

Melodie Slabbert*

**THE INTERNATIONAL LIBRARY OF
MEDICINE, ETHICS AND LAW
LEGAL AND ETHICAL ISSUES IN
HUMAN REPRODUCTION**

**Edited By Bonnie Steinbock
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In *Mount Isa Mines Limited v Pusey*,¹ Windeyer J of the Australian High Court referred to the law as ‘marching with medicine but in the rear and limping a little’. Although this remark was made in relation to the role of law in providing for damages for nervous shock occasioned by negligence, the truth of this is even more emphasised in recent times in view of the breathtaking advances that have taken place in the sphere of human reproductive technology. *Legal and Ethical Issues in Human Reproduction* is one of the volumes in the extensive series of legal materials relating to the teaching and study of medicine, ethics and the law. Each volume — dealing with a specific subject area — provides a compendium of basic materials, drawn from the most significant periodical literature. Other volumes in the series include, for example, titles such as *AIDS: Society, Ethics, and Law*,² *Ethics and Medical Decision-Making*,³ *The Genome Project and Gene Therapy*,⁴ *Medical Practice and Malpractice*⁵ and *Mental Illness, Medicine and Law*.⁶ The series preface to the above volume states that the total of 15 volumes provide an ‘indispensable resource in a world in which even the best-stocked library is unlikely to cover the range of materials contained within these volumes’.

If one considers the rapid rate at which medical technology, in particular reproductive medicine, has advanced over the past few decades, there can be no doubt that there is a huge need for a collection of legal materials dealing with the range of fundamental ethical, philosophical and legal issues resulting from these developments. Many legal scholars have grappled with some of these issues and

* DLitt (University of Pretoria); LLD (University of South Africa); Senior lecturer, Department of Jurisprudence, University of South Africa.

1 (1970) 125 CLR 383, 395.

2 Edited by U Schlenk.

3 Edited by M Freeman.

4 Edited by S McLean.

5 Edited by H Teff.

6 Edited by M Levine.

literally thousands of articles have been published on an ever-increasing range of topics under the broad heading of human reproduction. My primary concern with a single volume, dedicated to the legal and ethical issues in human reproduction, is that it would be impossible to cover even the most basic developments that have taken place.

This volume consists of five parts: the first relates to procreative liberty and assisted reproduction; Part II consists of papers devoted to assisted reproduction and the family; the third part is dedicated to contractual reproduction, which includes gamete donation and surrogacy arrangements; Part IV deals with reprogenetics, and finally Part V, which addresses the limits to procreative liberty. Each part consists of between two and four articles, published over more than a decade from 1986 to 1999 by well-known and highly respected international legal scholars in the field of medical law and ethics.

Part I, 'Procreative Liberty and Assisted Reproduction' examines the nature and scope of the right to reproduce. John Robertson's classic 1986 essay, 'Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction', lays the groundwork for this volume. For Robertson, decisions relating to procreation should be left to individuals, as these decisions are central to a person's identity, dignity and the meaning of one's life. This idea was later expanded in his provocative book on procreative liberty, *Children of Choice* (1994). For Robertson, the moral case for a legal right to reproduce is therefore as compelling as the right to avoid reproduction. Turning to US constitutional law, Robertson analyses Supreme Court dicta supporting a married couple's right to reproduce and finds a constitutional justification for a broader interpretation of the right to reproduce. Non-coital and coital reproduction (the former better known as assisted reproduction) should both be protected from government interference, as the motivations, interests and values are the same. Robertson carefully examines one of the justifications for limiting ART, more commonly referred to as the potential for 'harm to offspring'. He subsequently distinguishes between avoidable and unavoidable harm. In his view, limiting people's liberty to prevent *avoidable* harm is legitimate, in other words, utilising reproductive techniques that cause children to be born damaged when they could have been born 'healthy and whole' is wrong. On the other hand, if the harm is *unavoidable*, then no wrong to the offspring has been done, although the child may be born damaged. Robertson argues that few, if any, children will have lives so dreadful that they would prefer never to have been born. For these children, it is life with the harmful condition or no life at all, as exercising the choice to be born with the harmful condition is not an option for them.

