above argument. They admit that parents have a right not to be discriminated against on the basis of attributional parenthood, but they reject the argument by parity of reasoning argumentation. Put another way, they claim that if the right not to become a biological parent argument is sound, it leads to conclusions that are difficult to accept (or at least which people do not currently accept). They claim that:

[I]t does not follow from the fact that this treatment [discrimination on the basis of attributional parenthood] is wrong that one therefore possesses a right to the death of the foetus. Indeed, there are reasons to doubt that any such further right exists. To see why, consider cases that look very similar to the one in question. Surrogate mothers, egg and sperm donors, and women or couples who give their child up for adoption may all experience the harms of attributional parenthood, as well as other felt obligations more generally. If the right against the harms of attributional parenthood

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<sup>14</sup> L. Cannold. Women, Ectogenesis, and Ethical Theory. *J Appl Philos* 1995; 12: 55–64.

entail further rights to prevent or avoid such harms in the case we have been considering, they should entail similar rights in these cases as well. And yet, in these other cases, we do not typically think that the existence of such harms gives rise to any further rights to the biological mother or father.<sup>15</sup>

M&D seem to believe that the alleged intuitions against the claim that gamete donors and surrogate mothers have rights towards the child are a sufficient reason to believe that there are no such rights, and thus surrogate motherhood, gamete donation and adoption are problem free practices. However, they omit the work of numerous philosophers who argue, for example, that gamete donors *do have* parental obligations (and perhaps rights) towards the child produced from their gametes. Indeed, several scholars argue that no parental responsibility theory can explain why the accidental father, who procreates due to birth-control failure, has parental obligations towards the child but a sperm donor does not. This notion has been brought forth by Rivka Weinberg<sup>16</sup>, as well as J.L Nelson<sup>17</sup>, David Benatar<sup>18</sup>, Melissa Moschella<sup>19</sup>, Reuven Brandt<sup>20</sup> and Andrew Botterell<sup>21</sup> – just to mention a few.

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<sup>15</sup> Mathison & Davis, *op. cit.* note 9, p. 3.

<sup>16</sup> R. Weinberg. The Moral Complexity of Sperm Donation. *Bioethics* 2008; 22: 166–178.

<sup>17</sup> J.L. Nelson. Parental Obligations and the Ethics of Surrogacy: A Causal Perspective. *Public Aff Q* 1991; 5: 49–61.

<sup>18</sup> D. Benatar. The Unbearable Lightness of Bringing into Being. *J Appl Philos* 1999; 16: 173–80.

<sup>19</sup> M. Moschella. Rethinking the Moral Permissibility of Gamete Donation. *Theor Med Bioeth* 2014; 35: 421–440.

<sup>20</sup> R. Brandt. The Transfer and Delegation of Responsibilities for Genetic Offspring in Gamete Provision. *J Appl Philos* forthcoming doi:10.1111/japp.12251

<sup>21</sup> A. Botterell. Why Gametes are not like Enriched Uranium. *Bioethics* 2016; 30: 741–750.

It is also argued that mothers and fathers remain obliged, life-long, to their birth children even when the child is adopted out. Lindsey Porter frames this in the following way: ‘makers – that is, ‘birth parents’ and other causers – do not and cannot cease to be obliged to their birth children, even when adoption takes place.’<sup>22</sup>

If these authors are correct, there is reason to believe that the genetic parent has a right to the death of the fetus so that they could avoid the obligations and harms of attributional parenthood. Adoption won’t resolve the issue because parental obligations cannot be transferred or delegated to someone else; such obligations are non-transferrable in nature.

These claims might be against someone’s intuitions, but the intuitions solely are not a sufficient reason to believe genetic ties do not matter in the case of gamete donors, surrogate mothers and – ectogenesis abortion. Appealing to alleged intuitions is a somewhat common way to argue in applied ethics, but without a proper theory that explains why those intuitions are justified, the intuition argument fail. If one wants to reject the right not to become a biological parent argument, one should offer a parental responsibility theory that exonerates genetic parents from their parental obligations altogether or give another reason why the argument fails. M&D do neither. Because there are no alternative ways to avoid the harms of parental obligations than the death of the fetus, the right to the death of the fetus argument stands.

