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IS THERE A RIGHT TO THE DEATH OF THE FOETUS?

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ABSTRACT
At some point in the future – perhaps within the next few decades – it will be possible for foetuses to develop completely outside the womb. Ectogenesis, as this technology is called, raises substantial issues for the abortion debate. One such issue is that it will become possible for a woman to have an abortion, in the sense of having the foetus removed from her body, but for the foetus to be kept alive. We argue that while there is a right to an abortion, there are reasons to doubt that there is a right to the death of the foetus. Our strategy in this essay is to consider and reject three arguments in favour of this latter right. The first claims that women have a right not to be biological mothers, the second that women have a right to genetic privacy, and the third that a foetus is one's property. Furthermore, we argue that it follows from rejecting the third claim that genetic parents also lack a right to the destruction of cryopreserved embryos used for in vitro fertilization. The conclusion that a woman possesses no right to the death of the foetus builds upon the claims that other pro-choice advocates, such as Judith Jarvis Thomson, have made.

1. INTRODUCTION

Given the rapid rate at which medical technology is currently advancing, some researchers now predict that within only a few decades it will be possible for doctors to transfer an otherwise pre-viable foetus from the mother's body into an artificial womb and carry it to term – a process known as *ectogenesis*.[1] In addition to the numerous other ethical implications this technology raises, which others have discussed at length elsewhere, this technology also calls into question one of the most long-standing assumptions in the debates concerning the ethics of abortion – namely, that terminating a pregnancy necessarily entails the death of the foetus. Once ectogenesis leaves the realm of science fiction and become the new medical reality, we will be forced to see these two events – i.e. the termination of pregnancy and the death of the foetus – as both conceptually and practically distinct.[2]

[1] Our arguments in what follows do not explicitly turn on a particular conception of viability; however, it will be useful to clarify this idea briefly here, since it features prominently in most discussions of abortion. There are two natural ways of understanding what the concept of viability is meant to capture: on the first understanding, viability concerns the foetus's ability to live and develop without relying upon any sort of external apparatus or technology for its survival. On the second understanding, viability concerns the foetus's ability to live and develop without relying upon the mother's body. We see no reason for endorsing the first understanding: there are many cases in which children are born requiring constant medical intervention, and it seems implausible to conclude that such children are not viable. Thus, the second way of understanding viability seems more accurate. Of course, once ectogenesis is possible, the category of viable foetuses will grow considerably, since there will be a larger number of foetuses that could live and develop outside the mother's body, i.e. by being transferred to an artificial womb. In theory, barring any other medical issues *every* foetus will be viable from the point of conception.

[2] As one reviewer has pointed out to us, the possibility of ectogenesis is not necessary for motivating the philosophical problems concerning the right to the death of the foetus, since certain jurisdictions (e.g. the United Kingdom) already permit abortions past the point of viability. Of course, in such cases, the philosophical question with which we are primarily concerned is complicated by the further issue (which we discuss briefly in the closing section of this essay) of whether or not the woman has a right to choose what to do with her body that may override the viable foetus's (alleged) right to life. Thus, we believe that the possibility of ectogenesis brings about a unique way of framing the question of the

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Some theorists have argued that this technology, especially if made readily available and cost-effective, would essentially conclude the abortion debate, since the two rights commonly thought to be in tension could be jointly exercised: pregnant women will be able to exercise their right of autonomy by terminating the pregnancy, and the foetus can be carried to term, thus not being denied its right to life (which proponents of that side of the debate typically argue it to have). Others have argued that the debate will continue, since in addition to the right to terminate the pregnancy, the woman also has a right to the death of the foetus. Indeed, some have suggested that the right to obtain an abortion *just is* the right to the death of the foetus. If this is correct, then it is still an open question how to understand the tension between the right to an abortion (understood in this way) and the foetus's supposed right to life.

Several of the most popular philosophical defences of the right to obtain an abortion deny that this right entails a further right to the death of the foetus. For example, at the end of her pathbreaking essay *A Defense of Abortion,* Judith Jarvis Thomson argues against such a right:

> [W]hile I am arguing for the permissibility of abortion in some cases, I am not arguing for the right to secure the death of the unborn child. [. . .] I have argued that you are not morally required to spend nine months in bed, sustaining the life of that violinist; but to say this is by no means to say that if, when you unplug yourself, there is a miracle and he survives, you then have a right to turn round and slit his throat. You may detach yourself even if this costs him his life; you have no right to be guaranteed his death, by some other means, if unplugging yourself does not kill him.[3]

Peter Singer and Deane Wells give a similar argument:

> If the feminist argument for abortion takes its stand on the right of women to control their own bodies, feminists at least should not object [to the use of this new technology]. 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.[4]

Thus, while these new technologies may mean the end of one particular version of the abortion debate, a new and urgent question arises in its wake: Is there a right to the death of the foetus? In this essay, we consider three possible arguments for grounding the moral right to the death of the foetus that philosophers have offered, in either this discussion or related contexts. We argue that there are compelling reasons to reject each of these arguments. By showing that the most plausible arguments to the contrary are unsuccessful, the lack of reasons in favour of a right to the death of the foetus provides support for the claim that there is no such right.

Before turning to these arguments, we must issue a few caveats. First, as with many others in this literature, we aim to stay relatively neutral on the specifics of what constitutes a right. Typically, a right is a significant interest that confers upon its possessor the power to make claims on others to respect or protect it. Given that we do not focus our criticisms on any specific definition of a right, but rather address (and cast doubt on) the various possible grounds for the alleged right, this definition should suffice for present purposes. Second, in this essay, we take no stand on the moral status of the foetus. We recognize that views concerning the status of the foetus will affect the topic we are considering, and might indeed be necessary to fully settle this issue. But we remain agnostic on this issue here, as we lack sufficient space to argue one way or the other, and do not wish to simply assume a position. Third, we are aware that each of the arguments we consider has a large literature, and we only cover the basics of such views. While we believe that we cover each argument in enough to detail to show why it is likely to fail, limitations on space preclude us from considering all the possible responses available. Fourth, in what follows, we focus primarily on the question of the biological mother's and father's rights to the death of the foetus. If there were such a right, the biological mother and father would seem to be the best candidates for holding that right. Of course this means setting aside, for the most part, many of the other possible rights holders, such as sperm donors, egg donors, and gestational mothers. Space constraints preclude greater discussion of these issues; however, it will suffice to say here that if our arguments in what follows are correct and the biological parents have no right to the death of the foetus, then it seems unlikely that these other individuals would have such a right either.

2. BIOLOGICAL PARENTS' RIGHTS

A popular argument given in support of the right to the death of the foetus is one we will refer to as the 'biological parents' rights' argument. On this view, an abortion consists (perhaps as a conceptual matter) in both terminating a pregnancy and preventing parenthood. Accordingly, part of the general right to an abortion includes the right to the death of the foetus as a way

right to the death of the foetus that does not require settling the question of the right to bodily autonomy.

[3] J.J. Thomson. A Defense of Abortion. *Philos Public Aff* 1971; 1: 47–66: 66.

[4] P. Singer and D. Wells. 1984. *The Reproduction Revolution: New Ways of Making Babies*. Oxford: Oxford University Press: 135.

of ensuring that neither the man nor the woman becomes a parent to this particular child.

There are several ways of spelling out this claim in greater detail. One way – perhaps the most common way – is to argue that the right to the death of the foetus is necessary for preventing certain harms from befalling the biological parents. That is, without this further right, the parents would still feel morally responsible for the child, and this would cause them significant harm. This felt obligation may be either self- or socially imposed.[5] In the first case, a biological parent may feel that she has abandoned her child. One study suggests that, in a scenario in which the choice is between aborting the foetus and having it brought to term in an artificial womb, or aborting it and ensuring its death, many women who consider abortion to be a morally permissible option would choose the latter. Several women reported that ectogenesis would leave them with a lingering sense of obligation toward the child, even if no legal obligation were maintained.[6] (One would expect similar reports from men; however, to our knowledge, no such studies have been conducted.)