The second article by Ann MacLean Massie, 'Regulating Choice: A Constitutional Law Response to Professor John A Robertson', criticises some of Robertson's controversial arguments. Her strongest critique relates to Robertson's 'harm to

offspring’ argument and his reliance on ‘wrongful life’ cases for stating that he could not find any condition under which it would have been better for the child not to have been born at all. Massie uses an example of a child born with the assistance of IVF to a mother who tests positive for HIV. In such a case, both the mother and child may be destined to die soon, which challenges Robertson’s claim that IVF services in this situation would not harm children who have no other way to be born. According to Robertson’s analysis, the woman’s fundamental right ‘to bear or beget a child’ would override any interest that the state might assert in restricting her access to IVF because the resulting child — which may be HIV-positive and whose mother may die soon — would be better off to have been born than not to have been born at all.

Part II, ‘Assisted Reproduction and the Family’, flows from the discussion of the right to reproduce and looks at assisted reproduction and the family, more specifically how the right to marry and found a family should be interpreted. Logically, this discussion will lead to questions concerning the meaning of parenthood and family. Assisted reproduction not only separates rearing from biological parenthood, but also makes a distinction between the genetic and gestational components thereof. A child born as a result of ART, using donated gametes and a surrogate mother, may have five individuals who could all be said to be the parents: the intending rearing parents who are not genetically related to the child; the sperm donor (biological father); the egg donor (genetic mother); and the woman who will carry the baby (the surrogate or gestational mother). John Hill’s article, ‘What Does it Mean To Be a “Parent”? The Claims of Biology As a Basis for Parental Rights’, touches exactly on this issue. Hill maintains that it is not the biological tie between parent and child which is important, but the ‘preconception *intention* to have a child, accompanied by undertaking whatever action is necessary to bring a child into the world’,⁷ in other words, the intention to parent should trump the claims of genetic or gestational parents. Alta Charo, in ‘And Baby Makes Three — or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution’, challenges the idea that children can only have two parents and pleads for family law reform that will acknowledge the various biological and contractual ties of all the adults involved. From the child’s point of view, it may ‘simply be wrong’ to cut out these adults.⁸

Part III, ‘Contractual Reproduction: Gamete Donation and Surrogacy Arrangements’, takes a close look at some of the legal and ethical issues arising from gamete donation and surrogacy. Dan Callahan’s article, ‘Bioethics and Fatherhood’, confronts the widespread social acceptance of artificial insemination by donor (AID). Callahan regards AID as ‘irresponsible’ and analogous to abandoning a woman when she falls pregnant. The only difference between these

⁷ Bonnie Steinbock (ed), *Legal and Ethical Issues in Human Reproduction* (2002) 414.

⁸ *Ibid* 23.

two situations appears to be that AID is 'licensed and legitimated' and is treated as a kind and 'beneficent action'.⁹ His objections are harsh, especially if one considers that his sperm donation in fact enables another man to become a father, which could hardly be regarded as an irresponsible act.

John Robertson, in 'Legal Issues in Human Egg Donation and Gestational Surrogacy', highlights the legal lacunae existing in respect of egg donation. Some of the unresolved legal issues revolve around the rearing rights and duties of the offspring; the risk to egg donors and the legality of compensating donors. In view of this uncertainty, Robertson believes that full disclosure, free and informed consent and respect for the interests of all parties will ensure the maximum protection for physicians, couples, donors and surrogates who participate in these practices. Bonnie Steinbock's paper on surrogate motherhood, 'Surrogate Motherhood as Prenatal Adoption', grapples with one of the most contentious and complicated legal issues in human reproduction. Steinbock does not regard commercial surrogacy as necessarily exploitive, harmful to children born of such an arrangement, or inconsistent with human dignity. Payment to surrogate mothers in her view compensates for the risk, sacrifices, loss of income and discomfort the surrogate mothers undergo during the process. One of the problematical issues in surrogacy is whether an infant should be taken from the surrogate mother by force if she refuses to relinquish the baby after birth. Steinbock claims that this can be avoided by incorporating into surrogacy statutes a 'change of mind'-period, analogous to those provided in many adoption statutes. Following the famous 'Baby M' case, many states in the US have adopted a 'change of mind'-provision, but it is unclear whether these statutes also extend to gestational surrogacy, in which the surrogate mother has no genetic relation with the child she bears. Part III ends on a high note with an article entitled 'Markets in Women's Reproductive Labor' by Debra Satz. She traces the problem with contract pregnancy back to gender inequality between the sexes. Reproduction is a sphere that has historically been marked by inequality. For Satz, contract pregnancy contributes to gender inequality in three ways: it gives others increased access to and control over women's bodies and sexuality; it reinforces stereotypes about the proper role of women in the reproductive division of labour; and finally, it raises the danger that 'motherhood' will be defined in terms of genetic material, in the same way as 'fatherhood'.

Part IV, 'Reprogenetics', addresses — as suggested by the title — the legal and ethical issues arising from the combination of reproductive and genetic technologies. Examples that spring to mind are somatic cell nuclear cloning (SCNT), pre-implantation genetic diagnosis (PGD), and the manipulation of egg cells (IVONT). Abby Lippman, in 'Prenatal Genetic Testing and Screening: Constructing Needs and Reinforcing Inequities', is opposed to prenatal testing as it assumes, in her view, that a disabled life is worthless and that it would be better to

⁹ Ibid 248.

prevent the birth of a disabled child. Women are pressurised into having their pregnancies tested, and indirectly, into aborting their disabled foetuses, as society still does not accept children with disabilities. PGD, on the other hand, provides for prenatal genetic testing to be performed on extra-corporeal, in vitro embryos, which has the advantage that the decision to abort is avoided, as only embryos diagnosed as genetically ‘healthy’ need to be implanted. Jeffrey Botkin, in a related article ‘Ethical Issues and Practical Problems in Pre-implantation Genetic Diagnosis’, convincingly argues that PGD is not always a good substitute for ordinary prenatal diagnosis, for a number of reasons, of which one is that PGD may require prenatal diagnosis as a ‘back-up’, which means that abortion may still be ‘required’.

John Robertson, in an illuminating paper, ‘Two Models of Human Cloning’, proposes two models for regulating human reproductive cloning. ‘Model 1’-cloning would refer to cloning as a means of treating infertility, in order to create a child with whom a couple has a biological connection, whereas ‘model 2’-cloning would, rather than be used in instances of infertility, be used to create a child with a particular genome. The problem with ‘model 2’-cloning relates to couples who express an interest in rearing children through cloning rather than through sexual reproduction, in other words not claiming a right to reproduce *per se*, but ‘a right to select, control, or shape offspring characteristics in the course of reproduction — a right to engage in reprogenetics’.¹⁰ Our present understanding of human reproduction and procreative freedom does not yet embrace such a revolutionary model, but Robertson maintains that this may change in future.

The final part in this volume, Part V, ‘Limits to Procreative Liberty’, addresses the possible justifications for limiting procreative freedom. The first article, ‘Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy’ by Elizabeth Scott, looks at how the current law, reflecting a paternalistic approach, fails to protect the interests of mentally disabled persons when their parents propose sterilisation. She suggests an alternative model, which she calls the ‘autonomy model’, which strives to maximise individual and family autonomy and minimise paternalistic intervention by the state. The goal of protecting the retarded person’s interest can be achieved, according to Scott, by choosing the appropriate decision-maker, which in most cases will be the individual herself or her parents. The court’s role should be limited to deciding whether the individual has the capacity to make her own choices or whether this decision must be taken by her parents.¹¹

The second paper in this final part by Philip Peters, ‘Harming Future Persons: Obligations to Children of Reproductive Technology’, analyses Robertson’s ‘harm to offspring’ argument which was briefly referred to above. He concludes that while

¹⁰ Ibid 628.

¹¹ Ibid 808.

this approach may be well-suited to tort law, it is inappropriate from a public health perspective. Public health has to consider unnecessary harm that reproductive choices may inflict on future children as a class.¹² The final paper by Derek Morgan and Robert Lee, ‘In the Name of the Father? *Ex parte* Blood: Dealing with Novelty and Anomaly’, discusses the well-publicised case of Diane Blood and her (successful) artificial insemination with her husband’s sperm after his death. They emphasise some of the pitfalls of the posthumous use of reproductive technologies, particularly the social consequences, by quoting Marilyn Strathern’s words of caution:

The more we give legal certainty to social parenthood, the more we cut from under our feet assumptions about the intrinsic nature of relationships themselves. The more facilitation is given to the biological reproduction of human persons, the harder it is to think of a domain of natural facts independent of social intervention. Whether or not all this is a good thing is uncertain. What is certain is that it will not be without consequence for the way people think about one another.¹³

The selection of papers included in this volume clearly indicates the inadequacy and or incapacity of the law in general to produce proper legal responses or answers to some of the vexing issues raised in human reproduction. Surrogate motherhood is just one clear example of how the law fails to provide a satisfactory answer to the question of legal parenthood. The range of issues — from IVF, research on embryos, embryo donation, surrogate motherhood, prenatal genetic testing to cloning — covers a broad spectrum of contentious issues which continue to challenge our notions of morality and our laws. The most difficult task must have been selecting for inclusion in this volume those few papers of ‘central theoretical importance’ (see Series Preface), as there are many other equally important legal ‘voices’ or responses to these dilemmas, which for obvious reasons could not be included. Nevertheless, this volume, like the others in the series, provides an accessible compendium of basic materials for both students and scholars. Bonnie Steinbock’s introduction successfully integrates the various contributions in this volume and also conceptualises some of the more technical issues, which is very useful for newcomers in this field.

It is inevitable that some of the issues addressed in this volume will overlap with those covered by other related volumes in this series, such as embryo research (see also the volume *Human Experimentation and Research*), the regulation of reproduction from feminist perspectives (see the volume *Women, Medicine, Ethics and the Law*) and reproductive rights (the volume *Abortion*). Those researching

¹² Ibid 399.

¹³ Ibid 853.

these issues should therefore be advised to also refer to the other volumes in this series.

Some of the articles in this volume, for example John Robertson's 'Embryos, Families and Procreative Liberty' and Bonnie Steinbock's 'Surrogate Motherhood as Prenatal Adoption' were published between 15 and 17 years ago. One may logically question the relevance of these publications in the light of the progress in medical technology and the law that has taken place since then. For example, in what can be considered as one of the most important medico-legal developments of the past decade, the House of Lords on 13 March 2003 finally cleared the way for researchers in the United Kingdom to use cloned human embryos in embryo research.¹⁴ Five Law Lords unanimously dismissed an appeal by an anti-abortion group that therapeutic cloning was illegal because it was not covered by the relevant legislation regulating human embryology and fertility. (The same pro-life alliance successfully argued in the High Court in 2001 that the said legislation, the *Human Fertilisation and Embryology Act 1990* (UK), did not extend to cloned embryos created by cell nuclear replacement (CNR), the technique used to produce Dolly the sheep.) Robertson's classic 1986 paper, 'Embryos, Families and Procreative Liberty', although technically outdated as far as these developments are concerned, continues to provide a solid theoretical understanding of the underlying philosophical and legal issues relating to assisted reproduction and embryo research. Robertson's paper on human cloning which appears in Part IV of this volume — published in 1999 — cleverly balances any potential 'gaps' that may have been identified by the serious researcher. A careful selection of future papers when revising the contents of this volume will ensure that it remains an indispensable aid in the study of law and human reproduction.

In conclusion, *Legal and Ethical Issues in Human Reproduction* certainly succeeds in achieving the goal set out in its preface, namely to assist scholarly endeavour by providing an accessible compendium of basic materials.

¹⁴ See *Regina v Secretary of State for Health (Respondent) ex parte Quintavalle (on behalf of Pro-Life Alliance) (Appellant)* [2003] UKHL 13.