## **THE RIGHT TO GENETIC PRIVACY**

Another way to argue for the right to the death of the fetus is to claim that gestating the fetus, even if outside the womb, violates some other rights the genetic parents possess. I believe ectogenesis abortion violates two kinds of rights, in addition to a right of not becoming a biological parent: a right to genetic privacy and a right to property.

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<sup>22</sup> L. Porter. Adoption is not Abortion-Lite. *J Appl Philos* 2012; 29 :63–78.

There is at least in some cases a right to genetic privacy. For example, if a mad scientist finds a way to clone humans, steals my DNA and creates a fetus that is genetically identical to me, which he then gestates in artificial womb, my right to genetic privacy is violated. Therefore, I have a right to the death of the fetus.

Similarly, if ectogenesis abortions become reality, some women (and men) will have genetic children who carry their genetic material without their consent. Therefore, their right to genetic privacy is violated and they have a right to the death of the fetus. Call this the *Right to Genetic Privacy Argument*:<sup>23</sup>

1. People have a right to genetic privacy.
2. Ectogenesis abortion violates the genetic privacy of the genetic parents of the fetus.
3. Therefore, genetic parents have a right to the death of the fetus.

I believe the mad scientist example shows that the first premise is true. People in general have a right to genetic privacy. But does ectogenesis abortion violate parents' genetic privacy and if so, do genetic parents have a right to the death of the fetus? M&D are sceptical. They state that even if there is a right to genetic privacy there will be considerable limits to that right. M&D claim that at most, one has a right that her entire genome not be released without her consent. But they don't argue why there is only a right that one's *entire* genome not be released – clearly more is needed than a mere declaration. M&D claim that because the fetus' genetic material comes only partly from the genetic mother, the mother's genetic privacy is not violated, in such a way that she has a right to the death of the fetus. However, this line of reasoning explains only why the genetic *mother* has no right to the death of the fetus. But the nature of right to the death of the fetus has been misunderstood here.

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<sup>23</sup> Again, the formulation of the argument is my own, although M&D argue against this argument.



A right to genetic privacy in the case of ectogenesis should not be understood as an *individual* but a *collective* right. That is because reproduction is not an individual but a collective action. So, even though a fetus shares 50 % of its genetic material with each genetic parent respectively, 100 % of the fetus' genetic material comes from its genetic parents. Because having a genetic child in the world who carries the genetic material of the parents without their consent is against their right to genetic privacy, the genetic parents together have a right to the death of the fetus. To use that right, however, they must be unanimous about it. Only if they both agree and want the death of the fetus can they choose it to happen. Just like a company that is owned by two persons together: one of them alone cannot decide what should be done to it, but together they can.

To conclude, a right to the death of the fetus is not an individual right (as a right to terminate the pregnancy is), but a couple's collective right, therefore the right to genetic privacy argument stands.

A right to the death of the fetus is a right the genetic parents can only use together.

### **THE RIGHT TO PROPERTY**

There is yet another way to claim that the genetic parents have a right to the death of the fetus: the genetic parents own the fetus, and because of that, their property rights are violated if the fetus is gestated in an artificial womb without their consent. Call this the *Right to Property Argument*.<sup>24</sup>

1. The fetus is property of the genetic parents.
2. People can destroy their property.
3. Therefore, genetic parents can destroy their fetus.

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<sup>24</sup> Again, the formulation of the argument is my own, although M&D argue against similar argument.

Common intuitions seem to support both premises and therefore the Right to Property Argument. For example, it is commonly believed that the couple owns their (early) fetus or their embryos.<sup>25</sup> Consider a couple who uses IVF treatment (in vitro fertilization) to get pregnant. Surplus cryopreserved embryos are *their* embryos and no-one can use them against the couple's consent. In fact, it is commonly believed that a couple using IVF has a right to destroy surplus cryopreserved embryos. M&D share this intuition (and so do I).