This sort of harm may also be socially imposed. Parents may be harmed by something like what I. Glenn Cohen calls 'attributional parenthood', 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.[7] In many cases, this treatment might involve, among other things, others displaying certain negative reactive attitudes and subjecting the parent to certain forms of discrimination. Therefore, the thought goes, parents have a right to the death of the foetus in order to prevent these circumstances from coming about.

Let us consider these two types of harm (i.e. self- and societally imposed harms) in turn. First, we do not deny that individuals have an important interest in avoiding these self-imposed harms. Conferring a general right on this basis, however, seems unwarranted. For one thing, such harms, emerging as they do in large part from one's attitudes toward the situation, are characteristically contingent, and would surely differ considerably between individuals. Generally, the possibility that some action might cause psychological harm gives us reason not to do that action, and it certainly gives the individual a reason to avoid that action; however, it does not typically involve conferring upon that class of individuals a right against that action.

We grant that parents have a right not to be discriminated against on the basis of attributional parenthood. But it does not follow from the fact that this treatment 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 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. That is, it is not as if the surrogate parent is afforded any further rights (e.g. visitation rights, shared custodial rights, etc.) in virtue of the fact that such rights would help her avoid the possibility of harms stemming from attributional parenthood.

One might object here that the surrogate does not have any further rights since she has waived these very rights in this case. That is, by offering to be a surrogate, she has given up her right to have any sort of relationship with the child. While this may be true in some cases, it is certainly not true of all surrogates. More importantly, there may be ways of avoiding the relevant harms that involve certain things the surrogate has not explicitly promised to forgo. For example, yearly visits with the child may help the surrogate mother prevent or mitigate the harms of attributional parenthood, and in many cases, the surrogate will not have explicitly agreed not to make such demands. But even in such cases we do not find it plausible to claim that she has a *right* to such visits – even though it might be good, all things considered, to give her that opportunity. (The same argument will apply, *mutatis mutandis*, to each of the other sorts of biological relationships listed above.)

Thus far, we have argued against the claim that there is a right to the death of the foetus that is grounded in the more general right to avoid certain other attributional or psychological harms. But one might advocate for the much more general claim that parents have a right to determine whether they will be parents at all,

[5] The label of 'self-imposed harms' is admittedly unfortunate, since it may give the impression that such harms are things one brings upon oneself, and we do not want to encourage this reading here. Despite this, there does not seem to be a better way of capturing the idea without introducing a new term.

[6] L. Cannold. Women, Ectogenesis, and Ethical Theory. *J Applied Phil* 1995; 12: 55–64. It is worth noting the date of this study (1995), as well as its limited sample (45 Australian women). It is of course possible that attitudes have changed, or that this sample was in some sense unrepresentative. These differences would be important to the argument, since it seems to rely heavily on the fact that such attitudes are sufficiently widespread.

[7] I. G. Cohen. The Right Not to Be a Genetic Parent. *South Calif Law Rev* 2008; 81: 1115–1196. For a defence of the claim under consideration, see S. Langford. An End to Abortion? A Feminist Critique of the 'Ectogenetic Solution' to Abortion. *Womens Stud Int Forum* 2008; 31: 263–269: 265.

regardless of the harms stemming from the effects of felt obligations. That is, it is possible that the right not to be a biological parent is not reducible to, subsumed within, or dependent upon some other right in the way suggested previously.

We think there are several reasons to doubt that such an argument would succeed. First, it is clear that one has no right to decide whether or not she will be a biological parent *in general*, for this would entail that she has *some* right to the death of her child even long after it is born. Of course, in such cases, this right would be swamped by the rights and interests of the child, and for this reason, could never be justifiably exercised.[8] This does not, however, resolve the problem entirely, for it is still wildly implausible to think that such a right exists at all: it is not as if there is some weight on the side of the scale in favour of killing one's child, but much more weight on the opposite side. Rather, there is simply no weight on the former side whatsoever. Thus, in order to be plausible, the right not to be a biological parent would have to be restricted to the unborn – that is, a right not to *become* a biological parent.

Second, it is not obvious that this right should be limited only to parents. After all, many of the reasons that could be given in support of it would also seem to apply to, e.g. biological siblings and grandparents. Suppose, for example, that my parents (with whom I am no longer in contact) are considering having a child that I will never be able to meet and have a relationship with. (We may, but need not, suppose that I find this fact deeply unsettling, as one might in the felt obligation cases above.) Intuitively, I do not have a right – even a very weak one that would be outweighed by my parents' rights to bodily autonomy – to the death of my unborn sibling.

In order to be at all plausible, then, the right must be restricted so as to apply only with respect to the unborn (perhaps only in the first or second trimester) and only with respect to biological parents. There is, of course, nothing mysterious about the thought that parents of an unborn child might have certain rights that others do not. However, it is not at all clear why the right not to stand in a certain sort of biological relationship should be among them. Moreover, it is puzzling that this particular right (i.e. of parents alone, with respect to their unborn children) can possess such considerable weight in these relationships and at specific times, but none whatsoever in other relationships and at other times. In other words, the restriction here looks problematically ad hoc. Thus, we believe this sort of argument is likely to fail.[9]

3. GENETIC PRIVACY

Another possible avenue for establishing the right to the death of the foetus is to appeal to the more general right to genetic privacy. If ectogenetic abortions become reality, some women will have genetic children in the world who carry their genetic material without their consent. Some might argue that this constitutes a violation of the right to genetic privacy.

There are two basic strategies for responding to this argument. The first is to deny that any such right to genetic privacy of this very broad sort exists at all, and thus, *a fortiori*, no right to the death of the foetus can be thought to follow from it or be subsumed within it. One compelling reason to deny that this broad right to privacy exists is that the basis for such a right is the interest individuals have in their genetic material being misused. Thus, my right to genetic privacy is not a right that such information not be out in the world at all; rather, it is a right that it not be misused, e.g. by denying me health insurance or a job. So, the more basic right here, as we saw earlier, is a right not to be discriminated against. And we grant, as we did before, that there is such a right; however, it does not follow from this that there is any further right.

The second strategy is to grant that there is a general right to genetic privacy, but to resist the claim that the right to the death of the foetus follows from, or is somehow included within, this more general right. After all, even if we have a right to genetic privacy, there will be considerable limits. For one thing, my right to genetic privacy might be (and often is) permissibly overridden by other considerations, such as the rights and interests of other members of society.[10]

But suppose we deny this claim as well. At most, then, I have a right that my *entire* genome not be released without my consent. But of course, a child contains only half of each parent's genetic material. Why should we think that this threshold is morally important? Is it twice as important as the 25% of genetic material that each grandparent has? And what about the genetic overlap between siblings? It seems very implausible to think that

[8] The same will be true, of course, if the foetus possesses the same moral status as an infant, as many of those opposed to abortion will claim.

[9] A related claim that we are unable to consider in this article concerns the rights parents might have to procreation. One possible defence of the right to the death of the foetus is that people have a right not to procreate. We believe that this approach is connected closely enough to the right not to be a parent that we can put it aside. For a thorough discussion of the legal issues in America of this potential right, see: I. G. Cohen. The Constitution and the Rights not to Procreate. *Stanford Law Rev* 2008; 60: 1135–1196.

[10] See: H. Malm. Genetic Privacy: Might There Be a Moral Duty to Share One's Genetic Information? *Am J Bioeth* 2009; 9: 52–54.

when my biological sister releases her genetic information without my consent, she has thereby violated my right to genetic privacy. Thus, a defence of the 50% threshold is needed; but we doubt that such a defence could be given that would not rely on special pleading.

One could perhaps argue that, while there is a right to genetic privacy, obtaining an elective abortion – even in the case where the pregnancy is terminated and the foetus is carried to term in an artificial womb – constitutes willingly discarding genetic material, and thus, is tantamount to waiving that right. By analogy, if, after a surgery, a doctor finds some positive use for a patient's medical waste (say, cells from a removed cancerous tumour) it is difficult to see in what sense this alone would constitute a violation of the patient's rights. And in several notable cases, the courts have agreed.[11] This argument is bound to be controversial, however. Some will be inclined to deny that undergoing a medical procedure for which the patient has no reasonable and safe alternative qualifies as a wilful discarding of her genetic material. As such, we do not rest our argument on this claim. Suffice it to say: if one is committed to or inclined to agree with these arguments, the case for resting the right to the death of the foetus on the more general right to genetic privacy is incredibly tenuous.

4. PROPERTY

Although genetic privacy is not a good candidate for defending the right to the death of the foetus, a related argument might be. Perhaps the correct claim is not that parents possess a right to privacy, but rather that they have a right to control their property. To motivate this argument, consider a related case involving cryopreserved embryos. For in vitro fertilization, it is standard practice to remove and fertilize more ova than the number of children the potential parents want in case the procedure does not initially succeed. The result is that there are usually embryos left over, which are then either destroyed or kept frozen until the woman wants to try to conceive again. The question is whether or not the woman – or perhaps the woman and the genetic father – have the right to the destruction of the embryos.[12]

Many have the intuition that parents possess the right to the destruction of such embryos, and indeed we have this intuition. In conversations with colleagues, we have also found that most of them believe that parents do not have the right to the death of the foetus (whether or not the woman has a right to an abortion in the first place). We contend that these intuitions are inconsistent. So far as we can see, there is no morally relevant difference between the two cases that explains why destruction should be a right in one case but not the other. Both cases involve an embryo (provided that in the non-IVF case the pregnancy is early on) with the potential to develop into a foetus and then an infant. The location of the embryo – in the mother's uterus or frozen in the lab – is morally irrelevant to this particular question.

One might think that the right to the destruction of the embryo exists because the embryo is frozen and not developing, whereas the standard embryo is growing. If someone does think that this difference is morally relevant, it would have to be due to an attribution of value to the foetus and not the frozen embryo, which is a value claim about which we are remaining neutral. (Despite our neutrality, we are doubtful that this distinction is in fact morally relevant.)

Another potential difference is that a foetus is more developed, so the difference between a foetus inside a woman's womb and an embryo frozen in a lab is that the foetus possesses value that the embryo lacks.[13] This view successfully identifies a difference between the cases, but we are unpersuaded that it is morally relevant. While there are biological differences between a foetus and an embryo, and while some distinctions – e.g. when the mother first feels the foetus move—have attempted to point to a relevant developmental difference, such distinctions are widely considered to be irrelevant. We agree with those rejections.

A final possibility is that the frozen embryo is the *property* of the mother (or parents), whereas the foetus is not. While we suspect that people might hold this sort of view, we once again see no reason why it should apply in one case but not the other. We address the property claim for both in more detail below.

Therefore, many people have inconsistent beliefs about frozen versus non-frozen embryos (including us, initially). Whichever position one holds, consistency demands that the cases be treated the same. If the parents possess the right to destroy any unused cryopreserved embryos, they also have the right to the death of the foetus, and vice versa.[14]

[11] See, for example, the 1990 case of *Moore v. Regents of the University of California* (51 Cal. 3d 120; 271 Cal. Rptr. 146; 793 P.2d 479). Of course, a court ruling does not definitively show that there is a legal right to something, and certainly does not establish a moral right. We include this case for our legal moralist readers.

[12] By 'embryo' we mean 'cryopreserved embryo' unless otherwise stated.

[13] An embryo becomes a foetus at approximately nine weeks, which is well before it possesses most of the standard features that people argue make it deserving of moral consideration. Of course, at some point viability might begin at nine weeks, but that will change as technology progresses.

[14] The language commonly used – i.e. the *death* of the foetus versus the *destruction* of the embryo – might be telling of bias against the embryo, although there are also philosophical reasons for not using 'death'. Cases involving cryopreservation are the sort Fred Feldman uses in his discussion of what death is and when it occurs. Some believe – falsely, on Feldman's view – that death occurs when life ceases (i.e. when biological processes stop), in which case the embryo dies when it is frozen. See F. Feldman. The Enigma of Death. *Philosophia* 1992; 21: 163–181.

The defence for the property claim in IVF cases might go as follows. Women spend thousands of dollars and use their biological material to produce viable embryos. Given what is involved in this process, the woman should have the right to decide what happens to the products of her effort, and based on the process of that production, she can determine what happens to the embryos because they are her property. More generally, one could argue along Lockean lines that we own our bodies, and also the fruits of our labour.

Sarah Chan and Muireann Quigley are sympathetic to this position.[15] Although they do not argue for the position explicitly, they show how the property claim can apply to genetic material. For instance, they cite Hillel Steiner, who argues that self-ownership gives us the right to use and dispose of our genetic material (e.g. blood, hair, and skin) however we see fit.[16] (This is a claim about physical property, not a right to intellectual property. Due to the problems discussed above – e.g. what percentage of one's genetic information does one have a right to protect, given that an embryo is only 50% one's own material? – we believe that the intellectual property claim is likely to fail.) Based on this argument, and assuming that the cases are in fact analogous, it follows that the mother also has a right to the death of the foetus because the foetus is her property in the requisite sense. (The same point applies to the genetic father, although the specifics of the case might determine whether the threshold of 'mixing one's labour' has been crossed for the father.)

Suppose a pregnant woman requires emergency surgery on her liver, and that the liver problem is unrelated to the pregnancy. If, under general anaesthesia, the surgeon removed one of her kidneys because another patient needed it, clearly the surgeon has violated the rights of the woman. One way, although not the only way, of diagnosing the violation is that the kidney *belonged to* the woman.[17] It was hers to use as she wished. Similarly, if, during the liver surgery, the surgeon had removed the foetus from the pregnant woman without her consent, one way of explaining the wrong involved is that the woman had a right to decide what happened to it. In other words, the foetus was her property.

An amendment on this case also shows why determining whether or not the foetus possesses intrinsic value will not resolve the issues we are considering. Although this point is contentious, many will agree that the woman just described does not have a right to the destruction of her liver, which needs to be removed for her health, if others could be made better off by it through a transplant. The liver lacks intrinsic value, yet this fact does nothing to show that the woman either does or does not possess the right to its destruction. Although the analogy has limits, others can take an interest in the foetus – perhaps because of its potential for intrinsic value, which the liver lacks – which could similarly show that a right to the death of the foetus is not a trivial claim if the foetus lacks intrinsic value.

The point goes the other way too. If the foetus *does* possess intrinsic value, this might make it more difficult to justify a right to its death, but it does not settle the issue either way. We can, after all, possess the right to destroy something even if that thing has intrinsic value. 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.[18]

Return now to the claim that the foetus is the property of the parents. As a first response, it is worth remarking that property rights can have limitations. Although we are taking no stand on the moral status of the foetus, those who affirm some status to it can proceed by granting that parents have a property right over the embryo (or foetus) but maintain that the right does not extend to the destruction of their property. Analogous cases show how commonplace this sort of approach is. For instance, culturally 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. More contentiously, pets are generally considered property, yet there are restrictions on what we are permitted to do to them (including causing them harm). These limitations are justified by appealing to the intrinsic value of the property, or minimally the instrumental value the property possesses for those other than the owner. Therefore, even if it is the case that parents own their embryos, it does not necessarily follow that they are permitted to destroy them.

We believe that the property claim fails even if the embryo possesses no moral status. Although this is not a reason that we are appealing to, there is legal precedent for the state taking an interest in protecting the potentiality of human life, which happened most famously in

[15] S. Chan and M. Quigley. Frozen Embryos, Genetic Information, and Reproductive Rights. *Bioethics* 2007; 21: 439–448.

[16] H. Steiner. 1994. *An Essay on Rights*. Oxford: Wiley-Blackwell: 233. Cited by Chan and Quigley ibid: 443.

[17] This is, of course, a controversial claim. See the following from Chan and Quigley's paper (*op. cit*. note 12, footnote 12) for discussions of the claim that our genetic material is our property: G. Calabresi. Do We Own Our Bodies. *Health Matrix* 1991; 1: 5–18; G.A. Cohen. 1995. *Self-Ownership, Freedom and Equality*. Cambridge: Cambridge University Press; R.E. Gold. 1996. *Body Parts: Property Rights and the Ownership of Human Biological Materials*. Washington: Georgetown University Press; J.W. Harris. Who Owns My Body. *Oxford J Legal Studies* 1996; 16: 55–84; S.R. Munzer. Kant and Property Rights in Body Parts. *Canadian J Law Jurispr* 1993; VI: 319–341; J. Nedelsky. Property in Potential Life? *Canadian J Law Jurispr* 1993; VI: 343–365.

[18] Again, we are aware that there are many ways that a foetus is not the same as a piece of art or an organ. We use these examples merely to show the broad point about the connection between intrinsic value and associated rights.

Roe v. Wade.[19] Even though the ruling makes no claim about the intrinsic value of the foetus, it recognizes that the state can still have an interest in protecting *future* intrinsic value. Given that the Supreme Court in *Roe* and a later case, *Planned Parenthood v. Casey*,[20] set the legal right for abortion prior to viability, full ectogenesis would mean that a woman could never have a standard abortion in the United States.

Suppose that the foetus lacks moral status. One reason why we reject the property claim is that the labour-mixing explanation is going to be incapable of demarcating why parents, and only parents, own the embryo. After all, others mix their labour in the IVF process – most obviously the doctor who extracts the ova and performs the procedure – yet they do not acquire a property claim to the embryo.

A more compelling reason is that, working back from an adult – who is clearly not the property of his parents – there is no clear place where the property claim can be justified.[21] Locke himself rejected the claim that parents own their children,[22] which is entirely uncontroversial now. But do the parents own their children when the children are *in utero*? This too is implausible. 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. (Indeed, if giving birth doesn't involve mixing one's labour, then surely nothing does.) Similarly, we see nothing that would make the foetus the property of the woman earlier in gestation. One might appeal to a non-Lockean view of property rights, according to which acquiring property does not rely on mixing one's labour. While our argument doesn't address these other possibilities directly, they will all be prey to the same problem of showing when the foetus no longer becomes one's property and why. It is possible that a view could successfully achieve this, but we are doubtful. Therefore, we reject the property claim that the mother has a right to the death of the foetus.

Even though the foetus is never the property of the mother, perhaps there is some relevant difference between a foetus and a cryopreserved embryo that makes the latter one's property. (Note that, according to Chan and Quigley, the embryo is the property of both parents and not only the mother, which already means that the mother will not be the sole possessor of the right to the death of the foetus, if the comparison holds.) However, if the foetus is never the property of the mother when it is inside her, then it is unclear why the property claim should change when the embryo is outside her in the lab. The justification for the property argument is supposed to be based on labour-mixing, which, as we just argued, does not change based on the location of the embryo. What reason is there for thinking that the property claim changes when the embryo is in a lab instead of inside the mother? As far as we can see, there is no such reason. Therefore, the parents never possess a property right over the cryopreserved embryo or the foetus.

This result will be unsettling for some people. If parents do not own their IVF embryos, what will stop others from taking them before the mother has conceived? This worry is understandable, but misplaced. Our argument says nothing about the use rights parents possess over embryos, and there are obvious reasons why parents should be allowed to use those embryos without worrying that others will take them. We grant that our argument does have implications regarding what the parents can decide to do with the embryos once they no longer want them, and while this conclusion is not one we originally set out to show, we can see no reason why it is mistaken.

One might also worry about the rights of mothers when they are carrying a foetus in standard cases. This too is misplaced. We have affirmed the mother's right to her bodily autonomy, so it no more follows that anyone can demand that she have an abortion than it does that they can demand one of her organs. The case above of the unjustified kidney extraction shows exactly this. Property rights play no role in justifications for bodily autonomy. Relatedly, some in the children's rights literature have explored the issue of justifying why parents get to retain custody of their biological children, instead of, say, the state. For obvious reasons, exploring this issue would take us too far afield, but it is worth pointing out that none of the popular options for parrying this worry involve a property right over one's children.

5. PRACTICAL IMPLICATIONS

It is reasonable to wonder what sorts of practical implications result from the arguments in this article. We never argue against, and in fact strongly endorse, the arguments of Thomson and others in favour of a woman's right to an abortion. Our goal has been in part to show that accepting arguments in favour of abortion does not lead directly to a right to the death of the foetus; it is the latter claim of which we are sceptical.

[19] *Roe v. Wade*, 410 U.S. 113 (1973): 162.

[20] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[21] On the first page of 'A Defense of Abortion' (*op. cit*. note 2, p. 47) Thomson mentions that the strategy we are about to employ—i.e. challenging our opponent to point out where, during the continuous development of a human, its moral status changes—is relied on 'too heavily and uncritically' by opponents of abortion. As proponents of abortion we are happy to use this argument for a different purpose. We grant that acorns are not oak trees; our claim is that one can own neither the foetus nor the child.

[22] D. Archard. *Children: Rights and Childhood*. New York: Routledge: 15.

However, it does not follow from our arguments that every viable foetus should be kept alive. First, we take no stand in this essay on whether or not the foetus possesses intrinsic value. If the foetus does possess such value, then there is a pro tanto reason for keeping it alive; if it does not, there is no such reason. Second, we also make no claims about what other morally relevant factors might exist that would determine the best outcome all things considered. It might turn out that these other factors should be given significant weight. Considering these factors and determining their final weight would take us well beyond the scope of this article.

A second question is, according to our argument, whether or not it would be all things considered best to bring most foetuses to term. To fully answer this question, it would be necessary to determine the moral status of the foetus. If the foetus deserves moral consideration, then it probably should be brought to term in most cases. If it does not, then, while the mother possesses no right to the death of her foetus, it might be all things considered best for the foetus to die. This is because the harms that might befall the mother and the limited social resources for properly bringing to term and caring for the child (i.e. the costs associated with carrying it to term in the artificial womb, finding it a suitable family, and so forth) might be prohibitive. Dealing with all the morally relevant factors for each case would be a large task indeed, but it is sufficient here to note that our view does not entail that all, or even any, foetuses should be brought to term against the wishes of the parents.

A third issue is that new technologies might determine what type of procedures women can have when they request an abortion. We affirm that women have a right to bodily autonomy, and that this right includes consenting to and refusing medical procedures. New technologies present a threat to these rights: A woman who wants an abortion might be forced to choose between a standard abortion, which would result in the death of the foetus, or undergo a more dangerous, invasive, or painful procedure to ensure the survival of the foetus. Our view does not entail that the second option is morally required of her, for she has the right to bodily autonomy, which permits her to choose the less invasive procedure if she so desires. We have argued, however, that this bundle of rights does not include the mother's right to the death of the foetus.

6. CONCLUSION

This article has surveyed several of the most plausible ways of grounding the right to the death of the foetus. If our arguments are successful, there are good reasons to doubt that such a right exists. Certain readers will be satisfied with this result. After all, many philosophers, such as Thomson, Singer and Wells, and others, have long assumed that there is no such right, so our arguments will provide support for what had been considered by them to be obvious. Others, however, will find this result unsettling. There is more to be said about each of the arguments we consider in this article. What we know is that, year by year, IVF is becoming more common and science is expanding its ability to keep foetuses alive ex utero. Therefore, it is important to treat this problem not as an interesting science fiction example, but as a practical issue that deserves more philosophical attention.

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