

The Rights of Children and the Redefinition of Parenthood

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I am delighted to be visiting your beautiful country and this great city, and I am honored to be speaking with you today in this distinguished institute dedicated to the great good and goal of human rights. It is a great privilege for me to participate in such an important conversation.

For surely the global human rights revolution is one of the most important and impressive developments of our time. With its deep roots in many of the world's cultures and religions, with its basic principles and forms of expression owing much to the great 18th century enunciations of natural and human rights in Europe and America, and with its modern shape and direction stemming largely from the 1948 Universal Declaration of Human Rights, today's global human rights revolution – a revolution still in progress – is radically transforming the way that we think about ourselves as individuals, as citizens, and (as we shall see) even as family members.

As with most revolutions, the results to date are mixed. The human rights revolution today is producing problems as well as successes. But mostly it is producing successes, leading around the world to more human freedom, a more universal respect for human dignity, and greater and more widespread opportunities for full human flourishing.

Particularly at the international level, the language of human rights has now become our primary language for expressing our ideas of the good, especially as regards universal minimum standards of justice. For this reason, for better and for worse – and largely, I

say again, for better – rights talk has become *the* way that we talk about many of our most important needs and aspirations. As the Canadian human rights scholar Michael Ignatieff puts it:

Rights are not just instruments of the law, they are expressions of our moral identity as a people. When we see justice done – for example, when an unjustly imprisoned person walks free, when a person long crushed by oppression stands up and demands her right to be heard – we feel a deep emotion rise within us. That emotion is the longing to live in a fair world. Rights may be precise, legalistic, and dry, but they are the chief means by which humans express this longing.

Today I want to speak with you about this global human rights revolution as it applies to the institutions of marriage and the family. I speak today as an American, with perhaps more than my share of distinctly American biases and preoccupations, but I believe that the issues I will raise are relevant to current trends and developments in many other societies as well.

In particular, I want to focus today on two basic human rights. The first is the right to marry and to found a family – a right that was formally articulated in Europe as early as the 12th century in Christian canon law, and a right that is enunciated explicitly in both the Universal Declaration of Human Rights and the Charter of Rights of the European Union. The second right I would like us to examine today is the right of the child, in so far as possible, to know and be raised by her own two natural biological parents, except when it is contrary to the best interests of the child. This right is clearly implied in the Universal Declaration, with its insistence that the family is the natural – I emphasize *natural* – and fundamental group unit of society, and it is explicitly enunciated in the UN Convention on the Rights of the Child. These two basic human rights, including how they can both complement one another and conflict with one another, constitute the story that I wish to tell today, and the recommendation that I wish to make.

Now, as we know, a basic problem when we use the language of human rights is the tendency and the temptation to treat each specific right as if it stands alone, in splendid isolation and reigning in absolute mastery, conveniently disconnected from other rights that may conflict with it – and also disconnected from any overarching anthropology or system of values that alone permit us to adjudicate rights in conflict and also to understand rights in relationship to duties, obligations, and other human goods that cannot easily be expressed in terms of rights. The obvious danger in this take-your-pick, cafeteria-style, essentially de-contextualized approach to human rights is that each right, in its isolated supremacy, tends to get expressed in absolutist, totalizing terms. I fear that we in the United States, trained as we are in what we call our “bill” of rights, are particularly prone to this temptation, and that as a result, we Americans have much to learn from the typically more holistic, integrated human rights frameworks that are evident in a number of other countries, including Denmark.

With these concerns in mind, let us consider first the right to marry and found a family. As I mentioned, here we see one of the oldest and most fundamental of human rights, dating in Christendom from as early as the 12th century. Moreover, as the wording of Article 16 of the Universal Declaration clearly implies – the article states that men and women “have the right to marry and to found a family” – this right is in fact a compound right. That is, the right to marry also implies and carries with it the right to bear and raise children. Another way to make this point is to say that the institution of marriage is intrinsically connected to the institution of parenthood and to the values, norms, and social expectations connected to bearing and raising offspring.

Today, in the United States and in many western countries, this basic human rights is being expanded and re-imagined in important new ways, with far-reaching implications for society that I believe are only just now beginning to be recognized and assessed. In essence, the new conceptualization of this right is that all persons have the right to form the families that they choose and to bear children in the way that they choose.

This re-conceptualization of family rights is driving, and being driven by, at least three distinct trends. The first and probably most important is the rapid scientific development, and the growing social acceptance, of assisted reproductive technologies. Here I mean phenomena such as the donation or sale of sperm and eggs to individuals or couples who cannot or do not wish to conceive children in the traditional way; surrogacy (or what the *New York Times* recently called “professional child bearing”); the any-day-now arrival of reproductive cloning; and any number of other amazing and hard-to-understand medical techniques that essentially allow us, for the first time in human history, to isolate and split apart the genetic, gestational, and social-legal dimensions of parenting.

The second trend, this one in the area of family law, is the steady lessening, and in some cases nearly full elimination, of distinctions between married and unmarried persons in the eyes of the law. The third trend, also in the area of family law, is the establishment of equal marriage rights for gay and lesbian couples.

To a significant degree, these three trends hang together. They largely complement and reinforce one another. They are all defended by proponents who depend almost entirely on the language of human rights. The essential rights claim is that modern individuals have the right to form families of their own choosing and bear children in the way that they wish, without restriction or interference from society, and with the full support of available medical and scientific technologies.