Many people have inconsistent intuitions as they believe it is impermissible to kill the early fetus but permissible to destroy frozen embryos. In both cases, there is an embryo involved that has a potential to develop into a fetus and then into an infant. The location of the embryo is morally irrelevant so whichever position one holds, consistency demands that the cases are treated the same, M&D claim and I agree. M&D reject the claim that it is permissible to destroy cryopreserved embryos and I reject the claim that it is impermissible to kill the fetus.

It is also commonly believed that people have a right to destroy their property. As M&D state: 'If we buy a rare piece of art, and supposing that art can possess intrinsic value, we, as the owners, still have the right to destroy it.'<sup>26</sup> So why would there be no right to destroy the fetus or the embryos? M&D argue that because even if one owns something there are limitations to what one can do to it. They claim:

[C]ulturally protected buildings or artefacts can be privately owned but have use limitations. Buying a historic building means we can occupy it, but we are not allowed to raze it. (...) These limitations [to destroy] are justified by appealing to the intrinsic

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<sup>25</sup> Although it is not a philosophical argument, it is worth mentioning that in November 2016 a Missouri court has ruled that a divorced couple's frozen embryos should be treated as marital *property*. [http://www.bionews.org.uk/page\\_729067.asp](http://www.bionews.org.uk/page_729067.asp) [Accessed 25 February 2017].

<sup>26</sup> Mathison & Davis, *op. cit.* note 9, p. 7.

value of the property, or minimally the instrumental value the property possess for those other than the owner.

But why do I have a right to destroy a rare piece of art, as M&D claim, but I have no right to destroy a historic building? They don't give any justification to why it would be permissible for the owner to destroy a rare piece of art but not a historic building – after all, they both have intrinsic value and/or value to others. But perhaps M&D just want to say that it is *usually* permissible to destroy one's own property but not *always*. So, is it permissible to destroy the fetus or the embryos?

M&D think that because a fetus (and cryopreserved embryos) shares only 50 % of its genetic material with one individual, that individual cannot have a property right to it, and therefore there is no right to destroy it. But that is not a problem unless we want to claim that the mother (or the father) alone has a right to the death of the fetus. That is not the position I am arguing for. I claim that the fetus is the collective property of its genetic parents. When the genetic parents agree and they both want the fetus killed or the embryos destroyed, it is morally permissible for them to do so since they together share 100 % of the fetus' or the embryos' genetic material, and gestating the fetus or the embryos against their consent violates their rights.

Another reason why someone might reject the property right argument is that because many people are involved in the process of creating the embryos, it cannot be explained why only the parents own the embryo. For example, M&D claim that in the process of in vitro fertilization there are several people, most obviously, the doctor who extracts the ova and performs the procedure – yet they do not have a property right over the embryo. Therefore, we should reject this version of the argument what M&D call the labour-mixing argument for the property rights.

There are two responses I want to make. First, as stated earlier, many philosophers believe genetic ties are morally meaningful. If they are right, that is a sufficient reason to believe that genetic parents – and not the other parties – have a property right to the fetus and the embryos. Because the

doctor performing the IVF do not share genetic material with them, he has no property right to the embryos – even though he has taken a part of the process of creating the embryos.

Second, the objection against the labour-mixing argument for property rights can be applied only to embryos created in the process of IVF – not to a fetus created in normal sexual intercourse. When two people have sex and it leads to fertilization, the two people are the only ones bringing the fetus into existence by mixing their labour. So, the labour-mixing argument for property rights explains why genetic parents have property right to the fetus and why they do not have property right to cryopreserved embryos.

Perhaps someone would object. For example, M&D argue that because parents do not own their children, parents cannot own their fetuses or embryos either. ‘If the justification for property is that one has mixed one’s labour, then nothing about leaving the womb explains why the baby is no longer the property of the mother.’<sup>27</sup> Obviously, children are not parents’ property. But that has nothing to do with mixing labour. Children are not property because children are persons: morally valuable individuals. Now, whether a fetus is a person is a question outside the scope of this paper, although I admit that if an early fetus is a person, it might change the outcome of the debate.<sup>28</sup>

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<sup>27</sup> Mathison & Davis, *op. cit.* note 9, p. 7.

<sup>28</sup> I am of course familiar with the wide scope of literature concerning the moral status of the fetus. The most important defences of fetal rights and the moral status of the fetus include: D. Marquis. *Why Abortion is Immoral. Journal of Philosophy* 1989; 86: 183–202; P. Lee. *The Pro-Life Argument for Substantial Identity: A Defense. Bioethics* 2004; 18: 249–263; F. Beckwith. 2007. *Defending Life: A Moral and Legal Case Against Abortion Choice*. New York, NY: Cambridge University Press; R.P. George and C. Tollefsen. 2008. *Embryo: A Defense of Human Life*. New York, NY: Doubleday; C. Kaczor. 2015. *The Ethics of Abortion: Women’s Rights, Human Life, and the Question of Justice*. 2<sup>nd</sup> ed. New York, NY: Routledge. Of course, if these authors are correct

## CONCLUSION

I have argued that genetic parents have a right to the death of the fetus. That is because ectogenesis abortion without the consent of the genetic parents violates their right not to become biological parents. It also violates their right to genetic privacy and their property rights. I have considered some recent objections against a right to the death of the fetus and showed them to be flawed. I have claimed that Mathison and Davis omitted important literature about how parental obligations are acquired and they have not identified that a right to the death of the fetus is a collective – not an individual – right. If my argumentation is correct, ectogenesis abortion does not solve the abortion debate since there is a right to the death of the fetus and therefore we cannot reconcile pro-life and pro-choice positions.

I am not the first to argue that there is a right to the death of the fetus. Stephen L. Ross<sup>29</sup> has argued so, so have Catriona Mackenzie<sup>30</sup> and Christine Overall<sup>31</sup>. However, my position differs from

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and killing the fetus is as wrong as killing any standard adult, then my arguments might be refuted because a serious right to life could outweigh any other rights the parents have. On the other hand, one might claim, if the fetus has no value at all, so that killing the fetus is equivalent to, for example, cutting one's hair, then there would be no need to argue for the right to the death of the fetus. So, perhaps my argumentation would convince those who believe the fetus does not have full moral status equivalent to a standard adult human, but who believe that the fetus is not akin to one's hair either. I believe most people think this way, thus my argumentation should convince most people.

<sup>29</sup> S.L. Ross. Abortion and the Death of the Fetus. *Philos Public Aff* 1982; 11: 232–245.

<sup>30</sup> C. Mackenzie. Abortion and Embodiment. *Australas J Philos* 1992; 70: 136–155.

<sup>31</sup> C. Overall. Rethinking Abortion, Ectogenesis, and Fetal Death. *J Soc Philos* 2015; 46: 126–140.

previous advocates of a right to the death of the fetus because I have claimed that the right to the death of the fetus is not a genetic mother's right but a couple's collective right which they can use only together. Of course, nowadays a woman's right to bodily autonomy outweighs other arguments but when ectogenesis becomes an option, this changes.

My position has the value of equality because when ectogenesis becomes possible men and women can exercise equally their rights not to become a genetic parent, their rights to genetic privacy and property. Perhaps some feminists see this as a reason to object, but I see it is a reason to value my position. As Tuija Takala writes: '[T]he strong opposition to ectogenesis coming from many feminist (sic) stems from the fact that it might increase the rights of males when it comes to reproduction. But for anyone who is truly for equality this should not be an unwelcome development.'<sup>32</sup>

Many courts in the U.S. and in Europe have struggled with the cases where couples divorce, and one partner wants to use frozen embryos left over from IVF and the other partner objects. This leads to the question of what should be done to the fetus when ectogenesis abortion becomes available and genetic parents disagree about the fate of the fetus. This question is important and interesting, but nevertheless beyond the scope of this paper.

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<sup>32</sup> T. Takala. 2009. Human Before Sex? Ectogenesis as a Way to Equality. In F. Simonstein, eds. *Reprogen-Ethics and the Future of Gender*. Dordrecht: Springer: 187–95.