Let me very briefly cite a few examples – most of them quite recent – of how this re-conceptualized human right is now becoming operational in a number of western societies. In New Zealand, a just-released report entitled “New Issues in Legal Parenthood” proposes that many children conceived with donor sperm or eggs should have three or more legal parents, with sperm or egg donors being permitted, if they wish, to “opt in” to parenthood. In Ireland, just last week, a Commission on Assisted Reproduction proposed that surrogate mothers have no legal standing with respect to the children that they carry and bear, irrespective of their wishes during or after the birth. The parents who “commission” the child are the only legal parents from start to finish.

In Britain, in February of this year, the government health service, worried about a drop-off in donated sperm and eggs, began an active recruitment campaign to ask new sperm and egg donors to come forward. In the United States, after same-sex marriage became legal in the state of Massachusetts, public health officials in that state proposed striking the words “mother” and “father” from the birth certificates of all children in that state, replacing these words with the phrases “Parent A” and “Parent B.” More broadly, the entire field of reproductive technology as well as the broader fertility industry in the United States continues in an almost entirely unregulated environment.

In Canada, in an amazingly contradictory pair of moves, it is now the right of an adopted child to know the identity of his or her biological parents; whereas in the case of donor-conceived children, revealing to the child the identity of his or her biological parents is a federal crime, punishable by a fine, imprisonment, or both. Also in Canada earlier this year, the federal government, as a part of its implementation of equal marriage rights for gay and lesbian couples, proposed striking the term “natural parent” from all of Canadian law, and replacing it with the term “legal parent.”

That sound you just heard is the earth shifting. The social change I am describing contains a number of dimensions and carries with it a number of important likely consequences for families and for society, including (but probably not limited to) an increase in personal freedom and autonomy, greater recognition of the rights and dignity of gays and lesbians, a weakening of marriage as a pro-child social institution, and direct strides toward the marketization and commodification of human reproduction. Each of these likely consequences – and please notice that as a group, by most reckonings, they would appear to be a decidedly mixed package – is important and deserves serious consideration.

But I want to focus today on just one of the dimensions and consequences of this trend. I am referring now to a fundamental redefinition of what it means to be a parent and how we decide who are a child’s parents. Specifically, I am referring to the phenomenon of

erasing the biological basis of parenthood from law and replacing it with the idea of the state-defined “legal” parent. This erasure not only represents a dramatic transfer of power from private life to the state, but is also, I believe, contrary to the best interests of children.

Which leads us to our consideration of a second fundamental human right with respect to marriage and the family – the right of the child, in so far as possible, to know and be raised by its two natural parents.

It seems to me that this right of the child to know her own two natural parents is just as much a right, and just as important, and just as prominent in the history of human rights discourse, as the right of the adult to marry and found a family. As a sociological matter, we know that, for children, *biological parents matter*. The social science evidence on this point is overwhelming. I have been studying the issue of child well-being for nearly two decades now, and if from the perspective of the child there is a more important idea than this one – for each child, a natural mother and father who love the child and love each other – I do not know what it is.

So it seems to me that we have a clear case of rights in conflict. Making one right stronger almost necessarily means making the other weaker. Greater regard for adults’ expressive family and sexual needs means less regard for children’s well-documented developmental needs, and vice versa. Michael Ignatieff, a former teacher of mine whom I quoted earlier, is apparently untroubled by this conflict. In vigorously defending the right of adults to form the families they choose and bear children in the way that they wish, Ignatieff argues that the trend toward ever-greater adult autonomy is in any case inevitable, since, as he puts it, “the rights revolution appeals to an idea of equality and against this idea there is no remaining court of appeal.”

Maybe so. But if there is any remaining court of appeal, either in my country or in yours, surely that court is a court that is focused first and foremost on the needs of *children*.

And surely about the only thing left in your country and in mine that can effectively challenge or balance a rights claim is ... *another rights claim*.

So here is my recommendation. Just as human rights theorists in recent decades have worked creatively to develop and expand the rights claims of adults with respect to marriage and the family, so human rights proponents today and in the coming period should work creatively to develop and expand, particularly in light of new medical and technological developments, the rights claims of children with respect to marriage and the family. To make my own small and initial contribution to this worthy endeavor, let me conclude with four propositions about the rights of children.

1. Every child has the right, in so far as society can make it possible, to know and be raised by its two natural biological parents, except when it is contrary to the child's best interests. The implication of this right is that society should recognize and support the institution of marriage, since marriage is our *only* social institution that seeks fully to unite, in the persons of the spouses, the biological, social, and legal dimensions of parenthood. The great good and goal of marriage is to give to each child the gift of the two persons who brought the child into the world. For this reason, marriage is society's most pro-child social institution and probably ultimately society's single most important protector and guarantor of the rights of children.

2. Every child has the right to a natural biological heritage, defined as the union of the father's sperm and the mother's egg. Society should typically refrain from actions that would efface or deny the child's natural biological heritage, or what the French philosopher Sylvianne Agacinski calls the child's double origin.

3. Every child has the right to know his or her biological origins. Individuals and society should typically refrain from creating genetic orphans, or children who do not and can not know their natural origins.

4. Children have the right to be heard. Today, the rights claims of adults tend to come through loud and clear. Children's voices are much harder to hear. So let me, to illustrate what I mean, briefly share with you one such voice. Her name is Narelle Greech. She is from Australia. She is writing to the Canadian ethicist Margaret Somerville about a magazine article advocating society's full embrace of the new and emerging reproductive technologies. Greech writes: